Representation by industrial associations

Talia Epstein reports on *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55

In its recent decision in *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55, the High Court considered whether the fact that a person is eligible for membership of an industrial association is sufficient to make the industrial association 'entitled to represent the industrial interests of' that person in relation to contraventions or proposed contraventions of a civil remedy provision of the *Fair Work Act 2009* (Cth). In doing so, the Court accepted that historical recognition of the right of trade unions to act for non-members under previous statutes provided an important context to understand the intended meaning of the provision.

Background

The appellant, Regional Express Holdings Limited (known as 'Rex') is a commercial airline. The respondent (the 'Federation') is an industrial organisation and a registered organisation of employees under the *Fair Work (Registered Organisations) Act 2009* (Cth).

In September 2014, Rex sent a letter to a number of persons to the effect that any Rex cadet who insisted on his or her workplace right to appropriate accommodation during layovers under the relevant enterprise agreement would not be given a position of command.

The Federation alleged that the letter contravened various civil remedy provisions of the *Fair Work Act 2009* (Cth) and applied to the Federal Circuit Court for the imposition of pecuniary penalty orders for the alleged contraventions.

Before the Federal Circuit Court, Rex applied to have the claim summarily dismissed on the ground that the Federation lacked standing. The question was whether the Federation was entitled to represent the industrial interests of the recipients of the letters in circumstances where the recipients were not members of the Federation. Section 540(6)(b)(ii) of the Fair Work Act provides that an industrial organisation may apply to the Court for orders in relation to a contravention of a civil remedy provision only if, *inter alia*, the industrial association is 'entitled to represent the industrial interests of' the person affected by the contravention.

The primary judge, Judge Riethmuller, rejected Rex's application on the basis that because the recipients of the letter, who were affected by the alleged contravention, were eligible for membership of the Federation, the Federation was entitled to represent their industrial interests within the meaning of s 540(6)(b)(ii) of the *Fair Work Act*.[1]

Rex's appeal to the Full Court of the Federal Court of Australia (Jessup J, with whom North and White JJ agreed) was dismissed.[2] The judges of the Full Court based their decision on an historical survey of legislative development of the expression 'entitled to represent the industrial interests of'. Tracing its origins from a line of cases culminating in *R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1957) 97 CLR 7, which established the entitlement of a trade union to represent the industrial interests of employees eligible for membership of the union (the 'Dunlop Rubber principle'), to the current legislative framework, the Full Court held that phrase as used in s 540(6)(b)(ii) could be understood as meaning that an industrial organisation is entitled to represent the industrial interests of employees who are eligible for membership of the organisation.[3]

Rex appealed to the High Court, arguing that the Full Court erred by allowing themselves to be diverted from the text of the legislation by judicial and legislative history. Rex further submitted that the Full Court had misstated or misunderstood the Dunlop Rubber principle as establishing that a registered trade union in an industrial dispute represented the industrial interests of non-members.

The High Court's decision

The High Court (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ) dismissed the appeal in a joint judgment, finding that the Full Court was not diverted from the text of the relevant provision. Indeed, the Full Court's approach to statutory interpretation, which looked to the context of the provision both within the *Fair Work Act* and against the backdrop of its legislative history, was entirely conventional given that the expression did not have a plain and ordinary meaning which in and of itself revealed what was meant by the word 'entitled'.[4]

Context within the Fair Work Act

The High Court first examined the context of s 540(6)(b)(ii) within the Fair Work Act. The expression 'entitled to represent the industrial interests of' appears in multiple provisions throughout the Act and, subject to contrary indication, the presumption is that the expression has the same meaning wherever it appears. Here, having regard to the other provisions in which the phrase appears, it was apparent that the phrase is intended to have the same meaning wherever it is used in the Act.[5]

The High Court then observed that the majority of provisions in which the expression appears give an industrial association standing to take action in relation to a person who is a member of the organisation. In each such case, an industrial organisation is also given standing to take action where the organisation is 'entitled to represent the industrial interests of' a person. Reading these two provisions together, in each such case, the condition 'entitled to represent the industrial interests of' could logically be understood as something which arises otherwise than from a person's membership of the organisation.[6]

The High Court considered that the context of s 540 itself further supported this interpretation. The terms of s 540(6)(b) can be contrasted with s 540(5), which provides that an employer organisation may apply for an order in relation to a contravention or proposed contravention of a civil remedy provision '*only if the organisation has a member* who is affected by the contravention, or who will be affected by the proposed contravention' (emphasis added). Section 540(5) therefore limits the circumstances in which an employer organisation may apply for an order to circumstances where the contravention affects a member, in contrast to the broader terms of s 540(6)(b). This analysis indicated that the Fair Work Act clearly draws a distinction between a person's membership

Regional Express Airlines VH-ZRE Saab 340B at Wagga Wagga Airport, 18 June 2009. Bidgee / GNU Free Documentation License, Version 1.2

of an organisation and the organisation's entitlement to represent the industrial interests of the person, leading to the conclusion that entitlement to represent the industrial interests of a person is not limited to members of the organisation.[7]

Historical context

The historical background and the *Dunlop Rubber* line of cases provided important context for the interpretation of s 540(6)(b)(ii) and supported the above conclusion. This line of cases was the starting point of the concept of an organisation's entitlement to represent the industrial interests of persons eligible for membership of the organisation. Considering the history of legislative application of that concept, culminating in its appearance in the *Fair Work Act*, the High Court agreed with the Full Court's analysis that the historical context logically implied that the entitlement of an organisation to represent the industrial interests of a person referred to in s 540(6)(b)(ii) equates with the *Dunlop Rubber* principle.

Although the expression 'entitled to represent the industrial interests of' was not used as such in *Dunlop Rubber*, or for that matter for some time in any of the subsequent authorities, as a result of *Dunlop Rubber* it came to be understood that an organisation or a union was entitled to protect the industrial interests of those groups of employees who were within its conditions of eligibility. Consistently with the Dunlop Rubber principle, provisions enacted in subsequent legislation, including s 178(5A) of the *Workplace Relations Act 1996* (Cth), were understood as operating on the basis that an organisation's entitlement to represent the industrial interests of a member in relation to work covered by a certified agreement derived from eligibility rules giving the organisation coverage in relation to the work of the member covered by the agreement.[8]

The effect of s 539 of the Fair Work Act was to consolidate in one provision a range of miscellaneous provisions going to an industrial organisation's standing to take certain action. Although the standing rules in respect of the civil penalty provisions in s 540(6) applied the expression 'entitled to represent the industrial interests of' in a novel setting, given the prior well-established meaning of the expression, the High Court considered that the phrase was used in its established sense.[9]

Industrial associations and rules of eligibility for membership

The High Court then turned to the argument advanced by Rex that not all industrial associations referred to in s 540(6) would necessarily have rules of eligibility for membership. Endorsing the findings of Jessup J and the Full Court, the High Court held that the fact that the *Dunlop Rubber* principle may not fit precisely with industrial associations that do not have eligibility rules was not a sufficient reason to doubt that the established sense of the expression was applicable to an industrial association which, like the Federation, is a registered organisation and therefore does have eligibility rules. Section 540(7), by emphasising the requirement in s 540(6) that an organisation be entitled to apply for an order, reinforced the conclusion that the *Dunlop Rubber* principle should apply to registered organisations in the same way that it applied to registered trade unions.[10]

The High Court left undecided the question of whether s 540(6) was limited in its application to registered organisations. In the context of the present appeal, it was clear that the section did apply to registered organisations. However, the High Court flagged that the *Dunlop Rubber* principle sense of entitlement to represent the industrial interests of persons may apply, *mutatis mutandis*, to other forms of industrial organisations having a real interest in ensuring compliance with civil remedy provisions in relation to a particular class of persons.[11] For now, the answer to this question remains unsettled, but the High Court's concluding remarks left open its determination until a time when the question is squarely raised on the facts of the case.

END NOTES

1 *Australian Federation Of Air Pilots v Regional Express Holdings* [2016] FCCA 316 at [29]- [30], [43].
2 *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2016) 244 FCR 344.
3 Ibid at 363 [56] (North J and White J agreeing at 345 [1], 365 [65]).
4 *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55 at [19].
5 Ibid at [20]-[21].
6 Ibid at [22].
7 Ibid at [23]-[28].
8 Ibid at [39]-[40].
9 Ibid at [48].
10 Ibid at [49].
11 Ibid at [50-[51].