FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 4) [2012] FCA 894

Citation:	Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 4) [2012] FCA 894
Parties:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and DARYL PETER LAMBERTH v PILBARA IRON COMPANY (SERVICES) PTY LTD (ACN 107 210 248)**
File number:	NSD 1928 of 2011
Judge:	**KATZMANN J**
Date of judgment:	22 August 2012
Catchwords:	**INDUSTRIAL LAW** – Civil penalty – *Fair Work Act 2009* (Cth), s 546 – where employer took adverse action for prohibited reasons – multiple contraventions – whether arose out of a single course of conduct – relevance of employee's conduct where employee's behaviour contributed to employer's action – relevance of the operation of the "reverse onus" – factors relevant to determining seriousness of contraventions
Legislation:	*Crimes Act 1914* (Cth) s 4AA *Fair Work Act 2009* (Cth) ss 361, 539(2), 540, 546, 557
Cases cited:	*ACE Insurance Limited v Trifunovski (No 2)* [2012] FCA 79 *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* (2011) 205 IR 465 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 *Kelly v Fitzpatrick* (2007) 166 IR 14 *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 *QR Ltd v Communications, Electrical, Electronic, Energy,*

Information, Postal, Plumbing and Allied Services Union of Australia (2010) 204 IR 142
Royer v Western Australia (2009) 197 A Crim R 319
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Date of hearing:	2 August 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	41
Counsel for the Applicants:	Ms C Howell
Solicitor for the Applicants:	Slater & Gordon
Counsel for the Respondent:	Mr JJE Fernon SC
Solicitor for the Respondent:	Freehills

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1928 of 2011**

BETWEEN:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **First Applicant**
	DARYL PETER LAMBERTH **Second Applicant**
AND:	**PILBARA IRON COMPANY (SERVICES) PTY LTD (ACN 107 210 248)** **Respondent**

JUDGE: **KATZMANN J**
DATE OF ORDER: **22 AUGUST 2012**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

The respondent pay to the first applicant the following pecuniary penalties:

1. For contravening s 340(1)(a)(ii) of the *Fair Work Act 2009* (Cth) ("the Act") by refusing to employ the second applicant after the expiration of his contract of employment because he exercised a workplace right by making complaints and inquiries in relation to his employment: $8,500;

2. For contravening s 340(1)(a)(ii) of the Act in its assessment of the second applicant's performance in its mid-year performance review because he exercised a workplace right by making complaints and inquiries in relation to his employment: $11,000; and

3. For contravening s 346(b) of the Act by refusing to accept the second applicant's nomination for the position of safety and health committee representative because he engaged in industrial activity by representing or advancing the views, claims or interests of an industrial association: $16,000.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1928 of 2011**

BETWEEN:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **First Applicant**
	DARYL PETER LAMBERTH **Second Applicant**
AND:	**PILBARA IRON COMPANY (SERVICES) PTY LTD (ACN 107 210 248)** **Respondent**
JUDGE:	**KATZMANN J**
DATE:	**22 AUGUST 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 On 29 June 2012 I determined that the respondent contravened the *Fair Work Act 2009* (Cth) ("FW Act" or "the Act") by taking adverse action against the second applicant, Daryl Lamberth, in four respects and made declarations to that effect. Three of the contraventions involved breaches of s 340(1)(a)(ii) of the Act, and one a breach of s 346(b). Each of these sections is a civil remedy provision within the meaning of the Act. Accordingly, in each case the Court may impose a penalty: FW Act, s 546. There is no dispute that both applicants have standing to apply for penalties under the Act. See FW Act s 540. But the applicants ask that the penalties be paid to the first applicant, the Construction, Forestry, Mining and Energy Union ("the CFMEU") (see s 546(3)(b)).

2 The Court's power to impose a pecuniary penalty is conferred by s 546(1) of the FW Act. It contains no list of factors that must be taken into account. It merely provides that if the Court is satisfied that a person has contravened a civil remedy provision it may, on application, order a person to pay a pecuniary penalty that it considers appropriate.

3 The parties proceeded on the basis that the factors relevant to the assessment of penalty include those listed by Mowbray FM in *Mason v Harrington Corporation Pty Ltd*

[2007] FMCA 7 and adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14, and the submissions were largely focussed on those factors. As Gyles J pointed out in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11], however, and as the parties themselves acknowledged, the Court's discretion is unlimited and a judge's checklist is no substitute for it. The task of the Court is to fix penalties that are appropriate to the circumstances of the case and which pay due regard to the need to maintain public confidence in the statutory regime: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 ("*McAlary-Smith*") at [91] per Buchanan J. The purpose of the statutory penalties is to punish the wrongdoer, to deter it from behaving in the same way again and to deter other employers who might be tempted to follow suit. But the amounts must be proportionate to the wrongdoing and conform to prevailing standards: *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [93].

4 The applicants' case is that each of the contraventions was serious, calling for penalties in the mid to high range. The respondent submitted that penalties in the low range were warranted, if, that is, any penalty at all should be imposed.

5 The relevant facts are set out in detail in my previous judgment: *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697. It is, however, convenient to recall the salient ones.

6 The respondent is a large company. The evidence given by its human resources manager, Simone Slade, was that there were close to 1,000 employees in the Rail Division alone. Mr Lamberth was one of 207 employees at the particular depot where he worked. There is no evidence about the respondent's financial position but it is a wholly owned subsidiary of Hammersley Holdings Limited, in turn a wholly owned subsidiary of Rio Tinto Limited, and is the main employing entity within the Rio Tinto group of companies operating in the iron ore mining industry in the Pilbara region of Western Australia.

7 The respondent employed Mr Lamberth as a trainee car examiner on a 12-month fixed term contract with the prospect of permanent employment at the end of the term.

8 Mr Lamberth took a keen interest in matters of health and safety at the workplace. For five years in his previous employment he had been an elected occupational health and

safety representative. In his relatively short time with the respondent he made (and pursued) numerous complaints and inquiries about matters of this kind. In the process he irritated his supervisors. At times he was abrasive and argumentative. After an altercation with one supervisor he joined the CFMEU. He quickly became an active and enthusiastic member of the union, encouraging other employees to join, and campaigning in support of a collective agreement promoted by the union, initially over the respondent's opposition.

9 For years the consistent message given to staff by the chief executive of Rio Tinto Limited was that direct engagement with the workforce (rather than through the intermediary of a trade union) was the way to go.

10 Most employees on 12-month fixed term contracts were offered permanent employment at the expiration of the fixed term. But not Mr Lamberth. I found that the respondent's conduct in this respect contravened s 340(1)(a)(ii) of the FW Act. It was adverse action taken for the prohibited reason that Mr Lamberth had exercised a workplace right within the meaning of s 341(1)(c)(ii) of the Act. The workplace right was the making of complaints and inquiries in relation to his employment. Mr Lamberth was also marked down in the mid-year performance review for the same reason. The circumstances in which that occurred are described at [141]–[149] of my previous judgment. This, too, constituted adverse action within the meaning of the Act and is the second contravention attracting a penalty.

11 The third and fourth contraventions relate to the same conduct although they involve breaches of different sections of the Act. Mr Lamberth nominated himself for a position as safety and health committee representative. But, despite his interest and experience, the respondent (through one of its managers, Mark Hamilton) refused to accept his nomination. The circumstances are described in [54]–[58] of my previous judgment. I found that the decision was taken for two reasons prohibited under the Act: because Mr Lamberth had made complaints and inquiries in relation to his employment and because he represented or advanced the views, claims or interests of the CFMEU. In taking this action the respondent was in breach of ss 340(1)(a)(ii) and 346(b).

THE ISSUES

12 There was no dispute about the legal principles. The parties were at loggerheads, however, about four matters:

(a) Whether the first and second contraventions should be treated as a single course of conduct (as the respondent argued);

(b) The relevance of Mr Lamberth's own conduct;

(c) Whether the fact that the Court applied "the reverse onus" to come to its conclusions has a bearing on the amount of the penalty; and

(d) How serious the respondent's contraventions were.

13 I now turn to consider these questions before going on to determine the appropriate penalties.

Should the first and second contraventions be treated as a single course of conduct?

14 As the respondent submitted, where a party has engaged in multiple contraventions, it is relevant to consider whether the breaches are properly attributable to a single course of conduct. Of course, as the Full Court pointed out in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 at [39], this is not a principle peculiar to the industrial context. It derives from the criminal law. Its purpose is to avoid oppression, through penalising someone twice for what is essentially the same criminality. For this reason, it is necessary to carefully identify what the criminality (in this case, culpability) is. The same motive will rarely be enough. In this case the applicants contend that is all that ties the conduct together.

15 There is no doubt that there is a connection between the first two contraventions. I found that the report of the mid-year performance review was, in substance, contrived to justify the planned course of terminating Mr Lamberth's employment. Nevertheless, the applicants point out that the conduct involved in the two contraventions occurred at different times, and was different in character. Furthermore, the mid-year performance appraisal was not (on the respondent's evidence) necessarily determinative of whether Mr Lamberth's contract would be renewed and the decision maker in each case was different. But Michael Wilkings, the Superintendent Rail Operations at the 7 Mile Yard where Mr Lamberth

worked, was intimately involved with both decisions. It was only after his intervention that all positive comments were removed from the draft appraisal and the marks reduced to convert a satisfactory performance to one virtually guaranteed to bring about the termination of Mr Lamberth's employment. And while both Matthew Bushby (Mr Lamberth's immediate supervisor) and Mr Wilkings gave evidence that Mr Lamberth still had the chance to redeem himself after the mid-year appraisal, I have little doubt that the attitudes of the these two men would not have changed even if he had done so. In fact, with one notable exception there was no untoward behaviour after the final report of the mid-year performance review was produced and what there was took place after the decision not to renew Mr Lamberth's contract had been made. Yet, the applicants correctly submit that, as it was Mr Hamilton who made that decision and as there is no evidence that he had any knowledge of the manipulation of the performance appraisal, there is no basis for saying that the two contraventions constituted "the same criminality".

16 There is, in any case, no requirement that the two contraventions be treated as one: *Cahill* at [41]–[42]; *Royer v Western Australia* (2009) 197 A Crim R 319 at [25]–[31].

17 The position is quite different when it comes to the third and fourth contraventions. These concern the very same acts.

18 Section 557(1) provides that for the purposes of Pt 4-1 of the Act, two or more contraventions of particular civil remedy provisions set out in subs (2) are, subject to subs (3), taken to constitute a single contravention if they are committed by the same person and they arose out of a course of conduct by the person. None of the sections contravened in this case appear in subs (2). This would seem to point to a legislative intention that the contraventions with which this case is concerned are not to be taken to constitute a single contravention. But that does not mean that the fact that the third and fourth contraventions are concerned with the same action is immaterial. As Keane CJ and Marshall J said in *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 204 IR 142 at [49]:

> Even if s 557(2) does not apply to a case to oblige to treat as one contravention all the consequences of a particular piece of conduct, it is open to the Court, in an appropriate case, to take into account, as a matter of discretion, the circumstance that the same acts or omissions have resulted in multiple contraventions by multiple breaches of a term cast in similar language in each of multiple agreements, by imposing a lesser penalty or even no penalty in respect of breaches of some terms,

while imposing a substantial penalty in breach of other terms. [Citations omitted.]

What is the relevance of Mr Lamberth's conduct?

19 This was the high point of the respondent's submissions. The respondent drew attention to the various findings I made to the effect that Mr Lamberth was argumentative and, at times, confrontational in his approach. It also drew attention to my concerns about aspects of Mr Lamberth's evidence. The way in which Mr Lamberth gave his evidence is irrelevant. But I accept that, to the extent that Mr Lamberth's behaviour at the workplace contributed to the respondent's actions or explained its behaviour, it is relevant. I am satisfied that the decision not to renew the contract was made not only because Mr Lamberth made complaints and inquiries in relation to his employment. In my view, Mr Lamberth's sporadic intemperate outbursts contributed to the respondent's decisions not to offer him further employment after the expiration of his contract and to penalise him in his mid-year performance review. I also think that Mr Lamberth's aggressive manner probably contributed to Mr Hamilton's decision to reject his nomination for the safety and health committee.

What is the relevance of the application of "the reverse onus"?

20 Section 361 of the FW Act relevantly provides that, if in an application in relation to a contravention of Pt 3-1 it is alleged that a person took action for a prohibited reason and taking that action for that reason would constitute a contravention, it is presumed, in proceedings arising from the application, that the action was or is being taken for that reason or with that intent, unless the person proves otherwise. This is what the respondent means by "the reverse onus". Noting that for relevant purposes a person takes action for a prohibited reason if the reasons for the action include that reason (see s 360), the respondent drew attention to my findings to the effect that the respondent had not proved that the adverse action was not taken for reasons that included a prohibited reason. The respondent relied on these findings to support a submission that, viewed objectively, the contraventions fall into the lower end of the scale of contraventions of this type. It submitted that the Court did not make findings that are indicative of actual or deliberate contraventions of the Act.

21 I fail to see how the mode of proof has anything to do with the gravity of the contraventions. In this respect I would adopt the applicants' submissions. Section 361 is a

procedural provision. It facilitates proof of facts which (generally speaking) only the alleged wrongdoer knows. The fact that I found that the respondent had not rebutted the presumption does not detract from or diminish the importance of the conclusions that the Act had been contravened. The submission that the Court did not make findings that point to actual or deliberate contraventions of the Act is simply wrong.

22 That said, however, as I have already indicated, I accept that in evaluating the gravity of the contraventions it is proper to take into account in the respondent's favour that the prohibited reasons were not the sole reasons actuating or informing its conduct.

What is the appropriate penalty?

23 The Court's approach is no different from the approach applied in sentencing. The first task is to assess the objective seriousness of the contraventions and then to look at whether there are subjective factors that mitigate it.

The objective factors

24 The starting point must be the penalty fixed by the Parliament. In the case of a body corporate, s 546(2) of the Act provides that the maximum penalty is five times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subs 539(2). That number is 60. A penalty unit is $110: *Crimes Act 1914* (Cth), s 4AA. Accordingly, the maximum penalty for each contravention is $33,000 and the maximum total of the penalties is $132,000.

25 The first contravention had serious consequences for Mr Lamberth. He lost his job and had to look for other work. He managed to find it very quickly, returning to his former job with Fortescue Metals. This caused no financial loss. Indeed, his salary was higher there. But this workplace was 500 kms away from his home, which meant that he was separated from his pregnant wife (who is employed by the respondent at Karratha) and later newborn child for considerable periods of time. No doubt this caused him (not to mention his family) great personal hardship.

26 In the case of the second contravention, the respondent's conduct involved manipulating the assessment process to disadvantage Mr Lamberth. This is a serious matter.

27 As for the third and fourth contraventions, these are grave. Employees have a right to nominate for membership of the committee. Members are elected by the employees. The employer has no right to interfere with the election process. Not only did the respondent deny Mr Lamberth his right to nominate and, potentially, to contribute to the work of the committee, it also interfered with the rights of the other employees who might have voted for him. Indeed, the evidence indicated that there was every prospect that Mr Lamberth would be elected and that the respondent's decision to reject his nomination was actuated in part by this perception. It is therefore reasonable to conclude that the respondent's conduct deprived the other employees (or, at least, the majority of them) of their chosen representative.

28 In the first two cases the seriousness of the contraventions are tempered by the contribution of Mr Lamberth. While he had nothing to do with the manipulation of the assessment process, the assessment in part no doubt reflected genuine concerns about his behaviour. It is possible that Mr Lamberth's "poor communication skills" also contributed to Mr Hamilton's decision to reject his nomination for the safety and health committee, but I doubt it played any significant role. Indeed, I rather think it was a convenient excuse. After all, the evidence disclosed that Mr Hamilton was aware of this issue well before then and yet it was he who suggested Mr Lamberth nominate in the first place. The catalyst for Mr Hamilton's change of heart was most likely Mr Lamberth's involvement in union activities (see [164]–[179]).

Subjective factors

29 The respondent has not previously been found to have contravened the FW Act. But on 4 March 2009 it admitted to contraventions of s 342(1) of the *Workplace Relations Act 1996* (Cth) ("WR Act") in that it failed to lodge with the Workplace Authority an Australian Workplace Agreement for 57 of its employees and that in doing so it failed to pay four employees the amount of shift allowance due under the relevant award. It offered an undertaking to the Commonwealth of Australia (through the Office of the Workplace Ombudsman) as a result of which the Workplace Ombudsman decided not to commence civil penalty proceedings against it. With one qualification there is no evidence that it failed to honour the undertaking. The qualification relates to paragraph (g) of the undertaking, in which the respondent promised to ensure that it did not engage in conduct in contravention of the Act or Regulations in the future. The WR Act, of course, has been repealed. But the

provisions in play in this case largely duplicate provisions contained in the WR Act. There is no evidence that the respondent did not take appropriate steps to guard against contraventions of the Act. Equally, however, there is no evidence that it had any system in place to prevent the kinds of contraventions that occurred in this case. Indeed, such evidence as there is touching on this issue indicates that it did not.

30 Still, the circumstances of the contraventions of the WR Act are entirely different from those in the present case. In the former case the respondent voluntarily disclosed to the Office of the Workplace Ombudsman that it had not lodged the agreements as required and it appears to have fully cooperated with the Office in the investigation.

31 I do not regard these previous contraventions as aggravating factors but the respondent should not be treated as a first offender.

32 More significant is the fact that the respondent showed no contrition. On the contrary, it consistently sought to justify its conduct. Far from cooperating with the prosecutor, it put the applicants to strict proof on every matter (at first including, astonishingly, the CFMEU's status as an industrial association within the meaning of the Act), and it denied engaging in adverse action when there was no evidentiary basis for doing so.

33 The respondent submitted that no weight should be put on the absence of contrition. I reject the submission. The absence of contrition bears upon the risk of reoffending and therefore on the question of specific deterrence. The respondent drew my attention to some recent remarks of Perram J in *ACE Insurance Limited v Trifunovski (No 2)* [2012] FCA 793 at [113]–[114] where his Honour said:

> It is not clear to me how an artificial construct such as a corporation can experience the complex human emotion of contrition made up, as it is, of an amalgam of distinctly human emotions such as regret, shame and sympathy. I do not doubt that a corporation may exhibit signs of regret but it is too much to expect that such an artificial construct can be meaningfully contrite.
>
> For civil penalty cases involving corporations it would be more coherent to ask only whether the corporation has changed its behaviour. Nothing more can be expected; a person who does not literally or physically exist may not wear sackcloth.

34 While I naturally accept the force of Perram J's remarks, I do not agree that nothing more can be expected of a corporation than that it has changed its behaviour. A corporation

may admit its wrongdoing and spare the other parties the costs of prosecuting the case. In a jurisdiction, such as this, where costs can only be awarded in exceptional cases that is a meaningful expression of contrition. The corporation may also offer recompense. It may apologise. The decision-makers themselves could offer apologies. It may introduce precautions to guard against the risk of reoffending. In the present case, evidence was led (and not contradicted) that the General Manager, Ben Van Roon, acknowledged that Mr Hamilton should not have rejected Mr Lamberth's nomination for the safety and health committee. In the circumstances, the respondent could (and should) have stopped the ballot.

35 Yet, the respondent did nothing. Moreover, it sought to shift all responsibility away from itself to the employee it wronged.

36 Doubtless the primary purpose of having a system of pecuniary penalties for conduct of this kind is to deter employers from taking action against employees for reasons the Parliament considers unacceptable. The penalties should therefore be of a kind that would be likely to act as a deterrent to like-minded employers: *Ponzio* at [93]. Barker J observed in *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* (2011) 205 IR 465 at [20] that "[a]t a general level, persons in the position of an employer must receive a message, indicated by the imposition of a pecuniary penalty, that much more than lip service is to be paid to the objectives of the FW Act in relation to industrial freedoms". The same must be said of workplace rights.

37 Consequently, as the authorities demonstrate, deterrence (both general and specific) plays an important part in the assessment of penalty. Specific deterrence will often be unnecessary. But this is not such a case. The failure to acknowledge wrongdoing or to explore, let alone devise, ways of preventing future action being taken for, or influenced by, a prohibited reason indicates the need for the penalty to deter this respondent from acting in the same way again. Ms Slade gave evidence that the respondent has no formal process or written guidelines or procedures for making decisions about whether to offer further employment to a person on a fixed term contract. Nor does it have a system for auditing decisions of this kind. Ordinarily, she said, and in this particular case, there was not even a formal record of who made the decision, the reasons for it or when it was made. As the applicants submitted, the absence of transparent procedures for determining who should be offered permanent employment is open to abuse and conducive to decisions being taken for

prohibited reasons. That is particularly so where, as here, the employer has been averse to unions playing an active role at the workplace.

38 These matters together with the absence of any contrition indicate that, despite the respondent's relatively good record, there is a substantial risk of re-offending.

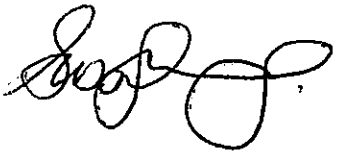
Penalties

39 Taking all these factors into account and approaching the assessment as I must as a process of instinctive synthesis (*McAlary-Smith* at [27], [55]) I would impose a penalty of $8,500 for the first contravention (the refusal to renew the contract) and $11,000 for the second (the mid-year performance review). In view of the identity of the conduct involved in the third and fourth contraventions I would impose a fine of $16,000 for the fourth (the refusal to accept Mr Lamberth's nomination for the safety and health committee because of his industrial activity), but impose no penalty for the third contravention (the refusal to accept the nomination because he exercised his workplace rights by making complaints and inquiries). The aggregate penalty is $35,500. That amount is certainly not oppressive or crushing and does not offend the principle of totality (cf. *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383). Indeed, anything less would be unlikely to have any deterrent effect.

40 I will order that the penalties be paid to the CFMEU. There was no opposition to this course.

41 There will be no order as to costs.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann.

Associate: 

Dated: 22 August 2012