Fair Work Class Actions on the Rise

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Multi-million dollar underpayment claims in the Calombaris Group, the Rockpool group and the AU$300 million Woolworths self-declaration are likely to fuel a growing trend in fair work class actions.

"Industrial class actions" or representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**the FCA Act**) that involve allegations of breaches of the FW Act, have to date been "rare beasts" [1].

Between 1992 and March 2018 only 3.4 percent of funded representative proceedings commenced in the Federal Court were claims by employees or workers.

This appears to be changing as there are currently 11 separate industrial class actions before the Federal Court of Australia.

Claims for breach of the Fair Work Act which would otherwise be uneconomic (or even just too much hassle) for an individual claimant are made possible by litigation funders. This is because such claims en masse can lead to a good return for the individual claimant and the funder.

With plenty of material to work with thanks to recent decisions of the Federal Court and the growing incidence of underpayment, litigation funders have understandably extended their interest to claims under the Fair Work Act and seemingly have no shortage of claimants.

Landmark Judgment

In a landmark judgment handed down on 8 October 2019 by the Federal Court of Australia (*Turner v Tesa Mining (NSW) Pty Ltd* [2019] FCA 1644), a litigation funder has been ordered to provide security for costs with respect to two representative proceedings.

This is an especially significant decision given that the proceedings were brought under the *Fair Work Act 2009* (Cth) (**the FW Act**), as s570 of the FW Act provides that such claims are generally "no cost".

In this case, the Applicant brought representative proceedings in the Federal Court of Australia representing employees who had worked at the Mount Arthur Coal Mine in New South Wales through two labour-hire firms from 2012 to 2018. The proceedings were funded by UK-based litigation funder, Augusta Ventures Ltd (**the Funder**).

The proceedings allege that a number of employees were wrongly being treated as casual employees by the labour-hire firms and sought compensation for unpaid entitlements as well as orders for pecuniary penalties.

The labour-hire firms sought security for costs directly against the Funder in the sum of approximately AU$1 million each.

The Court held that it had an inherent power (and a general statutory power) to order security for costs against a

non-party to the litigation (the Funder) even though it was not expressly provided for in the Court Rules.

The implication of this decision is that the Funder has skin in the game if the claim does not succeed – a guarantee or some other form of security should ensure the labour hire firms recover their costs if they succeed in their defence of the claim.

The Court found that there was no compelling reason for the policy consideration central to section 570 of the FW Act (no cost jurisdiction), which safeguards the inequality between an employer and employee, to be extended to non-party funders who are using such claims for their commercial advantage.

Implications

The claim, involving the largely casualized business structure used at the mines follows the decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, and serves as a warning to employers who utilise systematic and ongoing casual engagement of employees that these employment structures may be subject to scrutiny and to class action claims.

The claim also highlights the growing interest of litigation funders in the employment arena.

Employers (and any venture capitalists taking over businesses) should take care in ensuring their workforce model is sound to avoid the disruption, cost and adverse publicity associated with fair work class actions.

Happily, at least for those defending such claims, the decision also evidences the ability of the Court to provide some security for costs against litigation funders.

Dentons can provide advice and assistance in auditing workplace structures and arrangements to employers who are keen to avoid fair work underpayment claims.

Further information regarding employee class actions can be found here.

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1. *Turner v Tesa Mining (NSW) Pty Ltd* [2019] FCA 1644), 1↩

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