FEDERAL MAGISTRATES COURT OF AUSTRALIA

BROBBEL v SWEETS FOR YOU PTY LTD & ANOR *[2008] FMCA 1016*

WORKPLACE RELATIONS – Admitted contraventions of *Workplace Relations Act 1996* – consideration of matters relevant to penalty

Workplace Relations Act 1996, s.400(5)

Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Kelly v Fitzpatrick [2007] FCA 1080

Applicant:	ANTHONY PETER BROBBEL
First Respondent:	SWEETS FOR YOU PTY LTD (ACN 117 229 277)
Second Respondent:	JIM MARTINOSKI
File Number:	MLG 1548 of 2007
Judgment of:	Burchardt FM
Hearing date:	19 June 2008
Date of Last Submission:	19 June 2008
Delivered at:	Melbourne
Delivered on:	5 August 2008

REPRESENTATION

Counsel for the Applicant:	Ms M.J. Richards
Solicitors for the Applicant:	Piper Alderman
Counsel for the Respondents:	Mr G. Katz
Solicitors for the Respondents:	Meerkin & Apel

ORDERS

(1) That the First Respondent pay a penalty of $12,000.00 to the Consolidated Revenue Fund for its contravention of s.400(5) of the *Workplace Relations Act 1996.*

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLC 1548 of 2007

ANTHONY PETER BROBBEL
Applicant

And

SWEETS FOR YOU PTY LTD (ACN 117 229 277)
First Respondent

JIM MARTINOSKI
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The issue in this case is the quantum of penalty that should be imposed on the Respondents for admitted contraventions of s.400(5) of the *Workplace Relations Act 1996* ("the Act").

2. Although both the First and Second Respondents admit the contraventions, a penalty is sought against the First Respondent alone.

3. For the reasons that follow, I will order that the First Respondent pay a penalty of $12,000.00 to the Consolidated Revenue Fund.

The facts

4. There is no issue in these proceedings as to Inspector Brobbel's appointment or his capacity properly to bring the proceedings or as to the incorporation of the First Respondent.

5. It is also common cause that the Second Respondent, together with his sister, Ms Martinoska, are the two directors who control the affairs of the First Respondent, Sweets For You Pty Ltd (ACN 117 229 277) ("Sweets For You").

6. The First Respondent operates a business as a Donut King franchise at the Greensborough Plaza shopping centre. It has done so since taking over the business in July 2006.

7. Ms Claus had been an employee for some time prior to this and, following a period in about August and September 2006 when she worked as a casual, she eventually became a permanent part-time employee of 35 hours per week. Self-evidently, that would have been important employment to Ms Claus.

8. In November 2006 all employees at the store, including Ms Claus, were offered by the First Respondent the opportunity to enter into an Australian Workplace Agreement ("AWA"). All employees at the store, except Ms Claus, entered into such AWA.

9. In or about November 2006 Ms Claus asked Mr Martinoski to make changes to the AWA including an assurance that her hours would stay the same and that she would be given more responsibility. Some of those changes were agreed by Mr Martinoski but she was never offered an amended AWA.

10. On 9 February 2007 Ms Martinoska asked Ms Claus and another employee, Carly Beeson, to attend a meeting at the store after work. That meeting took place and was attended by Ms Claus, Ms Beeson, Mr Martinoski and Ms Martinoska.

11. In the course of the meeting (see statement of agreed facts, paragraph 23) Mr Martinoski most likely used words to the effect:

"And as for you, Jennifer, asking for your fucking payslips, we're not going anywhere, so you don't have to keep fucking asking for them,

And,

If it was up to me, I would close the shop for a week, sack everyone and rehire everyone - people who do care about my business."

12. It is also agreed that at the meeting Mr Martinoski put the AWA on the table in front of Ms Claus and said words to the effect:

"If you don't sign this, your hours will be cut to 15 hours a week."

13. Ms Claus did not sign the AWA on Friday 9 September 2007. Ms Martinoska on the following Sunday issued a roster by text message with Ms Claus' hours reduced to 15 hours per week, according to Ms Claus' interview with Mr Brobbel (see exhibit APB-2).

14. Ms Claus resigned from her employment on Monday, 12 February 2007. By consent, orders were made by Registrar Byrne on 23 May 2008 by which the Court declared that each of the Respondents had contravened s.400(5) of the Act by applying duress to Ms Claus in connection with an AWA.

15. The parties were in agreement as to the relevant considerations to be borne in mind in fixing a penalty in these circumstances. Both parties referred me to *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7, which was adopted by Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080 ("*Kelly*").

16. Here, it seems to me, the following considerations are significant:

a) Duress is an inherently unattractive and significant form of misconduct which the legislation proscribes;

b) While Mr Martinoski denies that he ever intended to cut Ms Claus' hours of work, the fact is that he made a very clear threat to do so and that his co-director sister sent Ms Claus a message which, ostensibly, put that threat into effect;

c) Ms Claus resigned in effect almost immediately after that threat. For reasons which I shall expand on below, I have no doubt that she did so because of the reduction in hours, as she saw it;

d) This threat by Mr Martinoski was made in anger and on the spur of the moment;

e) Nonetheless, Mr Martinoski's language and conduct at the time of the threat were offensive and bullying;

f) It is self-evident that Ms Claus regarded her hours of work as important. It is agreed that she sought to protect them in the negotiations over the content of the AWA. Her immediate resignation is only to the same effect;

g) The company has no prior transgressions of the legislation against it; and

h) The company is a small one which, on any view, does not make a substantial profit.

17. Much of the argument before me centred on the extent to which it was open to the Court to infer, in the absence of an agreed statement of facts to this effect, that Ms Martinoska had reduced the hours of work of Ms Claus and that the resignation followed therefrom.

18. It was however agreed that Ms Claus had sought to maintain her hours of work in the AWA negotiations; and further, that Mr Martinoski threatened to reduce her hours of work to make her sign the AWA and that Ms Claus resigned on the Monday following the conversations in which the threat was made on the Thursday.

19. The materials filed by Inspector Brobbel include records of interview in which Ms Claus makes clear her state of mind. No objection was taken to the receipt of those materials.

20. In my view, it begs common sense to presuppose that Ms Claus left for any reason other than the reduction of her hours. Whether Ms Martinoska meant to achieve this result or not, she plainly sent a message which would have reasonably conveyed that impression to Ms Claus.

21. I was informed by counsel for Mr Brobbel, without objection, that Ms Claus had been in employment at Donut King for some years and that she was the most senior employee at the time of the termination of her employment. Her employment was effectively all but full-time, being 35 hours per week.

22. Given the concern Mr Claus had already expressed about the amount of time she was being allocated for work in the AWA discussions, it is far more probable than otherwise that she left because she perceived that the threat had been carried out and put into effect. I repeat, it begs common sense to come to any other conclusion.

23. The extent to which the Respondents fought, somewhat tenaciously, to suggest otherwise is a matter I find relevant when I consider the extent of their contrition.

24. I accept, as is conceded, that the Respondents have cooperated fully with Inspector Brobbel in his investigations and have saved the Court the trouble of a full trial.

25. Against this, however, it must be said, in the face of the materials disclosed by Ms Claus' initial complaint, that I suspect the Respondents would have been very poorly advised to adopt any other course.

The quantum of penalty

26. As I have said, a penalty is sought against the First Respondent alone.

27. Duress is, as I have said, a serious matter of its nature. Nonetheless, the scale of penalties to be applied is enacted by Parliament, namely $0 dollars to $33,000.00.

28. It becomes a matter of putting this particular case at the appropriate point in that continuum. The authorities show that each case has to be considered in the light of its own relevant facts and circumstances; these are always different and no more than broad guidance can be obtained from penalties imposed in other cases.

29. In the ultimate, I think that a penalty of $12,000.00 is appropriate. That penalty takes proper consideration and gives credit to the Respondents for their cooperation and contrition. Nonetheless, this

was bullying conduct against an employee who plainly felt it to be offensive and oppressive, because she resigned almost immediately thereafter.

30. While I accept this is a case where specific deterrence is of little significance, general deterrence is significant. It is clear from cases coming before this Court that the retail industry is rife with infractions of proper compliance with the Act.

31. This is not a case that gives rise to the totality principle, but I have given careful thought to whether or not this penalty will be crushing or otherwise overly onerous. It should be noted as Tracey J pointed out in Kelly at [28] that:

> *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [2001] ATPR 41-815 at [13]."*

32. I note that it has been agreed that the First Respondent be given time to pay and I will hear the parties as to the timetable that is to be put in place.

I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate: Brooke Evans

Date: 5 August 2008