FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Transport Workers' Union of Australia

[2010] FCA 768

Citation:	Fair Work Ombudsman v Transport Workers' Union of Australia [2010] FCA 768
Parties:	**FAIR WORK OMBUDSMAN v TRANSPORT WORKERS' UNION OF AUSTRALIA**
File number:	SAD 158 of 2009
Judge:	**BESANKO J**
Date of judgment:	23 July 2010
Catchwords:	**INDUSTRIAL LAW** – application for pecuniary penalties for organising strike action in contravention of s 494(1) of the *Workplace Relations Act 1996* (Cth) – where respondent admitted contraventions – where strike action took place during review process which could have resulted in a loss of work or wages for the respondent's members – where respondent had not previously been found liable for similar contraventions – where respondent's conduct was deliberate, but respondent expressed contrition and co-operated with authorities – where parties had proposed agreed penalties for two contraventions of *Workplace Relations Act 1996* (Cth)
Legislation:	*Building and Construction Industry Improvement Act 2005* (Cth) *Fair Work Act 2009* (Cth) s 687 *Fair Work (Transitions and Consequential Amendments) Act 2009* (Cth) *Federal Court Rules* O 6 r 17 *Retail Marketing Sites Act 1980* (Cth) *Trade Practices Act 1974* (Cth) *Workplace Relations Act 1996* (Cth) s 420, s 494
Cases cited:	*Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 followed *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 followed *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61 applied *The Attorney-General v Tichy* (1982) 30 SASR 84 discussed

Date of hearing:	6 April 2010
Place:	Adelaide
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	32
Counsel for the Applicant:	Mr J Bourke
Solicitor for the Applicant:	Clayton Utz
Counsel for the Respondent:	Mr A Hatcher
Solicitor for the Respondent:	Maurice Blackburn Lawyers Pty Ltd

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **SAD 158 of 2009**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**TRANSPORT WORKERS' UNION OF AUSTRALIA** **Respondent**

JUDGE:	**BESANKO J**
DATE OF ORDER:	**23 JULY 2010**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. A penalty of $17,500 be imposed on the respondent for organising strike action by workers at the Ramp Services Area at Adelaide Airport on 12 December 2007 between 12.50 pm and 9.00 pm in contravention of s 494(1) of the *Workplace Relations Act 1996* (Cth).

2. A penalty of $17,500 be imposed on the respondent for organising a ban by workers at the Ramp Services Area at Melbourne Airport on the handling of baggage in respect of flights coming from or going to Adelaide on 12 December 2007 between 3.10 pm and 9.25 pm in contravention of s 494(1) of the *Workplace Relations Act 1996* (Cth).

3. The penalties imposed on the respondent in paragraphs 1 and 2 above be paid into the Consolidated Revenue Fund on or before 23 August 2010.

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 Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
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JUDGE:	**BESANKO J**
DATE:	**23 JULY 2010**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

1 On 12 October 2009, the Fair Work Ombudsman issued an application for the imposition of penalties pursuant to s 494(1) and s 494(5) of the *Workplace Relations Act 1996* (Cth) ("WR Act") on the Transport Workers' Union of Australia. The details of the claim are as follows:

> "... the Applicant claims the following:
>
> 1. The imposition of a penalty on the Respondent for a contravention of s 494(1) of the WR Act by reason of the Respondent organising industrial action at Adelaide Airport on 12 December 2007.
> 2. The imposition of a penalty on the Respondent for a contravention of s 494(1) of the WR Act by reason of the Respondent organising industrial action at Melbourne Airport on 12 December 2007."

2 At the hearing of the application, the applicant, with the consent of the respondent, tendered a document entitled, "A Statement Of Agreed Facts, Admissions and Recommended Orders". In that document, the parties state that they jointly submit to the Court that the following orders are appropriate:

> "(a) A penalty of $17,500 be imposed on the Respondent for its contravention of s 494(1) of the WR Act by reason of its organisation of industrial action on 12 December 2007 at Adelaide airport.
>
> (b) A penalty of $17,500 be imposed on the Respondent for its contravention of s 494(1) of the WR Act by reason of its organisation of industrial action on 12 December 2007 at Melbourne airport.
>
> (c) The penalties imposed on the Respondent be paid into the Consolidated Revenue Fund."

3 The respondent tendered an affidavit of Mr Michael Kaine who is the Assistant Federal Secretary of the respondent. Both parties made submissions as to the appropriate penalties.

THE CORRECT APPROACH TO AGREED PENALTIES

4 The correct approach of the Court to a statement of agreed penalties was addressed by the Full Court of this Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 ("*NW Frozen Foods*") and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 ("*Mobil Oil*"); [2004] ATPR 41-993. *NW Frozen Foods* involved a consideration of penalties under the *Trade Practices Act 1974* (Cth) ("TP Act"), and *Mobil Oil* involved a consideration of penalties under the *Petroleum Retail Marketing Sites Act 1980* (Cth).

5 In *Mobil Oil*, the Full Court was asked to consider whether, in a case where the parties proposed an agreed amount to be imposed as a penalty, the Court was bound by the decision in *NW Frozen Foods* to consider whether the proposed amount was within the permissible range in all of the circumstances and, if so, impose a penalty of that amount.

6 In *Mobil Oil*, the Full Court (at [51]) summarised the propositions which emerged from the reasoning in *NW Frozen Foods*:

> "(i) It is the responsibility of the Court to determine the appropriate penalty to be imposed under s 76 of the *TP Act* in respect of a contravention of the *TP Act*.
>
> (ii) Determining the *quantum* of a penalty is not an exact science. Within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another.
>
> (iii) There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy. Accordingly, when the regulator and contravenor have reached agreement, they may present to the Court a statement of facts and opinions as to the effect of those facts, together with joint submissions as to the appropriate penalty to be imposed.
>
> (iv) The view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty. In particular, the views of the regulator on matters within its expertise (such as the ACCC's views as to the deterrent effect of a proposed penalty in a given market) will usually be given greater weight than its views on more "subjective" matters.

(v) In determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case. Where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so.

(vi) Where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court's view, appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if within the permissible range."

7 The Full Court then said there were five further points to be made. First, they discussed the rationale identified by the Court in *NW Frozen Foods* for giving weight to a joint submission on penalty. Secondly, the Court observed that the reasoning in *NW Frozen Foods* did not mean that the Court must commence its reasoning with the proposed penalty and limit itself to considering whether the penalty is within the permissible range. It is open to the Court to take that approach; however, it is not bound to do so. Thirdly, the Full Court noted that the Full Court in *NW Frozen Foods* had acted on the basis of clear admissions and a detailed statement of agreed facts setting out how the contraventions had occurred. Fourthly, the Full Court affirmed the proposition that the regulator should always explain to the Court the process of reasoning that it contends justifies a discounted penalty. Finally, the Full Court said that there was nothing inconsistent in *NW Frozen Foods* with the proposition that the Court may request the parties to provide additional evidence or information or verify the information provided, or with the proposition that, in the absence of a contradictor, the Court may seek the assistance of an amicus curiae or of an individual or body prepared to act as an intervener under O 6 r 17 of the *Federal Court Rules*, or with the proposition that, if the Court is not disposed to impose the penalty proposed by the parties, it may be appropriate for the parties to be given the opportunity to withdraw consent to the proposed orders and for the matter to proceed as a contested hearing.

8 In the result, the Full Court in *Mobil Oil* said that the criticisms which had been made of *NW Frozen Foods* in decisions of single judges did not warrant any departure from the principles stated in the case.

THE FACTS

9 By reason of the *Fair Work (Transitions and Consequential Amendments) Act 2009* (Cth) ("the Transitional Act"), the WR Act repeal day is 1 July 2009. By reason of Schedule 2, Part 3, sub-item 11(1) of the Transitional Act, the WR Act continues to apply, on and after the WR Act repeal day in relation to conduct that occurred before the WR Act repeal day. By reason of Schedule 18, Part 3, sub-item 13(1) of the Transitional Act, for the purposes of the application of the WR Act in relation to conduct that occurred before the WR Act repeal day, an application that could have been made or continued by a workplace inspector may be made or continued, on and after the WR Act repeal day, by a Fair Work Inspector. By reason of s 494(7) of the WR Act, an application for the imposition of a pecuniary penalty on a person for a contravention of s 494(1), may be made by, among other persons, a workplace inspector.

10 At all material times, the applicant was a statutory appointee of the Commonwealth, appointed by the Governor-General by written instrument pursuant to s 687 of the *Fair Work Act 2009* (Cth) ("FW Act"). By reason of s 701 of the FW Act, the applicant is a Fair Work Inspector. The applicant brings this proceeding for two contraventions of s 494(1) of the WR Act.

11 At all material times, the respondent was an organisation within the meaning of that term in the WR Act; a body corporate by reason of Schedule 1, clause 27 of the WR Act; and a party to and bound by, the *Transport Workers' Union (Qantas Airways Limited) Enterprise Bargaining Agreement VI (2005-2008)* ("the TWU Agreement").

12 At all material times, Qantas Airways Limited ("Qantas") was a party to and bound by the TWU Agreement; employed various employees who were members of, or eligible to be members of, the TWU to work at the Qantas Ramp Services Division at the Adelaide airport ("the Adelaide Ramp"); employed various employees who were members of, or eligible to be members of, the TWU to work at the Qantas Ramp Services Division at the Melbourne airport ("the Melbourne Ramp"); was an employer within the meaning of s 6 of the WR Act in so far as it employed the Qantas Adelaide employees at the Adelaide airport and employed the Qantas Melbourne employees at the Melbourne airport; engaged Blue Collar Recruitment Pty Ltd ("Blue Collar") to provide labour to work at the Adelaide Ramp;

and engaged Ready Workforce (a division of Chandler Macleod) Pty Ltd ("Ready Workforce") to provide labour to work at the Adelaide Ramp.

13 At all material times, each of the Qantas Adelaide employees and the Qantas Melbourne employees was an employee for the purposes of s 420 and s 494 of the WR Act; was a party to, and bound by, the TWU Agreement; and performed work as an employee of Qantas at the Adelaide Ramp ("Qantas Adelaide employees") or at the Melbourne Ramp ("Qantas Melbourne employees") as the case may be. At all material times, the overwhelming majority of the Qantas Adelaide employees and the Qantas Melbourne employees were members of the TWU.

14 At all material times, each of the Blue Collar workers was an employee or contractor for Blue Collar; and performed work for Qantas at the Adelaide Ramp. At all material times, the overwhelming majority of the Blue Collar employees were members of the TWU. At all material times, each of the Ready Workforce employees was an employee or contractor for Ready Workforce; and performed work for Qantas at the Adelaide Ramp. At all material times, the overwhelming majority of the Ready Workforce employees were members of the TWU.

15 The TWU agreement was at all material times a pre-reform certified agreement within the meaning of Schedule 7 clause 1 of the WR Act; was by reason of Schedule 7 clause 6 of the WR Act, at all material times to be treated for the purposes of s 494 of the WR Act as if it was a collective agreement; was certified by the Australia Industrial Relations Commission on 13 October 2005, and came into force on that date; had a nominal expiry date of 1 July 2008, pursuant to cl 2 of the TWU agreement which set out its period of operation; and contained the terms and conditions of employment that governed the work of the Qantas Adelaide employees and the Qantas Melbourne employees.

16 In or about early December 2007, Qantas decided to undertake a formal review into the operation and efficiency of the belt room section of the Adelaide Ramp. The review was through a tender process involving external suppliers being asked to quote on the supply of belt room functions ("the Tender Review Process"). On 11 December 2007, there was a meeting between Qantas management, Mr John Loader who was a TWU organiser, and several TWU delegates to discuss Qantas's intention to conduct the Tender Review Process.

The meeting was conducted in the Adelaide Airport Qantas Conference Room and was attended by Mr Alex Jeffries, the Qantas Airport Manager-Adelaide, Mr David Shuker, the Qantas Ramp Services Manager, Mr Con Katsambis, the Qantas People Manager, Mr Loader, Mr Craig Moir, a TWU delegate, Mr Greg Moroney, a TWU delegate, and Mr Andrew Mattison, a TWU delegate. The meeting started at 11.30 am and finished at approximately 1.05 pm. There was a Powerpoint presentation by Qantas management to Mr Loader and the TWU delegates.

17 The Tender Review Process raised the prospect that the work currently performed by TWU members in the belt room at the Adelaide Ramp would be "outsourced" to an external supplier which could result in job losses for TWU members working at the Adelaide Ramp or significant wage losses for TWU members working at the Adelaide Ramp who accepted work with an external provider as those members would no longer have their terms and conditions of employment determined by the TWU Agreement or have both of these consequences. By reason of those matters, the TWU objected to the Tender Review Process and engaged in the industrial action described below to prevent the Tender Review Process from proceeding.

18 At approximately 12.15 pm, Mr Alex Gallacher, the Secretary of the South Australian and Northern Territory Branches of the TWU, and for and on behalf of the TWU, addressed the Qantas Adelaide employees who worked at the Adelaide Ramp about the Tender Review Process. Mr Gallacher encouraged the Qantas employees to take industrial action by not performing any further duties for the benefit of Qantas until Mr Jeffries met with the Qantas Adelaide employees concerning the withdrawal of the Tender Review Process. From between 12.15 pm and 9.00 pm on 12 December 2007, the Qantas Adelaide employees, the Blue Collar employees and the Ready Workforce employees were required pursuant to their terms of employment to perform work at the Adelaide Ramp for Qantas. By reason of the organisation of the Adelaide industrial action, from 12.50 pm until 9.00 pm on 12 December 2007, the Adelaide workers refused to perform any work, despite being required to do so at the Adelaide Ramp. The Adelaide strike by the Adelaide workers constituted "industrial action" by the Adelaide workers within the meaning of that term in s 420(1)(a), (b) and (c) of the WR Act. At all material times for the duration of the Adelaide strike, the TWU, through its officials, advised Qantas that the Adelaide strike would not cease until Mr Jeffries met with the Qantas Adelaide employees concerning the withdrawal of the Tender Review

Process. Following negotiations between the TWU and Qantas, at 9.00 pm on 12 December 2007, the Adelaide strike ceased and there was a return to work by the Adelaide workers at the Adelaide Ramp.

19 From between 3.10 pm and 9.25 pm on 12 December 2007, the Qantas Melbourne employees were required pursuant to their terms of employment to perform work at the Melbourne Ramp, such work including handling baggage in respect of flights coming from or going to Adelaide. The TWU, through its delegates, organised for the Qantas Melbourne employees to engage in industrial action from between 3.10 pm and 9.25 pm on 12 December 2007 by the Qantas Melbourne employees refusing at the Melbourne Ramp to handle baggage in respect of flights coming from or going to Adelaide. The Melbourne baggage handling ban constituted "industrial action" by the Qantas Melbourne employees within the meaning of that term in s 420(1)(a) and (b) of the WR Act. Following negotiations between the TWU and Qantas, at 9.25 pm on 12 December 2007 the Melbourne baggage handling ban ceased and there was a return to normal duties by the Qantas Melbourne employees at the Melbourne Ramp.

20 By reason of the TWU organising the Adelaide strike on 12 December 2007, the TWU contravened s 494(1) of the WR Act by organising industrial action prior to the nominal expiry date of the TWU agreement. By reason of the TWU organising the Melbourne baggage handling ban on 12 December 2007, the TWU contravened s 494(1) of the WR Act by organising industrial action prior to the nominal expiry date of the TWU agreement.

21 The Statement of Agreed Facts contains a table which sets out details of the effects of the Adelaide strike on flights scheduled to depart from Adelaide and a table which sets out details of the effects of the Melbourne strike on flights destined to travel from Melbourne to Adelaide. In terms of the Adelaide strike, 15 flights out of Adelaide were delayed with a minimum delay of 6 minutes and a maximum delay of 3 hours and 12 minutes. In terms of the Melbourne baggage handling ban, three (probably four) flights scheduled to fly from Melbourne to Adelaide were delayed with a minimum delay of one hour and 35 minutes and a maximum delay of 5 hours and 20 minutes.

22 Qantas did not proceed with the Tender Review Process after 12 December 2007.

23 In August 2009, the TWU agreed with the Fair Work Ombudsman to support and encourage its members to participate in a one-hour training program on the following terms:

(a) the training will occur at all capital city airports where Qantas agrees to provide one hour's paid training time for each training session;

(b) the training will be jointly conducted by the Fair Work Ombudsman with the TWU and its officials prior to the penalty hearing in this proceeding (if possible);

(c) the training will be about the rights and obligations of employees, unions and union officials under the FW Act; and

(d) the Fair Work Ombudsman will, in consultation with the TWU, develop and finalise the training materials and will provide the TWU with the training materials in advance of the training session.

24 Mr Kaine's affidavit establishes, and, in any event, it is not disputed by the applicant, that the TWU has not previously been found guilty of a contravention of the WR Act or its "predecessors". Furthermore, Mr Kaine deposes to the fact that the TWU has agreed to support and encourage its members to participate in a training program conducted jointly with the applicant about the rights and obligations of employees and officials under the FW Act. The training was expected to take place early in 2010, subject to Qantas releasing TWU members to attend the training.

25 During submissions, I was told that the training program was implemented in March of this year and that the terms of the program were met. I was also told without objection that it was a condition of the agreement between the applicant and the respondent before the commencement of this proceeding that the applicant would take no further action against the respondent, its officers or members, in relation to the conduct which occurred on 12 December 2007.

THE APPROPRIATE PENALTIES

26 The considerations which are relevant to the fixing of the appropriate penalties are well established. The major considerations were summarised, although in the context of the *Building and Construction Industry Improvement Act 2005* (Cth), by Tracey J in *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61 at [40].

27 The first consideration is the nature and extent of the conduct which led to the contraventions. The applicant submits that the conduct is substantial and serious, and in my opinion that is a correct characterisation of the conduct. The second consideration is the circumstances in which the relevant conduct took place. I take into account that the strikes took place in the context of the Tender Review Process which raised the prospect of TWU members losing their employment or suffering significant wage losses. I do not think that that is a mitigating factor, but it does mean that the circumstances in which the relevant conduct took place are not as serious as if, for example, the industrial action was motivated by a desire to secure better conditions. The third consideration is the nature and extent of any loss and damage sustained as a result of the contraventions. There was no evidence of any economic loss sustained by Qantas as a result of the industrial action. Nevertheless, the inconvenience to the travelling public caused by the industrial action must have been considerable. The fourth consideration is whether there has been similar prior conduct by the respondent. As I have said, in this case, the TWU has not previously been found guilty of a contravention of the WR Act or its "predecessors". The fifth consideration is whether the breaches were properly distinct or arose out of the one course of conduct. Even though the conduct in this case was related conduct in the sense that it had a common cause, I do not think that it was one course of conduct such that the penalties should be reduced on account of that fact. In *The Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93, Wells J said:

> "But the practice and principles of sentencing owe little to such procedure; what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. ... Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was

> truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient."

28 Even though the cause of the industrial action might have been "historically interdependent", in my opinion there were two distinct contraventions in this case.

29 The sixth consideration is whether or not the contraventions were deliberate. The contraventions in this case were deliberate and that is an important consideration. The seventh consideration is whether senior management were involved in the contraventions. The Adelaide strike resulted from encouragement by Mr Gallacher who was the Secretary of the South Australian and Northern Territory Branches of the TWU. The eighth consideration is whether the respondent has exhibited contrition. To a point, this overlaps with the issues of co-operation and corrective action. During submissions, the following statement was made on behalf of the respondent:

> "The Transport Workers' Union expresses its regret that in seeking to prevent the prospect of its members' work being outsourced with a result of a loss of jobs, or a reduction in wages, it took action, which by disrupting normal work, caused inconvenience to the travelling public."

30 I think that is an expression of contrition. The ninth consideration is whether the respondent has taken corrective action. To a point, that has occurred by reason of the training program which was conducted in March 2010. The tenth consideration is whether the party committing the contravention has co-operated with the enforcement authorities. I was told by counsel for the respondent, without objection from counsel for the applicant, that the admission and the entry into of the agreed statement of facts occurred prior to the institution of proceedings. There has been no expense, time or effort expended on contested legal proceedings in this case. The eleventh consideration is the need for deterrence, both specific deterrence and general deterrence. This is an important consideration in this case having regard to the fact that the contraventions were deliberate and the fact that it was not suggested that the respondent's officials were not aware of the law at the time the contraventions took place.

31 The respondent provided a schedule setting out penalties imposed in other cases for unlawful industrial action. It is no criticism of the respondent to say that that is of limited assistance having regard to the different circumstances in each of those cases.

CONCLUSIONS

32 The maximum penalty for each contravention is a pecuniary penalty of $33,000. The proposed penalty in the case of each contravention is $17,500, which is 53 per cent of the maximum penalty. I think the relevant factors are reasonably clear in this case. The respondent has taken corrective action, it has expressed contrition and it has co-operated with the authorities from an early stage. On the other hand, the contraventions were serious and were deliberate. The Adelaide strike resulted from encouragement by a high ranking official of the respondent. In those circumstances, a substantial penalty is called for in the case of each contravention. I think a penalty in the order of 50 per cent is appropriate, and, in those circumstance, I will impose the penalties jointly agreed by the parties.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate: 

Dated: 23 July 2010