

FEDERAL COURT OF AUSTRALIA

Smith v Zinifex Australia Limited (No 2) [2008] FCA 1836

INDUSTRIAL LAW – admitted application of duress in connection with Australian Workplace Agreement in contravention of *Workplace Relations Act 1996* – mitigation of penalty due to actions of respondent – no substantial need for specific deterrent – general deterrence relevant

Industrial Relations Act 1984 (Tas)
Workplace Relations Act 1996 (Cth) s 170WG(1)

Smith v Zinifex Australia Ltd [2008] FCA 532 cited

RAYMOND SMITH v ZINIFEX AUSTRALIA LIMITED
TAD 46 of 2007

HEEREY J
5 DECEMBER 2008
MELBOURNE

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

TAD 46 of 2007

**BETWEEN: RAYMOND SMITH
 Applicant**

**AND: ZINIFEX AUSTRALIA LIMITED
 Respondent**

JUDGE: HEEREY J

DATE OF ORDER: 5 DECEMBER 2008

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The Second Respondent be removed as a party to this proceeding.
2. The Applicant have leave to file an Amended Statement of Claim and Amended Application both dated 27 November 2008.
3. The Respondent have leave to file a Defence to Amended Statement of Claim also dated 27 November 2008.

THE COURT NOTES THAT:

4. The parties have filed an agreement entitled Statement of Agreed Facts dated 27 November 2008, in accordance with s 191(3) of the *Evidence Act 1995* (Cth).

THE COURT DECLARES THAT:

5. On 9 December 2005, the Respondent contravened s 170WG(1) of the *Workplace Relations Act 1996* (Cth) as then in force by making statements at a meeting at which each of Geoffrey Charles Holmes, Shaun Maxwell Russell and David Glen Scurrah were present which amounted to the application of duress to the Labour Hire Employees in connection with an AWA.
6. In December 2005, the Respondent contravened s 170WG(1) of the *Workplace Relations Act 1996* (Cth) as then in force by applying duress to Geoffrey Walter Bailey in connection with an AWA.

THE COURT ORDERS THAT:

7. In relation to the contravention referred to in order 5 hereof, a penalty of \$10,000 be imposed upon the Respondent.
8. In relation to the contravention referred to in order 6 hereof, a penalty of \$5,000 be imposed upon the Respondent.
9. The penalties imposed in Orders 7 and 8 be paid by the Respondent into consolidated revenue within 21 days.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

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

TAD 46 of 2007

BETWEEN: **RAYMOND SMITH**
 Applicant

AND: **ZINIFEX AUSTRALIA LIMITED**
 Respondent

JUDGE: **HEEREY J**

DATE: **5 DECEMBER 2008**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 The respondent Zinifex Australia Ltd has admitted two contraventions of the
Workplace Relations Act 1996 (Cth) s 170WG(1). That section prohibited the application of
duress in connection with an Australian Workplace Agreement (AWA).

2 The parties have agreed on a proposed penalty namely \$10,000 for the first
contravention and \$5,000 for the second contravention and have submitted an agreed
statement of facts and agreed written submissions. The statement of agreed facts includes the
following:

This statement of agreed facts sets out the factual basis and admissions upon which
the parties seek to have this proceeding resolved, and cannot be relied upon in any
other proceedings for the purpose of proving the facts contained in the Agreed Facts.

3 At the hearing I said that the proposed penalties appeared to me to be appropriate and
I made orders accordingly. My reasons for making such orders are as follows.

The contraventions

4 Zinifex operated a zinc smelter (the Smelter) at Lutana near Hobart. As well as its
own employees, Zinifex used the services of workers employed by Skilled Group Limited
and TESA Group Pty Ltd (collectively, the Labour Hire Companies). The Labour Hire

Companies were contractually entitled to pass on to Zinifex any wage increases which they were obliged to pay to their workers.

5 Until 1 September 2007 Zinifex was bound by the *Zinifex Hobart Smelter Enterprise Award* (the Zinifex Award) made by the Tasmanian Industrial Commission (the TIC).

6 Immediately prior to 21 September 2005 the Zinifex Award operated subject to the overriding operation of the Zinifex Hobart Smelter Enterprise Agreement 2004 (the Zinifex Agreement), an industrial agreement registered under the *Industrial Relations Act 1984* (Tas). However, the Zinifex Agreement had not yet been recognised by the TIC as binding on the Labour Hire Companies or their employees at the Smelter.

7 By a decision of the TIC made on 21 September 2005 (and subsequently affirmed on appeal) the TIC determined that the Labour Hire Companies were bound by the Zinifex Award in relation to employees working at the Smelter.

8 Prior to the TIC decision Labour Hire Companies employees at the Smelter would generally work a rotating roster of four days on – four days off with a twelve hour shift on each day worked. The rates charged by the Labour Hire Companies to Zinifex did not make any provision for the payment of overtime penalties for work after eight hours.

9 The effect of the TIC decision was that employees of the Labour Hire Companies who worked at the Smelter became entitled to be paid overtime rates for all hours worked in excess of eight hours per day. This meant that the extra cost to the Labour Hire Companies would be passed on to Zinifex.

10 As a result of the TIC decision, and with the knowledge and approval of Zinifex, the Labour Hire Companies decided to invite employees engaged in the Smelter to enter into AWAs.

11 On 9 December 2005 a discussion took place at the Smelter between, on the one hand, Mr Mark Emmett, who was the Superintendent of Electrolysis at the Smelter, and, on the other hand, Labour Hire Companies' employees Geoffrey Holmes, Shaun Russell and David Scurrah. Mr Emmett made statements to the three workers to the following effect:

1. employees who did not sign the AWA they had been offered would not receive further work at Zinifex because of the increased labour costs involved in engaging them under the Zinifex Award;
2. employees who had signed AWAs would receive work in preference to employees who had not signed AWAs;
3. people who had signed AWAs would be used by Zinifex in preference to those who had not, regardless of their skills;
4. in a hypothetical situation in which Mr Scurrah had signed an AWA but Mr Holmes had not, then regardless of whether Mr Holmes had more experience or was a better operator than Mr Scurrah, Mr Scurrah would be used by Zinifex;
5. Mr Emmett was aware that some labour hire workers had signed AWAs and some had not, and there were enough employees who had signed AWAs to take the place of the non-AWA labour hire employees.

12 Mr Scurrah signed the TESA AWA immediately after the meeting. Mr Holmes and Mr Russell each signed his copy of the Skilled AWA shortly afterwards.

13 At the time of the meeting Mr Emmett knew and intended that by securing the employment of employees of the Labour Hire Companies at the Smelter under AWAs Zinifex would effectively override the conditions of employment provided by the Zinifex Award and that it was reasonable for those employees to assume that Mr Emmett would, or at least could, give effect to the consequences referred to in the statements he made to them.

14 By making the statements Mr Emmett sought to have each of the Labour Hire Companies' employees enter into AWAs with their respective employers. Neither he nor Zinifex were parties to the employment relationship between these employees and their respective employers.

15 The statements made by Mr Emmett were likely, and intended, to pressure the employees to agree to the respective AWAs offered to them without regard to whether each wished to do so. The statements achieved that result.

16 By reason of his position as the Superintendent of Electrolysis at the Smelter and his responsibility for the engagement of workers through the Labour Hire Companies, Mr Emmett enjoyed a significant power disparity in relation to the employees.

17 The foregoing establishes the first contravention. The second contravention concerned Mr Geoffrey Bailey, an employee of Skilled. He did not immediately sign an AWA. At some time between 15 and 25 December 2005 Mr Emmett had a conversation with Mr Bailey in substantially the following terms:

Emmett Have you signed the AWA yet?
Bailey No I haven't.
Emmett Why haven't you signed it?
Bailey The advice I've got from the Union and from the other blokes that I am working with, including the full timers, is not to sign it.
Emmett Alright, that's up to you, but I'll give you a little scenario, we've got 26 or 27 blokes down in Castings [where Bailey worked at the time], and only one hasn't signed the AWA, and I'll put it this way, we will not be needing his services anymore and we won't be ringing him for work.
Bailey So what you are saying is that if I don't sign that agreement, I won't be able to work here anymore?
Emmett The labour costs here are about \$90,000 per month and there is no way that I am going to pay another \$40,000 under the Award.
Bailey Fair enough, I'll get back to you.
Emmett Well, we want the things signed by next week.

18 At the time of the conversation Mr Emmett knew and intended that Mr Bailey would, if he agreed to the AWA, be paid lower wages in respect of each twelve hour shift as compared to wages payable for a twelve shift under the Zinifex Award.

19 Mr Emmett knew and intended that by securing the employment of Labour Hire Companies' employees at the Smelter including Mr Bailey under AWAs, Zinifex would effectively override the conditions of employment provided by the Zinifex Award for the employees of the Labour Hire Companies working at the Smelter.

20 It was reasonable for Mr Bailey to assume that Mr Emmett would, or at least could, give effect to the consequences referred to in the statements made in the conversation with him. By making the statements to Mr Bailey, Mr Emmett sought to have Mr Bailey enter into an AWA with his employer Skilled.

21 Neither Mr Emmett or Zinifex were party to the employment relationship between Mr
Bailey and Skilled. Statements to Mr Bailey were likely, and intended, to pressure Mr Bailey
to agree to the AWA offered to him, without regard to whether he wished to do so.

22 By reason of his position as the Superintendent of Electrolysis at the Smelter and his
responsibility for managing the engagement of workers through the Labour Hire Companies,
Mr Emmett enjoyed a significant power disparity in relation to Mr Bailey.

23 Generally it is accepted that Mr Emmett acted within the scope of his responsibilities
with Zinifex and that Zinifex is liable for his conduct.

Other relevant matters

24 Zinifex did not instruct or intend Mr Emmett to make the above statements to the
Labour Hire Companies' employees. By reason of Zinifex's contractual relations with the
Labour Hire Companies, Zinifex had a legitimate concern about the cost implication for its
own business of the TIC decision. In the circumstances it was reasonable to expect that
Zinifex would provide Mr Emmett with guidance about what was and what was not
acceptable conduct in relation to dealing with Zinifex concerns about the cost implication of
any response by the Labour Hire Companies to the TIC decision. However Zinifex did not
provide Mr Emmett with any such guidance.

25 Zinifex no longer operates, owns or has any connection with the Smelter. It sold the
Smelter to Nyrstar Limited in September 2007.

26 Zinifex has never previously been found to have engaged in similar conduct to that
alleged in the current proceedings.

27 At all relevant times Zinifex was an employer with a long history of collective
bargaining with employees at the Smelter. Throughout this period Zinifex utilised enterprise
bargaining agreements and awards to set the terms and conditions of its employees'
employment. At no point did Zinifex enter into AWAs or State-registered individual
agreements under the Tasmanian legislation with its employees.

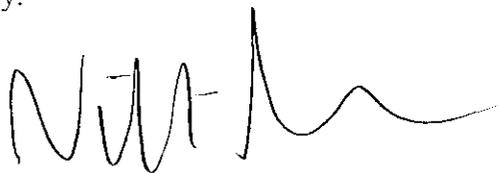
28 Zinifex became aware of these proceedings when it was served with the application and statement of claim in December 2007. It sought a determination that the applicant was not empowered to bring the current proceedings. I decided that objection adversely to Zinifex: *Smith v Zinifex Australia Ltd* [2008] FCA 532. After that decision was handed down Zinifex co-operated with the enforcement authority and has agreed to these facts without the need for a trial. Although the Zinifex objection failed, it was clearly arguable and not an exercise in delay or obstruction.

The appropriate penalties

29 In my opinion the foregoing facts would provide some mitigation for the contraventions by Zinifex. The contraventions were not the implementation of a deliberate policy, but rather arose out of a reaction to the particular circumstance created by the TIC decision. In the light of Zinifex's industrial history and the fact that it no longer has any connection with Smelter, there is not a substantial need for specific deterrence in this case. On the other hand, the contraventions are of a law regarded seriously by the Parliament, as the maximum penalties indicate. General deterrence is relevant. I think in all circumstances the penalties sought to be imposed are reasonable.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey.

Associate:



Dated: 5 December 2008

Counsel for the Applicant: C Rawson

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent: S J Wood

Solicitor for the Respondent: Minter Ellison

Date of Hearing: 1 December 2008

Date of Judgment: 5 December 2008