Casenote

Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589.

The Federal Court decision in *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 (16 November 2001), has had, and will potentially continue to have far reaching implications for the access that casual employees have to unfair dismissal actions.[1] The Court held that the *Workplace Relations Regulations 1996* (Cth) excluding casual employees engaged for a short period from relief from unfair dismissal actions, were invalid. Traditionally, regulation 30B of the *Workplace Relations Act 1996* (Cth) has been interpreted in a way that has excluded casual employees, unless engaged by a single employer on a regular and systematic basis over a period of at least twelve months, and having before their termination a reasonable expectation of continuing employment.[2] The implications of the decision of the Full Court of the Federal Court in this decision are great, as casual employees with less than twelve months service may now be entitled to have their claims heard in relation to relief for unfair terminations. However, this will depend on the legality of subsequent amendments to the *Workplace Relations Act 1996* (Cth).

Background

Omar Hamzy, a Year Ten school student, was employed at a Kentucky Fried Chicken restaurant in September 1999. He worked three or four hours on two or three nights per week on a roster that varied from week to

[1] Note: This case does not concern unlawful terminations, which are actionable regardless of a specified period of service.

[2] B Creighton and A Stewart, *Labour Law: An Introduction*, (ed, 2000), 318-319.

week. In the action it was agreed between KFC and Hamzy that he worked on a 'regular and systematic basis' (regulation 30B(3)(a) of the *Workplace Relations Regulations 1996* (Cth)). His employment was terminated in April 2000 before twelve months' service, making him ineligible to take advantage of the provisions of the *Workplace Relations Act 1996* (Cth). In May 2000, Hamzy lodged an application for relief in respect of termination of employment under sections 170CE(1) and 170CK of the *Workplace Relations Act 1996* (Cth), seeking reinstatement and compensation for lost remuneration. In November 2000 Commissioner Wilks heard the application. The employer, Tricon, contended that Hamzy was excluded by regulations 30B(1)(c) and 30B(3) of the *Workplace Relations Regulations 1996* (Cth) from claiming relief. They argued that regulation 30B(1)(d) excludes from the operation of the termination of employment provisions of the *Workplace Relations Act 1996* (Cth) casual employees "engaged for a short period, within the meaning of subregulation (3)." Regulation 30B(3) specifies the circumstances in which a casual employee may be taken to be engaged for a short period. This is unless:

(a) the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least twelve months; and
(b) the employee has, or but for a decision by the employer to terminate the employee's employment, would have had, a reasonable expectation of continuing employment by the employer.

Counsel for Hamzy argued that these provisions were invalid. At first instance Commissioner Wilks accepted the Tricon arguments and held that the validity of the regulations was not a matter that could be properly determined by the Commission. In applying the regulations, Commissioner Wilks was bound to find that the former employee was a casual employee whose employment had not extended beyond 12 months. He also found that:

> Mr Hamzy's employment was not regular and systematic. Regardless of this finding, the result of the earlier findings was that, if reg 30B(3) was valid, Mr Hamzy was excluded by reg 30B(1)(d) from obtaining relief under Subdivision B or C of Division 3 Part VIA of the Act. [3]

Commissioner Wilks made the assumption that the regulation was valid, and therefore dismissed Mr Hamzy's claim.

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[3] [2001] FCA 1589 (16 November 2001), 10.

Appeal to the Full Bench of the Federal Commission

A notice of appeal was filed under section 45 of the *Workplace Relations Act 1996* (Cth) by Hamzy. He sought referral to the Federal Court on a number of questions of law. Counsel for Hamzy claimed that Commissioner Wilks had either refused or failed to exercise his jurisdiction under Division 3 of the *Workplace Relations Act 1996* (Cth), that he had erred in dismissing the application, that he had failed to consider the validity of regulations 30B(1)(d) and 30B(3), and he had failed to interpret the nature of Hamzy's employment.

The Full Bench of the Commission referred questions of law for consideration by the Federal Court. The central points for investigation were as follows:

1. Is regulation 30B(3) of the *Workplace Relations Regulations 1996* (Cth) authorised by section 170CC of the Act?[4] If the answer is in the negative, is the said subregulation, in so far as it purports to exclude the applicant from bringing an application for relief, authorised by any other provision of the Act or is it invalid?
2. Is regulation 30B(1)(d) authorised by section 170CC of the Act? If the answer is in the negative, is the said subregulation, in so far as it purports to exclude the applicant from bringing an application for relief, authorised by any other section of the Act or is it invalid?[5]

In referring these questions, the Commission adjourned the appeal against the decision of Commissioner Wilks pending the determination of the Federal Court on the above points of law.

Decision of the Federal Court

In order to determine the validity of the regulations, the Full Court had to consider several matters. The first of these issues was the meaning of the expression "engaged on a casual basis" as in section 170CC(1)(c) of the Act. Mr Rogers, Counsel for Mr Hamzy, submitted that "the expression 'employees engaged on a casual basis,' in s.170CC(1)(c) of the Act does not have the same meaning as the words 'casual employee,' used in reg 30B(1)(d) of the Regulations." He contended the former expression does not have a commonly understood industrial meaning, the latter does. He said that in section 170CC(1)(c) Parliament deliberately avoided the more common expression 'casual employee' because it wished to make clear that it was not attempting to catch all persons who are designated

[4] Section 170CC(1)(c) of the *Workplace Relations Act* (Cth) states that the regulations may exclude casual employees engaged on a casual basis for a short period.

[5] Above n 3, 15.

casual employees under awards. It chose the expression to ensure that only true casuals (and then only those engaged for a short period) could be excluded from benefit under the Act."[6]

The Full Court declared that:

> In our opinion there is no material difference between the description 'employees engaged on a casual basis for a short period,' in s.170CC(1)(c) of the *Workplace Relations Act*, and the description 'a casual employee engaged for a short period,' in reg 30B(1)(d). Both descriptions embrace an employee who works only on demand by the employer (or perhaps only by agreement between employer and employee) over a short period (whatever that may be). The essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work. But that is not inconsistent with the possibility of the employee's work pattern turning out to be regular and systematic.[7]

The Court then considered whether the regulations define a 'short period.' The term 'short period' was included in the legislation under the influence of the *Convention Concerning Termination of Employment at the Initiative of the Employer*, adopted in 1982. It was therefore open to the Governor General to specify what should constitute a 'short period' for the purposes of regulations carrying that provision into effect, provided that the selected period might reasonably fall within a description of a 'short period'. The Full Court held that:

> [W]e do not find it necessary to determine whether a period of twelve months may reasonably be regarded as a 'short period' of casual employment, either generally, or in relation to any particular type of employment...the regulations leave no room for the operation of the concept of 'short period' simpliciter.[8]

Interpretation and Validity of Regulations

In arguing the validity of the regulations, the Commonwealth intervened and contended that to apply regulation 30B(3) the first step was to determine whether the employee was a 'casual employee.' The second step was to determine whether that person was engaged on a regular and systematic basis for a period of twelve months, and had a reasonable expectation of continuing employment with the employer, as per paragraphs (a) and (b) of the regulation. It was argued that if the employee did not fulfil this second step they would then be excluded from obtaining access to unfair dismissal relief.

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[6] Above, 35.
[7] Above, 38.
[8] Above, 45.

The Full Court rejected this interpretation, stating that it misconstrued the regulation. The Court found that:

> [T]he person described in the opening words of reg 30B(3), before the qualification introduced by the word unless, is not a casual employee engaged for a short period but a 'casual employee'. As a matter of ordinary English, the qualification applies to all casual employees, not only to casual employees engaged for a short period. It follows that the qualification potentially catches casual employees who do not fall within the class of employees mentioned in s.170CC(1)(c) of the Act. It may catch employees engaged on a casual basis for a period exceeding anything that may reasonably be called 'short'[9]

In deciding the validity of regulation 30B(3), the Federal Court stated that:

> Regulation 30B(1), as drafted, goes beyond the regulation making power conferred on the Governor-General by reason of s.170CC(1)(c) of the Act. The problem is that the Governor-General, being empowered to make regulations concerned with the length of the period of employment, has made regulations that impose criteria that have nothing to do with length of employment.[10]

Therefore, the Full Court determined that the regulation went beyond the regulation making power conferred on the Governor-General by section 170CC(1)(c).

Having determined that regulation 30B(3) was invalid the Full Court also found regulation 30B(1)(d) to be invalid, the reasoning being that regulation 30B(1)(d) makes reference to 30B(3) and this reference operates as a qualification upon the preceding words. The Full Court held that had regulation 30B(1)(d) not referred to regulation 30B(3) it would have been valid.

One of the more interesting issues that arise from the case relates to evidence put forward about the nature and facts surrounding casual employment in Australia.

The Evidence

The Court noted that the following discussion "is interesting, but none of it bears on the question whether s.170CC(1)(e) of the *Workplace Relations Act* supports reg 30B of the regulations."[11]

Counsel for the Minister presented some statistics concerning the nature of casual employment in Australia:

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[9] Above, 48.
[10] Above, 51.
[11] Above, 58.

> These statistics reveal that total Australian casual employment grew from 848,300 in 1984 to 1,931,700 in 1999, an increase of 117.7%. This compared with a growth in permanent employment over the same period of 19.1%. There were more additional casual employees than permanents. Casual density increased from 15.8% to 26.4%. The increase was steady throughout the period. Casual density rose by about 1% per year, with slip backs only in 1990, 1997 and 1999.[12]

The expert witness for the Minister, Professor Mark Woden from the University of Melbourne, presented evidence on several issues concerning casual employment. He noted that "there is a high rate of casualisation among employees aged between 15 and 19 years, many of whom are students."[13] In his evidence he stated:

> in my view, the application of the unfair dismissal provisions of the Federal *Workplace Relations Act* 1996 (Cth) to the types of casual employees excluded by regulations would be likely to have an adverse effect of job creation in Australia. In particular, I consider that it would be considerably more difficult for more vulnerable classes of potential employees, such as early school leavers, to find work and to gain the ability to progress to other positions within the workforce.[14]

He made further submissions in his affidavit, none of which were based on empirical evidence. He believed that if the regulations were allowed to be applied to casuals such as Mr Hamzy, with less than 12 months' service:

> there would be fewer jobs, especially for school leavers, unemployed people and persons seeking to re-enter the workforce after a period of absence. Firms value the flexibility afforded by casual employment. In particular, they value the ability to vary working hours quickly and sever employment relationships at short notice. Extending the reach of unfair dismissal laws to casual employees would effectively remove one of these flexibilities. That is, employers would no longer have the same flexibility to vary employment numbers in line with variations in demand for their product. Further, employers would have to spend more time, money and effort in deciding who they hire. If they hire someone who is a poor fit with their business, it will now be much more difficult and costly to remove that person.[15]

During the cross examination, Counsel for Hamzy:

> suggested to Professor Woden that if his assumption about the effect of unfair

[12] Above, 54.
[13] Above, 56.
[14] Above, 59.
[15] Above, 61.

> dismissal laws on casual employment opportunities was correct, it would also apply to full time permanent employment. Professor Woden agreed.[16]

Professor Woden also agreed that "the peak in increased employment happens to coincide with the most protective provisions, from the employee's point of view." He also agreed that the pattern in relation to permanent employment was similar. It was suggested that this "rather demonstrates that the existence or non-existence of unlawful dismissal legislation has got very little to do with the growth of employment and that it is dictated by economic factors."[17] Professor Woden agreed.

Dr Richard Hall, from the University of Sydney, disagreed with Professor Woden's conclusions about casual employment and its effects:

> If the extension of unfair dismissal laws to include a greater proportion of casuals occurred there is little logical reason to expect that it would automatically lead to fewer jobs. First, many casuals are employed by employers with the intention of retaining them for relatively long periods anyway. Second, employers who chose not to engage casual employees would be likely to meet their labour needs through other strategies that facilitate a high degree of flexibility, for example, through the use of flexible hours, part-time contracts and/or the use of probationary periods. There is no evidence that greater reliance on these strategies would lead to any adverse consequences for job creation at the aggregate level.[18]

In examining the above evidence, the Federal Court came to the conclusion that:

> [I]t seems to us that the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven. It may be accepted, as a matter of economic theory, that each burden that is placed on employers, in that capacity, has a tendency to inhibit, rather than encourage, their recruitment of additional employees. However, employers are used to bearing many obligations in relation to employees...Whether the possibility of encountering an unlawful dismissal claim makes any practical difference to employers' decisions about expanding their labour force is entirely a matter of speculation. We cannot exclude such a possibility; but, likewise, there is no basis for us to conclude that unfair dismissal laws make any difference to employers' decisions about recruiting labour.[19]

The Federal Court came to the conclusion that "the Minister's argument in relation to s.170CC(1)(e) lacks a proper factual foundation. It must be

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[16] Above, 64.
[17] Above, 66.
[18] Above, 69.
[19] Above, 70.

rejected. The above reasoning compels the conclusion that reg 30B(3) is invalid."[20] In relation to 30B(1)(d) the Federal Court stated that:

> it is apparent, in the present case, that the words 'engaged for a short period', in reg 30B(1)(d), would operate differently, if retained but stripped of the reference to s.30B(3), than with that reference. Without the reference to reg 30B(3), the words would require determination only of the question (a mixed question of fact and law) whether the employee's period of engagement could properly be regarded as 'short'; whereas the regulation maker intended the question to be determined by reference to the altogether different criteria set out in reg 30B(3)(a) and (b).[21]

It was concluded that there were inherent difficulties with the matter because there was no agreement between the parties about whether Hamzy's employment was regular and systematic. This matter was still to be considered by the Full Bench of the Federal Commission. In this regard the Full Court held it to be preferable to mark each of the questions of law referred as 'Inappropriate to answer.' As the applicant applied for declaratory relief, the court declared that neither regulation 30B(1)(d) nor regulation 30B(3) were authorised by section 170CC of the *Workplace Relations Act 1996* (Cth) and were both invalid.

Consequences of the Decision

As a result of the above decision, the Federal Government acted quickly to stop casual workers with three months' service from accessing unfair dismissal remedies, amending the Regulations accompanying the *Workplace Relations Act 1996* (Cth). As from 7 December 2001, amendments made by the Governor-General to the regulations came into force. The changes mean casual employees engaged for a short period – now defined as anything up to twelve months – are excluded from applying for unfair dismissal relief.

However, it will be necessary to wait and see if the legislation passes through the Senate. The Australian Democrats, who hold a balance of power in the Senate, have doubts as to whether or not the amended legislation is legal. The Democrats are also concerned with the continual rise of casual employment, and whether it would be fair to legislate against this growing section of the workplace.[22]

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BA/LLB(Newcastle).

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[20] Above, 73-74.
[21] Above, 79.
[22] www.workplaceinfo.com.au/registered/alert/2001/01320.htm