Article

WORKERS COMPENSATION & SELF INSURANCE

From Little Things Big Things Grow

Can your business stand a fine of $20,400?

By John Walsh

The decision of the Federal Circuit Court of Australia in *Cerin v ACI Operations Pty Ltd & Ors* delivered on 14 October 2015 by Judge Simpson is a very good example of how, on occasions, "*from little things big things grow*" (apologies to Kev Carmody).

Judge Simpson imposed a penalty in the sum of $20,400 upon ACI Operations Pty Ltd ("ACI") for a contravention of the provisions of the *Fair Work Act 2009* ("the FW Act"). The contravention in dollar terms was worth $181.66!

ACI is a global business that makes glass bottles and the applicant was one of 208 employees at the West Croydon plant on Port Road in South Australia.

The applicant was injured at work in April 2009 and remained in receipt of income maintenance.

On 12 October 2012, the applicant was advised by ACI that his employment would be terminated on 12 November 2012.

It appears that WorkCover (as it then was) either approved the termination or acquiesced.

Section 58C of the *Workers Rehabilitation & Compensation Act 1986* ("the *WRC Act*") relevantly provides that:

> "*58C(1) If a worker has suffered a compensable injury, the employer from whose employment the injury arose must not terminate the worker's employment without first giving the Corporation and the worker at least 28 days' notice of the proposed termination*".

Whilst the Notice of Termination complied with Section 58C of the *WRC Act*, it did not comply with the relevant provisions of the FW Act which required that the applicant be provided with five weeks' notice of termination of employment or five weeks' pay in lieu thereof.

Judge Simpson found that:

> "*The conduct of the first respondent in terminating the applicant's employment without giving proper notice or pay in lieu is somewhat bizarre. No satisfactory excuse for not complying has been provided. It would seem that the first respondent argues that the authority to terminate the applicant's employment was given to them by the worker's compensation authority and that this authority somehow excused them from complying with the FW Act provisions. It did not. In its Outline of Submissions, the first respondent ignores the fact that it was obliged to comply with the provisions of the FW Act, and in particular, the provision that required that it give the applicant five weeks' notice of termination of employment, or five week's pay in lieu thereof. They say that they believe that they were properly complying with industrial legislation by complying with Section 58B (sic) of the WRC Act.*"

It appears that the decision to terminate the applicant's employment was taken in the context of a long-running and perhaps acrimonious dispute between the parties and the worker's union because Judge Simpson found that there was "*no satisfactory explanation as to why the respondents did not comply with the provisions of the FW Act. It would appear that the parties, and in particular the respondents and their solicitors, were more concerned about the workers compensation aspect of the matter, rather than the FW Act aspects. This may well have been because the parties had for a long time prior to commencing proceedings in this Court, been dealing with the matter in the State workers compensation*

jurisdiction. This, however, does not provide the respondents with a satisfactory explanation for their actions."

In imposing a penalty of $20,400 upon ACI, Judge Simpson had this to say:

> "*Compliance with minimum standards is an important consideration in all industrial disputes such as this one. One of the objects of the FW Act is the maintenance of an effective safety net of minimum terms and conditions and effective enforcement mechanisms. The substantial penalty set by Parliament, and awarded by the Courts for contraventions for failure to comply with compliance notices, reinforces the importance placed on compliance with minimum standards…**The penalty that I propose to make will be a warning to employers of the need to comply with the legislation to the letter**.*" (my emphasis)

The penalty was imposed pursuant to Section 44 of the *FW Act* which is a civil remedy provision, contravention of which attracted a maximum penalty of $51,000 at the relevant time. Judge Simpson considered that the contravention could be regarded as being in the middle range of seriousness for contraventions of this kind and her penalty, which was 40% of the maximum penalty, reflected that view.

How much was actually at stake again?

The applicant continued to receive weekly payments of income maintenance and the difference between the sum he would have earned if he had received five weeks' notice and the amount that he was actually paid by way of income maintenance was $181.66!

ACI will undoubtedly absorb the penalty but there is a lesson here for all businesses, and in particular small to medium enterprises, and that is to be aware of all of the legislation which impacts upon decisions taken in relation to an employee's employment. If in doubt, seek advice because early advice is the cheapest advice that can be obtained. Don't let a saving of $181.66 turn into a penalty of $20,400…not to mention the legal costs associated with a trial which "*has taken up a lot of Court time*".

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