

LAWS4228

Labour Law

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Semester 2 2014

How to Use this Script:

These sample exam answers are based on problems done in past years. Since these answers were written, the law has changed and the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore DO NOT use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so YOUR MARK WILL PROBABLY END UP BEING WORSE! The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning.

Please do not use them for any other purposes - otherwise you are putting your academic future at risk.

**NB: All sections will refer to the Fair Work Act 2009 (Cth) unless otherwise stated.**

# Question 1

(**15/20**)

Simon’s prospect of success is dependent on whether or not his dismissal was adverse action for a prohibited reason.

**Has Mary engaged in adverse action?**

By dismissing Simon (an employee) Mary has engaged in adverse action as per s342(1). But adverse action in and of itself does not contravene the act.

**Was the action taken for a prohibited reason?**

The reasons for Simon’s dismissal were outlined in the email sent by Mary as 1) his underperformance and; 2) the complaint he made in respect of Jack.

Jack has a workplace right under s341(1)(c)(ii) to make a complaint as an employee pertaining to his employment.

**Was his complaint about Jack in relation to Jack’s uncle a supplier ‘in relation to his employment’?**

It was held in *Walsh* that the nature of the relationship between the complaint and the employment need not be direct. Similarly, Ms Walsh raised a probity issue in relation to a contract with a supplier with whom she dealt with in the course of her employment. More specifically, she dealt with him in the department she managed – just as Simon manages the glass ornaments division and deals with the supplier (Jack’s uncle) of ornate beads. It was inconsequential whether or not Ms Walsh had a contractual duty to report the misdeed of others. This is analogous with Simon’s situation. By not raising the issue about Jack and his uncle he may have caused himself prejudice in his employment in the future.

Likely to be held that this complaint was ‘in relation to his employment’ and therefore the complaint was a workplace right and if the reason for his dismissal was his complaint then action was taken for a prohibited reason.

**Multiple reasons for dismissal**

The alleged prohibited reason need not be the only reason which prompted the action. The first reason – Simon’s underperformance – is not prohibited. The prohibited reason here is the second – the complaint Simon made in respect of Jack. Per s360 it will be assumed that Mary took this action because of the complaint.

Unlikely that Mary could argue under s361 could prove otherwise. We do not have a *Barclay* issue of uncertainty here. Mary was clear in her email/dismissal of Simon that it was part of the reason. Despite the fact that there were other reasons (like in *Walsh*) she clearly takes determinative action after the complaint is made.

**Advice**

Likely that Mary would be found to have taken adverse action for a prohibited reason. I would advise Mary that Simon has a fair chance of success.

Feedback

Assessment criteria E VG G S NS

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| --- | --- | --- | --- | --- | --- |
| Identification of legal issues | e |  |  |  |  |
| Explanation of the law |  | vg |  |  |  |
| Application of the law to the facts |  | vg |  |  |  |
| Ability to reach a reasoned conclusion |  | vg |  |  |  |
| Structure |  | vg |  |  |  |
| Expression, grammar and spelling |  |  |  | s |  |

Key: E – Exceptional; VG – Very good; G – Good; S – Satisfactory, NS – Not satisfactory

# Question 2

(**12/15**)

**Preliminary issues**

* Bargaining occurs after the previous agreement reached its nominal expiry date (31 December 2013).
* We have an agreement to bargain here.
* A NERR has been issued in accordance with the regulations
* The Union is a bargaining representative here because they have multiple union members employed at the bank.

**Sending the revised offer directly to employee’s homes**

Does sending the revised offer directly to employee’s homes constitute ‘capricious or unfair conduct that undermines freedom of association or collective bargaining’ per s228(1)(e)?

CFMEU argued in *Tahmoor* that sending material to employee’s homes was capricious or unfair. The court held that it was not, as long as it was not misleading. Sending the offer home may be hard bargaining but it is neither capricious nor unfair.

**Communicating directly with employees/putting the proposed agreement to ballot**

Does communicating directly with employees and putting the proposed agreement to ballot constitute ‘capricious or unfair conduct that undermines freedom of association or collective bargaining’ per s228(1)(e)?

In *Tahmoor* it was held that direct communication with employees does not breach s228(1)(e). Rather it is a legitimate tactic to communicate with your employees, especially if the proposals put to the employees are subsequently put to the employee bargaining representatives.

The $4000 bonus incentive if the employees voted up the agreement in the next two months can be construed yet again as ‘hard bargaining’. The bank is entitled to have a position and they are entitled to fight for it.

Holding a ballot without agreement of the other bargaining agents does not always constitute a breach of good faith bargaining requirements. In *Tahmoor* three questions were identified as indicators of whether or not this conduct would breach the requirements:

1. Have negotiations reached ‘an impasse’?

It appears that the Bank is unwilling to change its stance on the cuts to conditions. In each of the offers outlined the bank refuses to increase wages and keep the same conditions. Having said that, it does appear that there was movement between each of the offers. The bank originally offering a 0.5% pay rise, then a 1.5% pay rise and the union seeking a 7.5% pay rise and then a 4% pay rise. It is hard to say whether these negotiations had truly reached ‘an impasse’ as they had in *Tahmoor*.

1. Was there reasonable opportunity to discuss the bank’s latest proposal?

This is impossible to say on the facts. We are not given dates. Assume that if there is a long enough time between the offer and the ballot then the union would have had a reasonable opportunity to discuss the latest proposal because the bank informed all of the employees, including those who had acted on the behalf of the Union before.

1. Have negotiations reached such a stage that the bank is entitled to put this proposal to a ballot to see if progress could be made?

The bank is extremely frustrated with the ‘1970s’ attitude of the Union. Perhaps the negotiations had reached this stage. Yet again, question because of the lack of certain ‘impasse’.

**Issue with surface bargaining?**

Surface bargaining would contravene s228(1)(e).

In *Tahmoor* there was a long history of negotiating meetings with the CFMEU representatives which indicated that they were not merely surface bargaining (as was found in *Endeavor*) but rather they were driving a hard bargain. They were not attempting to ‘frustrate’ the process.

Here the Bank appears to have been negotiating frequently (except for the period of protected industrial action) and also appears to have increased their offer over time. This points to them not engaging in ‘surface bargaining’. Neither of the actions Michelle is asking about would amount to surface bargaining.

**Advice**

I would advise Michelle that the Bank is within its rights to send the revised offer directly to employees homes as long as the information is not misleading or false.

Without knowing more of the facts I would caution her that it may not be found that there was an ‘impasse’ as there was in *Tahmoor* however, she could probably rely on there being ‘reasonable opportunity to discuss the bank’s latest proposal’ by waiting a week or two before holding the ballot. This advice may be overly cautious, the courts have historically been rather lenient in regards to good faith bargaining requirements.

Extremely unlikely for either action to breach s228(1)(e).

Feedback

Assessment criteria E VG G S NS

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# Question 3

(**10/10**)

In *Canavan* the employer put forward an enterprise agreement which provided that paid annual leave would be paid as a ‘loading upon or incorporated into the hourly rate of pay’ thus paying annual leave notionally in advance. Here Jim is attempting to do the same thing but with paid personal leave.

Jim suggests rolling the monetary value of 10 days personal leave into the wage and 10 days paid personal leave is the full entitlement as per s96. Paid annual leave and paid personal leave are both entitlements under the NES. And in both scenarios this would leave the employers to fund any personal time taken off work/any annual leave taken off work. This is not advantageous to the employee.

This ‘all up pay rate’ would, as per the reasoning in *Canavan* be contrary to s55(1). In para 36 of *Canavan* it is indicated that express removal of an NES provision is not necessary. Rather, if the effect of the provision in the agreement is to remove the benefit provided for by the NES then that would constitute exclusion.

**How does Jim’s ‘all up pay rate’ exclude the NES? (Consistent with findings in *Canavan*)**

1. It excludes the entitlement to ‘paid personal leave’ as per s96

The leave would no longer personal leave accompanied by pay.

1. It excludes the requirement for payment in respect of personal leave as per s99

S99 references the base rate of pay for the employee’s ordinary hours of work as the rate of pay to be given for paid personal leave. Now that the base rate of pay includes the paid personal leave pay this is problematic. Say an employee is promoted or their base rate changes. Depending on when the employee takes their personal leave they may actually be taking it at a reduced pay.

1. Inconsistent with s101 therefore excluding s100

Acknowledging that ‘paid personal leave’ is when the employee takes personal leave and concurrently receives pay S101(2)(a) has the effect of prohibiting the cashing out of personal leave if it would result in the employee’s inability to take personal leave with pay for less than 15 days. At all times under Jim’s proposal employees would have 0 personal leave with pay days accrued and would be unable to take paid personal leave. This way the paid personal leave does not accrue if not taken either, thus an employee could be left needing many personal leave days at once. The very nature of personal leave days is that you’re unlikely to be able to predict when you need them, this could leave people into financial trouble.

**Advice**

I would advise Jim that it is not possible to include this all up pay rate under the *Fair Work Act 2009 (Cth)* as it would contravene s55(1).

Feedback

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# Question 4

(**3/5**)

**Relationship between Caring and the aged care workers**

Caring is a labour hire company. Therefore there is no contractual relationship between the workers and the aged care facilities Caring hires them out to. Caring is the employer and the aged care workers are the employees. Caring takes on the normal employer obligations.

**Industrial action**

The strike is industrial action as per s19(1)(c) as the employees refused to perform work.

**Was this protected industrial action?**

On the facts none of the common requirements that apply for industrial action to be protected industrial action have been satisfied as per s413. Thus, this is not s408 protected industrial action.

**Can James legally make this payment?**

Under s474 James as an employer must not make a payment to an employee in relation to the duration of the industrial action (1 hour) as per s474(1)(b). And what is more his employees have breached s475(1)(b) which is a civil remedy provision by asking James to make such a payment.

**Advice**

I would advise James not to make the payment as it would breach s474(1)(b).

Feedback

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|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
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