# FEDERAL COURT OF AUSTRALIA

## Fair Work Ombudsman v Maritime Union of Australia [2013] FCA 215

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| Citation: | Fair Work Ombudsman v Maritime Union of Australia [2013] FCA 215 |
| Parties: | **FAIR WORK OMBUDSMAN v MARITIME UNION OF AUSTRALIA, CHRIS CAIN and WILLIAM TRACEY** |
| File number: | WAD 118 of 2011 |
| Judge: | **BARKER J** |
| Date of judgment: | 31 October 2012 |
| Catchwords: | **INDUSTRIAL LAW** – respondents admitted contraventions of s 494(1) of *Workplace Relations Act 1996* (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<br>*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 2 item 11(1)<br>*Workplace Relations Act 1996* (Cth) s 420(1)(c), s 494(1), s 494(2), s 494(5), s 495(6), s 826(2), Sch 7 cl 1, Sch 7 cl 6(b) |
| Cases cited: | *Alfred v Wakelin (No 1)* [2008] FCA 1455<br>*Alfred v Walter Construction Group Limited* [2005] FCA 497<br>*Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union* [2011] FCA 810<br>*Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560<br>*Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Thornton Engineering Australia Pty Ltd* [2009] FCA 1584; (2009) 191 IR 315<br>*BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union* [2001] FCA 336<br>*Cahill v Construction, Forestry, Mining and Energy Union (No 4)* [2009] FCA 1040; (2009) 189 IR 304<br>*Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; (2004) ATPR 41-993<br>*Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; (2008) 168 FCR 383 |

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| Date of hearing: | 31 October 2012 |
| Place: | Perth |
| Division: | FAIR WORK DIVISION |
| Category: | Catchwords |
| Number of paragraphs: | 37 |
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| 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 118 of 2011**

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| **BETWEEN:** | **FAIR WORK OMBUDSMAN**<br>**Applicant** |
| **AND:** | **MARITIME UNION OF AUSTRALIA**<br>**First Respondent** |
| | **CHRIS CAIN**<br>**Second Respondent** |
| | **WILLIAM TRACEY**<br>**Third 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 494(5) of the *Workplace Relations Act 1996* (Cth) (WR Act) on the first respondent for organising a 24 hour strike at the DP World site in Fremantle, Western Australia on 19 May 2009 in contravention of s 494(1) of the WR Act.
2. A monetary penalty of $2,640 be imposed pursuant to s 494(5) of the WR Act on the second respondent for organising a 24 hour strike at the DP World site in Fremantle, Western Australia on 19 May 2009 in contravention of s 494(1) of the WR Act.
3. A monetary penalty of $3,630 be imposed pursuant to s 494(5) of the WR Act on the third respondent for organising a 24 hour strike at the DP World site in Fremantle, Western Australia on 19 May 2009 in contravention of s 494(1) of the WR Act.
4. The above penalties be paid to the Consolidated Revenue Fund of the Commonwealth in accordance with s 841(a) of the WR Act within 30 days of the date of this order.
5. There be no order as to costs.

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

**IN THE FEDERAL COURT OF AUSTRALIA**
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| **BETWEEN:** | **FAIR WORK OMBUDSMAN**<br>**Applicant** |
| **AND:** | **MARITIME UNION OF AUSTRALIA**<br>**First Respondent** |
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| **JUDGE:** | **BARKER J** |
| **DATE:** | **31 OCTOBER 2012** |
| **PLACE:** | **PERTH** |

## REASONS FOR JUDGMENT

1 On 31 October 2012, I made orders pursuant to s 494(5) of the *Workplace Relations Act 1996* (Cth) (WR Act) imposing monetary penalties on the first, second and third respondents. These are the reasons for so doing.

## RELEVANT FACTS

2 At all material times, the first respondent and DP World Australia Limited and DP World (Fremantle) Limited (collectively, DP World) were parties to the *DP World Fremantle Enterprise Agreement 2008* (Agreement), a pre-reform certified agreement within the meaning of Sch 7, cl 1 of the *Workplace Relations Act 1996* (Cth) which, by reason of Sch 7, cl 6(b) of the WR Act, had effect as if it were a collective agreement to which s 494 of the WR Act applied. The Agreement commenced operation on 17 March 2006 and had a nominal expiry date of 30 June 2011.

3 On 19 May 2009, at approximately 4:30pm, the second respondent (who was at all material times employed as the secretary of the Western Australian branch of the first respondent) and the third respondent (who was at all material times employed as an organiser

of the first respondent) convened a meeting of employees of DP World (meeting). Each of the DP World employees was at all material times bound by the Agreement.

4 At approximately 4:55pm, the second and third respondents spoke to those in attendance at the meeting about pending redundancies at DP World and the attitude of DP World towards the redundancies. Following this address, a DP World employee in attendance proposed a motion to the effect that the DP World employees should strike for 24 hours (motion). A ballot was held and the employees in attendance at the meeting collectively voted in favour of the motion. The second and third respondents did not try to stop the motion being put to a vote, nor did they make any attempt to dissuade the employees from taking strike action.

5 Shortly after the meeting, the second respondent informed a representative or representatives of DP World that the DP World employees were on strike.

6 Between the conclusion of the meeting and approximately 5:30pm on 20 May 2009, 113 DP World employees (striking employees) 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 494(5) of the WR Act imposing the proposed penalties on the first, second and third respondents, as well as an order imposing no order as to costs.

**UNLAWFUL INDUSTRIAL ACTION**

10 Pursuant to Sch 2, item 11(1) of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), the WR Act continues to apply on and after the WR Act repeal date (1 July 2009) in relation to conduct that occurred before this date.

11 Sub-sections 494(1) and (2) of the WR Act provide:

> (1) From the day when:
> (a) a collective agreement; or
> (b) a workplace determination;
> comes into operation until its nominal expiry date has passed, an employee, organisation or officer covered by subsection (2) must not organise or engage in industrial action (whether or not that action relates to a matter dealt with in the agreement or determination).
>
> Note 1: This subsection is a civil remedy provision: see subsection (4).
>
> Note 2: Action that contravenes this subsection is not protected action (see section 440).
>
> (2) For the purposes of subsection (1), the following are covered by this subsection:
> (a) an employee who is bound by the agreement or determination;
> (b) an organisation of employees that is bound by the agreement or determination;
> (c) an officer or employee of such an organisation acting in that capacity.

12 "Industrial action" is defined in s 420(1) of the WR 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;

13 Section 826(2) of the WR Act provides:

> 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 [*Building and Construction Industry Improvement Act 2005* (Cth)] (as the case requires), to have been engaged in also by the body corporate.

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

- constituted industrial action within the meaning of s 420(1)(c) of the WR 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 494(1) of the WR Act.

15 It is also agreed and I accept that the second and third respondents organised the strike in contravention of s 494(1).

16 Lastly, it is agreed and I accept that the second and third respondents' conduct was engaged in for and on behalf of the first respondent and, therefore, pursuant to s 826(2) of the WR Act, the first respondent also contravened s 494(1).

**PENALTIES FOR CONTRAVENING S 494(1) OF THE WR ACT**

17 Pursuant to ss 494(5)(a) and (6) of the WR Act, and s 4AA of the *Crimes Act 1914* (Cth) (as it then applied), the maximum penalties available for a contravention of s 494(1) of the WR Act are:

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

18 The penalty which the parties agreed ought to be paid by the first respondent for contravening s 494(1) of the WR 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 494(1) is $2,640, which represents 40% of the maximum penalty available. The penalty which the parties agreed ought to be paid by the third respondent for contravening s 494(1) is $3,630, which represents 55% of the maximum penalty available.

19 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 WR Act. In imposing the proposed penalties on the first, second and third respondents I have taken these considerations into account.

## GENERAL PRINCIPLES FOR DETERMINING PENALTIES FOR A CIVIL CONTRAVENTION

20 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.

21 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.

22 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**

23 *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.

24 The catalyst of the unlawful industrial action was the issue of possible future dismissals of DP World employees for reasons of redundancy. It appears as though it was the desire of the respondents to avoid involuntary redundancies. On 14 May 2009, at approximately 8:30am, various DP World management representatives met with the third respondent to discuss the issue of possible future dismissals of DP World employees for reasons of redundancy. During this meeting, the third respondent said words to the effect of: "If we can't amicably come to an agreement on the redundancies, there'll be industrial action."

25 Although, as was agreed by the respondents, the industrial action was unlawful, I accept that it was motivated by concerns regarding possible involuntary redundancies of DP World 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 and third respondents made no attempt to follow the dispute resolution procedure in cl 24 of the Agreement.

26 *Nature and extent of any loss or damage*: The strike commenced on a day when the DP World site was operating at full capacity. As a result, it caused general delays and disruption to work at the site. Further, as a consequence of the strike the vessel NYK Kamakura was not able to be worked as scheduled. This appears to have been fully contemplated by the respondents.

27 *Similar previous unlawful industrial action*: None of the respondents have any relevant prior contraventions of civil penalty provisions. This is a factor which warrants a significant discount from the maximum penalty: *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Thornton Engineering Australia Pty Ltd* [2009] FCA 1584; (2009) 191 IR 315 at [22].

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

29 *Deliberate nature of the unlawful industrial action*: Clearly, the conduct of the second and third respondents 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 secretary of the Western Australian branch of the first respondent and the third respondent was at all material times employed as an organiser 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 and third respondents engaged in on the relevant dates (although, as mentioned, pursuant to s 826(2) of the WR Act the second and third respondents' 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 494(1) of the WR 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, as mentioned, the respondents do not have any relevant prior contraventions of civil penalty provisions. However, counteracting this consideration 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 494(1) of the WR 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, second and third respondents. The level of the agreed penalties sends an appropriate message to the respondents and others affected by the operation of the WR Act that contravention of the Act will result in 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: 13 March 2013