FEDERAL MAGISTRATES COURT OF AUSTRALIA

MASON v SERCO SODEXHO DEFENCE SERVICES PTY LTD *[2008] FMCA 373*

INDUSTRIAL LAW – Penalty hearing for breach of s.400(5) Workplace Relations Act 1996 – where breach admitted – where respondent argued it was an isolated aberration – where employee not disadvantaged – where contrition shown – necessity for deterrence.

Workplace Relations Act 1996 (Cth), ss.167(2), 330, 400(5), 719(1)
Workplace Relations Amendment (Transitional Towards Fairness) Act 2008

Jones v Hanssen Pty Ltd [2008] FMCA 291
Coal & Allied Operations Pty Ltd (No.2) [1999] FCA 1714
Cotis v Pow Juice Pty Ltd [2007] FMCA 140
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Carr v CEPU & Anor [2007] FMCA 1526
Ponzio v Firebase Sprinkler Systems Pty Ltd [2005] FCA 733
Pine v Seelite Windows & Doors Pty Ltd [2005] FCA 500
Lisette Pine v Expoconti Pty Ltd [2005] FCA 1434

Applicant:	INSPECTOR GREGORY JAMES MASON
Respondent:	SERCO SODEXHO DEFENCE SERVICES PTY LTD
File Number:	SYG 2424 of 2007
Judgment of:	Raphael FM
Hearing date:	17 March 2008
Date of Last Submission:	17 March 2008
Delivered at:	Sydney
Delivered on:	28 March 2008

REPRESENTATION

Counsel for the Applicant:	Mr R Bromwich
Solicitors for the Applicant:	Sparke Helmore
Counsel for the Respondent:	Mr R Goot SC
Solicitors for the Respondent:	Minter Ellison

ORDERS

(1) *A penalty of $7,500.00 is imposed upon the respondent pursuant to s.719(1) of the Workplace Relations Act 1996* (Cth) (the "Act") for contravention of s.400(5) of the Act.

(2) Pursuant to s.841 of the Act the respondent shall pay the sum of $7,500.00 to the Commonwealth.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2424 of 2007

INSPECTOR GREGORY JAMES MASON
Applicant

And

SERCO SODEXHO DEFENCE SERVICES PTY LTD
Respondent

REASONS FOR JUDGMENT

1. This is an application, brought by an Inspector appointed under s.167(2) of the *Workplace Relations Act 1996* (Cth) (the "Act") and employed by the Workplace Ombudsman, for a pecuniary penalty to be levied against the respondent for its admitted contravention of s.400(5) of the Act. The respondent accepts that it applied duress to an employee, Ms Jessica Shepherd, in connection with a workplace agreement by way of an SMS message sent on 9 November 2006.

2. The substantive issue before me is whether or not in all the circumstances of the case a penalty should be imposed upon the respondent. I have determined that a penalty should be imposed, albeit at the lower end of the range, and I set out below my reasons for coming to that conclusion and the amount of penalty that I have determined.

History

3. The parties presented to the court an agreed statement of facts. I have extracted from that statement those agreed facts which I believe to be relevant to this decision.

> "(3) On 1 October 2006, the respondent commenced providing services to the Australian Defence College, Weston in the Australian Capital Territory (the ADC), pursuant to a contract between the respondent and the Department of Defence.
>
> (4) Prior to the commencement of that contract, Ms Jessica Shepherd had been employed at the ADC by Eurest (Australia) Support Services Pty Ltd which had performed similar services to those provided by the respondent under the contract that commenced on 1 October 2006.
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> (5) On 7 September 2006, the respondent offered Ms Shepherd employment at the ADC as a casual Food and Beverage Attendant on terms and conditions contained in a proposed Australian Workplace Agreement (the proposed AWA). The proposed AWA was signed by Ms Shepherd on 15 September 2006 and returned to the respondent on 17 September 2007.
>
> (6) On 21 September 2006, before the respondent lodged the proposed AWA, the Federal government amended the Workplace Relations Regulations 2006 (WR Regulation). Because of the amendments, the proposed AWA arguably contained prohibited content and, after discussions with the WO, the respondent chose not to lodge the proposed AWA with the Workplace Authority. The proposed AWA was not lodged with the Workplace Authority under the WR Act.
>
> (7) On or about 5 October 2006, the respondent sent Ms Shepherd a replacement AWA (the replacement AWA) which had been changed to reflect the requirements of the amendments to the WR Regulation. The only amended terms and conditions of the AWA were in respect of personal/carer's leave (clauses 16.2 and 16.3). The amended clauses in the replacement AWA were more favourable to Ms Shepherd than the corresponding clauses in the proposed AWA.
>
> (8) On 18 October 2006 Mr Olsson sent an email to certain managers employed by the respondent, including the Site Manager. The text of this email reads as follows:
>
> > *"I just need to once again confirm with you all again that we can not place ourselves in a position to have any employees working for us that have no signed their original AWA offered to them by SSDS. If we have employees working with us who have not returned a signed copy of their AWA, than we have no option but to inform these employees that we will have no option as a company other than informing them that they are not employees of SSDS ASAP, for it was a condition of all new employees to sign a AWA prior to starting employment with SSDS. So unless they have returned a signed copy of their AWA, than they are not to be informed that they will not be paid, they*

are to informed that they will no longer have a position with SSDS forthwith unless we have on their files of signed copy of their AWA.

Sharon you will need to check with the site managers and payglobal records what employees are working for SSDS and check their files to make sure a copy of their AWA is contained on their file, if no copy is contained on file you need to inform the site managers who these employees are so that they can be informed as I have stated in the paragraph above.

The reason why I am again enforcing this is that the Union have claimed the following in the media "In the meantime the cleaners who cheekily started work without signing an AWA have now been told they will not be paid for the work that they have done until they sign. We wonder what the OEA will make of this?."

I know this may cause you some staffing issues, but the consequences of having employees working for our company without a signed AWA are dire and place us at risk of further political/union issues and legislation breaches, of which will open up another Pandora's box of issues/problems."

Could this please be actioned ASAP, and please contact me if you wish to discuss this issue further.

Regards,

Lindsay Olsson
National Industrial Relations Manager
Serco Sodexho Defence Services"

(9) Between 5 October 2006 and 9 November 2006, Ms Shepherd was asked on a number of occasions by Ms Rene Antonas, the Mess Manager at the ADC and an employee of the respondent (the Mess Manager), to sign and return the replacement AWA.

(10) On each of 10, 13, 20 and 27 October 2006, Mr Ken Coccetti, Site Manager at the ADC and an employee of the respondent (the Site Manager), left a telephone message concerning the replacement AWA on Ms Shepherd's voice mail.

(11) On 2 November 2006, Ms Shepherd sent the Site Manager a text message indicating that she was in the middle of university examinations and did not want to discuss the replacement AWA until she had completed the examinations in mid November.

(12) On 3 November 2006, the Site Manager sent an email to Mr Olsson which stated 'I have 2 outstanding as I discussed with you the other day and they are for Kate Shepherd and Jessica Shepherd. Both these girls are in the middle of exams and I am have [sic] problems contacting them. I have discussed this with both of them

about 10 days [sic] and have not received any information back from either of them; I will keep chasing them up'. A copy of this email is annexed and marked 'B'.

(13) On 9 November 2006, the Site Manager called Ms Shepherd in response to a message Ms Shepherd had left for the Site Manager. The Site Manager left the following voicemail message on Ms Shepherd's mobile phone:

> ***'Mate would you be able to give me a ring on my mobile as early as possible. I've just had a discussion with Renee about your AWA. I need to know exactly what it is that your issues are because without a signature on the AWA mate I can't continue to employ you and that's one of the issues I'll have. Please ring me so that we can discuss it and worse comes to worse I'll take the issue to the boss and see what we can do to accommodate your questions. Thanks mate. Cheers.'***

(14) On 9 November 2006, Mr Olsson sent an email to certain managers employed by the respondent, including the Site Manager, seeking to follow-up employees who had not signed an AWA. The email provides 'I have attached as up to COB yesterday and highlighted in yellow, a list of employees who were reissued AWAs of which are confirmed working for SSDS and who have not returned a copy of their signed AWA. This is now getting critical!!! I again need ASAP an update from you all regarding the status of their AWA i.e. will not sign, or will sign and will bring in, or in the post…Please follow this up with those staff highlighted in yellow in a very civil and non threatening manner.'

(15) In an email dated 9 November 2006, the Site Manager responded to Mr Olsson advising that 'After looking at the list there are no outstanding for ADC Weston'.

(16) On 9 November 2006, Ms Shepherd sent an email to the Site Manager advising that, among other things, she understood by the voicemail message that she had to sign the Replacement AWA or the respondent could no longer employ her, she was concerned that she had been 'put under duress' to sign the replacement AWA and that she had forwarded her concerns about the Site Manager's voicemail message to the WO, a union representative, the Base Services Staff at the ADC and Mr Mark Schafer, the respondent's Regional Manager.

(17) Mr Schafer responded to Ms Shepherd's email on 10 November 2006, explaining that, among other things, it was not a requirement of Ms Shepherd's employment that she sign the replacement AWA.

(18) As at 9 November 2006, Ms Shepherd was 19 years of age.

(25) By reason of the above, the respondent admits that it breached subsection 400(5) of the WR Act by applying duress to an employee, Ms Shepherd, in connection with an Australian Workplace Agreement.

(26) On 7 August 2007, the applicant commenced these proceedings against the respondent.

(28) The respondent has no prior convictions for contravention of the WR Act."

Other agreed matters

4. It was accepted that after the respondent had been informed about the inclusion of prohibited content in the original AWAs it acted on the recommendation of the Workplace Ombudsman to institute a Greenfields Agreement under s.330 of the Act which would apply to all employees engaged pursuant to the contract with the Australian Defence College. The Greenfields Agreement was in substantially the same terms as the original AWAs without the prohibited content. There was therefore no necessity for any employee to sign a new AWA whilst the Greenfields Agreement remained in force because they were covered by that industrial instrument. It was agreed that the respondent was a substantial employer of casual labour and had issued several thousand AWAs. It was agreed that the replacement AWA without the prohibited content was of greater benefits to the employee than the original AWA which she had signed. It was agreed that during the period in which Ms Shepherd was being to asked to sign the replacement AWA she continued to work shifts for the respondent at the ADC and that she worked further shifts for the respondent after the SMS had been sent and she had complained. Ms Shepherd ceased to work for the respondent after the 28 November 2006 for reasons unconnected with these proceedings.

Evidence

5. There was admitted into evidence an affidavit of Lindsay Geoffrey Olsson dated 10 October 2007 on behalf of the respondent and an affidavit of Gregory James Mason dated 6 August 2007 on behalf of the applicant. Mr Olsson was cross examined on his affidavit. He agreed that the company had never signed the original AWAs nor had it lodged them. Instead, having received advice from the Workplace Ombudsman it issued the Greenfields Agreement. Mr Olsson was taken to the email dated 18 October 2006 which is extracted at paragraph 3 of these reasons as part of the agreed statement of facts. It was put to him that the email did not correctly represent the law relating to AWAs. Mr Olsson indicated that it was his understanding that a company could

require an employee to enter into an AWA as a condition of employment. If, as he said happened at ADC, employees started working before they had signed AWAs then they were not strictly speaking employees. They could be told that this was the case. This would not represent the termination of employment but merely an acknowledgment that no employment had ever commenced. Mr Olsson did not accept that if a person had gone to work without an AWA they thereby became an employee and the company could not require them to sign the AWA as a condition of their continued employment. Mr Olsson insisted that the email had been written about employees who had not signed the original AWA and I accept that that was what he intended. However, by the time the email had been written the original AWAs were already known to the company to contain prohibited content, had not been signed by the company, had not been submitted to the Workplace Ombudsman and there was no intention to do any of those things. The employees were all covered by the Greenfields Agreement. There was absolutely no necessity for the email to have been sent. By this time the replacement AWA had already been sent to Ms Shepherd and Mr Coccetti was already telephoning Ms Shepherd and leaving messages for her to call him about the replacement document. On 13 October 2006 Mr Coccetti had attended a training meeting for managers in which Mr Olsson had explained the reasons for the replacement AWA. I am of the view that the email of 18 October 2006 was confusing. It could easily have been read by Mr Coccetti as referring not to the original AWAs but to the replacement AWAs. Although Mr Olsson thought that the original AWAs needed to be signed and returned it is not necessarily the case that other employees were not more aware of the real situation. The email of 3 November 2006 written by Mr Coccetti to Mr Olsson annexed to the agreement statement of facts is headed *"Re Employees Working for SSDS No AWA Return"* and states:

> "Lindsay
>
> I have two outstanding as I discussed with you the other day and they are for Kate Shepherd and Jessica Shepherd."

It would not have been difficult for Mr Coccetti to have read Mr Olsson's first email as applying to the replacement AWAs and to

make the threat which was contained in the voice mail message that he sent to Ms Shepherd on 9 November under that impression.

6. The importance of the finding which I have made above is that I cannot accept the submission put by the respondent that the SMS message from Mr Coccetti to Ms Shepherd was an isolated aberration for which he was solely responsible. I have come to the view that on the balance of probabilities the SMS message was induced by Mr Coccetti's misunderstanding of Mr Olsson's first email and that there was therefore a chain of responsibility for this incident that stemmed from Mr Olsson. Whilst I accept that Mr Olsson never intended that Ms Shepherd, a person who had signed the original AWA, should be threatened in the way she was I think that his own personal confusion about the legal status of employees and his confusing email were relevant circumstances in Mr Coccetti's decision to send the SMS.

Considerations as to penalty

7. In *Jones v Hanssen Pty Ltd* [2008] FMCA 291 Lucev FM considered a series of deciding cases in the Federal Court and the Federal Magistrates Court; *Coal & Allied Operations Pty Ltd (No 2.)* [1999] FCA 1714 per Branson J at 7-8 ("Coal & Allied Operations"); *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140at para 49 per Lloyd-Jones FM ("Pow Juice"); *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at paras 19-22, 36-37, 50 and 59 per Mowbray FM ("Harrington Corporation"); *Carr v CEPU & Anor* [2007] FMCA 1526 at para 7 per Lucev FM ("Carr") and found that there did not appear to be a dispute about the relevant considerations for assessment of penalty which were:

   a) the circumstances of the conduct (including deliberate defiance or disregard of the *WR Act*);

   b) relevant record of civil penalty contraventions;

   c) whether the contraventions are distinct or arise from a single course of conduct;

   d) the consequences of the contravening conduct;

e) deterrence, both general and specific;

f) the objects of the *WR Act*;

g) the size and financial resources of the contravener;

h) co-operation with regulatory authorities;

i) the contravener's contrition;

j) the size of the prescribed penalty, and any recent increases to that prescription; and

k) the totality principal.

8. These matters were addressed by both the applicant and respondent in the instant proceedings and I shall deal with each in turn.

Circumstances of the conduct

Although the SMS message could be read as a friendly attempt to get the documents signed and to deal with any problems that the employee might have with them there is no doubting the threat that was there made. The respondent argues that Mr Coccetti knew perfectly well that Ms Shepherd did not have to sign the document and Ms Shepherd knew that too. But I have found that there was some confusion induced by the email and not really clarified by any later event. I would also find from the consistent emails passing between Mr Olsson and Mr Coccetti that Mr Olsson wanted the AWA to be signed and returned to him even though there was no necessity for this. To the extent that Mr Coccetti should have realised that he could not make the signing and return of the AWA a condition of employment he was acting in defiance or disregard of the Act. But I am of the view that his defiance or disregard was a confused one and not a deliberate act done in the full knowledge that he was acting wrongfully.

Relevant record of civil penalty contraventions

There are no other contraventions recorded.

Whether the contraventions are distinct or arise from a single course of conduct

This heading relates to these occasions when the court is asked to consider more than one contravention. In this case there is only one contravention. I have not accepted that it was a contravention effected by Mr Coccetti in complete isolation of the actions of his superiors.

The consequences of the contravening conduct

In this particular case, and in great part because of the actions of Ms Shepherd herself in reporting the matter to the proper authorities, there were no substantive consequences of the contravention. Ms Shepherd continued to receive her offers of casual employment and took them up. She was not required to sign the second AWA. The replacement AWA that had been received by Ms Shepherd contained a number of explanatory statements and assurances that she was not obliged to sign the document. She was also told that she could not be placed under any duress to sign it. She was told that if she did not sign she would continue to be employed under the existing terms and conditions of employment, which in this case meant the Greenfields Agreement although I heard no evidence that the content or existence of this agreement had been made known to employees.

Deterrence, both general and specific

The applicant argues that deterrence is an important element in considering a penalty in this case. He states that the object of the Workplace Relations Act is to allow parties to choose the most appropriate form of agreement in the context of a fair and open bargaining process. The amendments which were made under the title "Work Choices Amendments" have the effect of devolving and deregulating the process of making, approving and lodging AWAs. The applicant argues that in the light of this it was important for employers to engage in fair and open bargaining and refrain from exercising duress. Because AWAs were no longer scrutinised the detection of duress became a problematic issue and that made deterrence all the more important. The applicant argues that the increase that was made in the penalties available for breaches of s.400(5) indicates that the

legislature considered the applicant of duress to be a very serious matter and contrary to the spirit of the legislation.

I accept that since 19 March 2008 there have been no more AWA's created. However, these forms of employment contract will remain in use until at least 31 December 2009. The duress provisions will continue to apply to interim transitional employment agreements which replace AWAs under the *Workplace Relations Amendment (Transition Towards Fairness) Act 2008*. There are those who would say that without collective bargaining there could never be equality of bargaining power between a large corporation employing thousands of workers on permanent and casual bases with a staff of human resources managers as well as regional and local managers and a 19 year told university student seeking casual employment whilst obtaining her degree. To the extent that the Act sets out to alleviate such inequality and to the extent that this is done by prohibiting duress then deterrence of such activity assumes an important place in the scheme. I would not like it to be thought that just because AWAs are no longer being offered the application of duress in bargaining between employer and employee is to be condoned.

The objects of the Workplace Relations Act

I have already given my views that the imposition of duress in bargaining offends against the objects of the Act.

The size and financial resources of the contravener

It is accepted that the contravener is a substantial Australian company with a large number of employees, many of whom are on AWAs. I have little doubt that even the imposition of the maximum penalty would not cause the respondent much financial hardship. To that extent I am of the view that this consideration is of neutral affect. In other words it is one which should not encourage me to either increase or reduce the penalty.

Co-operation with regulatory authorities

The respondent has at all times co-operated with the regulatory authorities. It is to be remembered that this whole incident arose out of the fact that it accepted the advice of the regulatory authority not to proceed with the first AWAs, to put in place a Greenfields Agreement and to issue new AWAs. The respondent provided all assistance required to the regulatory authorities to investigate the incident and on 30 November 2006 Mr Olsson requested that the Workplace Ombudsman conduct further training of managers about offering AWAs. On 8 December 2006 Mr Olsson conducted further training of all the respondent's managers throughout Australia when the legal requirements of the Act and Regulations were pointed out to them.

The contravener's contrition

The actions of the company since the incident was first reported to them by Ms Shepherd evidences an acceptance of its responsibilities and a determination from the highest levels of the company to ensure that such a thing never happened again. The treatment by the company of Ms Shepherd has also been exemplary. It was made quite clear to her immediately that the threat should never have been made and was not one the company ever intended to carry out. She was offered continued shifts and on 8 December 2006 Mr Olsson and Mr Shaw, the regional operations manager of the respondent, met with Ms Shepherd and her union representative as part of an investigation into the matter. Mr Coccetti himself was demoted and the company has undertaken the training regimes which I have previously described and which are dealt with in more detail in the helpful submissions of the respondent. I am sensible of the fact that the company has at no time denied its responsibility for the actions of Mr Coccetti and whilst it has sought to minimise their effect it has never suggested that those actions were anything less than serious and reprehensible. In his affidavit Mr Olsson has deposed that the company has a strong sense of social responsibility and actively contributes to the community. He sets out over two pages thirteen examples of programs in which the company has participated ranging from indigenous community development programs through employment programs for deaf persons, to programs assisting years 10 and 12 and TAFE and university students, to practice

interviewing skills as well as the participation of its employees in major charitable activities. The respondent is clearly a responsible corporate citizen which has expressed regret and concern at this offence, has taken steps to ensure that it will not reoccur and assisted the prosecuting authorities and the court to bring the matter to a speedy conclusion.

The size of the prescribed penalty, and any recent increases to that prescription

In 2004 the penalty for breach of s.400(5) was increased from a maximum of $2,000.00 for individuals and $10,000.00 for a body corporate to $6,600.00 for individuals and $33,000.00 for a body corporate.

The totality principal

This principal is not relevant where there is only one breach.

9. The respondent argues that this is a case in which no penalties should be imposed. It points to cases such as *Ponzio v Firebase Sprinkler Systems Pty Ltd* [2005] FCA 733 where Merkel J applying the decision of Finkelstein J in *Pine v Seelite Windows & Doors Pty Ltd* [2005] FCA 500 declined to impose a penalty saying:

> "No harm has been done to anyone. The contravention was inadvertent. It is unlikely to occur again. The amount of wages involved is insignificant. In these circumstances it would be quite wrong to punish the respondents. Nothing would be achieved by the imposition of a pecuniary penalty. There is no need for a specific deterrent: it is simply not necessary. An if any penalty were imposed it would be so low that it could not act as a general deterrent."

The respondent also relied on the views expressed by Kenny J in *Lisette Pine v Expoconti Pty Ltd* [2005] FCA 1434 at [16]:

> "I accept that this is not an appropriate case for particular weight to be given to the matter of general deterrence; and, in any event, this interest has been served by the bringing of this proceeding and the time and cost that the respondent has as a consequence been required to spend in relation to the proceeding, although I note the comments of Merkel J in Multiplex at [9]. I do not consider that this case is materially different from Firebase or D and E Air Conditioning; [*Ponzio v D and E Air Conditioning* [2005] FCA 964."

where North J said at [28]:

> "Taking into account the matters raised by both sides and the review of the cases which I have referred to I like Merkel J in *Firebase* place some special importance on the unlikelihood of the respondent reoffending. If there is no real risk of the respondent reoffending, the policy referred to by Mr O'Grady in favour of ensuring compliance with the law is satisfied with respect to the particular respondent."

10. All those cases related to breaches of the prohibition of paying employees during strikes. There was a clear benefit to the employees in the breaches which their employers had committed. There is a vast difference between that type of unlawful conduct and the breach here admitted. That Ms Shepherd was not disadvantaged by what occurred was a combination of happenstance and her own action. The action of the respondent strikes at the very heart and purposes of the Act. It should be recognised by a penalty. The penalty should take into account some value for specific deterrence and a greater value for general deterrence because not all companies will be as co-operative or as intent on ensuring the offence does not reoccur as this particular respondent clearly was. On the other hand the amount of the penalty should be mitigated by the contrition shown and the co-operation of the respondent with the authorities. I am of the view that an appropriate penalty in this particular case, bearing in mind the maximum of $33,000.00 and the acceptance by the applicant that the penalty should be at the lower end of the scale, is $7,500.00.

I certify that the preceding ten (10) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: