

FOCUS

WORKPLACE RELATIONS



Can picketing be protected industrial action?

In a recent interlocutory decision, the Federal Court has again considered the question of whether picketing can be protected industrial action under the *Workplace Relations Act*. Lawyer Rosemary Bryant-Smith reports.

Background

In *CEPU and Langley v the Australian Postal Corporation*,¹ Justice Finkelstein considered an application by the Communications, Electrical and Plumbing Union (*CEPU*) for (among other relief) an injunction to stop Australia Post dismissing one employee, Mr Shead, and to reinstate another employee, Mr Langley, to his normal duties.

Mr Shead and Mr Langley had allegedly been involved in picketing and a 'stop work' in support of an industrial dispute about the introduction of new technology at Australia Post's Melbourne Parcel Facility. Mr Shead argued that he was likely to be dismissed, following an internal investigation into his conduct on the picket line that resulted in a recommendation of dismissal. Mr Langley claimed that, following his participation in industrial action, he had been reassigned to other duties with a consequent reduction in pay. The *CEPU* argued that these actions by Australia Post were, or would be, in contravention of section 170MU(1) of the *Workplace Relations Act 1996* (Cth) (the *Act*).

Section 170MU prohibits employers from dismissing an employee, injuring an employee in his or her employment or altering an employee's position to the employee's prejudice, or threatening such actions, because the employee has engaged or is proposing to engage in protected action.

Inside:

Injured employees

Principal contractor liability

NSW OH&S law developments

Work practices and RSI

Unlawful discrimination

Your publication:

If you would prefer to receive our publications in electronic format, please email: publications@aar.com.au

www.aar.com.au

VISIT OUR WEB SITE TO READ ALL FOCUS EDITIONS

1. Federal Court, 26 February 2004

In this case, the employees needed to prove that their picketing could be 'industrial action' that was 'protected action' under the Act, in order to show that there was a serious question to be tried that Australia Post had breached s170MU.

Picketing as industrial action

Picketing is not mentioned in the definition of 'industrial action' in s4 of the Act. This has led to a number of cases in which the Australian Industrial Relations Commission and the Federal Court have considered whether or not picketing can constitute 'industrial action' and 'protected action'.

Traditionally, picketing has not attracted immunity as protected action under the Act, because it does not involve a 'ban, limitation or restriction on the performance of work'.

Traditionally, picketing has not attracted immunity as protected action under the Act, because it does not involve a 'ban, limitation or restriction on the performance of work'. Picketing traditionally involves the communication of information to persons entering or leaving a site. It is only unlawful, and actionable in tort, if it involves obstruction, besetting, or other unlawful conduct.

However, in some past cases, employers obtained injunctions against picketing, on the grounds that there was a serious question to be tried that the picketing would result in the commission of the torts of nuisance, besetting, and interference with contractual relations, and/or the coercion of other employees, in breach of the Act.

In 2002, the Federal Court held in *Transfield Construction v AFMEPKIU*² that a picket line, established by unions or their organisers for the purpose of preventing, deterring or discouraging employees from attending at their employer's premises and from carrying out their work, can be 'industrial action' under the Act, and therefore be the subject of a s127 order preventing industrial action. In that case, Justice Merkel recognised that his decision could have significant consequences. However, he did not discuss whether or not picketing could be 'protected action' under the WRA.

The decision

Justice Finkelstein noted, at the outset of his decision, that the question of whether or not picketing can constitute protected industrial action 'is a matter of some controversy' and 'the position is far from clear'.

After reviewing the relevant cases, including *Transfield Construction*, Justice Finkelstein held that it is possible that picketing could be industrial action. Justice Finkelstein noted that the correctness of Australia Post's contention would have to await authoritative determination, but his Honour was prepared to issue an injunction against Australia Post, restraining it from terminating Mr Shead's employment and from removing Mr Langley from his normal duties.

Consequences

None of the parties in this case made any specific arguments that the picket involved illegal activity, such as a breach of the Act, or the commission of torts such as nuisance, besetting, and interference with contractual relations. The CEPU's claim that Australia Post would breach s170MU was based simply on the fact that the two employees in question had been members of the picket, and that this was protected industrial action. Therefore, the implication of Justice Finkelstein's decision is that it is possible that picketing, in and of itself, could constitute protected action. If picketing is protected industrial action, an employee picketing during a bargaining period would enjoy limited immunity from certain common law actions (eg some actions in tort).

Justice Finkelstein noted, at the outset of his decision, that the question of whether or not picketing can constitute protected industrial action 'is a matter of some controversy' and 'the position is far from clear'.

CEPU v Australia Post is an interlocutory decision. As a result, Justice Finkelstein's analysis of the issues is brief, and the decision is not strong authority for the claim that picketing is protected industrial action. However, read with *Transfield Construction*, this decision may flag a significant change in the Commonwealth law relating to picketing.

2. [2002] FCA 1413

Don't dismiss the injured, nor the recently fit!

The New South Wales Industrial Relations Commission has placed a heavy onus on employers to show that dismissals following a return to work from injury are unrelated to the injury. Lawyer Nico Burmeister reports.

Background

In *CFMEU (NSW Branch) v Cobar Mining Services Pty Ltd*³, the CFMEU sought reinstatement of an employee on the basis that he had been dismissed:

- while injured; and
- because of the injury.

The employee was an unskilled trades assistant. He was injured in a workplace accident, which rendered him unfit for work for three-and-a-half months. Upon his return to full duties, his employment was terminated, purportedly because his position was redundant due to a directive by the site owner to his employer that unskilled labour should no longer be used.

Dismissal was unfair

The Commission was faced with two questions. First, was the employee 'injured' at the time of his dismissal? Second, if so, was the employee dismissed because of his injury?

In answering the first question, the Commission took account of the employee's continuing medical treatment and rehabilitation at the time of the dismissal. In light of this, the Commission concluded that he was injured at the time of dismissal.

On the question of whether the employee was dismissed because of his injury, the Commission placed the onus on the employer to prove that the injury was not a substantial or operative cause of the dismissal. The employer was unable to discharge this burden in light of contrary evidence, including the fact

that the written directive to cease employing unskilled labour was written one month after the CFMEU had commenced the litigation.

Implications

Employers must take great care when dismissing injured employees after their return to work. The fact that the employee is deemed medically fit to return to work may not prevent the injury from being a cause of the dismissal. The onus rests with the employer to show that the injury and the termination are not causally related and, to satisfy this onus, a paper trail and careful planning would be needed.

Principal contractor liable to subcontractor's employee

The NSW Court of Appeal⁴ found that a principal contractor was wholly liable to pay damages to a subcontractor's employee who was injured when a staircase, installed by the principal contractor in a residential unit under construction, collapsed. Special Counsel Del Bobeff and Lawyer Dana Wintermantel report.

Principal contractor liable in tort

The staircase was installed by the principal contractor under a system that suggested that it was safe if no safety tape was attached to it. The injured employee said that, if the safety tape had been attached, he would not have used the staircase. The court held that the principal contractor was liable in tort to the injured worker, but that the subcontractor employing the injured worker was not liable.

3. [2004] NSW IRComm 36

4. *Lipman Pty Ltd v McGregor & Orsa*

The court dismissed various claims for indemnity under the subcontract. However, more interesting is that, although the cases establish that an employer has a non-delegable duty to its employees, there was no breach in this case.

Implications

Although principal contractors may have assumed that contribution should be available from subcontractors where employees of those subcontractors are injured, that will not necessarily be the case. This case sits uncomfortably with other cases dealing with non-delegable duties, but it also highlights the tendency of the courts to attribute substantial responsibility to principal contractors.

Developments in NSW OH&S law

The Occupational Health & Safety Regulations, which came into effect in NSW in 2001, require that employers conduct a risk assessment of every item of plant and equipment and every operation that occurs within a workplace. Failure to do this can be punished by a fine. Partner David Cross reports.

Failure to conduct a risk assessment

It is also now clear that a failure to conduct a risk assessment, in and of itself, is a basis upon which an employer can be convicted of breaching one of the two relevant general duties under the *Occupational Health & Safety Act*. The Act requires an employer to ensure (to guarantee) the health and safety at work of employees and also of non-employees while they are at the employer's place of work.

In *WorkCover v Boral Construction Limited*, the company was prosecuted for failing to ensure the health and safety of one of its employees. The employee was driving a road-roller onto the back of a tray-top truck that transported it from site to site.

This operation was the subject of a standard procedure laid down by the employer, which involved driving the roller up a steel ramp. On this particular occasion, the roller slipped on the ramp and toppled off.

The company was prosecuted for failing to:

- have a safe system of work;
- train employees adequately; and
- conduct an explicit risk assessment of the operation.

The evidence that came out at the trial showed that there was an adequate system of work in place and that the employees had been trained in it. If those two matters were the only basis for the charge, the company might have been acquitted. However, the evidence established that no explicit risk assessment had been undertaken until after the accident, and that this assessment had identified certain changes (eg using specific traction materials on the ramp) that addressed the risk.

Message for employers

The message for employers is that a system of work may have been in place for many years without incident, but it is still necessary to subject that system to a risk assessment and to keep the records of that risk assessment.

RSI: a strain on employers

The NSW Industrial Relations Commission found an employer to be in breach of occupational health and safety legislation after work practices led to repetitive strain injuries. Lawyer Stacey Kelly reports.

Background

In this case,⁵ the employer was found to be in breach for failing to provide:

- a safe system of work; and
- plant that was safe and without risk to health.

The employer operates a container terminal at Port Botany and uses straddle cranes (**straddles**) to handle rail operations, and loading and unloading of



Unlawful discrimination and the inherent requirements defence

The New South Wales Administrative Tribunal recently found that the Commissioner of Police had unlawfully discriminated against a job applicant by failing to identify the inherent requirements of the job before rejecting his application to join the police force because of his disability. Partner Julian Riekert and Articled Clerk Tess Hardy report.

Background

The applicant, Mr Zraika, suffered from impaired vision. While both parties accepted that this was a disability, they disagreed about the extent of the disability and its impact on Mr Zraika's capacity to perform the duties of an operational police officer.

The central question was whether the Commissioner of Police was entitled to exclude Mr Zraika from consideration on the basis of his disability. To do this, the Commissioner needed to show either that:

- Mr Zraika was unable to perform the inherent requirements of the job; or
- unjustifiable hardship would be caused in providing remedial measures to enable Mr Zraika to perform these inherent requirements.

Decision

The Tribunal found that the proper process when considering a job application by a person with a disability was to:

- determine the inherent requirements of the job;
- determine whether the applicant with a disability is able to perform those inherent requirements without special assistance; and, if not,

ships. Six employees gave evidence at a hearing of the NSW Industrial Relations Commission that they had developed symptoms of neck and back pain after driving straddles for long periods. These had increased in severity and consistency over time.

The employer's operations required the straddle drivers to adopt extreme posture for long periods of time. There were also problems with the seating in the cabin, which compounded the posture problems.

Findings

The Commission held that the defendant had failed to ensure a safe system of work and to provide or maintain plant that was safe or without risk. The Commission was satisfied that repetitive body movements of the back and neck and the frequent adoption of extreme postures exposed the employees to the risk of repetitive strain injury (*RSI*).

This decision highlights the need for employers ... to assess the risk of repetitive movements and the adoption of extreme body postures. Safety is not limited to the avoidance of specific incidents and must extend to practices with indirect consequences over a longer period.

Ultimately critical was the employer's decision to leave it to its employees to determine the steps they should take to avoid the risk of RSI. The employees were not directed in accordance with various steps set out in reports and assessments by experts that were held by the employer.

Implications for employers

This decision highlights the need for employers, when undertaking assessments of the risks of injury to employees in the workplace and taking steps to minimise those risks, to assess the risk of repetitive movements and the adoption of extreme body postures, which can result in RSI and soft tissue injuries over a period of time. Safety is not limited to the avoidance of specific incidents and must extend to practices with indirect consequences over a longer period.

5. *Robert Darcy Coombs v Patrick Stevedores Holding Pty Ltd* [2004] NSW IRC 77



- determine whether the applicant may be able to carry out the inherent requirements of the job with a level of assistance that would not impose unjustifiable hardship.

The only evidence concerning the inherent requirements of the job was a list of conditions outlined in a medical questionnaire. The Tribunal found that these did not adequately describe the inherent requirements of the job, and that the visual acuity test undertaken by Mr Zraika was not determinative of whether he was able to perform the inherent requirements of the job safely. The Tribunal observed that Mr Zraika's circumstances, particularly his previous occupations as a motor mechanic and security guard, should have been taken into account.

As the Commissioner of Police did not establish that the provision of special services and facilities would impose an unjustifiable hardship, the Tribunal awarded Mr Zraika \$10,000 in damages for non-economic loss and ordered the Commissioner to reconsider Mr Zraika's application without reference to the visual acuity test.

Implications

When considering job applications from people with a disability, employers need to:

- identify the inherent requirements of the position before recruiting, by considering both the terms of the contract of employment, and the circumstances in which the particular employment is carried on; and
- use tests from which they can properly determine whether an applicant can perform the inherent requirements of the job safely.

The Tribunal acknowledged that identifying the inherent requirements of a position is often difficult and requires the investment of considerable time and expense. While the complexity of the task will not excuse an employer, the Tribunal will look most favourably on those employers who have made reasonable efforts to identify the inherent requirements of the positions in their organisations, and then devised fair and clear mechanisms to gauge whether an applicant with a disability can perform those inherent requirements.

For further information, please contact:

Jamie Wells
Partner, Brisbane
Ph: +61 7 3334 3268
Jamie.Wells@aar.com.au

Tim Frost
Partner, Sydney
Ph: +61 2 9230 4995
Tim.Frost@aar.com.au

Peter Arthur
Partner, Sydney
Ph: +61 2 9230 4728
Peter.Arthur@aar.com.au

Julian Riekert
Partner, Melbourne
Ph: +61 3 9613 8672
Julian.Riekert@aar.com.au

Tom Yuncken
Partner, Perth
Ph: +61 8 9488 3757
Tom.Yuncken@aar.com.au

Gavin MacLaren
Partner, Singapore
Ph: +65 6535 6622
Gavin.MacLaren@aar.com.au

David Cross
Partner, Sydney
Ph: +61 2 9230 4394
David.Cross@aar.com.au

Have your details changed?

If your details have changed or you would like to subscribe or unsubscribe to this publication or others, please go to www.aar.com.au/general/subscribe.htm or contact Barbara Leis on +61 7 3334 3371 or email Barbara.Leis@aar.com.au

www.aar.com.au