FEDERAL COURT OF AUSTRALIA

Wells v Locarno Management Pty Ltd [2008] FCA 1034

ALAN WELLS v LOCARNO MANAGEMENT PTY LTD and ALEX ZOTOS
VID 1194 OF 2006

JESSUP J
15 JULY 2008
MELBOURNE

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1194 OF 2006**

BETWEEN:	**ALAN WELLS** **Applicant**
AND:	**LOCARNO MANAGEMENT PTY LTD** **First Respondent**
	ALEX ZOTOS **Second Respondent**

JUDGE: **JESSUP J**
DATE OF ORDER: **15 JULY 2008**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS BY CONSENT THAT:

1. A penalty of $3,300 be imposed on the first respondent for the contravention by it of s 400(5) of the *Workplace Relations Act 1996* (Cth) constituted by the application of duress to an employee, Jasmine Anne Sinclair, in connection with an Australian Workplace Agreement in April and May 2006.

2. The first respondent pay the said penalty to the Consolidated Revenue within 21 days.

3. The proceeding otherwise be dismissed.

4. There be no order as to costs.

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

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AND:	**LOCARNO MANAGEMENT PTY LTD** **First Respondent**
	ALEX ZOTOS **Second Respondent**
JUDGE:	**JESSUP J**
DATE:	**15 JULY 2008**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 This is an application by a workplace inspector ("the applicant") for a pecuniary penalty to be imposed under s 407 of the *Workplace Relations Act 1996* (Cth) ("the WR Act") in relation to alleged contraventions of s 400(5) of that Act. The first respondent, Locarno Management Pty Ltd, was, at relevant times, the operator of the Hepburn Spa Resort in Hepburn Springs, Victoria. In the Further Amended Statement of Claim filed on 4 July 2007, it is alleged that the first respondent applied duress to certain of its employees in connection with Australian Workplace Agreements ("AWAs") which it proposed they should execute, in contravention of s 400(5) of the WR Act.

2 When the proceeding came on for trial on 23 June 2008, counsel for the applicant announced that the matter had been settled, that the parties had agreed to a written statement of facts to be placed before the court, and that the parties were also agreed upon the final orders which should be made in disposition of the proceeding. It is proposed that the first respondent be found to have contravened s 400(5) in one respect only, and in relation to one employee only, and that the proceeding otherwise be dismissed, with no order as to costs. The facts referred to below are taken from the parties' agreed statement.

3 The resort at Hepburn Springs stands upon land which is subject to the *Crown Land (Reserves) Act 1978* (Vic). The Hepburn Shire Council ("the Council") is the committee of

management for the land for the purposes of s 29A of that Act. The land was the subject of a lease between the council and a company associated with the first respondent which originally was to expire on 15 April 2006. For the sake of simplicity, I shall treat the first respondent as the lessee.

4 In November 2004, the first respondent took over the operation of the resort from the previous operator, at which time some of the staff at the resort, who had been employed by the previous operator, took up employment with the first respondent. They included a receptionist employed on a part-time basis at the resort, Ms Jasmine Anne Sinclair. Ms Sinclair was at that time paid an hourly rate of wage which was the same as that paid to her by the previous operator. That wage rate, it appears, was the same for all hours worked, including weekends and public holidays. At the same time, the first respondent included in Ms Sinclair's terms of employment a written statement to the effect that she was employed for a fixed term, ending on 15 April 2006. The reason for that was that the first respondent's lease of the premises ran only until that date.

5 Although the first respondent had taken over the resort in anticipation that its operating costs would be similar to those of the previous operator, it was in fact required to pay considerably more rent and, from 1 January 2005, its payroll costs were affected by a common rule declaration made under the WR Act, by which it became bound to comply with the Clerical and Administrative Employees Award ("the Award"). The effect of the Award was that the first respondent was required to pay Ms Sinclair penalty rates for time working on weekends and public holidays. It did so, calculating those rates by reference to her then hourly rate of pay (which was, it seems, in excess of the minimum hourly rate for which the Award provided).

6 It was the intention of the State Government that the resort and the land upon which it stood would be the subject of a major redevelopment on the expiry of the first respondent's lease in April 2006. However, by December 2005, a number of matters relating to the proposed redevelopment had not yet been decided, and no tender had been let for the building works. As a result, the shire council resolved to propose to the responsible Minister that the first respondent be offered a six-month extension to its existing lease. The first respondent was interested in taking such an extension, but only if it was able to reduce significantly its

operating costs. After some negotiation involving the first respondent and the council, a rental for the six month extension was agreed between them in late February 2006. By early March 2006 or thereabouts, the terms of the extended lease were, it seems, a matter of substantial agreement as between the first respondent and the council.

7 In early March 2006, it was the first respondent's intention to achieve, if possible, reductions in its payroll costs, including reductions in the wages and conditions of employment of staff who included Ms Sinclair. That intention was not then communicated to the staff. Rather, on 9 March 2006, the first respondent issued a memorandum to the staff, by which it informed them that it had agreed with the council upon terms and conditions for a new lease "that will take us through to late October 2006". The author of the memorandum said that this was "great news", and expressed the hope that the staff "will feel more secure in the months moving forward". It was said that new contracts would need to be formalised, which would be the concern of the chief executive officer of the resort when he returned from a conference overseas.

8 By late March 2006, the first respondent had decided to reduce the wages and conditions of employment of some staff, including Ms Sinclair. The employees concerned were to be given a choice between a contract of employment, which was based on the entitlements provided for in the Award, and an AWA, which removed award entitlements such as penalty rates. The first respondent's intention in these respects was not then communicated to Ms Sinclair.

9 In early April 2006, the first respondent instructed Ms Sinclair to accept customer bookings into the month of May 2006, in the expectation that the resort would continue to operate for another six months. To the knowledge of the first respondent, Ms Sinclair took such bookings.

10 On 6 April 2006, the first respondent issued a memorandum to all its staff, in which it was stated that, while awaiting final confirmation of the new lease, the first respondent was "formalising a new Workplace Agreement for the business going forward", which agreement would be made available once it had been lodged with the relevant workplace agencies. It was stated that an information kit on AWAs would be handed out on 8 April 2006. To give the staff time "to properly review, obtain advice and consider the AWA" the first respondent

said that it proposed to extend all current contracts, on the same terms and conditions, until 22 April 2006.

11 On 8 April 2006, the first respondent issued a memorandum advising employees that they could obtain an "employee form" from their workstations, and requiring them to read, and to study, the contents of that form. It was said that, in line with legislation, employees had to be informed, and that it was appropriate that they had all relevant information "to make choices for yourselves in moving forward". It was said that each employee's AWA would be given out early the following week, and that the employee should take the time to read and to consider it. It was pointed out that, by legislation, no staff member could be "coerced or put under duress to sign an AWA".

12 The first respondent did not provide AWAs for its employees, including Ms Sinclair, to consider in the week following its memorandum of 8 April 2006. Instead, on 12 April 2006, the first respondent issued another memorandum to its employees, including Ms Sinclair. It said that there had been discussion at management level "in relation to moving the business forward and looking after all staff members". The first respondent said that it did not want any staff member to leave the resort. It said that the fact that the resort would have to close down in October 2006 at the earliest was out of management's control. The author of the memorandum said that, in the time that he had been at the resort, he had seen "an escalation of costs that have been out of our control". He referred to some of the causes of that escalation, including "incurring federal awards across the board and in some instances with some departments being paid above award rates with some staff still wanting more". The memorandum said that, although management would not be able to address all the issues which were at hand in relation to pay rates, they had tried to ensure, wherever possible, the best outcome for staff and the business. It stated that "work contracts" would be offered to staff very soon.

13 On the evening of 15 April 2006, the chief executive officer of the first respondent held a staff meeting, at which he informed those present, including Ms Sinclair, of a number of matters relating to the extension of the lease, the need to reduce costs, and certain inconsistencies and inequalities in wage rates. He said that employees would be offered a choice between a new common law contract and an AWA. He said that existing employment

contracts would be extended for two weeks, to allow employees time to consider their options.

14 On about 25 April 2006, the first respondent provided Ms Sinclair with two documents. The first was a draft contract of employment which ran until 22 October 2006. The contract provided for casual, rather than for part-time, employment. It provided for an hourly rate of wage which was significantly less than the rate she had been receiving. The wage rate was referable to an award applicable in the hospitality industry, rather than to the Award. The second document provided to Ms Sinclair at this time was a draft AWA. It too provided for casual rather than for part-time employment. It contained no entitlement to annual leave or to personal leave. It provided for an hourly rate which, including the casual loading, was about 20% less than her then existing hourly rate. It excluded the operation of protected award conditions, including late shift and weekend penalties and overtime, to which she was the entitled pursuant to the Award.

15 In early May 2006, the first respondent provided a revised contract to Ms Sinclair, in which the hourly casual rate was referable to the Award, but which in other respects reflected the first of the two documents provided to her on about 25 April 2006.

16 In broad terms, the relationship between the wages which Ms Sinclair was receiving under her then terms of employment, the new draft contract of employment offered to her, and the draft AWA offered to her, was as follows. Ms Sinclair's existing rate of wage was the most favourable of the three. The rate provided in the draft AWA was less favourable than the existing rate, but more favourable than the rate provided in the draft contract. And the rate provided in the draft contract was the least favourable of the three.

17 By memorandum to all staff, including Ms Sinclair, on 5 May 2006, the first respondent requested the return of the new signed contracts by 9 May 2006. Ms Sinclair believed that if she did not return either the contract or the AWA signed by her by that date, her employment would be terminated. She signed the AWA on 8 May 2006, and provided it to the first respondent on 23 May 2006.

18 Ms Sinclair gave notice of her resignation on 22 June 2006, and left the employ of the first respondent on 5 July 2006.

19 In addition to the primary facts referred to above, the parties also agreed as follows. The memorandum from the first respondent of 9 March 2006 gave Ms Sinclair a reasonable belief and the expectation that she would be offered employment until at least October 2006. From then until 15 April 2006, the first respondent did not adequately consult with Ms Sinclair or put her on notice that her employment after 16 April 2006 would be subject to reductions in her wages and conditions for the extended period of the lease; or that it was not prepared to continue her employment on her existing terms and conditions. By acting in this way, the first respondent denied Ms Sinclair the opportunity, from 9 March 2006, to seek alternative employment. It was not until about 25 April 2006 that the first respondent disappointed what was by then a reasonable and legitimate expectation on the part of Ms Sinclair that she would be able to continue in employment in the same job and under the same terms and conditions. When she was then informed of the real situation, she believed that she faced sudden unemployment unless she agreed to the first respondent's terms. This placed her at a considerable disadvantage in bargaining. Ms Sinclair was unwilling to sign the contract offered by the first respondent, and it knew, or ought to have known, of that unwillingness. Because the contract offered to Ms Sinclair was inferior to the AWA, in effect she had to sign the AWA in order to keep her job. The first respondent should have known that this was the position in which Ms Sinclair was placed. She signed the AWA in the belief that she had no practical choice in the circumstances.

20 The applicant alleged, and the first respondent agreed, that, in the circumstances referred to above, the first respondent applied illegitimate pressure upon Ms Sinclair to sign the AWA, and that this constituted the application of duress within the meaning of s 400(5) of the WR Act. In the light of the parties' agreement, I am prepared to accept that this was so.

21 The parties also agreed that, in considering the level of penalty appropriate to be imposed for the first respondent's contravention of s 400(5), there were certain circumstances to be taken into account. The first respondent's conduct was not part of a conscious and deliberate plan to place Ms Sinclair at a disadvantage in negotiating her terms and conditions of employment. To this I would add that, although the first respondent's attempts to change the basis upon which Ms Sinclair was employed inadequately recognised the practical pressure under which she was thereby placed, the memoranda and other communications

addressed by the first respondent to its staff demonstrated at least an ostensible concern to comply with the requirements of the legislation in relevant respects, including a consciousness of the need to avoid the very kind of pressure which, as admitted, was involved in those attempts. The parties also informed the court that the first respondent had cooperated with all inquiries by the applicant and, by admitting liability and participating in an agreed statement of facts, had saved the public the expense of a trial, and saved its employees, or former employees, from the need to give evidence in court. Further, the first respondent has agreed to pay Ms Sinclair for the loss arising from its unlawful conduct.

22 The maximum penalty that may be imposed on a body corporate for a contravention of s 400(5) of the WR Act is $33,000. The parties are agreed that an appropriate penalty, in the circumstances of the present case, would be $3,300. In arriving at that figure, the parties have taken account of the nature and circumstances of the first respondent's conduct, the need for general deterrence, the fact that the first respondent has not previously contravened workplace laws and the mitigating circumstances to which I have referred.

23 The court is not bound by the agreement of the parties as to the level of penalty which should be imposed in a case such as the present. However, the court will not depart from an agreed figure merely because it might otherwise have been disposed to award some other figure. The predictability involved in the resolution of penal proceedings in accordance with a pre-trial agreement reached by the parties is something which should, as a matter of public policy, be regarded as beneficial. Only where the agreed penalty falls outside the permissible range should the court depart from the figure agreed by the parties. In this context, the permissible range is the range which would be permitted by the court, that is, a range within which the penalty is neither manifestly inadequate nor manifestly excessive. See *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, 290-91; *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] ATPR 41-993, [53]; *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, 565; and *Hills v Sutton* (2007) 169 IR 327, 329.

24 The parties submitted that the conduct of the first respondent in the present case justified a penalty towards the lower end of the range potentially available under the legislation. They justified that proposition by reference to the factors mentioned above. I am

satisfied that the penalty proposed by the parties is within the permissible range and I shall not, in the circumstances, depart from it. The parties agreed that the proceeding should otherwise be dismissed, and I shall so order.

25 In my reasons above, I have referred only to the first respondent. There are, in fact, two respondents in this proceeding. It appears from the allegations in the Further Amended Statement of Claim, and from the admissions and allegations in the Amended Defence, that the second respondent, Mr Alex Zotos, was at relevant times engaged in the management of the first respondent. Allegations of conduct which would amount to contraventions of s 400(5) of the WR Act are made against the second respondent. Those allegations are denied. One of the consent orders sought by the parties on 23 June 2008 was that the second respondent "be removed as a party". I was asked to act under O 6 r 9(b) of the Federal Court Rules in this regard. That provision empowers the court to order that a person who "has ceased to be a proper or necessary party to a proceeding" cease to be a party. As I understand it, the basis upon which it was submitted that the second respondent had ceased to be a proper or necessary party was that the proceeding had been settled, that the applicant was content that full responsibility for conduct admitted to be in contravention of s 400(5) was to be borne by the first respondent, and that no orders were sought against the second respondent.

26 I intimated to counsel that I would not be prepared to act under O 6 r 9(b) in the circumstances. The rule, in my opinion, is concerned with the situation arising when the presence of a person as a party is no longer a proper or necessary condition for the judicial determination of the dispute or question involved in the proceeding. There are all manner of such situations, including, for example, where there has been a change in the ownership of some relevant asset, or a change in the holder of a relevant office. The rule is not concerned with the situation arising where the applicant, for whatever reason, no longer wishes to make allegations against, or to seek relief from, a particular respondent. In such a case, the most obvious expedients are a discontinuance by consent (or with leave) under O 22 r 2 or the entry of a consent judgment in favour of the respondent concerned.

27 The necessity for the second respondent to remain a party is demonstrated by the state of the Amended Application and the pleadings. The Amended Application claims the imposition of penalties upon the second respondent for contraventions of s 400(5). As

pointed out above, on the current state of the pleadings there is a direct contest with respect to the question whether the acts and omissions of the second respondent gave rise to such a contravention. In this state of things, it would be wrong to exercise the power under O 6 r 9(b) in relation to the second respondent.

28 In a joint memorandum filed by the parties after I had reserved judgment, the applicant applied (in the alternative) for leave to amend the Further Amended Statement of Claim by the removal of the following paragraphs:

> 23. By reason of the foregoing, the second respondent applied duress to the relevant employees in connection with the AWAs.
> 24. In the premises, by his conduct, the second respondent breached section 400(5) of the WR Act in respect of each of the relevant employees.

If I thought this expedient would overcome the problems to which the parties referred, I would readily adopt it. However, I do not accept the parties' joint submission that it is only because of these allegations that the second respondent remains a proper and necessary party. The Amended Application seeks the imposition of penalties upon him, and other provisions of the Further Amended Statement of Claim contain detailed allegations of fact which would, or at least might, amply sustain such an outcome.

29 As a second alternative, the parties submitted that the proceeding should be dismissed in relation to the second respondent. This should be done, they submitted, by the order that the proceeding "otherwise be dismissed". I accept that submission. I consider that the making of such an order is an appropriate means of giving effect to the consent position reached by the parties in relation to the second respondent.

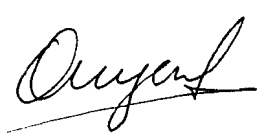
30 I should not conclude these reasons without placing on record an unfortunate event which occurred in the week prior to the matter coming on for trial. On 18 June 2008, five days before the trial was listed to commence, the second respondent sent an email to my staff in the following terms:

> I advised that I would report developments to you regarding this matter and it appears that this matter has reached settlement to be signed tomorrow morning.
>
> As I have mentioned to you previously, it is our view that the OWS has brought this action improperly with unsubstantiated allegations of duress. Our

> enquiries uncovered the fact that the Workplace Inspector (and applicant, Alan Wells) had knowingly concealed material evidence that would have dramatically affected the ultimate outcome of the proceedings. This involved concealment of evidence from a former staffmember directly contradicting material contained in the statement of claim and witness statements. Mr Wells did not discover notes from this interview and it was only by coincidence during a chance meeting with this lady that we learnt the truth.
>
> I intend to lodge a complaint with the Commonwealth Ombudsman as to the conduct of Mr Wells in bringing inappropriate proceedings in this manner.
>
> I guess when faced with this disturbing evidence, the OWS have agreed to drop most of the proceeding and we have agreed to accept one breach (down from the initial alleged 5 breaches) of the Act, even though as previously stated, we never breached the Act. However, when faced with a lengthy and costly legal battle against an applicant with unlimited funds and no prospect of a costs order, we have simply agreed to a fact that is untrue because it is commercially sensible to do so. I can assure you this was not an easy decision and should help to explain why it has taken so long to accept this unpalatable position.
>
> I understand that the agreed statement of facts will be filed with the court tomorrow for hearing of submissions on Monday.
>
> Please email or call if you have any further queries.

None of the allegations made against the "OWS" or the applicant in the email was maintained by either of the respondents at trial. I pointed out to counsel for the respondents, and he accepted, that at least some of the matters raised in the email were tantamount to allegations of an abuse of process, and would have given the respondents a basis for applying to have the proceeding permanently stayed. Unsurprisingly perhaps, in the light of the settlement of the proceeding, the parties desired that I should take no account of this email; and neither I have. It is mentioned here only because I consider it inappropriate that serious allegations of the kind referred to should be communicated to a Judge of the court in the circumstances in which they were without being placed on the open record.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate: 

Dated: 15 July 2008

Counsel for the Applicant:	Mr R Dalton
Solicitor for the Applicant:	DLA Phillips Fox
Counsel for the Respondents:	Mr J McDougall
Solicitor for the Respondents:	Tony Hargreaves & Partners
Date of Hearing:	23 June 2008
Date of Judgment:	15 July 2008