

Workplace Observer



Transport Workers' Union of Australia v Qantas Airways Limited (Penalty) [2025] FCA 971

The Federal Court of Australia has issued the largest pecuniary penalty in Australian employment history, with Qantas being ordered to pay \$90 million for unlawfully terminating 1,820 ground staff employees during the Covid-19 pandemic.

Prior to November 2020, Qantas' ground handling operations were undertaken by employees of Qantas and its subsidiary Qantas Ground Services Pty Ltd (QGS), many of whom were members of the Transport Workers' Union (the Union).

After Qantas outsourced the ground handling operations work at ten Australian airports to several third-party ground handling companies (said to assist in the airline's survival), the Union commenced proceedings in the Federal Court alleging various breaches of s.340(1)(b) of the Fair Work Act 2009 (Cth).

The Court accepted that Qantas took adverse action by dismissing the relevant employees, with the substantial and operative reason for doing so being to prevent those employees from exercising future workplace rights to engage in industrial action the following year. This position remained unchanged following Qantas' appeal to the High Court.

The Union sought for the maximum pecuniary penalty of \$121 million to be awarded (reflecting the maximum penalty for each of the 1,820 breaches). In considering the appropriate penalty, Justice Lee of the Federal Court considered (among other things) specific and general deterrence.

While Justice Lee accepted Qantas' submissions that it had suffered reputational damage as a result of the proceedings, His Honour considered Qantas was simply engaging in "performative remorse" and determined a higher penalty was required to achieve the object of deterrence. In this regard, His Honour relied on a body of well-established case law when noting it was important that "the penalty is not such as to be regarded as 'an acceptable cost of doing business'".

To that end, Justice Lee ordered a penalty of \$90 million, which is slightly less than 75% of the maximum penalty, of which \$50 million is to be paid to the Union. A final hearing will determine how the remaining \$40 million will be distributed (presumably among the affected previous employees).

This decision serves as a reminder to

employers to remain vigilant and ensure that any changes to their business operations are compliant with the relevant laws and regulations.

This is particularly so in circumstances where it appears courts are increasingly prepared to issue significant penalties. With penalties payable in many cases to applicants and union representatives, there is certainly incentives for applicants in commencing proceedings against employers for alleged legislative contraventions that attract a penalty.

Prosecutions by the Fair Work Ombudsman in relation to the underpayment of wages are likely to also see an increase given the applicability of pecuniary penalties in those proceedings, as well as ongoing regulation and heightened scrutiny on employers.

With large employers such as NAB already announcing rectification efforts in relation to underpayment, we anticipate further litigation in this area moving forward.

A joke from an employment lawyer

Why did the Employment Lawyer cross the road?

... because the chickens were on strike!

Did
You
Know?

An employer is not obligated to provide an ill or injured worker (with reduced capacity) suitable alternate duties indefinitely. Please get in touch with us to explore your options.

Helensburgh Coal Pty Ltd v Bartley [2025] HCA 29

On 6 August 2025, the High Court of Australia handed down its judgment concerning the inquiries that can be made by the Fair Work Commission to determine whether a redundancy was genuine for the purposes of s.389 of the *Fair Work Act 2009* (Cth).

The case centered around 22 former employees of the employer, that worked at its mine site. As part of its operations, the employer engaged two companies to provide services, through contractors. Due to the COVID-19 pandemic, the employer gave notice to its employees that it was restructuring the operations at the mine by reducing the crews and the days per week worked. Following consultation with its workforce, 47 employees were made redundant.

Redundancy not genuine, where employees can be redeployed to perform work of contractors

Proceedings before the Commission were subsequently brought by 22 of the dismissed employees, alleging that they had been unfairly dismissed. After two first instance decisions and two appeals, the Commission

held that the terminations were not cases of genuine redundancy, because it would have been reasonable in all the circumstances for the employees to be redeployed to perform the work that was being performed by the contractors.

The employer appealed to the High Court, asking the Court to determine whether the Commission is able to examine the employer's circumstances and how it could have made changes to how it uses its workforce to operate its enterprise, in any inquiry as to whether it would have been reasonable in all the circumstances for a person to be redeployed within the employer's enterprise.

In determining this question, the High Court found that the Commission was permitted to make this inquiry, holding "[t]he language of s 389 does not prohibit asking whether an employer could have made changes to how it uses its workforce to operate its enterprise so as to create or make available a position for a person who would otherwise have been redundant".

This case may have implications for employers who are considering whether its employees are redundant, where the employer utilises outsourcing arrangements as well as direct employees.

Where operational changes are being considered, and redundancies may be the result, legal advice is recommended, so please do not hesitate to contact us.

Get to know



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An unexpected fact about me is...

My favourite music genre is pop-punk.

My favourite footy team is...

West Tigers in the NRL (minus the losing).

My favourite quote is...

Yesterday is history, tomorrow is a mystery but today is a gift that's why it's called the present (Kung Fu Panda).

If I was an animal, I would be...

A golden retriever.

Set-off clauses lawfully operate within a payment period, but do not relieve record-keeping obligations

Federal Court clarifies the lawfulness of set-off clauses and record keeping obligations for employers

On 5 September 2025, the Federal Court of Australia handed down judgment surrounding the application of set-off clauses in employment agreements for over-award payments.

The Court held that when applying set-off clauses in an employment agreement, an employer can only set off over-award payments against obligations arising under the relevant award within the same pay period. The above-award portion paid to an employee remains capable of absorbing

any entitlements that an employee may be or may become entitled to, in that same period, however cannot be relied on to set-off entitlements owed in a previous or future pay period.

Practically, this will mean if an employer is intending to pay employees fortnightly, for example, an employer would only be able to set-off any over-award payments for entitlements per each fortnightly pay period, and this cannot be extended to apply to other pay periods.

Employers will need to have systems and processes in place to perform these weekly, fortnightly or monthly (as the case may be) reconciliations for its employees, to ensure employees are being paid correctly. For example, at times of high prevalence of public

holidays (such as Easter (around March/April), or the Christmas and New Year period), employers have to be careful about when work is performed and by who.

Separately, the Court also dealt with an employer's obligation to keep records under the *Fair Work Regulations 2009* (Cth) (**Regulations**).

The Court made clear that having a contractual set-off clause does not relieve employers of record keeping obligations under the Regulations, holding that "[t]he relevant contractual set-off clauses do not have the effect of relieving these record-keeping obligations".

Employers remain obligated to keep and maintain the records specified within the Regulations, and an employer's reliance on an "all-inclusive" payment to employees does not alter this obligation.

If you would like further information or advice in relation to contractual set-off clause in employment agreements, and your record-keeping obligations, we would be more than happy to assist.