

FEDERAL COURT OF AUSTRALIA

Health Services Union v Jackson (No 4) [2015] FCA 865

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at the Court's website. This summary is also available there.

There are two proceedings before the Court. It will be convenient to refer to them as "the Victorian proceeding", (VID 1042 of 2013), and "the New South Wales proceeding", (NSD 1501 of 2013). On 24 March 2014 I ordered that the two proceedings should be heard concurrently.

Initially, in the Victorian proceeding, the applicant ("**the HSU**" or "**the Union**") sought orders that Ms Jackson pay to it some \$280,000, together with interest and costs.

These claims arose from two matters. The first was referred to in the pleadings as the "**Toomey Pegg matter**". Toomey Pegg is a firm of solicitors. The HSU alleges that, acting in breach of duty and without authority, Ms Jackson retained Toomey Pegg to provide legal services to the HSU on her instructions thereby incurring a liability, on the part of the HSU, for legal fees totalling \$34,725.

The second claim in the Victorian proceeding related to what was referred to as "the NHDA transfers". The acronym referred to the National Health Development Account which, it is alleged, Ms Jackson opened and operated as the account holder. The HSU alleged that, between February 2004 and May 2010 Ms Jackson, acting without authority and in breach of duty, caused a total of \$246,500 to be transferred from the funds of the Victoria No 3 Branch of the HSU to the NHDA. The HSU sought to recover this amount.

Ms Jackson cross-claimed in the Victorian proceeding for wages said to be due to her as National Secretary of the HSU between 2012 and 2014 during which period she was on sick leave. This cross-claim was dismissed by operation of a self-executing order which I made on 15 August 2014.

The New South Wales proceeding was commenced by Mr Robert Elliott who was National Secretary of the HSU from 1996 to 2002. In this proceeding Mr Elliott sought orders for payment in lieu of untaken annual leave and long service leave, declarations and compensation for contravention of s 90(2) of the *Fair Work Act 2009* (Cth) (“the Act”), imposition of pecuniary penalties payable to Mr Elliott pursuant to the Act and the *Long Service Leave Act 1992* (Vic) and an award of damages for breach of contract.

The HSU cross-claimed against the former President of the HSU, Mr Michael Williamson, and Ms Jackson alleging that, acting without authority, and in breach of duty, they had caused the HSU to enter into an agreement with Mr Elliott pursuant to which he was paid remuneration and superannuation benefits totalling \$414,985 to which he was not entitled. The HSU sought interest and costs in respect of its cross-claim.

In April 2014 Mr Elliott discontinued his claim against the HSU and the cross-claim against Mr Williamson was stayed by order of the Court. Following these developments the only remaining claim being pressed in the New South Wales proceeding was that of the HSU against Ms Jackson.

Once it was ordered that the two proceedings were to be heard concurrently a consolidated statement of claim was filed by the HSU and a defence was filed by Ms Jackson.

In February 2015 the HSU sought and was granted leave to amend its consolidated statement of claim. These amendments related to the NHDA payments and saw the making of some additional claims.

The amendments to the NHDA claim pleaded, in the alternative, that the expenditure of funds from the NHDA account were unauthorised and otherwise improper. The NHDA claim was also increased to \$284,500 to account for additional transfers made between February 2004 and October 2010.

The additional claims arose out of investigations, undertaken by the HSU, into the expenditure of Union funds by, or on behalf of, Ms Jackson. They related to cash drawings

on Union accounts and purchases made on credit cards issued to Ms Jackson which were paid for by the Union.

Two further claims were also made. One was that Ms Jackson had been paid twice in respect of accumulated leave entitlements. The other related to what was said to be the payment to her of an unauthorised honorarium of \$63,000.

Following a series of adjournments, the trial was fixed to commence on 29 June 2015. When the proceedings were called on that morning counsel appearing for Ms Jackson advised the Court that she had filed a debtor's petition under s 55 of the *Bankruptcy Act 1966* (Cth) ("the ***Bankruptcy Act***"). A document which certified the appointment of a trustee of her estate was sent to the Court by the solicitor who had been acting for her. The solicitor advised the Court that, as a result of Ms Jackson's bankruptcy, he would shortly file a notice of ceasing to act for her. Such a notice was filed.

The HSU made an application, under s 58(3) of the Bankruptcy Act for leave to take fresh steps in and continue the proceedings. I granted that application on 3 July 2015: see *Health Services Union v Jackson (No 3)* [2015] FCA 694.

The trial eventually commenced on 7 July 2015. Neither Ms Jackson nor her trustee appeared.

As a result, the evidence relied on by the HSU was not challenged.

The evidence substantially supported the claims made by the HSU. Although the Union pressed all of its broad claims, it modified some parts of some of them in the course of the trial with the result that lesser amounts of compensation were sought.

Toomey Pegg matter

In December 2011 Ms Jackson was the National Secretary of the Union. A delegate of the General Manager of Fair Work Australia had conducted an investigation into various matters relating to the Union. The investigation gave rise to allegations that Ms Jackson may have contravened provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth) ("the ***FWRO Act***"). Ms Jackson was invited to respond to these allegations on or before 20 January 2012. On 18 January 2012 Ms Jackson formally retained Toomey Pegg to act for her at the HSU's expense. She could have, but did not, obtain authority from the Federal Executive or the Union's Finance Committee before doing so. Nor did she do so until after Toomey Pegg had rendered accounts for the firm's services. When she did so the Federal

Executive refused to accept responsibility for the accounts. Toomey Pegg eventually threatened legal proceedings. The dispute was settled by the Union paying \$34,725 to the firm because it accepted that Ms Jackson had acted with the ostensible authority of the Union when retaining its services.

The NHDA transfers

In 2003 a dispute between the Victoria No 3 Branch of the HSU (of which Ms Jackson was the Branch Secretary) and the Peter MacCallum Institute was settled. One of the terms of settlement was that the Institute would pay \$250,000 to the Union. It did so. On 4 December 2003 Ms Jackson opened a Commonwealth Bank account entitled “National Health Development Account.” She intimated, in the relevant authority, that the account was held by an unincorporated association. She did not name that association but certified, as the chairperson or chief officer of the association, that authority had been given for the opening and operation of the account “by resolution passed at a legally constituted meeting of the Committee Members of the Association.” Ms Jackson nominated herself as the only person authorised to obtain information relating to the account and to endorse cheques drawn on it. She did not have authority under the Union’s Rules to establish such an account or to transfer funds into it.

Between February 2004 and October 2010 a series of payments was made from Branch accounts into the NHDA account. These payments totalled \$284,500. None of them was authorised by the Branch Committee of Management. Ms Jackson used the money in the NHDA account for a range of purposes including part of a divorce settlement, holiday expenditure, retail purchases and cash withdrawals. Other money was spent on political campaigns in unions and in the ALP. Although the funds in the NHDA account had come from Branch accounts the expenditure was not accounted for or audited.

Cashed Cheques

Between July 2007 and May 2010 Ms Jackson signed 38 cheques, drawn on the Victoria No 3 Branch Account, authorising payment in cash. The total of the amounts drawn, using these cheques, was \$239,837. A further \$19,900 was drawn from the HSU East Branch account using two “cash” cheques between 24 May 2010 and 30 June 2010. Ms Jackson signed each of the 40 cheques. None of them was countersigned by two other members of the Branch Committee as required by Rule 60(c) of the Union’s Rules. Five of the cheques

were signed by Ms Jackson between 4 April 2008 and 19 May 2008 when she was not the Branch Secretary.

Twenty of the cheques were drawn on the eve of Branch Committee of Management meetings. Committee members who attended were paid \$100 each in cash to defray expenses. Ms Jackson kept the rest of the cash. She placed it in what she described as a “kitty”. The cash obtained upon presentation of the other 20 cheques also went into the “kitty”.

Ms Jackson drew on the “kitty” for personal purposes such as reduction of a credit union mortgage account operated by her and her former husband.

These cash withdrawals were not authorised by the Branch Committee of Management (save as to the “\$100 sitting fees”). The cash withdrawals were falsely recorded in the general ledger of the Branch under headings such as “honorarium”, “professional development” and “conference/seminar” expenses.

The honorarium

On the eve of the amalgamation of the Victoria No 3 Branch with other Branches to form the HSU East Branch, the Branch Committee of Management of the Victoria No 3 Branch passed a resolution which, purportedly, authorised the payment of \$63,000 to Ms Jackson. On 23 March 2010 the Committee resolved that:

“The BCOM also reminded the Secretary that she had not claimed the \$21 000 honorarium that she has been entitled to for the past 3 years, and she should arrange payment. The BCOM also noted that the Secretary should be paid the full \$21 000 honorarium in total, for this financial year, not pro rata, regardless of the date of amalgamation as a sign of thanks and appreciation for her service to health professionals.”

The amalgamation took effect on 24 May 2010.

On 30 June 2010 Ms Jackson wrote a cheque for \$63,000 on an account operated by the HSU East Branch. The cheque was made payable to her. She signed it. It was countersigned by one but not two members of the HSU East Branch Committee of Management.

At the time that the resolution was passed by the Committee of Management of the Victoria No 3 Branch Ms Jackson was not an employee of that Branch. She had not been since January 2008 when she assumed duties as National Secretary of the Union. As National Secretary she held a full time paid office under the Rules and her remuneration was fixed by the National Council.

The Court found that the payment of the honorarium was not authorised under the Union's Rules and should not have been paid.

The Elliott Memorandum

Mr Robert Elliott was a former National Secretary of the HSU. Between 2007 and 2010 he worked for the Victoria No 3 Branch as a consultant. Shortly before the Victoria No 3 Branch merged with other Branches to form the HSU East Branch Ms Jackson, as National Secretary of the Union and Mr Williamson as National President, signed a contract with Mr Elliott pursuant to which Mr Elliott was to be paid \$150,000 per annum for a maximum of 75 days work per year whether or not he rendered any services to the Union. Neither Ms Jackson nor Mr Williamson had authority, under the Rules, to bind the Union to enter into this contract of employment. The contract was eventually terminated but not before the Union and the State registered union had made payments, under it, to Mr Elliott. The Union suffered a loss totalling \$411,635.86 as a result of the execution of the Elliott Memorandum.

Credit Card Expenditure

The Union provided Ms Jackson with a number of credit cards. Between 2003 and 2011 Ms Jackson used the credit cards to pay for personal travel expenses, retail purchases, food and alcohol, entertainment and health and fitness services. This expenditure totalled almost \$400,000.

Ms Jackson did not account to the Branch Committee of Management for this expenditure.

The Court accepted that some of the expenditure was likely to have been made for Union purposes. Ms Jackson had made a relatively small personal payment to cover part of one of the card accounts. When allowance was made for these considerations, the Court found that Ms Jackson had used \$305,828.30 for personal purposes and that she had not been authorised to incur this expenditure on behalf of the Union.

Overpayment of wages

Between 2003 and 2010 Ms Jackson travelled overseas and interstate on what the Court found to be holidays. They extended over about 40 weeks. During these absences from the office Ms Jackson continued to be paid her normal wages and accrued annual leave which she could and should have taken whilst on holidays. On a number of occasions during 2009 she "cashed out" accrued annual leave and authorised days off entitlements.

Ms Jackson was found to have been paid \$67,912 by way of normal salary when she should have been drawing on her accrued entitlements.

The Union's claims

The Union relied on statutory, common law and equitable causes of action. It succeeded principally on the ground that Ms Jackson had contravened s 287 of the *FWRO Act*. This section provides that an officer of an organisation must not improperly use his or her position to gain an advantage for him or herself or someone else or to cause detriment to the organisation or another person. Relevantly impropriety may be present even if the officer concerned is not conscious that he or she is acting improperly and even if he or she has no intention of acting dishonestly. Impropriety may be present when an officer performs an act which the officer knows or ought to know he or she has no authority to perform. The Act provides for the Court to order the payment of compensation for any damage which has resulted from such a contravention.

The Court's orders

The Court has made orders in the two proceedings under which Ms Jackson is required to pay the Union \$1,338,626.16 as compensation for damage caused to the Union as a result of her contraventions of s 287. She has also been ordered to repay \$67,912 of overpaid salary being money had and received by her for the use of the Union.

JUSTICE R.R.S. TRACEY

19 August 2015

MELBOURNE