

# Employment & Industrial Case Note

October 2007

## ***Smith v Granada Tavern, Hibberd and Berechree Use of Duress in Signing AWA - Penalty***

This is a decision of Federal Magistrate Burchardt on penalty delivered on 19 September 2007.

The case is of interest in that in June 2007 Granada Tavern, its part owner Hibberd and its HR employee Berechree were found to have breached the WRA in that they had contrary to s400(5) used duress in attempting to have an AWA signed by employee Wills.

Wills was a casual employee and resisted the duress and insisted upon being paid in accordance with the Award. In response the employer reduced her hours which had been at a level and regular for some time. The employer through Hibberd and Berechree had identified in their minds at an early time the employee as a ringleader of workers who might resist the AWAs offered. The conduct of the employer also involved presentation of a deed releasing the employer from liability for entitlements otherwise owing under the Award. There were also threats of the workplace being run like a concentration camp if the AWAs were not signed. There were threats of poor performance with no grounds being raised against other employees as well as Hibberd stating he might not be truthful in defending and litigation that might be brought against the employer.

The maximum penalty available to be imposed was \$33000 for the company and \$6600 for individuals. The workplace inspector had asked for penalties at 90% for the company and Hibberd and at 50% for the HR employee Berechree.

The FM considered that no remorse had been shown by any party and looked at the conduct found to have occurred in breach of the Act as constituting duress.

Counsel for the Tavern and Hibberd had made submissions concerning the effect of the original finding on the reputation of the Tavern and Hibberd and that basically it had learned its lesson.

The FM considered the conduct of the employer had been at such a level and that it should be made aware to all employers that such conduct will not be tolerated – a penalty of 75% of the maximum was imposed. Totals of \$24750 and \$4950 were respectively imposed.

As to HR employee Berechree the FM found that although conduct occurred on only one occasion and undoubtedly at the direction of Hibberd she could have said no – she had breached the law and such unlawful act needed to be punished. A fine at 30% of the maximum was imposed - \$1980.

### **Lessons Learned**

It is surprising that in the casual occupations available in the hotel industry and in a small place like Hobart that an employee would stand up to the employer. It is a credit to Wills that she did so. Employees and Employers should be aware that the duress provisions are in place and that prosecutions can and will take place and succeed. Employers need appropriate legal advice on all workplace agreements no matter their format and that advice extends to their HR employees needing to know their responsibilities.

For all your workplace agreement needs contact our Employment and Industrial team - (07) 3223 6400.