From Big to Small and Out of Luck: How the new Closing Loopholes Legislation stops Insolvent Employers seeking to dodge Redundancy payments

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New legislation closes a loophole which previously prejudiced loyal employees who stayed to help during an insolvency administration. Where once large businesses became small due to restructuring or run-down of a business during an insolvency administration, those employees who remained missed out on their entitlements because by the time they were terminated the business had shrunk to a size which fit within the small business redundancy exemption under s 121 of the *Fair Work Act 2009* (Cth). This exemption applies to exempts small businesses with less than 15 employees from the requirement to make redundancy payments to employees.

OUT OF LUCK?

An example of the loophole was demonstrated in *Bullivant and Secretary, Attorney-General's Department* [2020] AATA 2047. This case involved the employee Ms Bullivant who on 1 June 2011 commenced employment with Kimberley Metals Limited (which later came to be known as

KBL Mining Limited) ("**KBL**").

KBL was placed into administration on 8 September 2016 at a time when there were 60 employees. Ms Bullivant stayed on to assist the voluntary administrators. Eventually the business was wound down and Ms Bullivant too was made redundant. On 28 November 2018, Ms Bullivant submitted a claim under the *Financial Entitlements Guarantee Act 2012* (Cth) ("**FEG Act**") seeking payment of unpaid wages, annual leave, payment in lieu of notice, redundancy pay and long service leave. On 19 December 2018, Ms Bullivant was advised she was entitled to payments amounting to $19,380.94, however she was not entitled to redundancy pay as by the time she was made redundant there were only 13 remaining employees and KBL was technically a "small business".

Ms Bullivant sought an internal review of this decision under s 38 of *FEG Act* claiming that KBL was not a small business and as such she was entitled to redundancy payments. Ms Bullivant relied on the fact that KBL was not a small business when the administration started. It was only because she had stayed on to assist the administrators of KBL that during this period the number of employees was reduced from 60 to 13. The internal review was rejected on 6 May 2019 and on 31 May 2019 Ms Bullivant bought this claim to the General Division of the Administrative Appeals Tribunal ("**AAT**") seeking a review of the original decision.

In the application Ms Bullivant stated that her right to a redundancy payment vested well before the company had fewer than 15 employees. In addition to this claim, she relied on a Letter dated 19 September 2018 from the liquidator which advised Ms Bullivant she was entitled to the equivalent of 10.0 weeks redundancy pay valued at $15,769.22. Ms Bullivant claimed that this Letter indicated a 'promise' by the administrator that she would be entitled to her redundancy pay if she stayed to assist them in winding down the business. Additionally, she relied on an informal statement she alleged had been made by the insolvency practitioners that 'if she remained and was made redundant, she would receive an attractive redundancy payment'. The administrators denied making any such statement.

The case turned on two main questions as follows:

1. Was an agreement entered into by the Insolvency Practitioner and Ms Bullivant, that if she stayed on, she would be paid redundancy entitlements?

2. Would this agreement be subject to the small business exemption rule in section 121(1)(b) of the *Fair Work Act* ("**FW Act**")?

The AAT found that the administrators had bound themselves to pay Ms Bullivant redundancy pay as a condition of her agreement to stay on and the decision was remitted to the Secretary to calculate and pay her redundancy entitlements pursuant to s119(2) of the *FW Act*.

This case forms one of many where tribunals have had to consider the issues arising from employers becoming small businesses at the end of an employee's redundancy causing them to lose out on redundancy entitlements. This was criticised in *Tjoputra and Secretary, Attorney-General's Department* [2021] AATA 1596 by Senior Member Chris Puplick who stated that:

"It is not so much "the flick of a pen" that has now resulted in these entitlements being rendered nugatory for so many applicants who have come before the Tribunal in recent years, but rather the failure of governments to address this unintended inequity"

Additionally in *Bower and Secretary, Attorney-General's Department* [2020] AATA 4353, the Deputy President R I Hanger AM QC stated that:

"I respectfully suggest that the attention of the Attorney General be drawn to the injustice that appears to be created in this kind of matter when the intention of the legislature was to enact beneficial legislation".

YOU'RE IN LUCK

In response to criticism within cases like these the Government enacted the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) which introduced s 121(4) into the *FW Act.* In accordance with this section, redundancy entitlements remain owing if:

1. An employer is insolvent or in the process of being wound up (apart from (solvent) members' voluntary liquidations) and
2. The employer only became a small business due to terminations made as a result of the insolvency or which occurred in the six months prior to the appointment of an insolvency practitioner.

Thanks to this new legislation Insolvency practitioners and employees will now have assurance that if a business winds down, regardless of the business becoming a small business employer, employees will retain their redundancy entitlements. Employees avoid the need to fear the loss of their redundancy entitlements. Insolvency practitioners can take comfort that employees will not need to allege arrangements or promises against them, and can offer the employees more certainty regarding their entitlements in a business wind down.

Matthews Folbigg Lawyers has a specialist team dedicated to Insolvency, Restructuring and Debt Recovery.

If you would like more information or advice in relation to insolvency and the small business exemption, contact our Principal Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au