

Case Note

Bradshaw v BSA Limited (No 2) [2022] FCA 1440

**Litigation funding for
employment class
action proceedings**

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Litigation funding for employment class action proceedings — guidance by the Federal Court

Bradshaw v BSA Limited (No 2) [2022] FCA 1440

1 Background facts

- Shine Lawyers brought proceedings against BSA Limited on behalf of thousands of telecommunications technicians. Shine Lawyers alleged that the technicians were misclassified as subcontractors, and they were in reality employees. BSA Limited agreed to settle the proceedings with Shine Lawyers. LLS Fund Services funded the proceedings (**Funder**).
- The parties agreed for a sum of \$20 million to be paid by BSA Limited in settlement of the proceedings.

2 Key issue to be decided

- As part of the settlement process the Federal Court was required to approve the proposed settlement and the settlement distribution scheme which outlined the method of allocation of funds to the group members, Shine Lawyers and the Funder.

3 Determination

- The Federal Court approved the \$20 million settlement figure but it took issue with the Funder's proposed apportionment of the settlement funds which included a 27.5% apportionment (\$5.5 million) to the Funder.
- The Federal Court held that the case differed from commercial class action matters because applicants in employment class action proceedings (as in this case) have the advantage of the 'no costs' jurisdiction provided by section 570 of the Fair Work Act (**FW Act**). The risk of a costs order in the employment jurisdiction was said to be 'much diminished'.
- The Federal Court held that the Funder's risks were reduced (as compared to a commercial class action matter) because there is a lower likelihood of funders being exposed to an adverse costs order (or being ordered to provide security for costs) in the employment context. Further, the Federal Court held that the Funder ought not to be reimbursed for \$700k spent insuring against a potential adverse costs order because such insurance was imprudent and did not take into account the far lower risk environment provided by the 'no costs' jurisdiction of the FW Act.
- The Federal Court held that a commission of \$3.7 million (commission rate of 18.66% or two times return on costs) was appropriate in the circumstances. This finding resulted in the group members' share of the settlement increasing from \$10.7 million to \$12.8 million.

4 Implications for employers

- Settlement sums in employment class action proceedings should reflect the lower risk environment provided by the FW Act.
- When negotiating settlement of employment class action matters, employers (and / or their representatives) should challenge settlement figures which are offered on the basis of comparison to commercial class action matters.

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Our team



Jasmine O'Brien

Principal

jobrien@sladen.com.au

03 9611 0149

0401 926 108

sladen.com.au

<https://www.linkedin.com/in/jasmine-obrien-sladen/>



Stephan Hill

Lawyer

shill@sladen.com.au

03 9611 0165

sladen.com.au

<https://www.linkedin.com/in/stephan-hill-27476a159/>