FEDERAL MAGISTRATES COURT OF AUSTRALIA

LAWLOR & DARTBRIDGE WELDING PTY LTD & ANOR *[2007] FMCA 2119*

INDUSTRIAL LAW – imposition of civil penalty – breach of *Workplace Relations Act* – failure to lodge AWA's within time prescribed

Workplace Relations Act 1996 ss.407(1)(b), 407(1)(a)

CPSU v Telstra (2001) 108 IR 288

Applicant:	LISA FRANCES LAWLOR
First Respondent:	DARTBRIDGE WELDING PTY LTD ACN 010 301 292
Second Respondent	WAYNE ROBERT HARRISON
File number:	BRG606/2007
Judgment of:	Jarrett FM
Hearing date:	25 October 2007
Date of last submission:	25 October 2007
Delivered at:	Brisbane
Delivered on:	25 October 2007

REPRESENTATION

Counsel for the Applicant:	Mr Herbert
Solicitors for the Applicant:	Fisher Cartwright Berriman
Solicitors for the First Respondent:	N/A
Counsel for the Second Respondent:	Mr Miller
Solicitors for the Second Respondent:	AI Group Legal

ORDERS

(1) That pursuant to subsection 407(1)(a) of the *Workplace Relations Act* 1996 (Cth), the Second Respondent pay to the Commonwealth a pecuniary penalty in the sum of EIGHT THOUSAND FOUR HUNDRED DOLLARS ($8,400.00).

(2) That the Second Respondent pay the said penalty within twelve (12) months of the date of this order.

(3) That the Application against the First Respondent be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG606 of 2007

LISA FRANCES LAWLOR
Applicant

and

DARTBRIDGE WELDING PTY LTD
ACN 010 301 292
First Respondent

and

WAYNE ROBERT HARRISON
Second Respondent

REASONS FOR JUDGMENT

Ex tempore

1. This is an application by Lisa Frances Lawlor, who holds a statutory position, for the imposition of a pecuniary penalty on the first and second respondents pursuant to ss.407(1)(b) and 407(1)(a) respectively of the *Workplace Relations Act* 1996.

2. The application against the first respondent is no longer pressed; that company is in liquidation and the prospect of recovering any pecuniary penalty against that company is apparently zero.

3. The application is, however, pressed against the second respondent who at all material times to this application was the managing director and perhaps the only shareholder of the relevant company.

4. It is probably as well to say a few words about what this case is not about. It is not about the political correctness or the rights and wrongs of AWA's. It is not about the political correctness, or the rights and wrongs of using foreign workers in Australia. It is not about the use of 457A long-stay visas for the importation into Australia of foreign labour. It is not about using foreign labour that might or might not bring economic advantages to the particular employer concerned.

5. This case is not about any of those things, but rather about a relatively simple matter - the failure by the first respondent and the second respondent to lodge Australian Workplace Agreements in accordance with the provisions of the *Workplace Relations Act* 1996 in respect of a number of worker's recruited from the Philippines and Malaysia to work in the first respondent's business in Brisbane.

6. The second respondent accepts that he is a person involved in the relevant contraventions for the purposes of the Act; no issue arises about that.

7. The facts of the matter are relatively straightforward and are the subject of agreement between the parties. The first respondent engaged a number of workers from either the Philippines or the Philippines and Malaysia - depending on which material one reads - and those employees were engaged under the terms of Australian Workplace Agreements.

8. There are 42 workers and their agreements involved in this case. Those workers came to Australia and commenced working for the first respondent. They were in engineering type capacities.

9. The evidence seems to be that, through oversight perhaps, the respondents did not lodge the relevant Workplace Agreements as required by the Act. They are required to be lodged 14 days after they are approved. In this case, they were lodged a long time after that.

10. It is also clear enough from the evidence that the failure to lodge the Australian Workplace Agreements in this case did not result in any tangible disadvantage to these workers. It is not suggested that they are owed any entitlements, or that the entitlements under the AWAs which they have received, were any less than they might otherwise have

expected if the agreements had been lodged on time. There is no suggestion that the workers were any worse off having regard to the entitlements that they might have received under any other relevant industrial instrument.

11. What then are the principles to be applied in determining the appropriate penalty in this case? A convenient starting point are some words of Finkelstein J. in *CPSU v Telstra* (2001) 108 IR 288 at 230. In that case his Honour said this:

> *The next matter to consider is what other factors should be taken into account in deciding an appropriate penalty in a case such as this. In another context I observed that the object of imposing pecuniary penalties may be either to punish, to deter, to rehabilitate, or some combination of the three. In that case I also referred to the problems associated with determining the appropriate basis for imposing penalties on a corporation. Laws are made for the protection of society. In the case of an offending corporation in breach of legislation such as the Workplace Relations Act the notion of retribution or punishment does not seem to have a significant role. First, a contravention of this type of legislation does not excite notions of moral responsibility when compared with contraventions of the criminal law where the community has a just expectation that an offender should receive some measure of punishment so that there will be no loss of respect for the law. Put differently, there will not be any real sense of grievance in the community at large if a corporation has not been dealt with in the same way as an offender who attacks individual liberties or freedoms. On the other hand, the basic objective of punishment should be to enhance social welfare by minimising the net social costs of wrongdoing. This is achieved by deterrence. Here I speak not only of specific deterrence, but also general deterrence. In a case such as the present, that may be of some importance. The reason is that Telstra submits that there is no need to impose any penalty because it will not offend again. That may be true, but even if there be no need for specific deterrence there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question and to act as a warning to others not to engage in similar conduct. It is also important to remember that proscribed conduct is often engaged in because it is profitable or will enhance the profitability of the company. To deter conduct engaged in with that purpose any penalty imposed must have the potential to render the conduct unprofitable. The achievement of that object is subject to the*

limitations placed upon the Court's power by the legislation in question.

12. Many of his Honour's remarks relate to the imposition of a penalty on a corporation, but in the context of the case before me his Honour's remarks are just as apposite.

13. Much of the argument before me has centred on whether this is an appropriate case to impose a penalty that provides a general deterrent effect. In my view, it is, for the reasons expressed by Finkelstein J. Notwithstanding that in this particular case there might be factors which tend to suggest that the element of specific deterrence is not relevant, nonetheless it is in the public interest to impose a penalty which marks the Court's disapproval of the respondents' failure to comply with the relevant legislation.

14. This is important legislation because it regulates the relationship between employers and employees. There may be very few people unaffected by the *Workplace Relations Act* 1996, and so a penalty which recognises and which reinforces the importance of that legislation and the significance of its timely observance is appropriate.

15. In this case I accept that there is very little that would indicate that specific deterrence is a real issue. The workers were denied no entitlements. They have received everything they were entitled to receive under the AWAs. But nonetheless, if an employer is to engage in this sort of conduct - that is the failure to lodge an AWA - then there is a potential for a number of matters to flow from that to the disadvantage of the employee. They have been referred to in argument by Mr Herbert. If those matters had been present in this case, a higher penalty may have been called for, but they are not present.

16. In my view, it is appropriate to impose one penalty, and to apply the totality principle. There are 42 breaches, but they all arise out of the same transaction or series of transactions, and it is appropriate to apply only one penalty. It is also appropriate to recognise, by way of discount, that the respondents have cooperated completely with the applicant. There is no suggestion at all that the respondents have not complied in a timely way with any requests that have been made of them by the applicants. There is nothing to suggest that the second

respondent in particular has not been as cooperative as one might have expected, and these proceedings themselves have been truncated by reason of that cooperation.

17. For all of those reasons, it seems to me that an appropriate penalty in this case is the sum of $8,400, which I calculate having regard to the totality principle, as $200 per offence. That is much less than the one-sixth of the maximum penalty sought by the applicant in respect of each offence. It is, it seems to me in the scheme of things, a relatively minor penalty, but a penalty that affects the purposes to which I have earlier referred; that is it provides some form of deterrence, generally speaking; it marks the Court's disapproval of the failure to lodge these AWAs, accepting that the failure was inadvertent - there is in no sense a suggestion that the failure was deliberate - but it also recognises the importance of ensuring that the legislation is complied with because of the very serious ramifications, not only for employees, but for employers if the legislation is not complied with.

18. For those reasons the penalty will be as I have pronounced.

19. I am also inclined to make an order that the penalty be paid within the next 12 months. This is a case that has attracted some publicity, as referred to in the course of submissions. It is not surprising, perhaps given the nature of that publicity that the second respondent finds himself in a position where it is difficult to obtain employment. I accept that submission, and for that reason allow 12 months to pay.

I certify that the preceding nineteen (19) paragraphs are a true copy of the reasons for judgment of Jarrett FM

Associate: S. Haysom

Date: 18 December 2007