

FOCUS

WORKPLACE RELATIONS



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UNION THREATS OF DISRUPTION AMOUNT TO COERCION

Threats by a union to disrupt work can amount to coercion, if the union acts through legitimate channels but under false pretences. Lawyer Carl Xu reports.

HOW DOES IT AFFECT YOU?

- Employers need not tolerate threats made by unions that effectively coerce them to enter an agreement with the union or to hire only union members.
- Even when it appears that a union is acting through proper channels, such as having WorkCover or a council intervene, its motive for doing so is important.
- Where an employer suspects that the motive behind a union's intervention is a false pretence to coerce it into dealing only with union members, it should keep clear records of any conduct that suggests this.
- There is a strong indication that a union is acting under false pretences if it is intervening in areas outside its usual concerns, such as traffic safety or inspecting workplaces that do not have any union members working there.

of the Construction, Forestry, Mining and Energy Union (the **CFMEU**) and did not have an agreement with them.

Before engaging Silvestri, LGB received visits from CFMEU officials in September and October, who threatened to disrupt work unless the project was manned by union members. Upon learning that LGB proposed to engage Silvestri, CFMEU officials repeated their threats.

The CFMEU carried out these threats on two occasions. On 11 September, it had WorkCover inspectors attend the site to inspect safety concerns and the site was shut down briefly for OHS reasons. On 21 October, following Silvestri's appointment, a CFMEU official illegally blocked the driveway to the building site with his car and later had the Wollongong council close the site claiming the traffic arrangements were a safety concern.

Following the second disruption, LGB terminated its contract with Silvestri, electing to contract with a CFMEU member. Silvestri claimed that the CFMEU breached, among other things, the following provisions of the *Workplace*

Post-termination evidence justifying termination; the need to consider alternatives for injured workers and more

BACKGROUND

LGB Contracting Pty Ltd was a developer and builder of a residential building in Wollongong and, in October 2003, engaged A & L Silvestri Pty Ltd (**Silvestri**) to carry out excavation and demolition works. Silvestri was not a member



Relations Act 1996 (Cth) (the **Act**):

- section 170NC(1),¹ which prohibits a person from taking or threatening to take action with the intention to coerce another person into making an agreement with the first person; and
- s298SC,² which prohibits a person from making a misleading misrepresentation about another person's obligation to become a union member.

THE DECISION

Justice Gyles found³ that the CFMEU breached s170NC(1) of the Act. His Honour rejected the CFMEU's argument that the officials were bona fide in investigating OHS breaches, and stated that 'it is no answer to say that there were legitimate reasons on each occasion for the site ultimately being closed.'

The legitimate concerns were found to be mere pretences for the CFMEU to cause disruptions. These were 'illegitimate and unconscionable', and carried out by:

- inviting WorkCover to conduct a safety inspection, even though there were no CFMEU members on site; and
- requesting that Wollongong Council close the site because of concerns for traffic safety, which was not a matter of concern to any workers on site.

However, the court did not find that there was any misleading representation under s298SC(c) in the respondent's comment 'that's the reason mate, you're not a member of the union'. This was because that comment was a statement in response to a site worker's question as to why Silvestri's trucks were denied access.

POST-TERMINATION EVIDENCE JUSTIFIES DISMISSAL

The Australian Industrial Relations Commission has found that events post-termination of employment can be relied on to justify a termination of employment. Special Counsel Rowan Kelly reports.

HOW DOES IT AFFECT YOU?

- Circumstances that come to light after a termination of employment may be relevant to whether the termination is unfair.
- Employers should still investigate an allegation of misconduct, obtain all relevant facts and give the employee an opportunity to respond, before making a decision regarding the employee's employment.

BACKGROUND

On 13 August 2007, Mr Johns was suspended with pay from his employment with Brisbane City Council (**BCC**) following an allegation that he had made physical threats. BCC directed that he return BCC's property, including a mobile phone, camera and car keys. Mr Johns was also invited to show cause as to why he should not be terminated from his employment.

Mr Johns did not return the items and did not substantively respond to the invitation to show cause.

On 27 August 2007, BCC terminated Mr Johns' employment on the basis that:

- he had failed to comply with the direction to return BCC's property; and
- he had been charged by police and was facing a court appearance relating to various indictable offences. These charges involved the alleged theft of BCC property by Mr Johns and fraud.

In January 2008, Mr Johns pleaded guilty to the charges of theft and fraud and was issued with a suspended sentence.

Mr Johns applied to the Australian Industrial Relations Commission, claiming that the termination was harsh, unjust or unreasonable.

1. Pre-WorkChoices reforms – now found at s400(1) and s798 of the Act.

2. Now found at s790.

3. *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2007] FCA 1047.



LEGISLATION

Section 652(3) of the *Workplace Relations Act 1996* (Cth) (the **Act**) provides that:

- ... [t]he Commission must have regard to:
- ...
- (b) whether the employee was notified of that reason [for the termination]; and
 - (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee ...

THE DECISION

Senior Deputy President Richards found⁴ that the second ground for termination of employment (the charges and impending hearing) was an inadequate reason for terminating Mr Johns' employment. The employer acted on the incorrect basis that an employee charged by police may have their employment terminated no matter what the outcome.

However, this was not critical as the first ground for termination of employment (failure to return BCC's property) was a valid reason to terminate Mr Johns' employment.

While the refusal to return the property was a sufficient reason to terminate employment, the Senior Deputy President found it appropriate to rely upon Mr Johns' plea of guilty to the charges, which came to be known by BCC subsequent to the termination.

The Senior Deputy President cited with approval Justice Kirby in the High Court decision of *Concut Pty Ltd v Worrell* [2000] HCA 64:

The question was not whether the employer was aware of such grounds to justify the course which the employer adopted. It was whether such grounds and justification existed.

The Senior Deputy President held that, although the charges to which Mr Johns pleaded guilty did not form part of the reasons for termination given to Mr Johns, they were still able to constitute part of the determination of whether the termination of employment was for reasons that were harsh, unjust or unreasonable.

In this case:

- Mr Johns' conduct had 'fatally compromised his employment contract' and had 'destroyed the confidence necessary to sustain that relationship'; and
- 'no issues of procedural fairness in replying to such proven charges arise or can arise for the purposes of section 652(3)(b) and (c)' of the Act.

Mr Johns' application was dismissed.

FAMILY RESPONSIBILITIES

Legislation recently enacted in Victoria will increase protection against discrimination for parents or carers. Senior Associate Joanna Musk and Articled Clerk Hugh Foley explain how it will affect Victorian employers.

HOW DOES IT AFFECT YOU?

- Victorian employees (current and prospective), contractors and firm partners who perceive that their employer, principal or firm has unreasonably refused to accommodate their responsibilities as parent or carer may bring a discrimination claim under the *Equal Opportunity Act 1995* (Vic).
- The reasonableness of any refusal to accommodate these responsibilities will be assessed against criteria specified in the legislation.
- An employer's refusal to grant a request for flexible work may already give rise to a discrimination claim under existing state and Commonwealth anti-discrimination law. However, the new legislation will emphasise the need for Victorian employers to consider whether flexible work practices can be accommodated, and to provide employees with flexible arrangements where it is not unreasonable to do so.

THE LEGISLATION

The *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic) (the **Act**) will amend the *Equal Opportunity Act 1995* (Vic) to establish an unreasonable refusal to accommodate parental or carer's responsibility as a ground for discrimination under Victorian law. The Act will come into force on or before 1 September 2008.

4. *Luke Edward Johns v Brisbane City Council* [2008] AIRC 230.

WHAT IS A REASONABLE REFUSAL?

In determining whether an employer's refusal to accommodate a carer's responsibilities is unreasonable, all relevant facts and circumstances must be considered, including:

- the employee's personal circumstances;
- the nature of the role;
- the nature of the arrangements required to accommodate the parental or carer responsibilities;
- the financial circumstances of the employer;
- the size and nature of the workplace and the employer's business;
- the effect on the workplace and the employer's business of accommodating those responsibilities, including the financial impact, the number of people who would benefit or be disadvantaged and the impact on efficiency, productivity and customer service;
- the consequences for the employer of making such accommodation; and
- the consequences for the employee of not making such accommodation.

The legislation provides examples of circumstances that would involve an unreasonable refusal such as:

- a refusal to accommodate a request by an employee to work additional daily hours to provide for a shorter working week;
- where an employee works on a part-time basis, refusing to reschedule a regular staff meeting so that the person can attend; or
- where a principal refuses a contract worker's request for flexible start, finish or break times.

These are only examples in the Act, and whether a refusal to accommodate is in fact reasonable will depend on the circumstances of the employment and must be analysed against the criteria in the Act in each case.

CONSIDER ALTERNATIVES FOR INJURED WORKERS

Employers will find it difficult to lawfully dismiss an injured worker if they have not first considered alternatives carefully. Special Counsel Del Bobeff and Articled Clerk Hannah Biggins report on a decision of the NSW Industrial Relations Commission.

HOW DOES IT AFFECT YOU?

- Before contemplating dismissal of a worker injured at work, employers should carefully consider alternative positions and duties that are available, and take reasonable steps to accommodate any of the limitations resulting from the injury.
- It is necessary to identify whether there is appropriate work of a kind available rather than a particular position.
- Penalties may apply if injured workers are dismissed within certain periods because they are not fit for employment as a result of a workplace injury.

BACKGROUND

The NSW Industrial Relations Commission (*IRC*) recently ordered the reinstatement of a 47-year-old plant operator, Mr Richard Hofman, who had been dismissed by Penford Australia Limited after 11 years' service.

Mr Hofman was injured at work on 1 January 2005. He returned to work, initially for limited hours and with lifting restrictions but, in February 2007, he returned to full time hours with suitable duties that did not require heavy lifting.

Penford dismissed Mr Hofman two-and-a-half years later, stating that the company could not provide suitable duties for him and that he was not fit for employment as a result of the lifting restrictions. Mr Hofman sought reinstatement to his previous position as a plant operator, at the same time providing a medical certificate specifying lifting restrictions. An application was made to the IRC for reinstatement under section 242 of the *Workers Compensation Act 1987* (NSW) (the **Act**).

THE DECISION

The Act allows the IRC to reinstate dismissed injured workers in 'employment of a kind' for which the worker has applied. At the hearing, Mr Hofman identified four different areas of work at the production facility for which he was fit that did not violate his lifting restrictions or that could reasonably be accommodated by Penford with some minor assistance.

Although accepting the importance of workers being flexible and able to complete work in different sections, Commissioner Cambridge decided that there was no fixed requirement for plant operators to rotate though all areas of the production facility.

Commissioner Cambridge noted that an employer is under a higher obligation to carefully consider alternatives to dismissal when a worker is injured at work, rather than through some 'external misadventure'.

The IRC held that Penford was able to facilitate employment of a kind for which the worker was fit, without any unreasonable costs imposed or operational difficulties, and reinstated Mr Hofman to a position that included (but was not limited to) the four areas of work that he had identified.



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