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AUSTRALIA

High Court Rules on Employer Decision making: Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32

The relationships between Australian employers and employees are subject to regulation from a variety of legislation at both Federal and State levels. The most significant of these is the Federal Fair Work Act 2009. The Fair Work Act contains within it "General Protections" provisions. These provisions prohibit an employer from taking adverse action against an employee for a number of identified reasons. Those reasons include that the employee is an officer or member of an industrial association, or because an employee engages or proposes to engage in particular kinds of industrial activity.

The taking of adverse action, in itself, will not constitute a breach of the Fair Work Act. It is only when the adverse action is found to have been taken because of a prohibited reason that a contravention of the Fair Work Act will be established. Controversy has existed in Australia about the connection between the adverse action and the prohibited reason which will be required in order to satisfy the causal connection encapsulated in the word "because".

When this case was before a Full Federal Court the majority judges rejected the notion that it was only the most recently operative step in a causative chain of events which would qualify as the "reason" for an employer taking adverse action against an employee. The focus of the Full Federal Court was on the objective connection between the action taken by the employer and the attribute or activity of the employee.

The decision of the Full Federal Court was appealed to the High Court of Australia. The High Court handed down its decision on 7 September 2012. Three separate judgments were issued by the five judges who heard the appeal. In their judgments the members of the High Court placed emphasis on the state of mind of the person responsible for taking the adverse action rather than an objectively determined causal relationship between the adverse action and the activity or attribute of the employee.
This decision should make it easier for employers to establish that adverse action was not taken for a prohibited reason. At the same time, it may provide for greater opportunity for the purpose for which general protections are provided to be evaded by framing decision making processes in an anodyne fashion.

Damages available for breach of an implied term of trust and confidence in an employment contract: Barker v Commonwealth Bank of Australia [2012] FCA 942

To date there has been no definitive High Court decision accepting an implied term of trust and confidence in employment contracts as part of Australian law. The term, where it is found to exist by the lower courts, is that an employer must not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. In addition to the existence of the term, related issues have been:

- whether the term is one which is implied in law as a consequence of the nature of employment contracts as a class of contracts, or whether the term is one to be implied in fact, which requires an examination of the particular employment arrangements in question;
- the availability of damages for breach of the term;
- whether the term will apply at the point of dismissal; and
- the nature and scope of the term, should it be implied.

In this case, a decision of a single judge of the Federal Court, handed down on 3 September 2012, it was held that there was an implied term of mutual trust and confidence in the employment contract between the employee Mr Barker, and his employer, the Commonwealth Bank of Australia. The term was held to be one implied by law rather than because of the factual circumstances of the particular case.

The factual circumstances of the case were such that the Federal Court did not need to involve itself in deciding whether the term applied at the point of dismissal. The term was invoked at an earlier stage, that is, between the time Mr Barker was notified that his position was redundant and the time his employment was terminated. The Commonwealth Bank had an employment policy in which it described certain steps that it would take in order to maximise the chances that an employee whose position had been become redundant could obtain another position within the Bank. These steps were not taken in relation to Mr Barker. The Federal Court held that this serious failure to follow the redeployment policy was a breach of the implied term of mutual trust and confidence, which gave rise to an entitlement to damages for the economic loss suffered by Mr Barker. This economic loss was calculated on the basis that Mr Barker would have had a 25 percent chance of securing alternative employment within the Bank until retirement, had the Bank followed its redeployment policy.

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CANADA

Headline: Mandatory Retirement Now Abolished in Almost All Canadian Jurisdictions

The rights of employees to continue working past what is typically considered "retirement age" will soon be extended to even more Canadian employees with the recent repeal of Federal legislation that allowed employers to require employees to retire once they reached the "the normal age for retirement" for persons in their position. In Canada, normal retirement age is generally between 60 and 65.

The changes to the Canadian Human Rights Act were passed by Parliament on December 15, 2011 and come into effect on December 15, 2012. Section 15(c) of the Canadian Human Rights Act formerly permitted an employer to require an employee to retire once he or she had reached "the normal age of retirement" for a person in that position. This change to the Canadian Human Rights Act will affect employees in federally regulated industries, such as banking, air transport, inter-provincial shipping and communications.

Even before section 15(c) of the Canadian Human Rights Act was repealed, the Canadian Federal Court of Appeal had ruled that this section violated the Canadian Charter of Rights and Freedoms in a way that could not be considered a justifiable limitation on an individual's right to equality. The Charter of Rights and Freedoms is a key constitutional document guaranteeing certain rights and freedoms to all Canadians, including the right to be free from discrimination on the basis of age. So-called "Charter Rights" can be limited by legislation or other government action only where to do so is reasonable and justifiable in a free and democratic society.

The Federal government is the last Canadian jurisdiction to repeal this kind of legislation: almost all provinces and territories have repealed any legislation permitting mandatory retirement in the past six years. Only New Brunswick's Human Rights Act still allows employers to require employees to mandatorily retire as pursuant to "the terms or conditions of any… retirement or pension plan."

Despite amendments to the law across most of Canada, mandatory retirement may still be allowed in some circumstances, such as where an employer can show that requiring an employee to retire at a certain age is a bona fide occupational requirement – i.e. where being below the retirement age reasonably necessary to accomplish a legitimate work-related purpose. This threshold is a high one, but could arguably be met in jobs where safety concerns are found to outweigh discrimination concerns.

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MEXICO

A reform of the Federal Labor Law was approved by the two legislative Chambers on November 13. The President of the Republic has 30 days to file observations, if any, which is unlikely because of his interest inpassing the Reform.

Tomas Natividad was the negotiator for the Employer's sector. The Law dates from 1930; it was reformed in procedural aspects in 1980, while thie current reform is substantive.

Among the favorable reforms for employers and for the labor environment are the following:

- The trial period in hiring is increased from one to six months, during which termination is without liability for the employer.
- The initial training period is increased from three to six months for the job, during which termination is without liability for the employer.
- Initial trial and training period are without restriction in companies that have less than 50 workers.
- Seasonal work (discontinued work, season or those that require services one week, one month or one year).
- The concept of "Decent Work," as defined by the ILO, was incorporated tin the Law.
- For unionized workers, training, ability and knowledge are taken into account for promotions.
- Rights for mothers in pre and post birth periods and breastfeeding, leave days for the parents for the birth of children and in case of adoption.
- Substantive equality for women and men.
- Rights of minors: more protection and regulations.
- Work in the field: more and specific rights.

New regulations regarding sexual harassment and bullying in the employment relationship, as well as discrimination, limiting access to women and the disabled to work, protection to working mothers, and pregnant women.

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NEW ZEALAND

Redundancy and the obligation to provide information

A common issue for New Zealand companies that are subsidiaries or branches of larger international organisations is managing the obligation to consult in good faith with employees about proposals which may impact on their continued employment. All too often, decisions are made internationally and New Zealand Managers are left in a situation where they are unable to comply with their obligation to consult with New Zealand employees about a proposal, as the decision has already been made.

The obligation to provide employees with information has arguably increased following a decision involving a New Zealand university. Until this decision, where employees were competing for positions in a downsizing situation, many employers had relied on the Privacy Act 1993 and not provided assessment material relating to other employees to individual employees. In this decision, the Employment Court clarified that the obligations under the Employment Relations Act 2000 trump obligations under the Privacy Act. As a consequence, the Court held that where there is a downsizing of roles (such as downsizing from five sales roles to three) and affected employees are competing for the remaining positions, those employees are entitled to request, and be provided with, information not only about their own assessment against the criteria, but also information about the other employees.

In practical terms, it is important that organisations with subsidiaries or branches in New Zealand are aware that evaluative material in a downsizing situation may be required to be disclosed to employees. Care therefore needs to be taken when assessing employees so that the assessments of employees are transparent, reasonable and suitable for disclosure without creating further risk for the organisation.

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US

U.S. Employers Must Prepare for Compliance Obligations under National Health Care Reform Law

One of the most important and controversial decisions of the U.S. Supreme Court this decade will result in the extension or expansion of health care coverage to many millions of Americans. On the last day of the 2011 term, the Supreme Court in a 5-4 decision generally upheld the constitutionality of the 2010 national health care reform law (the Patient Protection and Affordable Care Act of 2010 as amended by the Health Care and Education Reconciliation Act of 2010) as an exercise of Congress' power to tax. National Federation of Independent Business v. Sebelius, No. 11-393 (June 28, 2012) (together with Department of Health and Human Services v. Florida, No. 11-398, and Florida v. Department of Health and Human Service, No. 11-400).
For U.S. employers subject to the Act, there are a number of obligations that may require immediate attention:

- Employers sponsoring group health plans need to focus on ensuring compliance with the requirement for distribution of summaries of benefits and coverage during upcoming open enrollments.
- Employers that are negotiating collective bargaining agreements now must take into account the near- and long-term effects of the health care reform requirements.
- Employers must prepare to issue Form W-2s for 2012 that include the cost of group health coverage.

There are other key provisions of the health care reform legislation that affect covered employers, including the following:

- Play or Pay. Employers with 50 or more full-time employees will have to either (a) provide at least a specified minimum level of affordable health coverage to employees, or (b) pay a penalty beginning in 2014.
- Benefit Limitations. Employer group health plans are prohibited from imposing lifetime or annual limits on benefit amounts, waiting periods in excess of 90 days, and pre-existing condition limitations.
- Tax Treatment. Health flexible spending accounts' tax-free reimbursements for over-the-counter medicines are eliminated, and, beginning in 2013, the maximum health care flexible spending account amount is limited to $2,500. Also beginning in 2013, the employer tax deduction for retiree prescription drug benefit costs for employers receiving a related subsidy is eliminated.
- Non-discrimination. Insured group health plans are barred from discriminating in favor of highly compensated individuals regarding coverage and benefits.
- Tax Reporting. Employers must, among other things, report the annual cost of health coverage on each employee's W-2 and pay a per-plan-participant fee to the government for research purposes.
- Automatic Enrollment. Beginning in 2014, employers with more than 200 full-time employees are required to automatically enroll new full-time employees in group health plans.
- Patient Rights. The law already requires health care plans to provide coverage for children up to age 26, provide specific preventive care benefits on a first-dollar basis, and supplement the claim procedures already required under ERISA.

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BELGIUM

Gender neutral remuneration policy obligations

Recently, the Belgian government has added yet another reporting obligation for medium-sized and large companies operating in Belgium.

As of 7 September 2012, companies employing on average 50 or more workers will have to draft a bi-annual remuneration policy report. The information provided should detail the existing remuneration components for various categories of workers (blue-collar workers, white-collar workers and members of management). Furthermore, in the report the company should also make a further distinction between:

- company specific function categories or levels;
- number of years of service; and
- the level of experience and education.

The above information will have to be provided to either the works council or the health and safety committee. A meaningful discussion about this report should ensue. Based on the report, it could be decided to draw up and implement an action plan, although this is not an obligation.
The works council or the health and safety committee could also request the appointment of a internal remuneration policy mediator. The company can however refuse such a request. The implementing Act remains unclear about whether such refusal must be substantiated or not.
The overall aim of this new law is to reduce the (in)famous gender pay gap. However, national experts sincerely doubt the usefulness of this measure, claiming that the existing pay gap is caused by a difference in focus between male and female workers when applying for a job – salary vs. a positive work place environment and a work-life balance – rather than an intended company policy of unequal treatment.

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FRANCE

Sexual harassment – tougher sanctions are imposed

On May 4th 2012, the French Constitutional Court ("Conseil Constitutionel") repealed the sexual harassment law (Article 222-33 of the French Penal Code) on the grounds that it was too vague and failed to protect the victims.
The dangerous void left by the repeal of the sexual harassment law prompted French legislators to rush the new Bill through both houses of Parliament in order to remedy the situation and notably appease public anger as the repeal of the original legislation in May caused all pending sexual harassment suits to be dropped[1].
Under the old Act, sexual harassment was defined as "the act of harassing with the intention of obtaining sexual favors" which was punished by up to one year of imprisonment and a fine of €15 000.
The new Act which is in force since 7th of August provides a more detailed definition of sexual harassment and imposes tougher sanctions on the offenders. The new Act has broadened the scope of situations qualifying as sexual harassment and reinforces employer's obligation to prevent sexual harassment in the work place.
Under the new Act, sexual harassment is described as "the act of imposing on a person, repeatedly, words or behaviors of a sexual nature that either affect the person's dignity due to their degrading or humiliating nature, or put the person in an intimidating, hostile or offensive situation.
Is also equates to sexual harassment, even if not repeated, the use of any form of severe pressure in order to obtain real or apparent act of a sexual nature, sought for the benefit of the offender or a third party."

Article L.1153-1 of the French Labor Code on sexual harassment has also been modified in similar terms.
As for the tougher sanctions - applicable to both sexual and moral harassment - offenders can now face up to two years of imprisonment and a €30 000 fine[2].
The penalties get even tougher in case of sexual harassment with aggravating circumstances; notably (i) when the offender has authority over the victim, (ii) the victim is a minor of 15 years of age, (iii) the victim is emotionally vulnerable or is in a vulnerable socio-economic situation, (iv) or there are multiple offenders. In such cases, the offender faces up to 3 years in jail and a fine of €45 000[3].
The new Act was hailed by many groups, particularly feminists, as a significant step towards women's rights. According to government figures, around 1000 sexual harassment suits are registered each year but far fewer lead to sentences. From 2005 to 2010 on average only 80 sexual harassment cases per year resulted in sentences.
"Victims can once again seek justice and will be better armed since the crime is better defined and covers a wider spectrum, and the penalties are more proportionate to the seriousness of the offence." announced Christine Taubira, French Minister of Justice.
Whether this new Act will have a stronger deterrent effect on future offenders remains to be seen…

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[1]The only alternative for those victims was to seek damages by filing a civil lawsuit.
[2]The company as a legal entity faces a fine of €150 000.
[3]The company as a legal entity faces a fine of €225 000.

GERMANY

To renew or not to renew - discrimination claims of board members regarding their contracts

In April 2012, the German Federal Court (Bundesgerichtshof - BGH) ruled that protection against age discrimination applies also to members of the management board with respect to the renewal or non-renewal of their contracts.

The German Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz - AGG) of 2006 provides that members of the management are protected against discrimination only with respect to their access to positions and their career advancement. The termination of a manager's contract is not subject to scrutiny under discrimination aspects.
In its decision of 23 April 2012, the BGH now applied the AGG to the non-renewal of a manager's contract: The 62-year-old managing director of the municipal hospital of Cologne had been employed for a fixed term of 5 years, which was about to end. The supervisory board did not award him a new contract, but rather gave his position to a 41-year old competitor, effectively terminating his employment. The chairman of the supervisory board explained publicly that the city aimed to apply an age limit of 65 years for leading positions and therefore had not renewed the contract due to the short time the managing director had before reaching that age limit. Even in court, the employer was unable to give a reason for the non-renewal of the contract other than the age of the plaintiff. The court held that this decision constituted prohibited age discrimination - entitling the plaintiff to damages, including non-pecuniary losses.
While the termination of an employment contract upon reaching the statutory age limit is valid under German law, the employer's argument that a term of three years before retirement age was insufficient to safeguard the continuity of management did not convince the court.
Instead it held that the non-renewal was discriminatory. The distinction is a fine one: The termination of an indefinite contract would not fall within the scope of the AGG, the non-renewal of a fixed-term contract does. For German public companies (Aktiengesellschaften), a fixed-term contract is mandatory for board members so that the judgment is being very closely examined by German supervisory boards and shareholders. Companies should document in detail their decision to renew or to not renew management contracts, based on performance and development of the persons concerned or on business and strategic arguments - without any reference to the manager's age, sex, race or any other prohibited criteria. Otherwise, the decision may be a costly one.

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ITALY

Italian Labor Market Reform

As of July 18, 2012, several changes in the Italian Employment Law came into force.
The New Labor Market Reform deals with internal-flexibility (especially with reference to fixed-term contracts) and external-flexibility (dismissal requirements, procedure and relevant sanctions).

Fixed-term contracts may now be entered into also lacking the ordinary justifying grounds foreseen by D.Lgs 368/2001 (i.e. technical, organizational, production reasons or temporary replacement needs). Indeed, it shall be possible to enter into an "ungrounded" fixed-term contract provided that no prior employment relationship has been established between the same employer and employee (also with regard to duties other than the ones foreseen in the fixed-term employment contract). Such contract may have a maximum duration of twelve months and cannot be subject to renewal.

With regard to dismissals, Law 92/2912 provides:

a) further requirements for the letter of dismissals, which must now state the reasons grounding the termination of the employment. The common practice developed by the Italian case law already regarded as necessary for dismissal for just cause /subjective reason, to state the grounding reasons. The merit of the new regulation, thus, is to align the legislation to the common practice, rendering the speedier dismissal procedure compulsory for all types of dismissal.

b) shorter terms of challenge of the dismissal by the employee, which are equal 180 days (the former term being 270 days), running from the out-of-court challenge (which has to be served the employer within a term of 60 days from the termination of the employment contract, 120 for fixed-term contracts). The new legislation follows the path started by Law 183/2010 -"Collegato Lavoro"-, which had already shortened the terms of challenge from five years to 270 days -from 9 months-. The new term only applies to dismissals served following to the entering into force of the Law 92/2012.

c) a mandatory procedure to handle dismissals for economical grounds, according to which the employer with a headcount of more than 15 units must promote an out-of-court settlement procedure. The employer must inform the "DTL" (Local Labour Bureau) of its intention to dismiss, copying the employee. Within 7 days from the receipt of said communication, the "DTL" may summon the parties to evaluate possible alternative measures instead of the dismissal; failing the DTL to meet such term, the employer is entitled to proceed with the dismissal. Should the consultation phase be started, it must be completed within a term ranging between 20 – 35 days.

d) a new regulation of unlawful dismissals effected by employers hiring more than 15 units, according to which the reinstatement of the employee (which used to be the rule) is limited to few cases, e.g. discriminatory practice, dismissal due to pregnancy, handicap, marriage reasons, inexistence of the fact grounding the dismissal or if such fact, according to the applicable bargaining agreement, could not be sanctioned ceasing the employment relationship, etc..

The reform will now be put to the test of practice, which will assess its actual impact on the Italian labor market.

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NETHERLANDS

Judgment Dutch Supreme Court increases risks of on-call contracts

Many employers have a need for flexible deployment of personnel, for example through on-call contracts (zero hours contracts or contracts with minimum/maximum hours). These type of contract are subject to certain legal restrictions. One of the typical difficulties is that on-call workers can claim working hours based on the average hours they have worked in the past. In a judgment of 27 April 2012, the Supreme Court decided that employees can even claim working hours and salary based on these working hours retroactively. In retrospect, the employee might have a claim for certain working hours from the beginning of the employment, while a zero hours contract was agreed. Further to this judgment, we advise to survey the risks for all on-call contracts.

New legislation: obligation to register for supplying workers
Since 1 July 2012, for supplying workers for payment, a new obligation to register is applicable. The supplier is obligated to register this activity at the Commercial Register kept by the Chamber of Commerce. This obligation applies to all employers, so not only the professional suppliers, like employment agencies. Companies who professionally supply workers, like employment agencies, can inform the Commercial Register by submitting a change form. Companies who incidentally supply workers can do this by phone or email. For hirers it is of importance that they are no longer allowed to use suppliers who are not registered properly. The hirer needs to verify the registration on the website of the Chamber of Commerce. The consequences of not complying with the obligation to register are vast. Suppliers are liable to a fine of the Social Affairs and Employment Inspectorate of EUR 12,000 for each employee. Also hirers are liable for such fines. With the obligation to register, the Dutch government intends to improve tracing frauds and the protection of employees as well as to stimulate fair competition.

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POLAND

Prohibition of discrimination does not apply to every case of an unequal treatment
(Supreme Court – August 18, 2012, II PK 196/11)

According to Article 183c § 1 of Polish Labour Code (LC), employees have a right to equal remuneration for the same work or for the work of an identical value. The problem was how to decode that regulation – whether any violation shall be sanctioned or whether it applies exclusively to the prohibition of discrimination.

It has been explained that discriminated employee is an employee, who is being paid less than another employee for performing an equal or similar work and that only difference between them is caused by one or more of the reasons that have been mentioned in Article 183a § 1 LC (i.e. gender, age, disability, race, religion).

If an employee claims that the employer breached the provisions relating to the non-discrimination obligation and demands using provisions on equal treatment in employment, he (an employee) should indicate the reason for which he has been discriminated and the circumstances of an unequal treatment. The employer shall therefore prove that there has been breach of the principle of equal treatment.

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SPAIN

The New Spanish Employment Contract to Support Enterpreneurship (Law 3/2012, July 6th).

The new labor relations context that has arisen in Spain since the last reform implementedthrough the Law 3/2012, July 6th, includes several interesting modifications and new contributions supportingflexibility for Companies, most notably the creation of a new type of indefinite term employment contract, the contract to support entrepreneurship.

According to the rule, this contract has been created in order to facilitate stable employment relationships as well as to promote entrepreneurship. These general objectives mean in practice important social security and tax deductions and as well as the possibility to establish a one year trial period as long as the same is not terminated before a certain period of time.

The legal requirements established in order to formalize this contract are summarized in three main conditions: (i) This new type of contract can only be used by Companies with a staff of less than 50 employees –as these companies, according to the Spanish National Statistics Institute, constitute 92,23% of the business network in this jurisdiction- (ii) the contract must be fixed term and full time, and (iii) the contract must be signed with unemployed personnel. The Social Security and Tax deductions that the Company will be able to benefit from are approximately of 1.000,00 Euros per year for the first and 3.000,00 for the latter. However, companies unable to maintain the contract a minimum of three years will have to return to the corresponding Administrations the deductions applied[don't know what this means]

Nevertheless, this contract provides Companies with the possibility of an important employment cost reduction, especially for those that, despite the current economic situation, opt for the creation of new job positions.

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NORWAY

New legislation as a result of implementation of the Directive on temporary agency work

The Directive on temporary agency work (Directive 2008/104/EC of 19 November 2008) was implemented in the EEA agreement in July and became consequently a part of Norwegian legislation.
As a result, new provisions will be embodied in the Norwegian Working Environment Act. The new legislation will enter into force in on 1 January 2013. The most important is the principle of equal treatment.
This principle will be adopted in such a way that the working and employment conditions of temporary agency workers shall be at least those that would apply if they had been recruited directly by the user undertaking to occupy the same job. Still, the principle of equal treatment will only encompass the following areas: Duration and disposition of working time, overtime work (including overtime supplement), duration and disposition of breaks, night work (including compensation), holiday entitlements and pay. Furthermore, temporary agency workers shall be given access to the user undertaking´s collective facilities under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons. For the purpose of this provision "collective facilities" means for instance canteens and child-care facilities.

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AUSTRIA

Entitlement of employees to receive payments during a period of absence

Although Austrian employment law is governed by the principle that the employee's right to payment depends upon performance of his or her contractual obligation, statutory law provides for a variety of exceptions to that rule. Apart from their entitlement to receive payments during periods of illness and other important personal reasons, which prevent them from performing their contractual duties over a certain period of time, employees are entitled to guaranteed payment whenever they are not provided with work by their employer by reason of any occurrence affecting the employer's business in relation to work of the kind which the employee is employed to do.
This principle was further extended by the Austrian Supreme Court to circumstances where the employer withholds all or substantial parts of the agreed wages, without being legally entitled to do so. In a number of decisions the Court held that an employee may refuse to work during any such period until back wages have been fully settled. Exceptions to this rule are only accepted when the employer can establish that his refusal to pay was legally arguable.
In a very recent decision (OGH 29.5.2012, 9 ObA 39/11t) the Court had to deal with the case of a bricklayer, whose employer owed him remuneration for 102 hours of work. The worker announced that he would not resume his work until he received these payments. Eventually, he stayed at home for five days, claiming his remuneration for these days on top of the back payment.
Both the first and second instance Courts refused this claim, arguing that statutory law only provides for an entitlement to compensation if the employee was at least ready to work. The Supreme Court allowed an appeal and overruled both lower Courts, arguing that it would mean a severe infringement of the employee's right to refuse to work during periods of substantial back wages, if at the same time he was not entitled to receive his wages during such periods. Therefore, it would suffice if the facts of the case clearly indicate that the only reason for the employee's unwillingness to work was the fact that his employer still owes him a substantial amount of money. In this case, employees are not only entitled to refuse to work but also to the same compensation as if they had performed their contractual duties.

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