



HIGH COURT OF AUSTRALIA

13 September 2023

QANTAS AIRWAYS LIMITED & ANOR v TRANSPORT WORKERS UNION OF
AUSTRALIA
[2023] HCA 27

Today, the High Court unanimously dismissed an appeal from a judgment of a full court of the Federal Court of Australia. The appeal concerned whether a decision by Qantas Airways Limited ("Qantas") to outsource its ground handling operations at ten Australian airports contravened s 340(1)(b) of the *Fair Work Act 2009* (Cth) ("the Act"). The effect of the outsourcing decision was that ground handling services then being performed by employees of Qantas and Qantas Ground Services Pty Ltd ("QGS"), many of whom were members of the Transport Workers Union of Australia ("the TWU"), would instead be performed by staff of third-party suppliers.

Section 340(1)(b) provided that a person must not take adverse action against another person "to prevent the exercise of a workplace right by the other person". A person has a workplace right "if the person ... is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument" (s 341(1)(b)). It was agreed that Qantas took adverse action against the affected employees in making the outsourcing decision. At the time of the outsourcing decision the affected employees were prohibited from organising or engaging in protected industrial action under the Act because the affected Qantas employees' enterprise agreement had not reached its nominal expiry date and the affected QGS employees were practically unable to take protected industrial action. The TWU commenced proceedings in the Federal Court, with issues arising as to whether Qantas could prove that it did not make the outsourcing decision to prevent the exercise of workplace rights by affected employees and whether the outsourcing decision prevented the exercise of workplace rights.

The primary judge found that, while Qantas had "commercial imperatives" for making the outsourcing decision, Qantas had not discharged its onus under s 361 of the Act of disproving that the reasons for the outsourcing decision included preventing the exercise of workplace rights, namely preventing employees from engaging in protected industrial action and participating in enterprise bargaining. The primary judge found that Qantas had contravened s 340(1)(b) of the Act. The full court dismissed Qantas' appeal.

The issue before the High Court was whether s 340(1)(b) of the Act prohibited a person from taking adverse action against another person for the purpose of preventing the exercise of a workplace right that might arise in the future. The High Court unanimously held that it did and, in so doing, rejected Qantas' contention that s 340(1)(b) only proscribed adverse action for the purpose of preventing the exercise of a presently existing workplace right.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*