FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v TOYOTA MATERIAL HANDLING (NSW) PTY LIMITED *[2014] FCCA 251*

Catchwords:
INDUSTRIAL LAW – Penalties – contravention of section 170VP of the pre-reform *Workplace Relations Act 1996* (Cth) – making a statement in a declaration to the Office of the Employment Advocate the respondent knew, or ought reasonably to have known, was false or misleading – contraventions of sections 400(5), 337(8) and 337(9) of the post-reform *Workplace Relations Act 1996* (Cth) – application of duress – failure to provide information prior to approval of an ITEA – assessment of penalty.

Legislation:
Limitation Act 1969 (NSW)
Workplace Relations Act 1996 (Cth), (pre-reform), s.170VP
Workplace Relations Act 1996 (Cth), (post-reform), ss.400(5), 337(8), 337(9)
Fair Work Act 2009 (Cth), s.546(3)(a)

Cases cited:
Fair Work Ombudsman v Toyota Material Handling (NSW) Pty Limited [2013] FCCA 181
Mason v Harrington Corporation Pty Ltd t/as Pangea Restaurant & Bar [2007] FMCA 7
Kelly v Fitzpatrick (2007) 166 IR 14
Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426
CFMEU v Cole and Allied Operations (No.2)(1999) 94 IR 231
Australian Nursing Federation & Ors v Alcheringa Hostel Inc. [2004] 136 FCR 530
Ponzio v B & P Caelli Construction Pty Ltd & Ors [2007] 158 FCR 543
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Schanka v Employment National (Administration) Pty Ltd [2001] FCA 1623

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	TOYOTA MATERIAL HANDLING (NSW) PTY LIMITED
File Number:	SYG 1356 of 2011

Judgment of:	Judge Raphael
Hearing dates:	16 & 17 September 2013
Date of Last Submission:	20 December 2013
Delivered at:	Sydney
Delivered on:	20 February 2014

REPRESENTATION

Solicitors for the Applicant:	FCB Workplace Law
Counsel for the Respondent:	Mr J H Pearce
Solicitors for the Respondent:	Holding Redlich

ORDERS

(1) Pursuant to Order 1 of the Orders of Judge Raphael dated 18 November 2013, the respondent is to pay a penalty of $5,000.00 in respect of the contravention of section 170VP of the pre-reform WR Act, when the respondent made a statement in a declaration to the Office of the Employment Advocate on 24 March 2006 that it knew, or ought reasonably to have known, was false or misleading.

(2) Pursuant to Order 2 of the Orders of Judge Raphael dated 18 November 2013, the respondent is to pay a penalty of $28,050.00 in respect of the contravention of subsection 400(5) of the WR Act, when the respondent made a statement to Mr Morrow, Mr Dafo and Mr Gould on 1 May 2009 which amounted to the application of duress in connection with an ITEA.

(3) Pursuant to Order 3 of the orders of Judge Raphael dated 18 November 2013, the respondent is to pay a penalty of $8,250.00 in respect of contravention of section 337(8) of the WR Act, when the respondent failed to take reasonable steps to ensure that Mr Morrow, Mr Dafo and Mr Gould had, or had ready access to, a copy of their ITEA for 7 days before approval.

(4) Pursuant to Order 4 of the orders of Judge Raphael dated 18 November 2013, the respondent is to pay a penalty of $8,250.00 in respect of contravention of section 337(9) of the WR Act, when the respondent failed to take reasonable steps to ensure that Mr Morrow, Mr Dafo and Mr Gould were given an information statement at least 7 days before approval.

(5) The payments referred to in orders 1, 2, 3 and 4 above shall be paid to the Commonwealth pursuant to section 546(3)(a) of the *Fair Work Act 2009* (Cth).

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 1356 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

TOYOTA MATERIAL HANDLING (NSW) PTY LIMITED
Respondent

REASONS FOR JUDGMENT

1. On 18 November 2013 the court handed down its decision in relation to a matter that had been heard over two days in September 2013 and in respect of which the last written submissions were made on 11 November 2013. Although the case involved events that occurred in 2006 and 2009, conclusion of the matter had been delayed when it had been taken first to this court and then to the Full Bench of the Federal Court for a determination as to whether the *Limitation Act 1969* (NSW) applied.

2. The proceeding itself involved the circumstances surrounding the signing in 2006 of an Australian Workplace Agreement (AWA), and in 2009 of a site specific individual transitional employment agreement (ITEA). It was alleged the manner in which Mr Morrow was required to sign his AWA in 2006 constituted the application of duress and that the respondent had failed in other ways to comply with the pre-reform *Workplace Relations Act 1996* (Cth)[1] in the manner in which it made its reports to the Office of the Employment Advocate. In regard to the 2009 incidents, it was again alleged that the respondent had applied duress in connection with the ITEA and had contravened the *WR Act* in the manner in which Mr Morrow and two others were provided with

[1] "WR Act".

information about the ITEA they were required to sign. After consideration of the evidence, the court came to the conclusion that it could not make a finding in respect of duress in respect of the 2006 incident. The court made four declarations:

> "1. The respondent contravened section 170VP of the pre-reform WR Act by making a statement in a declaration to the Office of the Employment Advocate on 24 March 2006 that it knew, or ought reasonably to have known, was false or misleading.
>
> 2. The respondent contravened subsection 400(5) of the WR Act by making a statement to Mr Morrow, Mr Dafo and Mr Gould on 1 May 2009 which amounted to the application of duress in connection with an ITEA.
>
> 3. The respondent contravened subsection 337(8) of the WR Act by failing to take reasonable steps to ensure that Mr Morrow, Mr Dafo and Mr Gould had, or had ready access to, a copy of their ITEA for 7 days before approval.
>
> 4. The respondent contravened subsection 337(9) of the WR Act by failing to take reasonable steps to ensure that Mr Morrow, Mr Dafo and Mr Gould were given an information statement at least 7 days before approval."

3. The full history of the matter can be found by reading the lengthy judgment in *Fair Work Ombudsman v Toyota Material Handling (NSW) Pty Limited* [2013] FCCA 181. The parties were ordered to provide the court with written submissions in regard to penalty, which was done. The respondent attempted to file some additional evidence, but the court has not accepted this and has placed its considerations upon the submissions as to penalty provided by the parties up to 20 December 2013.

4. In accordance with its usual practice, the applicant sets out in its written submissions a short summary of the facts and then a substantial section on the identification and grouping of the contraventions, including the number of contraventions, reference to the course of conduct provisions of the WR Act and the common elements in the found conduct. The applicant submits, and the respondent accepts, that the court should look at the matter as if there are four contraventions for which penalties should be imposed. These being:

> "(a) making a false or misleading statement in a declaration about the provision of an information statement to Mr Morrow and access to an AWA to Mr Morrow (section 170VP of the pre-reform WR Act);
>
> (b) applying duress to each of the Employees in connection with their ITEAs (subsection 400(5) of the WR Act);

(c) failing to take reasonable steps to ensure that each of the Employees had, or had ready access to, a copy of their ITEAs for 7 days before its approval (subsection 337(8) of the WR Act); and

(d) failing to take reasonable steps to ensure that each of the Employees were given an information statement at least 7 days before approval of their ITEAs (subsection 337(9) of the WR Act)."

5. The applicant explains its decision at [14] and [15] of its written submissions:

"14. The Applicant accepts that, in respect of the Contraventions involving multiple employees, each Contravention arose out of the same decision by the Respondent and the contraventions involving each Employee should be grouped (following the principles set out at paragraph 6(c) above). This applies to:

(a) the three statements made on 1 May 2009 to Mr Morrow, Mr Dafo and Mr Gould amounting to the application of duress, which should be grouped as one contravention of duress under subsection 400(5) of the WR Act;

(b) the three failures to provide Mr Morrow, Mr Dafo and Mr Gould with their ITEAs for 7 days prior to approval, which should be grouped as one failure to provide ITEAs for 7 days prior to approval under subsection 337(8) of the WR Act; and

(c) the three failures to provide Mr Morrow, Mr Dafo and Mr Gould with information statements for at least 7 days before approval, which should be grouped as one failure to provide information statements under subsection 337(9) of the WR Act.

15. Further, the Respondent's false and misleading statements made on 24 March 2006 that Mr Morrow had received an information statement, and that Mr Morrow and Mr Leonard had each received their AWA at least 14 days prior to approval, were made in the one declaration document under the same lodgement process. For this reason, the statements should be grouped as a single contravention of section 170VP of the pre-reform WR Act."

6. Both parties make submissions as to the factors relevant to determining penalties. The applicant relies on what fell from Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangea Restaurant & Bar* [2007] FMCA 7 adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14,[2] and in *Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426 at [40]. The respondent provides more authority commencing with the decision of Branson J in *CFMEU v Cole and Allied Operations (No*

[2] "*Kelly*".

2)(1999) 94 IR 231 at 232; the submissions then made reference to the decision of *CPSU v Telstra* (2001) 108 IR 228 at [8]-[10], mentioning *Australian Nursing Federation & Ors v Alcheringa Hostel Inc.* [2004] 136 FCR 530 and quoting from what fell from Lander J in *Ponzio v B & P Caelli Construction Pty Ltd & Ors* [2007] 158 FCR 543, before setting out the checklist in *Kelly*. This checklist is only that. It does not proscribe or restrict the matters which may be taken into account in the exercise of the court's discretion: *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11].

7. The checklist of matters relevant is:

> "(a) the nature and extent of the conduct which led to the breaches;
>
> (b) the circumstances in which that conduct took place;
>
> (c) the nature and extent of any loss or damage sustained as a result of the breaches;
>
> (d) whether there had been similar previous conduct by the defendant.
>
> (e) whether the breaches were properly distinct or arose out of the one course of conduct;
>
> (f) the size of the business or enterprise involved;
>
> (g) whether or not the breaches were deliberate;
>
> (h) whether senior management was involved in the breaches;
>
> (i) whether the party committing the breach had exhibited contrition;
>
> (j) whether the party committing the breach hard taken corrective action;
>
> (k) whether the party committing the breach had cooperated with the enforcement authorities;
>
> (l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
>
> (m) the need for specific and general deterrence."

8. The court accepts that the applicant's assessment of what the respondent's conduct involved at [19] of its submissions is correct:

> "The Respondent's conduct involved the following:

> (a) on 23 March 2006, the Respondent made a declaration containing statements that it knew, or ought to have known, were false and misleading, about agreement-making requirements when it declared that:
>
> > (i) Mr Morrow had received an information statement prior to approval of his AWA; and
> >
> > (ii) Mr Morrow and Mr Leonard had each received their AWAs at least 14 days prior to approval;
>
> (b) on 1 May 2009, the Respondent applied duress to Mr Morrow, Mr Dafo and Mr Gould by way of making threats during the agreement making process that if they did not sign individual agreements by a designated date, they would suffer loss of having access to more lucrative rotating shifts;
>
> (c) in May 2009, the Respondent failed to provide adequate timeframes required to properly consider the individual agreements; and
>
> (d) in May 2009, the Respondent failed to provide an information statement to assist the Employees with considering the individual agreements.

9. Although it could be suggested that the reporting contravention and the failure to provide adequate timeframes or an information statement were offences of a technical nature, it is the court's view that these provisions were all important elements of a protective framework within an Act which would otherwise allow for the inclusion of terms within an employment contract that might be more favourable to an employer than those contained in a collective bargaining agreement, or might remove from the contract clauses which previously applied and which were beneficial to the employee. The provisions were designed to ensure that such safeguards as there were for the position of the employee, centring around giving the employee an opportunity to consider the proposals before being required to sign the document, were implemented. The court is of the view that in this context, the contraventions are not merely technical even if they do not involve the measure of seriousness that the court believes should apply to the finding of the application of duress.

10. The court has considered what fell from Moore J in *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 1623 and, in particular, where his Honour says at [74]:

> "For my part I would not view the penalty provisions in the WR Act as benignly as his Honour appears to have. In various ways many of the penalty provisions are

> designed to protect employees (or past or future employees) at risk, both economically and more generally, because of the unlawful conduct of others. Other penalty provisions are to protect employers from what the legislature views as inappropriate conduct. I would have thought there would be a community expectation that contravention of a penalty provision would be viewed seriously and ought be punished. In the present case, the conduct of ENA involved a denial of the freedom of four employees to negotiate about the manner in which their employment was to be regulated. This is significant individual freedom, as recognised by s 3(c) of the WR Act, which makes it an object of the Act to enable employers and employees "to choose the most appropriate form of agreement for their particular circumstances".”

11. When the court comes to consider nature and extent of the loss suffered by the employees as a result of the respondent’s conduct, the court notes that the effect of not complying with the pressure placed upon them to sign the ITEA would have been a substantial loss of earnings from being taken off the continuous shift employment that they were then on at the Hydro Site. By signing the agreement they maintained their previous shift work loadings, although initially even these were slightly reduced to bring them in line with those earned by other TMH employees. All three employees deposed to concerns about the effect of not signing upon their families.

12. In regard to the effects of not providing the appropriate notice period or information statements, it is argued that this meant that the employees did not have a proper opportunity to understand the arrangements and make an informed choice as to whether or not to sign. There is a certain strength in that, although in regard to the 2009 arrangements they were the subject of some quite prolonged discussion.

13. The applicant accepts that there is no evidence that the respondent had engaged in similar conduct to this in the past, which is an important consideration. This is particularly so when the company involved is one of the size of the respondent, which is a subsidiary of one of the largest corporations in Japan. The evidence reveals that the company, at the relevant time, employed between 650 and 700 people at a number of branch offices in NSW and had a dedicated Sydney head office with a human resources team. The existence of a human resources team and a lawyer with dedicated responsibility for compliance is also a matter that the court takes into account when considering an appropriate penalty.

14. The existence of these branches of management adds to the concern raised by the fact that a duress contravention is by its nature deliberate. It is difficult to perceive of a situation where a person is left without real choice inadvertently. It did not happen in this case. In regard to the reporting contraventions and the provision of documents to the employees, whilst there is no evidence that there was a deliberate withholding, a company with a human resources department and lawyers on staff should be well aware of its obligations. And non-compliance with those obligations, whilst possibly not deliberate, is certainly negligent.

15. The managerial staff involved in these contraventions would not be considered senior management by the court. But it would be, at the very least, middle or upper middle management. Certainly Ms Soud, the lawyer, could be considered such. The applicant argues that when the threats were made in 2009, Mr Wilson prefaced his threat to remove the employees from continuous shift work with the words "I've had a directive from Sydney" and that this indicates that senior managers must have been involved. The court is of the view that this statement, if true, does not evidence the involvement of anyone more senior that the persons previously discussed.

16. It is correct that TMH has not accepted responsibility for its conduct or shown contrition. There was a certain amount of cooperation with the authorities, but the position taken by the company throughout has been to resist these proceedings and to maintain the position that no contraventions took place.

17. As always in these cases serious consideration has to be given to the question of deterrence both specific and general. It could be said with regard to these contraventions that they relate to a form of contract of employment little used today. But deterrence is not only about preventing future breaches of the same laws, it is about the prevention of the breach of any law applied to the respondent. Given the large number of employees on the pay-roll of TMH it is important that the company understand its obligations and that it appreciates that if it contravenes the relevant workplace laws, it will be subjected to penalties for so doing. This means that even though these are "first offences", the penalties themselves should be sufficient (within the

context of the penalties scheme as a whole) to provide a wake-up call to the company and ensure that management, including HR, understands and implements the industrial laws governing the workplace. In regard to general deterrence it should be seen that a large company such as this should not be immune from penalty, or have one imposed with such a light touch that others be encouraged to view contraventions as a reasonable cost of doing business.

18. The penalties that the court proposes to order are set out in the table below. In coming to the figures that it has, it has taken into account the aggregate penalty, which it has determined is an appropriate response to the conduct which led to the breaches but is not oppressive or crushing.

Provision	Contravention	Maximum penalty	Penalty imposed (%)	Penalty imposed ($)
s.170VP pre-reform WR Act	Making a false or misleading statement in a declaration filed with the Employment Advocate	$10,000 per breach	50%	$5,000.00
s.400(5) WR Act	Applying duress to an employee in connection with an ITEA.	$33,000 per breach	85%	$28,050.00
s.337(8) WR Act	Failing to provide an employee with ready access to a workplace agreement 7 days before the agreement is approved.	$16,500 per breach	50%	$8,250.00
s.337(9) WR Act	Failing to provide an employee with an information statement	$16,500 per breach.	50%	$8,250.00
Total		$76,000		$49,550.00

19. The court makes the following orders:

(1) Pursuant to Order 1 of the Orders of Judge Raphael dated 18 November 2013, the respondent is to pay a penalty of $5,000.00 in respect of the contravention of section 170VP of the pre-reform WR Act, when the respondent made a statement in a declaration to the Office of the Employment Advocate on 24 March 2006 that it knew, or ought reasonably to have known, was false or misleading.

(2) Pursuant to Order 2 of the Orders of Judge Raphael dated 18 November 2013, the respondent is to pay a penalty of $28,050.00 in respect of the contravention of subsection 400(5) of the WR Act, when the respondent made a statement to Mr Morrow, Mr Dafo and Mr Gould on 1 May 2009 which amounted to the application of duress in connection with an ITEA.

(3) Pursuant to Order 3 of the orders of Judge Raphael dated 18 November 2013, the respondent is to pay a penalty of $8,250.00 in respect of contravention of section 337(8) of the WR Act, when the respondent failed to take reasonable steps to ensure that Mr Morrow, Mr Dafo and Mr Gould had, or had ready access to, a copy of their ITEA for 7 days before approval.

(4) Pursuant to Order 4 of the orders of Judge Raphael dated 18 November 2013, the respondent is to pay a penalty of $8,250.00 in respect of contravention of section 337(9) of the WR Act, when the respondent failed to take reasonable steps to ensure that Mr Morrow, Mr Dafo and Mr Gould were given an information statement at least 7 days before approval.

(5) The payments referred to in orders 1, 2, 3 and 4 above shall be paid to the Commonwealth pursuant to section 546(3)(a) of the *Fair Work Act 2009* (Cth).

I certify that the preceding nineteen (19) paragraphs are a true copy of the reasons for judgment of Judge Raphael

Associate:

Date: 20 February 2014