FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Maritime Union of Australia [2013] FCA 216

Citation:	Fair Work Ombudsman v Maritime Union of Australia [2013] FCA 216
Parties:	**FAIR WORK OMBUDSMAN v MARITIME UNION OF AUSTRALIA and WILLIAM TRACEY**
File number:	WAD 117 of 2011
Judge:	**BARKER J**
Date of judgment:	31 October 2012
Catchwords:	**INDUSTRIAL LAW** – respondents admitted contraventions of s 417(1) of *Fair Work Act 2009* (Cth) – parties submitted proposed penalties for Court's consideration – factors to consider in determining whether penalties are appropriate
Legislation:	*Crimes Act 1914* (Cth) s 4AA *Fair Work Act 2009* (Cth) s 19(1)(c), s 417(1), s 417(2), s 539(2), s 546, s 793(1) *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 3 item 3 *Workplace Relations Act 1996* (Cth) s 328, s 494(1)
Cases cited:	*Alfred v Wakelin (No 1)* [2008] FCA 1455 *Alfred v Walter Construction Group Limited* [2005] FCA 497 *Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union* [2011] FCA 810 *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Thornton Engineering Australia Pty Ltd* [2009] FCA 1584; (2009) 191 IR 315 *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union* [2001] FCA 336 *Cahill v Construction, Forestry, Mining and Energy Union (No 4)* [2009] FCA 1040; (2009) 189 IR 304 *Fair Work Ombudsman v Maritime Union of Australia* [2013] FCA 215 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; (2004) ATPR 41-993 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70;

(2008) 168 FCR 383

Date of hearing:	31 October 2012
Place:	Perth
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	37
Counsel for the Applicant:	Mr J Bourke SC
Solicitor for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	Mr C Dowling
Solicitor for the Respondents:	Maurice Blackburn

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **WAD 117 of 2011**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**MARITIME UNION OF AUSTRALIA** **First Respondent**
	WILLIAM TRACEY **Second Respondent**

JUDGE:	**BARKER J**
DATE OF ORDER:	**31 OCTOBER 2012**
WHERE MADE:	**PERTH**

THE COURT ORDERS THAT:

1. A monetary penalty of $13,200 be imposed pursuant to s 546 of the *Fair Work Act 2009* (Cth) (FW Act) on the first respondent for organising a 24 hour strike at the Broome Port Authority in Western Australia on 30 March 2010 in contravention of s 417(1) of the FW Act.

2. A monetary penalty of $3,630 be imposed pursuant to s 546 of the FW Act on the second respondent for organising a 24 hour strike at the Broome Port Authority in Western Australia on 30 March 2010 in contravention of s 417(1) of the FW Act.

3. The above penalties be paid to the Consolidated Revenue Fund of the Commonwealth in accordance with s 546(3) of the FW Act within 30 days of the date of this order.

4. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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AND:	**MARITIME UNION OF AUSTRALIA** **First Respondent**
	WILLIAM TRACEY **Second Respondent**

JUDGE:	**BARKER J**
DATE:	**31 OCTOBER 2012**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

1 On 31 October 2012, I made orders pursuant to s 546 of the *Fair Work Act 2009* (Cth) (FW Act) imposing monetary penalties on the first and second respondents. These are the reasons for so doing.

RELEVANT FACTS

2 At all material times, the first respondent and the Broome Port Authority (BPA) were parties to the *BPA Agreement 2008* (Agreement), a union collective agreement made under s 328 of the *Workplace Relations Act 1996* (Cth) (WR Act) and continued into existence after the commencement of the FW Act by Sch 3, item 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). The Agreement commenced operation on 6 January 2009 and had a nominal expiry date of 31 October 2011.

3 On 30 March 2010, at approximately 11:30am, the second respondent, who was at all material times employed as the assistant secretary of the Western Australian branch of the first respondent, conducted a meeting at the Port of Broome with approximately 20 BPA employees (meeting). Each of the BPA employees was at all material times covered by the Agreement.

4 During the meeting, the second respondent proposed a motion that the employees withdraw their labour for 24 hours and spoke in support of the motion. A ballot was held and the employees in attendance at the meeting collectively voted in favour of the motion.

5 Shortly after the meeting, the second respondent had a conversation with Mr Victor Justice, at all material times the BPA Chief Executive Officer, and Mr Kenneth Burleigh, at all material times the BPA Harbour Master and Marine Pilot, to the following effect:

- The second respondent advised Mr Justice that the port workers were on strike for 24 hours and if there was no satisfaction after they met tomorrow then they would go on strike again.
- Mr Justice stated that the strike was not a legal one and enquired about the reasons for it.
- The second respondent advised that the problems were known and that they had not been fixed so the workers were going on strike.
- Mr Justice said that this was “very disappointing behaviour”.
- The second respondent replied that this was what happened after the way he was treated by management last time he was at the port.
- Mr Justice started to say that the rules were being followed.
- The second respondent turned and said that the BPA had been disrespectful and that he would be available on the phone.

6 Between the conclusion of the meeting and approximately 11:30am on 31 March 2010, 15 BPA employees (striking employees) either failed to complete their shift or refused to work as rostered (strike, or unlawful industrial action).

PROCEEDINGS BEFORE THIS COURT

7 On 19 April 2011, the current proceedings were commenced on behalf of the applicant.

8 On 24 September 2012, the parties agreed to a resolution of the proceedings, with the respondents admitting liability and the parties agreeing to penalties to be submitted for the Court's consideration (proposed penalties).

9 On 31 October 2012, I made orders pursuant to s 546 of the *Fair Work Act 2009* (Cth) imposing the proposed penalties on the first and second respondents, as well as an order imposing no order as to costs.

UNLAWFUL INDUSTRIAL ACTION

10 Sub-sections 417(1) and (2) of the FW Act provide:

> (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:
> (a) an enterprise agreement is approved by the [Fair Work Commission] until its nominal expiry date has passed; or
> (b) a workplace determination comes into operation until its nominal expiry date has passed;
> whether or not the industrial action relates to a matter dealt with in the agreement or determination.
>
> (2) The persons are:
> (a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or
> (b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

11 "Industrial action" is defined in s 19(1) of the FW Act to include:

> (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

12 Section 793(1) of the FW Act provides:

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

13 It is agreed by the parties, and I accept, that the strike:

- constituted industrial action within the meaning of s 19(1)(c) of the FW Act;

- took place when the Agreement was in operation and prior to its nominal expiry date; and
- was engaged in by the striking employees in contravention of s 417(1) of the FW Act.

14 It is also agreed and I accept that the second respondent organised the strike in contravention of s 417(1).

15 Lastly, it is agreed and I accept that the second respondent's conduct was engaged in for and on behalf of the first respondent and, therefore, pursuant to s 793(1) of the FW Act, the first respondent also contravened s 417(1).

PENALTIES FOR CONTRAVENING S 417(1) OF THE FW ACT

16 Pursuant to ss 539(2) and 546(2) of the FW Act, and s 4AA of the *Crimes Act 1914* (Cth) (as it then applied), the maximum penalties available for a contravention of s 417(1) of the FW Act are:

- for a body corporate, $33,000 (300 penalty units); and
- for an individual, $6,600 (60 penalty units).

17 The penalty which the parties agreed ought to be paid by the first respondent for contravening s 417(1) of the FW Act is $13,200, which represents 40% of the maximum penalty available. The penalty which the parties agreed ought to be paid by the second respondent for contravening s 417(1) is $3,630, which represents 55% of the maximum penalty available.

18 The principles applicable where the parties have agreed on penalties were summarised by the Full Court in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; (2004) ATPR 41-993 at [51]:

- It is the responsibility of the Court to determine the appropriate penalty.
- 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.

- There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy.
- The view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty.
- 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.
- 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.

These principles have been applied numerous times in an industrial context, including cases involving contraventions of the FW Act. In imposing the proposed penalties on the first and second respondents I have taken these considerations into account.

GENERAL PRINCIPLES FOR DETERMINING PENALTIES FOR A CIVIL CONTRAVENTION

19 The purposes to be served by the imposition of penalties are threefold:

- punishment, which must be proportionate to the offence and in accordance with prevailing standards;
- deterrence, both specific and general; and
- rehabilitation: *Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union* [2011] FCA 810 (*Australian Building & Construction Commissioner*) at [26] and the authorities there cited.

20 The task with which the Court is faced in determining the appropriate penalties is one of "instinctive synthesis": *Australian Building & Construction Commissioner* at [27] and the authorities there cited. This task requires the Court to take into account all relevant factors and to arrive at a result which takes due account of them all.

21 In this regard, a number of factors are relevant, including:

- The nature and extent of the conduct which led to the contraventions.
- The circumstances in which the conduct took place.
- The nature and extent of any loss or damage sustained as a result of the contravening conduct.
- Whether there has been similar previous conduct by the respondents.
- Whether the contraventions were properly distinct or arose out of the one course of conduct.
- The size of the business enterprise involved.
- Whether or not the contravening conduct was deliberate.
- Whether senior management was involved in the contravening conduct.
- Whether the party committing the contravening conduct has exhibited contrition.
- Whether the party committing the contravening conduct has taken corrective action.
- Whether the party committing the contravening conduct has cooperated with the enforcement authorities.
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements.
- The need for specific and general deterrence.

See *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 (*Australian Opthalmic Supplies*) at [89]-[90] (Buchanan J) and the authorities there cited. However, ultimately the assessment of what, if any, penalties should be imposed is an exercise of the Court's discretion.

APPROPRIATE PENALTIES IN THIS CASE

22 *Nature and extent of the unlawful industrial action and the circumstances in which it occurred*: The nature and extent of the unlawful industrial action was outlined above. However, the circumstances in which the unlawful industrial action arose deserve attention.

23 The catalyst of the unlawful industrial action was the events that occurred on 5 March 2010, when the second respondent attended a consultative committee meeting at the Port of Broome. At first, the BPA refused to allow the second respondent to attend and speak at the meeting and the meeting was postponed. However, the meeting then proceeded with the second respondent in attendance as an observer. At the conclusion of the meeting the second respondent intimated that it was fine for the BPA management to continue to act as they had done while the Port was quiet, but that he would return when it was busier and "bring the Port to its knees".

24 Then, during the second week of March 2010, the second respondent prepared and caused to be distributed among the BPA employees a flyer bearing the first respondent's logo entitled "Broome Port Authority MUA Update – Broome Port Management Lose the Plot" (flyer). The flyer set out the complaints of the first and second respondents, including that:

- Management had been riding rough shod over the committee, implementing and achieving very little of what the workforce put up at the meetings and treating the committee, and therefore the workforce, with very little respect.
- The management team have no respect for their own workforce and basic workplace courtesies such as consulting workers when you are going to make changes that affect them. Nor do they have the common decency to prioritise capital spending so that issues that affect the workforce are out at the very front of the line in terms of the spending priorities of the Port. Not putting the building of a room to house archived lever arch files ahead in priority of decent ablution blocks on the wharf and reasonable gate house.
- We had to have a debate with the management team that it would appear to at least be reasonable to notify your workforce of changing the way they are paid to six minute increments rather than having them find out when their pay slips come through.
- The Port takes jobs of workers, jobs that would keep some in work over the quiet periods, through the flick of a pen. There appears to be no understanding that informing workers of change is a far cry from actual meaningful consultation.
- There appears to have been a seismic change in relation to the way in which the Port treats its own employees. It is about penny pinching and cut backs at the bottom end and an ever expanding growth of workers at the top end.

25 Although, as was agreed by the respondents, the industrial action was unlawful, I accept that it arose out of concerns for the treatment of the BPA employees. As such, the conduct of the respondents is to be contrasted with conduct carried out for arbitrary or base motives. However, I also accept that the second respondent made no attempt to follow the dispute settling procedure in cl 9 of the Agreement and, instead, the unlawful industrial action was organised before there was any attempt to negotiate with the BPA.

26 *Nature and extent of any loss or damage*: The strike commenced on a busy day for the BPA, with there being three vessels being worked at that time. This involved, inter alia, trucks coming and going as well as service organisations bringing chemicals, fuel and other matters to the vessels. As a consequence of the strike, there was no further work done on the vessels for the duration of the strike, and one vessel due to be worked was instead diverted to Port Hedland at a cost to the BPA of approximately $12,000.

27 *Similar previous unlawful industrial action*: On 31 October 2012 (simultaneously with the orders in this proceeding) both respondents were found to have engaged in conduct in contravention of s 494(1) of the WR Act, a provision which is similar in terms to s 417(1) of the FW Act: *Fair Work Ombudsman v Maritime Union of Australia* [2013] FCA 215. This conduct occurred on 19 and 20 May 2009. However, the relevant orders of the Court were made after the date of the conduct with which these proceedings are concerned. For this reason, following the reasoning of Branson J in *Alfred v Walter Construction Group Limited* [2005] FCA 497 at [13], I do not consider it appropriate to fix the amount of the penalty to be imposed in this proceeding on the basis that the respondents engaged in the unlawful industrial action contrary to s 417(1) of the FW Act after having been found to have earlier contravened s 494(1) of the WR Act. However, nor do I consider it appropriate to significantly discount the penalty otherwise appropriate on the basis that the contravening course of conduct was an isolated instance of conduct entirely uncharacteristic of the respondents.

28 *Size of the first respondent*: No party seeks to rely on the size or financial position of the first respondent in relation to penalty.

29 *Deliberate nature of the unlawful industrial action*: Clearly, the conduct of the second respondent in relation to the unlawful industrial action involved deliberate acts.

30 *Involvement of senior management*: As mentioned, the second respondent was at all material times employed as the assistant secretary of the Western Australian branch of the first respondent. There is no suggestion, however, that other senior officials were involved in the unlawful industrial action or had any direct knowledge of it. Further, there is no suggestion that the first respondent had direct knowledge of the conduct that the second respondent engaged in on the relevant dates (although, as mentioned, pursuant to s 793(1) of the FW Act the second respondent's conduct is taken to have been engaged in for and on behalf of the first respondent).

31 *Contrition*: Although there is no evidence of any expression of contrition by the respondents, lack of contrition is not an aggravating circumstance that justifies an increase in the level of the penalty imposed (however, contrition in the form of an apology can operate to reduce a penalty, at least where it can be seen to render it unlikely that the conduct will be repeated in the future): *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union* [2001] FCA 336 at [10]; *Cahill v Construction, Forestry, Mining and Energy Union (No 4)* [2009] FCA 1040; (2009) 189 IR 304 at [87].

32 *Cooperation with enforcement authorities*: The respondents have cooperated in the proceedings before this Court by agreeing with the applicant regarding:

- a statement of agreed facts, which includes admissions which establish the contraventions of s 417(1) of the FW Act; and
- the proposed penalties.

By taking this action, the respondents have helped to avoid the time and expense associated with what may otherwise have been a lengthy trial, as well as the imposition on a number of potential witnesses to attend Court to give evidence.

33 However, this cooperation only occurred just over one month prior to the trial and after the applicant had filed extensive affidavit evidence. In this respect, the comments of Stone and Buchanan JJ in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; (2008) 168 FCR 383 (*Mornington Inn*) at [76]-[77] are instructive:

> … in our view, it should be accepted … that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for

> cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice.
>
> A respondent who admits liability will spare itself the unnecessary cost of a contested hearing. Its motivation, therefore, should not be regarded as unduly altruistic. Depending on the stage at which liability is admitted it may or may not relieve an applicant of the bulk of the cost of preparing for a trial.

34 As mentioned, there is no evidence of any express contrition by the respondents. In *Mornington Inn*, Stone and Buchanan JJ, at [78], commented that:

> In the circumstances of the present case, the admission of liability 2 weeks before the trial was not evidence of contrition or remorse or, except in the most formal of senses, an indication of acceptance of wrongdoing. It would have been open to the primary judge, in our view, to refuse any discount for the admission of liability. There is no basis, therefore, upon which to complain about the allowance of a 'modest' discount of 10%. It was more than ample in the circumstances of this case.

Therefore, given that the respondents only admitted liability just over one month prior to the trial and there was no evidence of any contrition, I am of a similar view to that expressed by Stone and Buchanan JJ in *Mornington Inn*: see also *Alfred v Walter Construction Group Limited* [2005] FCA 497 at [15]; *Alfred v Wakelin (No 1)* [2008] FCA 1455 at [37].

35 *Deterrence*: Finally, the penalty arrived at by the Court must reflect the need for specific and general deterrence. Specific deterrence is directed to ensuring that the respondents are not prepared to engage in similar unlawful industrial action in the future, while general deterrence is directed to preventing similar unlawful industrial action by like-minded persons or organisations.

36 In relation to specific deterrence, it is relevant to note that there is the lack of evidence of any contrition on the part of the respondents, as well as the fact that the respondents only cooperated with the applicant at a late stage, which suggests that specific deterrence is likely to be necessary to prevent future unlawful industrial action.

CONCLUSION

37 The applicant and the respondents submit that the proposed penalties are appropriate and that they are within the permissible range of penalties for contraventions of s 417(1) of the FW Act. On the basis of a consideration of the factors outlined in *Australian Opthalmic Supplies* (as relevant), I accept this joint submission and so make orders imposing the proposed penalties on the first and second respondents. The level of penalties imposed will serve as a reminder that contraventions of the FW Act will be met with significant monetary penalties.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 12 March 2013