

FREEDOM OF ASSOCIATION - PENALTY

HADGKISS –v– BLEVIN – DECISION OF CONTI J **FEDERAL COURT OF AUSTRALIA 13 JULY 2004**

This decision concerns Part XA of the *Workplace Relations Act 1996* (C'th) s298U(a) and (c) and 329. In particular, this Industrial Law ALERT deals with His Honour's comments on the fixing of penalty following breach.

The following points are of relevance as made by His Honour:-

1. There were no mitigating circumstances for what were serious breaches of the Act;
2. No apology had been provided by Messrs Blevin and McGahan of the CFMEU:-

In light of the conclusions of the proceedings or otherwise.

3. The Union representatives had knowingly conducted themselves;
4. His Honour made reference to Branson J's decision in CFMEU –v– Coal & Allied (No 2) 1999 94 IR 231. [Although not set out by Conti J, this is the non-exhaustive list set down by Branson J as being relevant to penalty:

- (a) *The circumstances in which the relevant conduct took place (including whether the conduct was undertaken in deliberate defiance or disregard of the Act;*
- (b) *Whether the respondent has previously been found to have engaged in conduct in contravention of Pt XA of the Act;*
- (c) *Where more than one contravention of Pt XA is involved, whether the various contraventions are properly seen as distinct or whether they arise out of one course of conduct;*
- (d) *The consequences of the conduct found to be in contravention of Pt XA of the Act;*

INDUSTRIAL ALERT

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- (e) *The need, in the circumstances, for the protection of industrial freedom of association;*
- (f) *The need, in the circumstances, for deterrence].*
5. His Honour made reference to a lack of a provision in the legislation to order costs against the Union and its officers – and indicated but for the provisions of s329, he would have thought that the usual order for costs following the event or outcome would have applied;
6. That there were issues the Union raised as part of the defence that increased the length of hearing and counted against the Union in its argument on penalty;
7. That the Union misinterpreted His Honour's findings in that they submitted that the breaches were *at worst a trivial or purely technical breach*. His Honour responded that the *submission is substantially at odds with my very detailed findings...*;
8. That in assessing penalty he thought that it was the middle scale of potential gravity – nonetheless the offences were serious offences against the Act;
9. He took into account the absence of previous similar contraventions of the Act by the two persons concerned;
10. That in the circumstances of –
- pressuring the employee to join a Union;
 - such employee having an inadequate command of English;
 - such employee being already a member of another Union;
 - that such employee was in apparent need of work.
- The appropriate **penalty** was –
- to the Union \$5,500.00;
 - to each of Messrs Blevin and McGahan \$1,100.00;
 - that there be reimbursement of Union dues paid of \$193.63;
 - that there be loss of wages paid of \$1,090.43.

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The Message

The message for Unions from the decision:-

1. That the employment advocate is still out there searching for alleged breaches of Part XA of the Act – freedom of association provisions;
2. Be sure of the way that planning is conducted for the Defence of the breaches part of the action and contemplate that some tactics may come back to bite on penalty;
3. When making submissions, on penalty, be sure of the way the trial judge has found on the offending conduct in making his or her findings;
4. It appears the judges will be looking for some type of remorse either before or following adverse findings;
5. Second offences will be treated harshly.

Note the following:

- (i) That there is no guarantee that these actions will go away – pending the outcome of the Federal election and it may be that even then, the Senate will not pass amendments to these freedom of association provisions or the Office of Employment Advocate.
- (ii) In his first decision concerning the breach of the legislation, His Honour Justice Conti:-
 - (a) rejected a defence of a distinction between the Union and its NSW Branch – it had been asserted that the NSW Branch was a different entity and the Union was not responsible for such conduct of the representatives of the branch of the Union;
 - (b) found that the Union was responsible for the conduct of the officers as a Federal award was applicable to the site and the evidence suggested that the branches of the Union were subject to a unified administration.
- (iii) The *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* has introduced, for offences after that Act came into force [13 July 2004],

amendments to the penalty amounts. Penalty units have been substituted for the previous dollar amounts. The provisions by the *Amendment Act* are as follows:-

300 penalty units (currently therefore \$33,000.00) for an organisation and 60 penalty units (currently \$6,600.00) for a person.

These are substantial increases from \$10,000.00 and \$2,000.00 respectively.

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