JEFF PHILLIPS ON THE CASE

Jeffrey Phillips SC puts recent and topical case law under scrutiny. Here, he points out the complex nature of current workplace relations law by referring to the wit of Perram J from a recent Federal Court decision.

FEDERAL COURT COMEDIAN DISCOVERS INDUSTRIAL LABYRINTH

DEVA V UNIVERSITY OF WESTERN SYDNEY

Every court needs a comedic jurist. Writing in the January 2007 edition of *Vanity Fair*, Christopher Hitchens said:

> Wit, after all, is the unfailing symptom of intelligence.

Justice Nye Perram, recently appointed to the Federal Court of Australia, early in his judicial career seems to be filling the role of that court's resident comedian. In *Deva v University of Western Sydney* (2011) 203 IR 111, he needed to make a foray into the absurdly complex, bulky and labyrinthine regulations which have bedevilled workplace relations legislation since mid-2005. Anyone involved in industrial relations since that time will understand his Honour's difficulties in trying to make sense of the multifarious changes which have occurred to workplace relations leading on to the *Fair Work Act 2009* (Cth).

The obscurity of the legislation, the regulations and the transitional provisions was brought into sharp relief by Pradeep Deva, a dismissed administrator at the University of Western Sydney. Mr Deva was dismissed from the university on 13 January 2005. His claim for unfair dismissal at the time was dismissed by Commissioner Lawson sitting in the Australian Industrial Relations Commission (*Deva v University of Western Sydney* (unreported, AIRC, Lawson C, PR959203, 22 June 2005)).

Some five years later, Mr Deva filed an appeal from that decision. However, from the time when Commissioner Lawson dismissed his case until the filing of the appeal, a considerable amount of industrial law had flowed down the Parramatta River. Mr Deva's appeal was before the Full Bench of Fair Work Australia. In two decisions, the Full Bench dismissed his appeal on the basis it found it had no power to extend the time after it had expired. These two published decisions are found in *Deva v University of Western Sydney* [2010] FWAFB 7362 and *Deva v University of Western Sydney* [2010] FWAFB 8438.

From the Full Bench dismissal, Mr Deva sought relief in the Federal Court.

Perram J carefully, but critically, considered the full gamut of legislation which had occurred from Commissioner Lawson's decision in June 2005 until the matter came before him in 2011. He considered the repeal of the *Workplace Relations Act 1996* (Cth) in July 2009 and its transitional provisions. In unravelling the transitional provisions, he noted by deeming provisions and legal fictions the "disinterred *Workplace Relations Act* – including appeals – [would go] to FWA [Fair Work Australia]" (at [13]). This was despite the *Workplace Relations Act* "cussedly only referring to the now non-existent former Commission" (at [15]). In reaching this point, he noted that Sch 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) "lurches into view", by which one learns that a reference to the body acting under the *Workplace Relations Act* would be "a reference to FWA" (at [15]). An examination of the relevant Schedule "without laying all of its [issues] at once bare" said that the role filled by the former Commission would now need "to be filled by FWA" (at [15]). In considering this, Perram J was confronted with the many historical versions of the Act and the choice of which one would apply.

The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) inexplicably, as an amendment to the *Workplace Relations Act*, had re-numbered all the provisions. In dealing with the relevant appeal provision after the re-numbering, Perram J noted (at [17]):

> Only a pedant would want to know whether Mr Deva's appeal laid under s 45(1)(c) or s 120(1)(b). Fortunately, it does not matter.

His Honour, warming to the theme of the confusion brought by the transitional enactment and its regulations, noted the reference to the *Workplace Relations Act* includes (at [17]):

> also the regulations which accompanied it into the legal afterlife where repealed legislation lingers.

In proceeding through the *Workplace Relations Regulations 2006* (Cth), his Honour found the precise regulation dealing with Mr Deva's matter, as determined by the Full Bench, to be reg 7.4.13, which permitted only a 21-day period to appeal against a decision, and what he described as "the dead heart of the matter" (at [18]), being that the Commission in accordance with subreg (2) "must not grant an extension of time for the institution of an appeal under this Division". This is despite the earlier provision that would have applied through the WorkChoices legislation to the effect that the Full Bench, in the appropriate case, had a discretion as to whether to extend time in the institution and appeal or not.

His Honour observed that the complete prohibition about the extension of granting a right to institute an appeal out of time could potentially work an injustice. He gave this example (at [19]):

> what, for example, of the employee who had been in a coma or otherwise incapacitated (perhaps by reading these transitional provisions).

However, he found the words were "plain enough and both the concept and its blunt effect not unfamiliar" (at [19]).

Finally, his Honour dealt with the alternative claims Mr Deva brought to re-characterise his application as one of prerogative relief under s 39B of the *Judiciary Act 1903* (Cth). This claim was also summarily dispatched in the same quizzically laconic manner with which his Honour had dealt with other aspects of Mr Deva's failed and late application.

If the federal Opposition is searching around for some basis upon which it can reform the workplace relations system, it should start by making the *Fair Work Act* a simpler vehicle, not just for parties and their legal representatives, but also for judges. Perram J's barbs should not go unheeded.

The Federal Court has found its Jerry Seinfeld.

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