FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v RHD PTY LTD & ORS [2009] FMCA 1139

INDUSTRIAL LAW - Workplace Relations Act - duress applied to an employee in connection with an Australian Workplace Agreement – Respondents admitting liability on the morning of the hearing – appropriate penalty

Workplace Relations Act 1966 (Cth), s.400, 407 & 826

Kelly v Fitzpatrick (2007) FCA 1080
Rojas v Esselte Australia Pty Ltd (No.2) (2008) 177 IR 306, [2008] FCA 1585
Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2) (1999) 94 IR 231 at [7]-[8]

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	RHD PTY LTD (ACN 121 145 971)
Second Respondent:	ANTHONY WILLIAM EASTHER
Third Respondent:	DONALD BRUCE OLDMAN
File Number:	DNC 6 of 2008
Judgment of:	Terry FM
Hearing date:	16 July 2009
Date of Last Submission:	16 July 2009
Delivered at:	Darwin
Delivered on:	23 November 2009

REPRESENTATION

Counsel for the Applicant:	Mr James
Solicitors for the Applicant:	Clayton Utz
Counsel for the Respondent:	Mr Rowbottam
Solicitors for the Respondent:	Withnalls

AMENDED ORDERS

(1) Pursuant to ss.407(1)(b) and 407(2)(zi) of the *Workplace Relations Act 1996* (Cth) the First Respondent shall pay to the Commonwealth a penalty of ~~$13,500.00~~ $16,500.00 for a breach of s.400(5) of the Workplace Relations Act.

(2) Pursuant to ss.407(1)(a) and 407(2)(zi) of the *Workplace Relations Act 1996* (Cth) the Second and Third Respondents shall each pay to the Commonwealth a penalty of $3,300.00 for a breach of s.400(5) of the Workplace Relations Act.

NOTATION: These orders have been amended pursuant to rule 16.05(2)(e) of the *Federal Magistrates Court Rules 2001* **to reflect the deletion of the amount "$13,500.00" and insertion of the amount "$16,500.00" in Order 1**

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT DARWIN

DNC 6 of 2008

FAIR WORK OMBUDSMAN
Applicant

And

RHD PTY LTD (ACN 121 145 971)
First Respondent

And

ANTHONY WILLIAM EASTHER
Second Respondent

And

DONALD BRUCE OLDMAN
Third Respondent

REASONS FOR JUDGMENT

Introduction

1. On 22 August 2008 the Applicant (formerly known as the Workplace Ombudsman) commenced proceedings against RHD Pty Ltd (RHD), Anthony Easther and Donald Oldman seeking the imposition on them of civil penalties for an alleged breach of s.400(5) of the Workplace Relations Act.

2. S.400(5) of the Workplace Relations Act provides that:

> *"A person must not apply duress to an employer or employee in connection with an AWA."*

3. The Applicant alleged that the Second and Third Respondents, who at the time were the Company Secretary and the General Manager of RHD's operations in the Northern Territory and South Australia respectively, applied duress to Mary Hutchins, one of RHD's employees, by instructing the payroll officer, on Ms Hutchin's last day at work prior to commencing a period of maternity leave, not to pay Ms Hutchins her outstanding holiday pay and pro-rata salary until she signed a variation to her AWA.

4. The variation which the Second and Third Respondents wished Ms Hutchins to sign provided for her to be employed upon her return from maternity leave in a different position within the company at a significantly reduced salary.

5. S. 826(2) of the Act provides that:

> *Any conduct engaged in on behalf of a body corporate by:*
>
> *(a) an officer, director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; or*
>
> *(b) any other person at the direction or with the consent or agreement (whether express or implied) of an officer, director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the officer, director, employee or agent;*
>
> *shall be taken, for the purposes of this Act or the BCII Act (as the case requires), to have been engaged in also by the body corporate.*

6. Pursuant to this section the Applicant sought to have a penalty imposed on RHD as well as on the Second and Third Respondents.

7. The Respondents filed a joint defence on 17 November 2008 in which they denied liability. The matter was listed for hearing for three days on 15, 16 & 17 July 2009.

8. At the commencement of the hearing the Respondents' counsel advised the court that the Respondents intended to admit liability and that the

court would only be required to make a decision as to penalty. The matter was stood over until 16 July 2009 for submissions as to penalty.

The factual background

9. On 16 July 2009 the parties handed up an Agreed Statement of Facts. The following summary of the factual background is taken from that Agreed Statement of Facts.

10. Mary Hutchins commenced employment with PRD Realty in Darwin in 2004 and in December 2006 was employed as an accounts clerk on an annual salary of $46,000.00.

11. In December 2006 the First Respondent RHD purchased PRD Realty. All of PRD Realty's employees were terminated but most of the employees, including Ms Hutchins, were re-employed by RHD.

12. Ms Hutchins had become pregnant in September 2006. She discussed her pregnancy and impending maternity leave with the Second Respondent Mr Easther at the time RHD purchased PRD Realty. She informed Mr Easther that she wanted to take maternity leave from around 10 May 2007.

13. On 23 January 2007 Ms Hutchins signed an Australian Workplace Agreement (AWA) which provided among other things that her start date with RHD was 11 December 2006, that her classification was clerical and administrative employee and that her annual salary would be $46,000.00.

14. On about 20 February 2007 Ms Hutchins attended a meeting at which the Third Respondent Mr Oldman was present. She was informed that her position of accounts clerk was to be made redundant and that a full time accounts person was to be employed. Mr Oldman told Ms Hutchins that he could not guarantee that any position would be available to her upon her return from maternity leave.

15. Ms Hutchins informed Mr Oldman that he had to continue to employ her and she asked him to confirm details of the discussion in writing. Mr Oldman said that he would need to get advice before doing so.

16. On or about 26 February 2007 Mr Oldman told Ms Hutchins that she would be offered a new position in the company but that he could not advise her about the terms of the position.

17. On 11 March 2007 Ms Hutchins went on a month's annual leave. On her return to work on 10 April 2007 Mr Easther approached her. He offered her a position as a property management assistant, effective immediately, on an annual salary of $33,500.00.

18. At the request of Ms Hutchins Mr Easther agreed to continue paying her at the rate of $46,000.00 per annum until she went on maternity leave, which was agreed during the discussion would be on 27 April 2007.

19. Mr Easther said that he came away from the discussion with Ms Hutchins believing that she had agreed to accept the new position. Ms Hutchins was adamant that she had never agreed to accept the new position.

20. On 12 April 2007 Mr Easther presented Ms Hutchins with a variation to her AWA detailing the new position and salary. He requested that she sign the variation within seven days.

21. Ms Hutchins said that when she was asked to sign the variation to the AWA that she felt pressured and confused. Mr Easther agreed that Ms Hutchins appeared confused and appeared to 'baulk' at the request that she sign the variation but said that he did not understand why, as he thought that she had agreed to accept the new position.

22. Ms Hutchins did not sign the variation.

23. Ms Hutchins was due to start maternity leave on 27 April 2007 and on that day she requested payment of her entitlements, which were 12 days annual leave and pro rata pay for the working day of 27 April 2007. The total due to her was $2,591.09 gross.

24. Ms Hutchins told the payroll officer that she needed the money, as she had just been on holiday, was about to have a baby and was also moving house.

25. The payroll officer contacted Mr Oldman, who instructed her not to process the payment until Ms Hutchins had signed the variation to the AWA and returned her uniform and office keys. Shortly before 5.00pm the payroll officer told Ms Hutchins of these instructions.

26. Mr Oldman and Mr Easther later admitted to a Workplace Inspector that the decision to withhold payment to Ms Hutchins until she signed the variation to the AWA was a joint decision.

27. Ms Hutchins refused to sign the variation although she did eventually return her uniform and keys. On 4 May 2007 she lodged a complaint with the Workplace Ombudsman. On 22 May 2007 a Workplace Inspector contacted Mr Oldman, and after a discussion Mr Oldman agreed to immediately pay Ms Hutchins her entitlements. The entitlements were paid on 26 May 2007.

28. Mr Oldman and Mr Easther subsequently participated in recorded interviews with a Workplace Inspector. Mr Oldman said that he had acted on advice received from Don Tepper, an industrial advocate for the Real Estate Employers Federation of South Australia. Mr Easther confirmed Mr Oldman's account.

29. The Respondents admitted in the Agreed Statement of Facts handed up on 16 July 2009 that the instruction to the payroll officer to withhold Ms Hutchin's pay until she signed a variation to her AWA was an application of duress in connection with an AWA. RHD admitted that the conduct engaged in by Mr Oldman and Mr Easther was conduct engaged in by officers of RHD within the scope of the actual or apparent authority of each of them on behalf of RHD and within the meaning of s.826 of the Workplace Relations Act.

The submissions as to penalty

30. Pursuant to s.407(1) and (2)(zi) of the Act, a court may order a person who has contravened s.400(5) to pay a pecuniary penalty of up to:

    a) if the person is an individual – 60 penalty units (or $6,600.00);

    b) if the person is a body corporate – 300 penalty units (or $33,000.00).

31. The Applicant sought the imposition of a penalty of 50% of the maximum on each of the Respondents ie $3,300 in respect of the second and third respondents and $16,500.00 in respect of the company.

32. The Applicant's counsel handed up a written submission on 16 July 2009.

33. The Applicant submitted that Ms Hutchins was a vulnerable employee when the duress was applied. She was about to go on maternity leave and as a result of the instructions given to the payroll officer she was deprived of a sum of money which while not large in an objective sense was very important to her in her circumstances.

34. The money was not paid to Ms Hutchins until a month later and only after the intervention of the Workplace Ombudsman.

35. Mr Oldman and Mr Easther, who applied the duress, were part of the senior management of RHD. Both were based interstate and were responsible for the operations of the business at a 'state' level. RHD had approximately 20-25 employees at the time and while it was not a particularly large company it was not a small company either.

36. The Respondents did not admit liability until the first day of the hearing. It was submitted that there was a need for specific deterrence, as the Respondents had shown no contrition and their failure to admit liability at an earlier stage or to proffer an apology to Ms Hutchins suggested that they had no insight into the seriousness of their conduct.

37. It was further submitted by the Applicant that there was a need for general deterrence and that it was important that a reasonable penalty 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.*"[1]

38. The Applicant conceded that none of the Respondents had committed any previous civil penalty contraventions, but submitted that in light of the need for both specific and general deterrence, the fact that Ms Hutchins was a vulnerable employee, the fact that the conduct was only desisted in upon intervention by the Workplace Ombudsman and the

[1] Kelly v Fitzpatrick (2007) FCA1080

fact that senior management were involved, a mid-range penalty was appropriate in respect of each of the Respondents.

39. Counsel for the Respondents' made oral submissions concerning penalty.

40. The Respondents conceded that they had not apologised to Ms Hutchins for their actions. However the Respondents' counsel said that Ms Hutchins had taken proceedings against RHD alleging sexual and pregnancy discrimination and that during those proceedings Mr Oldman was apologetic.

41. There was no evidence from Mr Oldman in this regard and it was not clear exactly what Mr Oldman had been apologetic about.

42. The Respondent's counsel informed the court that Mr Brooks, a director of RHD, had asked that it be conveyed to the court that both he and his fellow director Mr Weston, realised that the conduct in respect of Ms Hutchins involved a serious error of judgment. Mr Brooks asked the court to accept that he and his fellow director now knew the true state of the law and would in future get proper advice about their obligations towards employees.

43. The Respondents' counsel asked the court to have regard to the fact Mr Oldman and Mr Easther voluntarily took part in records of interview with a Workplace Inspector and were frank in answering questions.

44. It was emphasised that Ms Hutchins had promptly been paid her entitlements once the Workplace Inspector spoke to Mr Oldman.

45. As to the individual circumstances of the Respondents, RHD was brought into existence solely for the purpose of acquiring the Raine & Horne real estate franchise in Darwin. It made a significant loss during its early period of trading. It was conceded during submissions that the directors of the company expected that the company would turn around.

46. The court was informed that Mr Easther had found the proceedings distressing and that the strain of the proceedings had had a psychological effect on him. No information was given about Mr Easther's financial circumstances.

47. Mr Easther pleaded in mitigation that he genuinely believed, after his conversation with Ms Hutchins on 12 April 2007 that she was willing to accept the new position at a lower salary. He admitted however that Ms Hutchins looked confused when he later asked her to sign a variation to her AWA.

48. Mr Oldman is 65 and is now a self-funded retiree. He has had a long history of involvement in business and in real estate and was formerly the president of the Central Districts Football Club in South Australia. It was submitted that Mr Oldman had found the proceedings against him distressing. No information was given about Mr Oldman's financial circumstances.

49. Mr Oldman pleaded in mitigation that he had genuinely believed, after his conversation with Ms Hutchins in February 2007, that she was receptive to the idea of accepting an alternative position in the company. He emphasised that he had made inquiries of Mr Don Tepper of the Real Estate Employers Federation of South Australia before withholding Ms Hutchins' entitlements and had acted on the advice he was given.

50. It was submitted that the publicity which would likely follow the handing down of the decision would be a punishment in itself, particularly for Mr Oldman and Mr Easther who took pride in their personal integrity and reputation.

51. Counsel for the Respondents' did not make any submissions about the quantum of the penalty but emphasised in particular that there was no need for specific deterrence as each of the Respondents had learned their lesson, that the Second and Third Respondents had been co-operative with the Workplace Inspector, that Ms Hutchins entitlements had been promptly paid to her once the error made by Mr Easther and Mr Oldman was pointed out to them, and that the publicity which would follow the decision would be a punishment in itself, particularly to Mr Oldman and Mr Easther.

Assessment of penalty

52. In *Rojas v Esselte Australia Pty Ltd (No.2)*[2] at 64 his Honour Moore J considered the decision of her Honour Branson J in *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)*[3] where her Honour said:

> *The Act gives no explicit guidance as to the circumstances in which an order imposing a penalty under s 298U of the Act will be appropriate or as to the circumstances in which a penalty of or near the maximum, or alternatively of a lesser amount, may be called for. The Court is simply directed to consider what is appropriate in all the circumstances of the case.*
>
> *The following matters, which are not intended to comprise an exhaustive list, seem to me to be considerations to which the Court may appropriately have regard in determining whether particular conduct calls for the imposition of a penalty, and assuming that it does, the amount of the penalty:*
>
> *(a) The circumstances in which the relevant conduct took place (including whether the conduct was undertaken in deliberate defiance or disregard of the Act);*
>
> *(b) Whether the respondent has previously been found to have engaged in conduct in contravention of Part XA of the Act;*
>
> *(c) Where more than one contravention of Part XA is involved, whether the various contraventions are properly seen as distinct or whether they arise out of the one course of conduct;*
>
> *(d) The consequences of the conduct found to be in contravention of Part XA of the Act;*
>
> *(e) The need, in the circumstances, for the protection of industrial freedom of association; and*
>
> *(f) The need, in the circumstances, for deterrence.*

53. At [65] of his decision, Moore J continued:

> *Although "check lists" of the above kind are a useful starting point in determining whether a penalty ought to be imposed, and*

[2] (2008) 177 IR 306, [2008] FCA 1585
[3] (1999) 94 IR 231 at [7]-[8]

> *if so the level of such penalty, at the end of the day the task of the Court is to fix a penalty that pays appropriate regard to the contraventions that have occurred:* Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith *[2008] FCAFC 8; (2008) 165 FCR 560 at [91]. Moreover, as the Full Court noted* in Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union *[2008] FCAFC 170 at [60], while general guidance as to the appropriate penalty may be obtained through an analysis of comparable cases, it remains necessary for the Court to give careful consideration to the circumstances of the case before it (see also* Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith *[2008] FCAFC 8; (2008) 165 FCR 560 at [12] per Gray J).*

54. In the particular case before me, I accept that there was no evidence that Mr Oldman or Mr Easther acted in deliberated defiance or disregard of the Workplace Relations Act, and I accept that none of the Respondents have previously been found to have engaged in conduct which contravened the Workplace Relations Act.

55. I accept that Mr Oldman and Mr Easther, and the directors of RHD regret what has occurred and that they will feel shame if the particulars of their conduct are publicised in a newspaper.

56. I accept that the publicity which may accompany this decision will be a punishment in itself for the Respondents, and in particular for the Second and Third Respondents, and I also accept that there is little need for specific deterrence in this matter. The directors of the First Respondent, and the Second and Third Respondents, have a long and unblemished record in business and have no doubt learned a salutary and expensive lesson as a result of these proceedings and other proceedings taken by Ms Hutchins.

57. However in my view the contravention of the Act was a serious one. It was carried out by two men who were part of the senior management of the company, and men who had considerable experience in business. It is difficult to accept that Mr Oldman and Mr Easther genuinely believed that Ms Hutchins had so readily agreed to accept an alternative position in the company at a salary 25% less than she had been receiving, and even if they did believe this for a time after their conversations with Ms Hutchins, it must have become clear to them by the time Ms Hutchins was due to go on maternity leave that she was not happy to sign the variation to her AWA. They nevertheless applied

illegitimate pressure in an attempt to coerce her into signing the variation.

58. The duress applied to Ms Hutchins placed Ms Hutchins in a difficult position. She was about the leave the workforce for a period of time she made it clear to the payroll officer that she particularly needed the money. The money to which Ms Hutchins was entitled was withheld from her for a month, and was only paid after she made a complaint to the Workplace Ombudsman.

59. The Second and Third Respondents co-operated with the Workplace Ombudsman in that they took part in records of interview and promptly paid Ms Hutchins her entitlement. However there is no evidence of contrition and there was no early admission of liability which might justify a discount being applied to the penalty.

60. Although I do not accept the submission by the Applicant's counsel that there is a need for specific deterrence in this case, there is a need for general deterrence. I am satisfied that the contravention of the act was serious and that it is appropriate to impose the mid-range penalties proposed by the Applicant. I therefore intend to impose a penalty of $16,500.00 in respect of the company and $3,300.00 in respect of the second and third respondent respectively.

61. The Applicant sought an order that any penalty imposed be paid to the Commonwealth.

62. For all of the above reasons the orders of the court shall be as set out at the beginning of this judgment.

I certify that the preceding sixty two (62) paragraphs are a true copy of the reasons for judgment of Terry FM

Associate: Barbara Cameron

Date: 23 November 2009