Hall Payne &CFMMEU win significant victory opposing ABCC prosecution

Author: Joseph Kennedy
Email: joek@hallpayne.com.au
Phone: 02 8280 4100
Date: Monday November 23, 2020

In June 2020, Hall Payne Lawyers represented the Construction, Forestry, Maritime, Mining and Energy Union ('**CFMMEU**') and two of their officials in relation to allegations of the taking of unlawful industrial action at the Qube construction site at Broadbeach in Queensland. On 12 November 2020, the Court handed down its judgment, dismissing the proceeding.

Background to the matter

As a result of a dispute which arose between an employee and the CFMMEU delegate at the Qube construction site, the delegate was stood down from work.

A CFMMEU organiser subsequently met with employees at the site to discuss their concerns regarding the matter and further meetings were held over the following days. During the meetings, which were held in the lunch shed, it was consistently raining outside.

The ABCC later brought proceedings and alleged that the CFMMEU had contravened:

- 46 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) ('**BCI Act**') in organising 'unlawful industrial action'; and
- 348 of the *Fair Work Act 2009* (Cth) ('**FW Act**') in organising 'industrial action' against the principal contractor with intent to coerce them into reinstating the delegate.

The ABCC sought for the Court to impose significant penalties on our clients as a consequence of the alleged contraventions.

Determining if ‘unlawful industrial action’ was taken

The main part of our case was the contention that the workers had not taken ‘industrial action’ under the BCI Act as the employees were entitled to not perform work under the *Building and Construction General On-site Award 2010* (‘**Award**’) and the custom and practice at the site as a result of inclement weather.

In determining whether the employees took ‘industrial action', the Court was required to determine whether they had any legal obligation to work. Whether the employees were entitled to refuse work was dependent upon the effect of the inclement weather clause of the Award.

The Court held that the employees were entitled, under the inclement weather clause of the Award, to refuse work on the basis that it was ‘*unreasonable or unsafe for them to do so, until informed that the site had been cleared for the resumption of work*’ and held that the evidence did not demonstrate that the employees were so informed.

The Court therefore found that the ABCC could not demonstrate that the employees were under any legal obligation to work at the site. Accordingly, the ABCC was unsuccessful in proving that the employees took ‘industrial action’ under the BCI Act.

This meant that the remaining parts of the ABCC’s case fell away and all of the ABCC’s claims were dismissed.

Conclusion

This win is a significant one for our clients. It provides a timely reminder that an award or agreement can potentially provide a lawful avenue for employees to refuse or fail to attend for work; in this case due to the inclement weather.

Get help from an employment lawyer

If you encounter issues at work, our industrial and employment law team have been successfully representing workers and unions for over 30 years. We work across the full spectrum of industrial and employment law. Get in touch with a member of our team across Australia for help.
