

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
KIEFEL, BELL, GAGELER AND NETTLE JJ

---

FAIR WORK OMBUDSMAN

APPELLANT

AND

QUEST SOUTH PERTH HOLDINGS PTY LTD &  
ORS

RESPONDENTS

*Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*  
[2015] HCA 45  
2 December 2015  
P38/2015

## ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Full Court of the Federal Court of Australia made on 17 March 2015 and, in its place, order that:*
  - (a) *the appeal be allowed;*
  - (b) *the order of McKerracher J made on 26 July 2013 be varied so that, in addition to the declarations contained in paragraphs 1 and 2 of the order, the following declarations are made:*
    - "2A. *The first respondent contravened s 357 of the Act by representing to Ms Margaret Best that the contract of employment under which she was employed by the first respondent was a contract for services under which she performed work as an independent contractor*";
    - "2B. *The first respondent contravened s 357 of the Act by representing to Ms Carol Roden that the contract of*



*employment under which she was employed by the first respondent was a contract for services under which she performed work as an independent contractor"; and*

- (c) *the proceeding be remitted to a judge of the Federal Court for further hearing to determine any pecuniary penalties to be imposed on the first respondent in respect of those contraventions.*

On appeal from the Federal Court of Australia

**Representation**

J L Bourke QC with J M Firkin for the appellant (instructed by Clayton Utz)

No appearance for the first respondent

R C Kenzie QC with S E J Prince for the second respondent (instructed by Ashurst Australia)

Submitting appearance for the third respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd**

Employment law – Employer and employee – Independent contractor – Sham arrangements – *Fair Work Act 2009* (Cth), s 357(1) prohibits representation by employer to employee that contract of employment under which individual is employed is contract for services – First respondent represented that employees performed work as independent contractors under contracts for services with second respondent – Whether first respondent contravened s 357(1).

Words and phrases – "contract for services", "independent contractor", "sham arrangement".

*Fair Work Act 2009* (Cth), s 357.



- 1 FRENCH CJ, KIEFEL, BELL, GAGELER AND NETTLE JJ. The question in this appeal is whether s 357(1) of the *Fair Work Act* 2009 (Cth) prohibits an employer from misrepresenting to an employee that the employee performs work as an independent contractor under a contract for services with a third party. For the reasons that follow, the answer to that question is in the affirmative and the appeal should be allowed.

### The Act

- 2 Section 357 is within Div 6 of Pt 3-1 of the Act. An object of Pt 3-1 is "to protect workplace rights"<sup>1</sup>. The expression "workplace right" is defined to include benefits to which a person is entitled as an employee, under a workplace instrument or under the National Employment Standards set out in Pt 2-2 of the Act<sup>2</sup>. The heading to Div 6 forms part of the Act<sup>3</sup>. The heading is "Sham arrangements".

- 3 Section 357 provides:

"(1) A person (the **employer**) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:
- (a) did not know; and
  - (b) was not reckless as to whether;

---

1 Section 336(a) of the Act.

2 Section 341(1)(a) of the Act, read with the definitions of "workplace instrument" and "workplace law" in s 12 of the Act.

3 Section 13(1) of the *Acts Interpretation Act* 1901 (Cth), as in force on 25 June 2009. See s 30J of the Act.

*French* CJ  
*Kiefel* J  
*Bell* J  
*Gageler* J  
*Nettle* J

2.

the contract was a contract of employment rather than a contract for services."

- 4 As a civil remedy provision within the meaning of Pt 4-1 of the Act, contravention of s 357(1) is not an offence<sup>4</sup>, but can give rise to civil proceedings for pecuniary penalty orders and other orders<sup>5</sup>. Those proceedings can be brought in the Federal Court of Australia or the Federal Circuit Court of Australia by a person affected by the contravention, by an industrial association or by a Fair Work Inspector<sup>6</sup>. The Fair Work Ombudsman has capacity as a Fair Work Inspector<sup>7</sup>.

#### Procedural history and facts

- 5 The Fair Work Ombudsman brought a proceeding in the Federal Court claiming, amongst other things, pecuniary penalty orders against Quest South Perth Holdings Pty Ltd ("Quest") for contraventions of s 357(1) of the Act. McKerracher J held at first instance that the proceeding was to be dismissed so far as it related to that claim<sup>8</sup>, and an appeal from that order was dismissed by the Full Court of the Federal Court (North, Barker and Bromberg JJ)<sup>9</sup>. This appeal, by special leave, is from that decision of the Full Court.

---

4 Section 549 of the Act.

5 Sections 545(1) and (2) and 546 of the Act.

6 Section 539 of the Act.

7 Section 701 of the Act.

8 *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 2)* [2013] FCA 582.

9 *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346.



3.

The Full Court found a number of uncontentious facts and reached a number of uncontroversial conclusions of law<sup>10</sup>. To the extent relevant to the appeal, they can be succinctly stated as follows.

Quest operated a business of providing serviced apartments, in the course of which Quest had for some years employed Margaret Best and Carol Roden as housekeepers. Contracting Solutions Pty Ltd ("Contracting Solutions") operated a labour hire business.

Quest and Contracting Solutions purported to enter into an arrangement of a kind which the Full Court described as a "triangular contracting" arrangement<sup>11</sup>. The arrangement had two components. First, Contracting Solutions purported to engage Ms Best and Ms Roden as independent contractors under contracts for services between them and Contracting Solutions. Next, Contracting Solutions purported to provide the services of Ms Best and Ms Roden as housekeepers to Quest under a labour hire agreement between Contracting Solutions and Quest.

Quest, by its conduct, then represented to Ms Best and Ms Roden that they were performing work for Quest as independent contractors of Contracting Solutions.

In fact, Ms Best and Ms Roden continued to perform precisely the same work for Quest in precisely the same manner as they had always done. In law, they never became independent contractors. At the time Quest represented that they were performing work for Quest as independent contractors of Contracting Solutions, they remained employees of Quest under implied contracts of employment.

The Full Court indicated that it would have held Quest's representations to Ms Best and Ms Roden to be contraventions of s 357(1) had it construed that provision to extend to a representation by an employer to an employee that the employee performs work as an independent contractor under a contract for services with a third party<sup>12</sup>.

---

<sup>10</sup> (2015) 228 FCR 346 at 353 [7]-[8], 356 [18], 356-357 [21], 357 [25], 358 [31], 361 [48], 394 [200], 398 [222], 400 [230], 402 [240], 412 [309], 415 [331], 416 [333], [335].

<sup>11</sup> (2015) 228 FCR 346 at 369 [96].

<sup>12</sup> (2015) 228 FCR 346 at 402 [240], 416 [335]-[336].

*French* CJ  
*Kiefel* J  
*Bell* J  
*Gageler* J  
*Nettle* J

4.

12        Instead, the Full Court construed s 357(1) to have a much more confined operation. The Full Court held that, to contravene the provision, a representation by an employer to an employee must mischaracterise the contract of employment that exists between the employer and the employee "as a contract for services made between the employee and the employer"<sup>13</sup>. That construction, the Full Court considered, was compelled by the text of s 357(1), read in light of its purpose as illuminated by its legislative history<sup>14</sup>.

13        We disagree.

#### Resolving the question of construction

14        The prohibition in s 357(1) is against an employer making a particular representation to an employee or prospective employee. The prohibited representation concerns the character of the contract, which exists or would exist between the employer and the employee as a contract of employment, under which the employee performs or would perform work. The content of the prohibited representation is that the contract of employment is or would be a contract for services under which the employee performs or would perform work as an independent contractor.

15        Nothing in the language of s 357(1) warrants the construction that the representation prohibited by the provision is confined to a representation that the contract under which the employee performs or would perform work as an independent contractor is a contract for services with the employer. The reference in the provision to "the contract of employment under which the individual is, or would be, employed by the employer" is a reference to the object of the prohibited representation. It is not a reference to the content of the prohibited representation. The content of the prohibited representation is expressed in terms which require nothing more than that the contract which is the object of the representation "is a contract for services under which the individual performs, or would perform, work as an independent contractor". The provision is silent as to the counterparty to the represented contract for services. Who might be the counterparty to the represented contract for services, and whether that counterparty might be a real or fictional entity, is correspondingly immaterial to the operation of the provision.

---

13    (2015) 228 FCR 346 at 366 [77]. See also at 370 [100], 412 [307]-[308].

14    (2015) 228 FCR 346 at 366-370 [80]-[99], 408-412 [281]-[306].

5.

16 To confine the prohibition to a representation that the contract under which the employee performs or would perform work as an independent contractor is a contract for services with the employer would result in s 357(1) doing little to achieve its evident purpose within the scheme of Pt 3-1. That purpose is to protect an individual who is in truth an employee from being misled by his or her employer about his or her employment status. It is the status of an employee which attracts the existence of workplace rights.

17 To confine the prohibition in that way would, moreover, be to give the provision a capricious operation. An employer would be liable to pecuniary penalty if the employer said to an employee "you are employed by me as an independent contractor". The same employer would act with impunity if the employer said to the same employee "you are employed by X as an independent contractor". That would be so even if X were entirely fictitious. Either way, the employee would be misled by the employer to think that the employee was an independent contractor, and the extent of the practical denial of workplace rights would be the same.

18 The legislative history contains nothing to compel the conclusion that the provision should be so confined. The explanatory memorandum for the Act explained s 357(1) as intended to restate in simplified terms the effect of ss 900 and 901 of the *Workplace Relations Act 1996* (Cth) ("the 1996 Act")<sup>15</sup>. Those sections, which were introduced into the 1996 Act by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) ("the 2006 Act"), dealt respectively with an employer making a prohibited representation to an employee and a prospective employer making a prohibited representation to a prospective employee. The prohibited representation was expressed in each of those sections in materially identical terms. The terms in which the prohibited representation was expressed reflected, without resolving, the present issue of construction.

19 The explanatory memorandum for the Bill for the 2006 Act is similarly inconclusive. There is a statement in the explanatory memorandum for the 2006 Act on which the Full Court placed weight<sup>16</sup>. The statement is that, in order to contravene s 900, a person "would need to have entered into a contract with an

---

15 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 233 [1447].

16 (2015) 228 FCR 346 at 368-369 [91]-[96].

French CJ  
Kiefel J  
Bell J  
Gageler J  
Nettle J

6.

individual and have made a representation to that individual that the contract was a contract for services under which the individual would perform work as an independent contractor"<sup>17</sup>. That statement does not say, and does not suggest, that the person would need to have made a representation that the contract was a contract for services with that person as distinct from with someone else.

20 The explanatory memorandum for the Bill for the *Independent Contractors Act* 2006 (Cth), which was enacted as part of the same legislative package as the 2006 Act, on the other hand, provides a strong indication that the purpose of the prohibition was to prevent misrepresentation as to the nature of the contract under which an employee performed work irrespective of who might be represented to be the counterparty to that contract. It will be remembered that the heading of the Division into which s 357 falls is "Sham arrangements". Sections 900 and 901 fell within a Part introduced into the 1996 Act by the 2006 Act which had the same heading<sup>18</sup>.

21 Under that same heading in the explanatory memorandum for the Bill for the *Independent Contractors Act*, the relevant concept of a "sham arrangement" was explained to encompass "an arrangement through which an employer seeks to cloak a work relationship to falsely appear as an independent contracting arrangement in order to avoid responsibility for legal entitlements due to employees"<sup>19</sup>. It was recorded that courts had held that parties "cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck"<sup>20</sup>. "Employees in disguised employment relationships", it was said, "should have appropriate remedies available to them"<sup>21</sup>.

---

17 Australia, House of Representatives, Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006, Explanatory Memorandum at 5 [5].

18 Part 22 of the 1996 Act.

19 Australia, House of Representatives, Independent Contractors Bill 2006, Explanatory Memorandum at 9.

20 Australia, House of Representatives, Independent Contractors Bill 2006, Explanatory Memorandum at 9, quoting *Re Porter* (1989) 34 IR 179 at 184.

21 Australia, House of Representatives, Independent Contractors Bill 2006, Explanatory Memorandum at 10.

7.

22 The misrepresentation attributed to Quest was squarely within the scope of the mischief to which the prohibition in s 357(1) was directed and is caught by its terms.

### Orders

23 The following orders should be made:

1. Appeal allowed.
2. Set aside the order of the Full Court of the Federal Court of Australia made on 17 March 2015 and, in its place, order that:
  - (a) the appeal be allowed;
  - (b) the order of McKerracher J made on 26 July 2013 be varied so that, in addition to the declarations contained in paragraphs 1 and 2 of the order, the following declarations be made:
    - "2A. The first respondent contravened s 357 of the Act by representing to Ms Margaret Best that the contract of employment under which she was employed by the first respondent was a contract for services under which she performed work as an independent contractor";
    - "2B. The first respondent contravened s 357 of the Act by representing to Ms Carol Roden that the contract of employment under which she was employed by the first respondent was a contract for services under which she performed work as an independent contractor"; and
  - (c) the proceeding be remitted to a judge of the Federal Court for further hearing to determine any pecuniary penalties to be imposed on the first respondent in respect of those contraventions.