Article Information

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What is "social origin"? Federal Circuit and Family Court considers the scope of protected attributes

The recent decision in Vergara v Bunnings Group Ltd[1] has provided some clarity on when dismissing an employee may amount to discrimination on the basis of 'social origin'. The Court found that for an employee to succeed in a social origin claim, they would need to show that they were part of a 'class' or 'social group'.

Background

Mr Claudio Vergara was dismissed from his employment with Bunnings Group Ltd in November 2021 after it discovered the employee had sexually harassed his former supervisor at a previous employer in contravention of the *Sex Discrimination Act 1984* (Cth). This dismissal occurred one month after the employer promoted the employee to a pricing coordinator role.

In response to his dismissal, the employee commenced proceedings claiming that:

1. the employer had breached section 351(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) by terminating the employee's employment due to his 'social origin' (**social origin claim**);
2. the employer had unfairly dismissed him (**unfair dismissal claim**);
3. the employer had breached the employee's employment contract on the grounds that his employment was terminated without any merit or reasonable basis (**breach of contract claim**) and;
4. the employer failed to provide appropriate notice of his dismissal (**notice claim**).

Social Origin Claim

In the employee's termination letter, it stated that his conduct with his former supervisor did '*not align with Bunnings values*'. The employee also provided evidence that since the sexual harassment findings were made against him, he had '*not been able to work in his chosen field for many years and had found it difficult to find alternative work*'. The employee therefore claimed that the sexual harassment findings made against him constituted a form of '*social origin*' and that Bunnings' decision to terminate his employment based on those adverse findings constituted a dismissal in breach of the general protections contained in section 351(1) of the FW Act.

This was a relatively novel claim, because the term '*social origin*' is not defined in the FW Act, nor has it been the subject of many judicial determinations. Article 1 of the *Discrimination (Employment and Occupation Convention 1958*) (**Convention**) refers to social origin, although it is not explicitly defined in the Convention. When the explanatory material was prepared as part of the preparatory work for the Convention, social origin was primarily expressed in terms of '*social mobility*', defined as the possibility for an individual to pass from one class or social category to another.

In dismissing the claim, Deputy Chief Judge Mercuri explained that discrimination on the basis of social origin arises when an individual's membership in a class or a socio-occupational category determines their occupational future by denying them certain jobs or activities. Nevertheless, the employee asserted that by the employer terminating his employment without any discussion or investigation into the adverse conduct with his former supervisor, they had discriminated against him on the grounds of his 'social origin'. However, Deputy Chief Judge Mercuri concluded that the social origin claim had no reasonable prospect of success, both because the alleged 'social origin' status did not arise, and even if it did, dismissal on that ground would not be unlawful:

1. The findings made in the employee's sexual harassment proceedings was not a finding which '*identified him by*

reference to a class, group or socio-occupational category to which he belonged'. Deputy Chief Judge Mercuri explained that the word 'social' is indicative of something relating to society and generally applies to a collective group whereas 'origin' is indicative of where something starts or begins. There was therefore nothing in the ordinary meaning of the term 'social origin' which would refer to an employee who has had sexual harassment findings made against him or her. Deputy Chief Justice Mercuri then suggested that if the employee was part of a class or collective group of people who have had adverse sexual harassment findings made against them, then his application would have had much greater force.

2. The termination of the employee's employment occurred in Victoria so for section 351(1) of the FW Act to apply, the adverse action taken because of the employee's social origin must be unlawful under an anti-discrimination law in Victoria. However, Deputy Chief Judge Mercuri explained that the term 'social origin' is not a protected attribute under section 6 of the Victorian *Equal Opportunity Act 2010* (Vic). Consequently, discrimination on the grounds of social origin is not unlawful in Victoria. This means that even if the employee was able to show that the sexual harassment findings made against him constituted a form of social origin, he would still be unsuccessful in his claim, because section 351(1) of the FW Act would not have application to a dismissal occurring in Victoria because such action is not unlawful in Victoria.

3. Deputy Chief Judge Mercuri also accepted the employer's submission that discrimination on the grounds of social origin is not unlawful under any of the following Commonwealth anti-discrimination laws listed in section 351(1)(aa)-(ad) of the FW Act: the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* or the *Sex Discrimination Act 1984*. Consequently, there was no breach of section 351(1) of the FW Act.

Unfair Dismissal Claim

Deputy Chief Judge Mercuri also dismissed the employee's unfair dismissal claim because there is nothing in sections 385, 386 and 387 of the FW Act which confers power on the Federal Circuit and Family Court to deal with unfair dismissal claims. The Fair Work Commission has the authority to arbitrate such matters.

Breach of Contract Claim and Notice Claim

The employee asserted that the employer was under an obligation to '*accord natural justice*' to him when it terminated his employment. The Court held that for this claim to succeed, the employee would need to establish that a term was implied in his employment contract, either in law or in fact, which imposed an obligation on his employer to act fairly in the way in which they terminated his employment.

The employee's breach of contract claim is somewhat novel because the law in this area is such that it can be quite difficult to establish implied contractual terms in law or in fact. This is because for a term to be implied into a commercial contract, it must, according to *BP Refinery (Westernport) Pty Ltd v Shire of Hastings)*[2] be:

1. reasonable and equitable,
2. necessary to give business efficacy to the contract, which means that no term will be implied if the contract is effective without it,
3. must be so obvious that it 'goes without saying',
4. capable of clear expression and;
5. must not contradict any express term of the contract.

Deputy Chief Judge Mercuri concluded that it was premature to dismiss this aspect of the employee's claim without giving him the opportunity to properly plead his claim. She therefore ordered the parties to participate in mediation over the employer's alleged breach of contract and insufficient notice of the employee's dismissal. It will remain to be seen whether this part of the claim ultimately results in a judicial determination.

This decision helps to clarify when a dismissal may amount to discrimination on the basis of social origin by explaining that:

- an employee must ensure that they can identify themselves by reference to a collective group or category of people to which they belong in order to bring a social origin claim;
- for the social origin claim to succeed, discrimination on the basis of social origin must also be prohibited under an anti-discrimination law in the place where the adverse action is taken.

These explanations will assist employers with understanding their obligations to not take unlawful adverse action under the general protections provisions in the FW Act.

[1] [2022] FedCFamC2G 818.

[2] (1977) 180 CLR 266.