Employment Law

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Explain the constitutional basis for the Fair Work Act 2009 (Cth) with reference to the Australian Constitution and discuss the relationship with Australian common law, with reference to the National Employment Standards.

The Fair Work Act, 2009 is a labour welfare legislation aimed at improving the relations between employees and employers so that productive workplace relations can be formulated which would further help in promoting national economic prosperity and promoting amicable relations between the Australians (Chapman, 2009). In this regard, it is submitted that the Fair Work Act, 2009 has been an extension of the process of amendments which also came under a lot of fire recently with the recent amendments which are popularly known as Work Choices Act and the amendments were brought forth in 2005. The amendments brought forth in the Work choices Act were criticized as being against the interests of the employees and workers and in favour of the employers and businesses (Riley, 2010).

There was a lot of debate about the constitutionality of the Work Choices Act and it was alleged that the provisions of the Work Choices act were contrary to the Constitution of Commonwealth of Australia. The reason why this submission is being made is because the constitutional basis for the Fair Work Act, 2009 (Chapman, 2009) is same as that of Fair Choices Act, 2005.To develop a better understanding of the constitutional basis of the Fair Work Act, 2009, it is important to discuss the landmark case of New South Wales vs Commonwealth[1] wherein the constitutionality of the Work Choices Act 2005 was discussed and adjudicated upon by the Hon'ble High court of Australia.

[1] New South Wales vs Commonwealth [2006] HCA 52.

The basic point of contention in the instant case was the expansion of federal powers regarding the labour welfare legislation in the form of Work Choices Act, 2005. The major point of contention was the purported elimination of the State Territory jurisdiction to legislate upon the labour welfare legislation and such powers were to be shifted to the federal parliament. Various states of the Commonwealth of Australia and major trade unions of the Commonwealth of Australia were parties to the aforementioned case in which the major points of contention stated above were debated and adjudicated upon (Lucev, 2009).

The Commonwealth of Australia contended that the Commonwealth and federal parliament was well within its powers as per the Constitution of commonwealth of Australia. The Government's thrust was in the argument that it was well within its powers to legislate upon any topic or law which created, altered the provisions pertaining to the conduct of employees of corporations, laws pertaining to business functions and various corporation's activities and relationships. The Government is also empowered to legislate upon issues protecting the corporations from various kinds of loss or damage. These powers are derived from (WASF, 2009)Section 51 (xx) of the Commonwealth of Australia constitution Act[2]. The provisions of the aforementioned section of the Constitution of Australia are often known as "Corporation Powers" and they bestow upon the Commonwealth and Federal parliament to legislate upon topics pertaining to foreign corporations, trading and financial corporations and this contention of the Commonwealth of Australia was upheld by the Hon'ble High Court of the Commonwealth of Australia vide a majority judgement in favour of the commonwealth government.

Accordingly, it can be stated that the constitutional basis of the Fair Work Act, 2009 is section 51 (xx) (WASF, 2009) of the Commonwealth of Australia Constitution. In this regard, it

[2] Section 51 (xx) of the Constitution of commonwealth of Australia.

is pertinent to note that there has been a significant change in the fair Work Act, 2009 when compared to the earlier labour welfare legislations in place in the Commonwealth of Australia, as earlier common law contracts pertaining to labour contracts were allowed in the commonwealth of Australia. With advent of the Fair Work Act, 2009 even though common law contracts are allowed, the same are abolished in case of individual statutory contracts. Even in cases wherein the common law contracts are allowed, the terms and conditions offered in the common law contracts cannot be less beneficial than the terms and conditions that are guaranteed under the National Employment Standards.

The National Employment Standards as per the Fair Work Act, 2009 establish a minimum or basic safety net for welfare of the workers and employees so that the employees are guaranteed the minimum set of safeguards and in this regard, the Fair Work Act, 2009 has been remarkable. The most remarkable feature of this statute has been the scope of the statute because it applies to the Constitutional Corporations and these corporations are covered under section 51 (xx) of the Commonwealth Constitution.

Another important feature of Fair Work Act, 2009 is the National Employment Standards and they set the minimum standards of employment which would govern the employment conditions in the Constitutional Corporations. The NATIONAL Employment Standards along with the Modern Awards established by the Fair Work Act, 2009 set up the basic safety net for the workers working in the Constitutional Corporations. (LSCSA)The various areas which are covered under the National Employment Standards are, maximum number of working hours, provisions for parental leave, arrangements for flexible working hours and options related to the same, various types of holidays such as annual leave, public holidays, community service and long leave entitlements compassionate leave entitlements termination and redundancy

entitlements etc (Pickering, 2010). it is because of the National Employment Standards that even if the common law contract governing employment in a Constitutional Corporation, notwithstanding the provisions to the contrary to the National Employment Standards in the common law contract, the provisions of the National Employment Standards and the Modern Award would prevail over the latter. It is submitted that the Fair work Act, 2009 is remarkable in a lot of ways and it plays a very significant role in bringing uniformity in the labour welfare legislation in the sense that it not only brings uniformity across the states pertaining to employment contracts and conditions, it also provides a platform for collective bargaining between the employees and the employers thus, it would not be wrong to state that the Act attempts to create a balance between the interests of the employees and the employers, i.e. businesses.

What is the difference between agency employment and temporary transfer of employment where a third party is injured? Explain with reference to case law and relevant legislation.

Agency work (Johnstone & Quinlan, 2005) often comes across as a way in which certain principal employers attempt to circumvent the arms of Law to evade or at least complicate the manner in which Occupational Health and safety Laws and their application can be avoided. The reason behind this is because the principal employer outsources the job for which the contracting agency hires the workers who undertake the tasks which are required to be fulfilled by the Principal employer. In this regard, what is noteworthy is that even though the workers are undertaking the tasks belonging to the host employers, it is for the temporary basis and

notwithstanding the fact that the risks posed by the tasks and the working environment which are totally the responsibility of the host employer, can be circumvented owing to the indirect relationship with the workers because of the triangular relationship between the host employer and the actual workers. The major problem that arises in this regard is that in the case of agency employment, there is great risk in terms of relief available in case of injury to the workers or to third party workers. (Johnstone & Quinlan, 2005)What happens in such cases; is that the agency which hires the workers claims that the workers were working under the directions of the host employer or the principal employer. On the other hand, the principal employer claims that the agency has hired the workers and as such it should be held liable for the injury caused to the third party or the workers of the agency which has provided the workers. This creates confusion and provides a scope for legal manipulation thereby denying or at least delaying grant of relief to the aggrieved which is a reason for concern because despite government attention on the matter for a very long time now, there have not been too many legislative efforts to regulate the area. On the other hand in cases of temporary transfer of business, the whole job is outsourced and along with it the responsibility to compensate is also transferred. (Pickering, 2010)As far as transfer or transmission of business is concerned, the same is governed by the provisions of the (Lucev, 2009)Fair Work act, 2009 and the provisions of the Act ensure that the liability to compensate out of the industrial awards cannot be evaded and the Act has provisions against sham schemes to avoid liability in Division 6 of the Act. Regarding agency work arrangements also designed to evade liability are provided protection against in terms of section 30 A of the Fair Work act, 2009. Regarding agency work employment, the landmark case of Swift Placements Pty Ltd v WorkCover Authority of New South Wales (2000) 96 IR 69[3] is important to be discussed wherein the (Lucev, 2009)NSW industrial Relations Commission held that the

[3] Swift Placements Pty Ltd v WorkCover Authority of New South Wales (2000) 96 IR 69.

workers hired by the contracting agency to be the employees of the agency notwithstanding the fact that they were working under the directions of the host employer.

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