FEDERAL MAGISTRATES COURT OF AUSTRALIA

STUART-MAHONEY v CFMEU & ANOR (No.3) *[2008] FMCA 1435*

INDUSTRIAL LAW – Contravention of freedom of association provisions of *Workplace Relations Act* – allegations of prior contraventions – admissibility of Cole Royal Commission Report – penalties imposed.

Workplace Relations Act 1996, ss.719, 779(2), 807
Building and Construction Industry Improvement Act 2005

Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union [2008] FCA 466
Alfred v Wakelin (No 1) [2008] FCA 1455
Cruse v Construction, Forestry, Mining and Energy Union (CFMEU) [2007] FMCA 1873
Leighton Contractors Pty Ltd v CFMEU (2006) 164 IR 375
Hadgkiss v Blevin [2004] FCA 697

Applicant:	KAREN STUART-MAHONEY
First Respondent:	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Second Respondent:	JASON DEANS
File Number:	MLG 1287 of 2007
Judgment of:	Burchardt FM
Hearing date:	19 September 2008
Date of Last Submission:	19 September 2008
Delivered at:	Melbourne
Delivered on:	27 October 2008

REPRESENTATION

Counsel for the Applicant:	Mr M. Farr
Solicitors for the Applicant:	Trindade Farr and Pill
Counsel for the Respondents:	Mr C.W. Dowling
Solicitors for the Respondents:	Emma Walters

ORDERS

(1) That a penalty of $24,775.00 be imposed on the First Respondent for its contraventions of the *Workplace Relations Act 1996* ("the WR Act") in respect of Wayne Gauci.

(2) That a penalty of $24,775.00 be imposed on the First Respondent for its contraventions of the WR Act in respect of George Galea.

(3) The Respondents shall pay George Galea lost wages in the sum of $190.74 within 30 days.

(4) That a penalty of $6,000.00 be imposed on the Second Respondent for his contraventions of the WR Act in respect of Wayne Gauci.

(5) That a penalty of $6,000.00 be imposed on the Second Respondent for his contraventions of the WR Act in respect of George Galea.

(6) That the Second Respondent pay $3,000.00 of each of the sums referred to in paragraphs 4 and 5, but that payment of the remainder be wholly suspended for 12 months from the date of these orders. If the Second Respondent is not found to have breached any provision of the *Building and Construction Industry Improvement Act 2005* (Cth) or the WR Act as a result of conduct occurring within 12 months of the date of these orders he shall not be obliged to pay balance of the penalties.

(7) Subject to paragraph 6, the penalties imposed in paragraphs 1, 2, 4 and 5 of these orders be paid into the Consolidated Revenue Fund within 30 days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1287 of 2007

KAREN STUART-MAHONEY
Applicant

And

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
First Respondent

JASON DEANS
Second Respondent

REASONS FOR JUDGMENT

1. On 4 August 2008 I declared that the Respondents had contravened certain provisions of the *Workplace Relations Act 1996* ("the WR Act") in respect of Wayne Gauci and George Galea. I heard submissions on 19 September 2008 as to the penalties that should or should not be imposed in respect of those contraventions.

2. The issues that fall for consideration in my view are:

    a) What are the relevant circumstances attaching to consideration of the contraventions?

    b) How many contraventions are there?

    c) The extent to which the First Respondent can be properly held liable for the actions of the Second Respondent.

d) The approach to prior infractions of the same or similar legislation by the Construction, Forestry, Mining and Energy Union ("CFMEU") and its various divisions.

e) The quantum of any penalties to be imposed.

f) Any ancillary orders.

The relevant circumstances

3. It is now becoming increasingly apparent that there are a number of potentially relevant and applicable considerations for determining considerations as to penalty in cases such as these. They have been summarised yet again more recently by Tracey J in *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426 ("*Stuart-Mahoney v CFMEU*") at [40] (and noting the cases therein cited).

4. It is also well established that such lists, while possibly helpful, are not a checklist and are not to be followed in any slavish way (*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560, per Buchanan J at [91]). As was pointed out by Giles J in *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2008] FCA 466 ("*Silvestri*") at [6]:

> *"The discretion is at large. There are no mandatory statutory criteria, and it is wrong to regard factors seen as relevant by one court as statutory criteria. Indeed, lists of factors can confuse an essentially straightforward task and lead to over-elaborate reasoning."*

5. Bearing these considerations in mind, the matters that I consider to be significant here are:

a) The conduct of Mr Deans towards Mr Gauci represented a clear and outrageous breach of the freedom of association provisions in the WR Act.

b) There is no doubt that Mr Deans knew full well that his conduct did indeed breach the WR Act. He gave no evidence denying this at the trial, where he merely denied his conduct, or at the hearing

on penalty. Rather, he has merely undertaken not to repeat the conduct.

c) While Mr Deans has undertaken not to repeat his conduct, he has expressed no remorse for it.

d) There was no cooperation by either of the Respondents with the Applicant. The Applicant was put to the time and expense of a full trial and the evidence of all the Applicant's witnesses was strongly contested.

e) The conduct of Mr Deans in respect of Mr Galea was likewise an outrageous and witting breach of the terms of the freedom of association provisions concerned.

f) The conduct towards Mr Galea caused Mr Galea, on Mr Galea's evidence, to be "distraught".

g) Mr Galea was, as I have found in my earlier reasons for judgment, distraught because he lost pay that he desperately needed.

h) Mr Galea did not lose the one hour for which the Respondents in their most recent submissions and written contentions have pressed; that submission ignores my finding that Mr Galea was away from work for a period of some hours considerably in excess of those asserted by the Respondents. Although the evidence is not precise, I think he was away from before 8.00 am till after 12.00 pm, when he left the union office. I accept the Applicant's submission that he lost four and a half hours' pay.

i) The CFMEU is a large and substantial organisation with considerable assets (see the material annexed to the affidavit of Ms Stuart-Mahoney filed on 18 August 2008).

j) Mr Deans, the Second Respondent, has no prior infractions alleged in respect of either this or any other relevant legislation.

k) Mr Deans' financial position is such that the entirety of his spouse's wages are spent on supporting their family, and that 85 per cent of Mr Deans' net $5,000.00 per month earnings are

spent on fixed expenditure, leaving him on those figures with an available discretionary expenditure for himself and his family of only some $750.00.

6. In addition to these specific matters, it is my view that the scheme of the WR Act in relation to freedom of association has been deemed important by Parliament, as reflected in the provisions designed to ensure that it obtains and in the penalties provided for breach.

7. The question of the prior conduct of the First Respondent is a relevant consideration that falls to be considered under the separate subheadings below.

The number of contraventions

8. The Respondents submitted that the entire series of contraventions established by my reasons for judgment arose out of one course of conduct and should therefore be treated as one contravention (s.719 of the WR Act). The Applicant, by way of contrast, submitted that the form of conduct in relation to Mr Galea and Mr Deans was radically different.

9. The Applicant did, however, accept that the conduct in relation to Mr Gauci could probably be treated as a single course of conduct - namely, refusing to allow a non-union member on site - and therefore accepted that that should be treated as one contravention only.

10. In my view, the conduct embarked upon, while arguably consistent with some broader overall single policy and therefore course of action, did involve two discrete contraventions of the legislation WR Act.

11. The conduct in relation to Mr Galea was concerned with ensuring that Mr Galea paid fees to the union of which he was already a member. Whilst that did undoubtedly have the ultimate effect of ensuring that when he commenced work he was part of a workforce all of whom were paid-up financial union members, it is of its nature different to the exclusion of Mr Gauci because he was not a union member at all.

12. In my view, there are two contraventions to be considered.

The extent to which the CFMEU is liable for the conduct of Mr Deans

13. The Respondents submitted strongly that the liability of the CFMEU was accessorial only and arose because of the operation of s.779(2) of the WR Act alone. They submitted that the conduct of Mr Deans was not engaged for his own personal gain, and that his conduct was not engaged in any way by officers, officials or members of the First Respondent.

14. I was at first somewhat attracted to that proposition, but I have since had the benefit of reading the decision of Jagot J in *Alfred v Wakelin (No 1)* [2008] FCA 1455.

15. In that judgment, his Honour had to deal with a set of circumstances materially indistinguishable from those here. A delegate, Mr Wakelin, had engaged in conduct that contravened the *Building and Construction Industry Improvement Act 2005* ("the BCII Act"). There was no evidence that the CFMEU had otherwise had any involvement in the contravening conduct.

16. At [34], Jagot J found that:

> *"These facts show that Mr Wakelin, in his capacity as a delegate and officer of the CFMEU, was involved in the instigation of the unlawful industrial action."*

17. At [40], Jagot J went on to find:

> *"The liability provisions in s.69 are part of the statutory scheme. The fact that the CFMEU attracted liability under s.69 through the actions of Mr Wakelin acting as its delegate and officer on the mine site is part of the factual context. However, there is no reason to treat liability attracted under s.69 as necessarily of a different character or consequence for the purpose of making orders under s.49. Mr Wakelin was the CFMEU's delegate and officer within the meaning of the BCII Act. His actions in shouting about what was to be done, taking the vote, and being involved in the contravention of s.38 by a number of employees were all carried about by him in that capacity. Consistent with my approach to Mr Wakelin, I consider that a penalty should be imposed on the CFMEU, having regard to the circumstances of the contravention and the objects of the BCII Act. In particular, specific and general deterrence are of greater weight with respect to the CFMEU than Mr Wakelin."*

18. It should be noted that the provisions of the BCII Act self-evidently are not exactly the same as those in the WR Act with which we are concerned here. Nonetheless, the methodology applied by Jagot J to the corresponding provisions of the BCII Act is in my view binding upon me, given that the circumstances are indistinguishable.

19. Even if Jagot J's observations are not binding because of differences in the legislation, or alternatively for some difference in fact between that case and this one that I have overlooked, I think that the legislative scheme in the WR Act is such that I should approach breaches by Mr Deans, who clearly was a CFMEU delegate acting in that capacity, as giving rise to clear responsibility on the part of the CFMEU. As Jagot J observed, Mr Deans' actions are part of the factual context.

The approach to prior contraventions and the admissibility of evidence contained in the affidavit of Ms Stuart-Mahoney

20. The Respondents' submissions dwelt at length upon the prior contraventions by the CFMEU, and its various divisions and parallel state-registered unions, of the WR Act and the BCII Act.

21. It was submitted, correctly as I apprehend it, that this was the first no ticket, no start contravention in Victoria.

22. It was put that contraventions of other legislation were irrelevant, as indeed I had earlier decided in *Cruse v Construction, Forestry, Mining and Energy Union (CFMEU)* [2007] FMCA 1873 at [71]. That decision itself followed, or at least I hope it followed, the decision of Le Miere J in *Leighton Contractors Pty Ltd v CFMEU* (2006) 164 IR 375.

23. Since then, however, I have had the benefit of reading the decision of Tracey J in *Stuart-Mahoney v CFMEU*, to which I have already referred. In that decision, his Honour said at [44]:

> *"In the present case, the applicant invites the Court to have regard to previous contraventions by the CFMEU of the WR Act in determining the appropriate penalty for the CFMEU's contraventions of the BCII Act. Similar previous conduct demonstrates that the respondent has a history of engaging in a particular conduct in question, that the penalties previously*

> *imposed were insufficient to deter the respondent from re-engaging in that conduct and that the respondent has failed to take adequate steps to prevent further contraventions. Conduct which is of a different character does not assist this assessment. See: Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union (2006) 164 IR 375 at [67]. Similar conduct which has been found to contravene other legislative provisions will have potential relevance. In this case, any previous contraventions of the provisions of Part 9 of the WR Act which relate to unlawful industrial action and coercion are relevant in determining the appropriate penalty."*

24. His Honour went on to deal with a number of prior contraventions of the BCII Act and the WR Act which he felt in the circumstances were relevant.

25. In my view, it is not appropriate to pick my way through each and every prior contravention alleged and/or admitted against the CFMEU, both in its various divisions and, as it were, in its ancillary state-registered counterparts. In my view it is sufficient to note that on any view, including that indicated by the submissions filed for the Respondents, the CFMEU does not come before the Court with anything remotely approaching an unblemished record in relation to its compliance with industrial law generally (see Giles J in *Silvestri* at [13] and the cases there cited) and this is not the first case of coercion of this sort alleged against the union (see *Hadgkiss v Blevin* [2004] FCA 697).

The admissibility of Ms Stuart-Mahoney's affidavit

26. The Respondents have pressed an objection to the material contained in Ms Stuart-Mahoney's affidavit which extracts findings from the Cole Royal Commission. While I have not given detailed consideration to this matter, for the reasons that follow, I do not believe that such information is prima facie admissible. It is hearsay. It does not constitute res judicata because the Royal Commission does not fulfil the functions of a Court but rather the administrative functions of an inquiry. Further, it does not constitute an issue estoppel between the parties in respect of the CFMEU, as the parties to the proceeding are not the same.

27. Even if I am wrong in respect of all these matters, I would exclude the material put forward by Ms Stuart-Mahoney on the footing that its probative value is outweighed by the prejudice it might potentially cause to the Respondents. After all, the Cole Royal Commission is now some years ago and a proper inquiry as to the force of the conclusions at which the Commission arrived would require to be updated, with all the attendant evidentiary difficulties that that would involve.

Size of the penalties to be imposed

28. The Respondents submitted that the Court should not impose a penalty, or that if it did so, the penalty should be at the lower end of the maximum provided by s.807 of the WR Act. The Respondents submitted that the declarations I made on 4 August 2008 served a deterrent purpose, and further they submit that that is enough.

29. I categorically reject any such submission. The Applicant is right to submit that the conduct of Mr Deans and the CFMEU strikes at the very heart of the freedom of association provisions. Even though this is a first recorded such contravention in Victoria, it is on any view serious. It is required to be assessed in light of the fact that the CFMEU supported Mr Deans at all points up to and including judgment.

30. While I accept that judgment is recent and there has been but little time for the CFMEU to adopt any remedial steps should they be necessary (bearing in mind that their position was that Mr Deans had not contravened the legislation) it is also to be noted that there has been no contrition expressed by either of the Respondents.

31. That is consistent of course at the very least with the pattern of prior infractions of industrial legislation generally and anti-coercion provisions in relation to freedom of association, which are on any view established against the CFMEU.

32. While Mr Deans' conduct is not shown to have been guided in any way by other CFMEU officers or higher officials, it was conduct engaged in by him as a delegate of the union.

33. While I accept that the maximum statutory penalty is reserved for the worst cases, it is difficult in some ways to imagine a commission of contravention of the freedom of association provisions by an individual delegate that could be more blatant or significant than those that occurred here. In a most naked way, Mr Deans sought to impose a no ticket, no start policy on Mr Gauci; and in the case of Mr Galea a no financial status, no start policy.

34. Given all the relevant circumstances of this case, I believe that the CFMEU should indeed pay a penalty, and a penalty of 75 per cent of the maximum for the two contraventions at that.

35. It is clear that specific deterrence has a significant role to play in respect of contraventions by the CFMEU, as indicated by its prior infractions of the legislation and its absence of contrition, together with the conduct of this case.

36. While on one view it was open to and proper for the CFMEU to accept Mr Deans' word as to what his evidence was, in truth the case for the Applicant was at least in part overwhelming. The pattern of the statutory declarations made, and most particularly that of Mr Gauci, was always likely to be somewhat compelling. Furthermore, there is no evidence that Mr Deans has suffered any kind of obloquy or retribution or harm as a result of the false story that he gave both to this Court and to the union. Indeed, there is no suggestion that he is no longer the union delegate of the site. If this was so, I would have been expected to have been told it.

37. The inference is clearly open to me, and I do indeed draw it, that the CFMEU fully supported and continues to support the position that Mr Deans has adopted.

38. General deterrence is also important. It is important that freedom of association provisions not be breached, and the penalties I have set will assist in that end.

39. Mr Deans falls in a slightly different light. While his conduct constitutes as clear a breach of the freedom of association provisions as one could wish to find, he is not a large and well-funded corporation

like the CFMEU but rather an individual striving to support a family who has no prior contraventions proved against him.

40. In all the circumstances, and bearing in mind the inexact nature of the exercise, in my view Mr Deans should pay two penalties of $6,000.00, of which half should in effect be suspended for a period of one year in the manner adopted in other cases previously. That penalty reflects the balancing act appropriate in circumstances where the conduct proved against Mr Deans is so serious in terms of what the legislation seeks both to achieve and prevent on the one hand, taken with the particular personal circumstances of Mr Deans including his undertaking, which I accept, not to infract the legislation again on the other.

41. Nonetheless, individual delegates also need to understand their obligations under the legislation and the decision will, it is trusted, achieve a deterrent effect that is entirely desirable.

Ancillary matters

42. As sought by the Applicant, the penalties should be paid into the Consolidated Revenue Fund.

43. Mr Galea should be provided with the pay he lost as a result of not being able to work, in the sum claimed by the Applicant. As I have said already, the quibbling by the Respondents with Mr Galea's wages is one of the matters I regard as having done them no credit. The actions of Mr Deans cost Mr Galea money, and he should be paid it.

I certify that the preceding forty-three (43) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate: Ms B Evans

Date: 27 October 2008