

FEDERAL COURT OF AUSTRALIA

Byrne v Australian Ophthalmic Supplies Pty Ltd [2008] FCA 66

INDUSTRIAL RELATIONS – prohibited conduct by employer – whether transfer and suspension of employee prejudiced employment in breach of s 792 of the *Workplace Relations Act 1996* (Cth) – employee complaint to Office of Workplace Services – employee participation in legal proceeding under industrial law – employee proposed to give evidence in legal proceeding under industrial law – compensation – penalty

Held: transfer and suspension of employee prejudiced employment for prohibited reasons – order for compensation payable to employee – order for penalty payable by employer

Workplace Relations Act 1996 (Cth) ss 167(2)(a), 792, 793, 807, 809

Corporations Act 2001 (Cth) s 440D

Penalty Interest Rates Act 1983 (Vic) s 2

Federal Court of Australia Act 1976 (Cth) s 51A

Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) (1998) 195 CLR 1, applied

Squires v Flight Stewards Association of Australia (1982) 2 IR 155, followed

Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, referred to

Community & Public Sector Union v Telstra Corporation Ltd (2001) 104 IR 195, applied

NICOLE BYRNE (A Workplace Inspector pursuant to s 167 of the Workplace Relations Act 1996) v AUSTRALIAN OPHTHALMIC SUPPLIES PTY LTD (ACN 005 419 107) (Administrator Appointed)

VID 1104 OF 2006

MARSHALL J

14 FEBRUARY 2008

SYDNEY (HEARD IN MELBOURNE)

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

VID 1104 OF 2006

BETWEEN: **NICOLE BYRNE (A Workplace Inspector pursuant to s 167 of
the Workplace Relations Act 1996)**
Applicant

AND: **AUSTRALIAN OPHTHALMIC SUPPLIES PTY LTD
(ACN 005 419 107) (Administrator Appointed)**
Respondent

JUDGE: **MARSHALL J**

DATE OF ORDER: **14 FEBRUARY 2008**

WHERE MADE: **SYDNEY (HEARD IN MELBOURNE)**

THE COURT ORDERS THAT:

1. Pursuant to s 807(1)(a) of the *Workplace Relations Act 1996* (Cth) (“the Act”) a penalty of \$60,000 is imposed on the respondent.
2. The penalty is to be paid into Consolidated Revenue within 21 days of the date of this order.
3. Pursuant to s 807(1)(b) of the Act, the respondent pay Ms Joanne Eghnatios, within 21 days of the date of this order, the sum of \$6,668.97 by way of compensation for damage suffered by her as a result of contraventions of Div 4 of Pt 16 of the Act by the respondent.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
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(ACN 005 419 107) (Administrator Appointed)
Respondent**

JUDGE: **MARSHALL J**

DATE: **14 FEBRUARY 2008**

PLACE: **SYDNEY (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

1 Ms Joanne Eghnatos worked for the respondent, Australian Ophthalmic Supplies Pty Ltd (“AOS”), as an optical dispenser. Until very recently AOS traded as “Merringtons” and operated a large number of retail shops throughout Australia. Unfortunately, Merringtons took a myopic approach to its obligations under industrial law. AOS failed to pay Ms Eghnatos and several other of its employees their correct wages and entitlements over a period of about 15 months. Ms Eghnatos complained to “Wageline” about the underpayments. The Office of Workplace Services (“OWS”), through one of its inspectors, commenced a proceeding against AOS in respect of the underpayments. AOS knew that Ms Eghnatos had complained to the Department of Employment and Workplace Relations (“the Department”). At the relevant time, OWS was part of the Department. AOS transferred Ms Eghnatos in her employment from a store reasonably proximate to her home to one which was a considerable distance from her home. When she refused to be transferred, AOS suspended her. The suspension remained on foot until her resignation.

The proceeding

2 The applicant, Ms Nicole Byrne, is a Workplace Field Inspector in the OWS. She has been appointed as a workplace inspector under s 167(2)(a) of the *Workplace Relations Act 1996* (Cth) (“the Act”). Ms Byrne is an “eligible person” for the purposes of s 807(4)(a)

of the Act and is entitled to bring the current proceeding.

3 The proceeding is one under s 807 of the Act for the imposition of a pecuniary penalty on AOS for contravention of s 792 of the Act. In her amended application, Ms Byrne also seeks an order for the payment of compensation to Ms Eghnatios under s 807(1)(b) of the Act.

4 Ms Byrne contends that AOS contravened s 792(1)(b) by injuring Ms Eghnatios in her employment and altering her position to her prejudice for reasons which include the following reasons, all of which are prohibited reasons under s 793:

- because Ms Eghnatios made a complaint to OWS, being a body having the capacity under an industrial law to seek compliance with that law or the observance of a person's rights under an industrial instrument; see s 793(1)(j);
- because Ms Eghnatios participated and proposed to continue to participate in a proceeding under an industrial law, namely Magistrates' Court of Victoria proceeding No T02953710 ("the Magistrates' Court proceeding"); see s 793(1)(k); and
- because Ms Eghnatios proposed to give evidence in the Magistrates' Court proceeding; see s 793(1)(l).

The hearing

5 When the matter was called on for hearing, counsel for Ms Byrne, Mr Paul O'Grady, handed to the Court a letter dated 4 February 2008 from Mr Andrew McLellan to Mr O'Grady's instructing solicitor, Mr Paul Barker of the Australian Government Solicitor. The letter advised the recipient that Mr McLellan was appointed Voluntary Administrator of AOS on 1 February 2008 (the previous Friday). The letter also stated that Mr McLellan consented to the continuation of the current proceeding against AOS. In the absence of such consent, or the grant of leave by the Court, the proceeding would have been stayed; see s 440D of the *Corporations Act 2001* (Cth).

6 At the commencement of the hearing, the solicitor who had represented AOS, prior to its entering into voluntary administration, requested and was granted leave to withdraw as solicitor for AOS on the Court record.

7 During the case management of the proceeding the Court had made orders that the trial be by way of affidavit and also made orders for objections to affidavit evidence to be filed 14 days in advance of the hearing. AOS failed to file any such objections to affidavit evidence relied on by Ms Byrne at a time when it was not in voluntary administration and when its solicitors were still acting for it.

The evidence

8 The evidence before the Court consists of unchallenged affidavits filed on behalf of Ms Byrne, in respect of which AOS had not taken any evidentiary objections, when it was in a position to do so.

9 The evidence of Ms Byrne demonstrates that:

- she has standing to bring the proceeding;
- in the Magistrates' Court proceeding OWS alleged that AOS had underpaid Ms Eghnatos in respect of her entitlements under three awards made by the Australian Industrial Relations Commission;
- on 7 June 2006 Magistrate Hawkins ordered, amongst other things, that the Magistrates' Court proceeding be listed for 16 October 2006;
- OWS expected to call Ms Eghnatos as a witness in the Magistrates' Court proceeding, until late in the week prior to the commencement of the hearing before Magistrate Hawkins when AOS admitted the relevant award breaches.

10 Mr Michael Duke is an employee of the Department. He was employed in OWS when it was part of the Department. In about January 2004, OWS received a Request for Assistance Form from Ms Eghnatos concerning underpayments of wages.

11 Mr Barker gave evidence that he spoke with Mr Richard Adamczyk of Frenkel Partners, who then acted for AOS, on 6 October 2006. Mr Adamczyk told Mr Barker that the affidavit material filed in the Magistrates' Court proceeding (which included that of Ms Eghnatos) had been forwarded to AOS.

12 Ms Eghnatos commenced employment with AOS on 22 April 2002. She completed

her job training at the Northland store. After that training AOS transferred her to its Northcote Central store, where Ms Eghnatios worked for a majority of the time, with occasional stints working at the Northland store. A few years ago, she also worked two days at the Melbourne Central store. The Northcote Central store was part of a work team which also comprised the Broadmeadows, Northland, Greensborough and Airport West stores. It did not include the Werribee store.

13 From her commencement in April 2002 until October 2003, Ms Eghnatios was employed under a traineeship. When the traineeship ended she continued to be paid by AOS as a trainee. She complained to “Wageline” in early 2004 and arranged to receive a form which she completed concerning her underpayments. Ms Eghnatios swore an affidavit in the Magistrates’ Court proceeding. The solicitor for AOS received that affidavit on 8 September 2006, in advance of the trial which was due to commence on 16 October 2006 before Magistrate Hawkins, and forwarded a copy of it to AOS.

14 On 5 October 2006, Ms Eghnatios’ team leader, Mr George Omar, told her that she was being transferred to the Werribee store with effect from 9 October 2006. When Ms Eghnatios asked for a reason, Mr Omar said, “we just need to transfer you.”

15 On 6 October 2006, when Ms Eghnatios received a copy of the work roster for the week commencing 9 October 2006, she telephoned Mr Omar and told him that she could not work in Werribee. Ms Eghnatios asked Mr Omar what her options would be. He said that she could resign and that, if she did not go to work at Werribee on Monday 9 October 2006, she should meet him that morning at the Northcote Central store.

16 Ms Eghnatios and Mr Omar met at the Northcote Central store on 9 October 2006. Mr Omar said that if Ms Eghnatios could not get to Werribee then AOS had no other placement for her. Ms Eghnatios told Mr Omar that she lived in Coburg and did not drive and that it would take her several hours of commuting each day to and from work if transferred to Werribee. Mr Omar told her that, because of her refusal to work at Werribee, she was suspended from employment with immediate effect. Ms Eghnatios then said to Mr Omar, “we both know the real reason why I am being sent to Werribee.” Mr Omar replied, “I can’t comment on that.”

17 Ms Eghnatios left the Northcote Central store and did not return to work with AOS. She resigned from her employment with AOS on 24 October 2006, effective 26 October 2006, while still suspended from her duties. She did so because, understandably, she felt that AOS did not value her as an employee. Ms Eghnatios continued to receive wages from AOS until her resignation. In November 2006, Ms Eghnatios secured casual employment for the period leading up to Christmas. On 7 February 2007, she obtained a full-time position as a receptionist.

18 Mr Peter Nguyen was employed by AOS from July 2006 until March 2007. From the second week of his employment Mr Nguyen managed the Werribee store. He reported directly to Mr Omar. In or about late August 2006, Mr Nguyen said Mr Omar told him that:

“... there was a group who were trying to make Merringtons look bad, complaining about their wages and holiday pay.”

Mr Omar then told Mr Nguyen that it was possible that “the person who was organising the group without mentioning who” would be moved to Werribee.

19 In the first week of October 2006, Mr Omar told Mr Nguyen that he was transferring “Joanne” to Werribee because “Head Office thought she was a trouble maker”. Mr Nguyen asked why she would be transferred to his store if she was a trouble maker. Mr Omar replied that, “they had hoped that she would leave”. Mr Nguyen then gave the following remarkable evidence:

“He [Mr Omar] said that it was my job to make Joanne [Ms Eghnatios] so uncomfortable when she came to work here that she would leave.”

20 Mr Nguyen said that Mr Omar also said:

“Head Office wanted to make it very uncomfortable for Joanne for all the trouble she caused so that she would resign and they would not have to do anything about it.”

Mr Nguyen said that in a later conversation, Mr Omar told Mr Nguyen that:

“... if someone asked why Joanne was coming to the Werribee store, I should not say anything about the [C]ourt case [the Magistrates’ Court proceeding] and that I should just say that she needed to learn something about dispensing.”

Injury/alteration to prejudice

21 The transfer and suspension of Ms Eghnatios by AOS each constituted an injury to her in her employment and an alteration of her position to her prejudice. The suspension of Ms Eghnatios denied her the opportunity to work. It was also disciplinary action which demeaned her in her employment. Although Ms Eghnatios was ultimately paid for the period of her suspension until her resignation, she was not told whether her suspension was with or without pay when it occurred. She was also not told how long it would last.

22 In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 18, Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ referred to injury in employment as a term which “covers injury of any compensable kind”, and alteration to an employee’s position to the employee’s prejudice as:

“... a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.”

23 Suspension from employment is an injury of a compensable kind. It is also an “affection of, or deterioration in, advantages enjoyed” before the suspension. Suspension can be a form of punishment and was most certainly a form of punishment meted out to Ms Eghnatios by AOS for being an alleged “trouble maker” and standing up for her workplace rights.

24 It is noteworthy that in *Community & Public Sector Union v Telstra Corporation Ltd* (2001) 104 IR 195 at 199 the Full Court endorsed the view expressed in *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155 at 164 by Ellicott J that an employee who was “stood down” on full pay for one month was injured in his employment because he was:

“... treated substantially differently to the manner in which [an employee] is ordinarily treated and where that treatment can be seen to be injurious or prejudicial.”

25 The transfer of Ms Eghnatios also constituted an injury in her employment and a substantial alteration to her position because it involved her in an amount of travel to access her workplace which was onerous compared to that required in her then current position.

26 The transfer was also “an injury” and “an alteration” because it was part of a plan devised by AOS to make Ms Eghnatos’ working life so intolerable that she would have no alternative but to resign. It was nasty and egregious conduct and involved an abuse of power by AOS in a relationship where the employer held all the power and Ms Eghnatos was doing no more than asserting her right to her correct entitlements.

The employer’s onus

27 Section 809(1) of the Act provides:

“(1) If:

- (a) *in an application under section 807 relating to a person’s conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and*
- (b) *for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;*

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person proves otherwise.”

28 AOS did not call evidence to discharge the onus imposed on it by s 809. The administrator also did not rely on any evidence in the proceeding. The case against AOS is overwhelming and need not be determined solely on its failure to discharge its evidentiary onus. The evidence relied on by Ms Byrne makes an overwhelming case for the asserted contraventions.

Prohibited reasons

29 I am satisfied, having regard to the evidence set out at [8] to [20] above, that in transferring and suspending Ms Eghnatos, AOS was actuated by reasons which included the following reasons:

- she made a complaint to the Department;
- she participated in and proposed to participate in the Magistrates’ Court proceeding; and
- she proposed to give evidence in the Magistrates’ Court proceeding.

30 In particular, Mr Omar's frank and disturbing disclosures to Mr Nguyen about AOS's reasons for transferring and then suspending Ms Eghnatos put beyond doubt the fact that AOS wished to punish and get rid of an employee who had complained to an appropriate authority about being underpaid and who was prepared to assist that authority to rectify the underpayments by giving evidence in a proceeding designed to rectify those underpayments.

Conclusion on the evidence

31 As demonstrated above, the evidence shows that AOS injured Ms Eghnatos in her employment and altered her position to her prejudice for reasons which included the prohibited reasons set out in s 793(1)(j), (k) and (l).

Compensation

32 Ms Byrne has applied for an order that AOS pay compensation to Ms Eghnatos. Under s 807(1)(b), the Court may make an order requiring AOS to pay "a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention" of Div 4 of Pt 16 of the Act.

33 Ms Eghnatos suffered economic loss as a result of her unlawful transfer and suspension by AOS. That economic loss is compensable under s 807(1)(b). Ms Eghnatos made no claim for non-economic loss.

34 Ms Eghnatos received \$544.54 per week in her employment with AOS. She did not obtain secure full-time employment until 7 February 2007, after her resignation on 26 October 2006. Had she stayed at work with AOS between those two dates she would have received \$8,168.10 (15 weeks pay). During those 15 weeks Ms Eghnatos earned \$2,227.40 from casual employment. Her financial loss arising out of AOS's contravention of Div 4 of Pt 16 of the Act is \$5,940.70 (being the difference between \$8,168.10 and \$2,227.40). Also, an amount should be added for interest on the \$5,940.70 from 7 February 2007 to the current date. Counsel for Ms Byrne sought the payment of interest from the date of her new employment. That amount of interest is \$728.27. The total compensation order is \$6,668.97.

35 The above amount of interest is calculated by reference to the Court's usual practice of applying the rate of interest applicable in the relevant State Supreme Court, unless there is

evidence that such a rate is not commercial. The current Victorian rate set under s 2 of the *Penalty Interest Rates Act 1983* (Vic) is 12%. There is no evidence before the Court that this rate is not a commercial one. Interest is able to be ordered pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth). There is no reason not to include an interest component to compensate Ms Eghnatos for being out of pocket in respect of her loss during the 15 weeks referred to above in respect of the period from 7 February 2007.

Penalty

36 Ms Byrne has established that AOS contravened Div 4 of Pt 16 of the Act six times. AOS injured Ms Eghnatos in her employment for three prohibited reasons and it altered her position to her prejudice for the same three prohibited reasons.

37 The breaches were flagrant and defiant and involved AOS in a course of conduct designed to humiliate and pressure an employee for doing no more than protecting her rights at work. AOS's conduct deserves a high range penalty.

38 AOS should receive some credit for its lack of previous transgressions against Div 4 of Pt 16. Further, the need for specific deterrence is lessened slightly by the fact that AOS is not currently trading.

39 The maximum penalty for each contravention is \$33,000. The overt acts of injuring Ms Eghnatos in her employment and altering her position to her prejudice by transferring her essentially amount to the same conduct described in two different ways. The prohibited reasons all relate to the same process of complaining about an underpayment through to assisting in the recovery of the underpayment. In the current circumstances, the appropriate approach to the imposition of a penalty is to focus on the two unlawful overt acts. First, there is the transfer and then the later act of suspension. Each should be accorded a penalty in the sum of \$30,000. No employee should be treated by any employer the way AOS treated Ms Eghnatos. Employees have the right to be paid the correct pay rate and the right to raise any issue about that pay rate with an appropriate authority without fearing humiliating retaliatory conduct by their employers.

40 Employees also have the right to assist in the preparation and presentation of cases in

courts of law and industrial tribunals designed to assert their legal rights without fear of thuggish retaliatory disciplinary action by an employer. The community should not tolerate the conduct which AOS engaged in with respect to Ms Eghnatios. The total penalty which should be imposed is \$60,000. Having regard to the totality principle, it would not be appropriate to treble that amount to reflect the three prohibited reasons for which the offending conduct was taken. It is appropriate, however, for the Court to punish the two separate discriminatory overt acts of the transfer and the suspension of an individual employee. The total sentence reflects the totality principle as discussed by Jessup J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at 570-571; [145] to [146].

Orders

41 The Court makes the following orders:

1. Pursuant to s 807(1)(a) of the *Workplace Relations Act 1996* (Cth) (“the Act”) a penalty of \$60,000 is imposed on the respondent.
2. The penalty is to be paid into Consolidated Revenue within 21 days of the date of this order.
3. Pursuant to s 807(1)(b) of the Act, the respondent pay Ms Joanne Eghnatios, within 21 days of the date of this order, the sum of \$6,668.97 by way of compensation for damage suffered by her as a result of contraventions of Div 4 of Pt 16 of the Act by the respondent.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 14 February 2008

Counsel for the Applicant: Mr P O'Grady

Solicitor for the Applicant: Australian Government Solicitor

There was no appearance for the Respondent

Date of Hearing: 4 February 2008

Date of Judgment: 14 February 2008