

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

**Retail and Fast Food Workers Union Incorporated v Woolworths Group
Limited [2022] FedCFamC2G 578**

File number(s): MLG 1557 of 2021

Judgment of: **DEPUTY CHIEF JUDGE MERCURI**

Date of judgment: 22 July 2022

Catchwords: **INDUSTRIAL LAW – FAIR WORK** – parties by consent seek declaration of contravention of the *Fair Work Act 2009* (Cth) – where the applicant notified the respondent of a dispute on behalf of the employee – where the parties agree on the amount of the penalty – consideration of the nature and seriousness of the contravention and impact of the contravention on the employee – balanced against the respondent’s lack of prior history of findings of contraventions, demonstrated contrition and steps taken to ensure that a similar situation does not arise in future – where the parties agree on an appropriate amount for the penalty – penalty order made.

Legislation: *Fair Work Act 2009* (Cth), ss 340, 341, 342

Division: Division 2 General Federal Law

Number of paragraphs: 28

Date of last submission/s: 4 March 2022

Date of hearing: 4 March 2022

Place: Melbourne

Counsel for the Applicant: Ms S Kelly

Counsel for the Respondent: Ms R Davern

Solicitors for the Respondent: Ashurst

ORDERS

MLG 1557 of 2021

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **RETAIL AND FAST FOOD WORKERS UNION
INCORPORATED**
Applicant

AND: **WOOLWORTHS GROUP LIMITED**
Respondent

ORDER MADE BY: **DEPUTY CHIEF JUDGE MERCURI**

DATE OF ORDER: **22 JULY 2022**

THE COURT DECLARES BY CONSENT THAT:

1. By directing Ms Lauren Dyer to attend a meeting for reasons including the reason that the Retail and Fast Food Workers Union Incorporated had notified a dispute on Ms Dyer's behalf attaching a petition about the state of the car parking lighting overnight at the Lilydale Store, Woolworths Group Limited took adverse action against Ms Dyer in contravention of section 340(2) of the *Fair Work Act 2009* (Cth).

THE COURT ORDERS THAT:

2. The respondent pay a pecuniary penalty of \$10,000 for its contravention of section 340(2) of the *Fair Work Act 2009* (Cth) by the direction to attend a meeting dated 30 October 2020.
3. The respondent pay the said pecuniary penalty to the applicant within 14 days of the date of this order.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

DEPUTY CHIEF JUDGE MERCURI:

INTRODUCTION

1 Before the court is an application for the imposition of a penalty in respect of a contravention of section 340 of the *Fair Work Act 2009* (Cth) ('FW Act').

2 The parties have reached an agreement on various factual matters, that the facts support a finding by the court that the respondent has contravened section 340 of the FW Act and that a penalty should be imposed by the court for that contravention. They join in submitting to the court that an appropriate penalty in this case is the sum of \$10,000 and that that penalty should be paid to the applicant.

EVIDENCE

Evidence of the applicant

3 The applicant relies upon an affidavit of Joshua James Callinan filed on 4 February 2022 and an affidavit of Lauren Dyer filed on 4 February 2022. In addition, the applicant relies upon various documents produced in the discovery which are found at Exhibit A and which were tendered by agreement of the parties. The applicant also relies upon written submissions also filed in these proceedings on 4 February 2022.

Evidence of the respondent

4 The respondent relies upon the affidavit of Kari Samantha Johnson filed on 18 February 2022, two additional documents tendered by agreement, namely Exhibit B and Exhibit C, and written submissions also filed on 18 February 2022.

5 At the hearing before me, Ms Johnson was required for cross examination. Subject to that cross examination, no other witness was required to attend and be cross examined.

FACTUAL BACKGROUND

6 Having regard to the evidence presented in this matter, and in particular, the agreed statement of facts between the parties,¹ I find as follows:

¹ Agreed Statement of Facts filed on 25 August 2021.

- (a) Ms Dyer was employed at the Woolworths store in Lilydale at the relevant time and she was, at the relevant time, a member of the applicant;
- (b) at all relevant times, Mr Atheeq Khan was employed as the store manager at the respondent's Lilydale store;
- (c) an issue arose in relation to the lighting in the carpark in September 2020, in particular, that due to some refurbishment works, employees were required to park a distance from the store in an area without adequate lighting in the evenings;
- (d) Ms Dyer asked the applicant to assist with addressing the issue with the respondent, and at the applicant's request, collected a number of signatures on a petition, prepared by the applicant about the lighting issue in the carpark;
- (e) at about this time there was another issue of lighting in the dock area which was rectified relatively quickly, that was a separate issue to the carpark lighting which was the subject of Ms Dyer's petition;²
- (f) on 28 September 2020, the applicant sent a letter to the respondent, by email, to Mr Khan, notifying a dispute under clause 22 of the *Woolworths Supermarkets Agreement 2018* ('the Agreement') on behalf of Ms Dyer and attached the petition with the collected signatures;
- (g) on 29 September 2020, Mr Callinan called Mr Khan about the dispute and Ms Dyer's concerns. Mr Khan replied that he would not speak to Mr Callinan without speaking to Ms Dyer first and that Woolworths did not recognise Retail and Fast Food Workers Union ('RAFFWU') as a union and would not recognise RAFFWU as a representative of Ms Dyer. Mr Callinan's unchallenged evidence is that Mr Khan then hung up;³
- (h) also on 29 September 2020, Ms Dyer received a call from Mr Trivedi, her department manager, with whom she had never spoken before. Mr Trivedi interrogated her about the petition, why she had not raised her concerns with him directly and sounded annoyed;⁴
- (i) Ms Dyer said that she told Mr Trivedi that she was happy to discuss the matter with him with her RAFFWU representative present and says that she felt threatened and attacked in this call;⁵

² Affidavit of Lauren Dyer affirmed and filed on 4 February 2022 at paragraph [15].

³ Affidavit of Joshua James Callinan affirmed and filed on 4 February 2022 at paragraph [5] and following.

⁴ Affidavit of Lauren Dyer affirmed and filed on 4 February 2022 at paragraph [16] and following.

⁵ Affidavit of Lauren Dyer affirmed and filed on 4 February 2022 at paragraphs [20] and [21].

- (j) Ms Dyer's evidence is that at the end of this call, which lasted about five minutes, Mr Trivedi told her that she would be moved from her usual work area to the grocery section, which she understood to be a change in her role;⁶
- (k) Ms Dyer's evidence, which is not challenged, is that she felt shaken and upset by this call and that she called the applicant and her husband and then returned to work;⁷
- (l) there is evidence that the following day, on 30 September 2020, an email passed from Ms Hayley Baxendale, who at the time working in the respondent's human resources department, to Mr Khan, in which Ms Baxendale says:

... I'm sorry that you have had to deal with RAFFWU lately, they can be very difficult to deal with ...⁸
- (m) on 30 September 2020, the issue which Ms Dyer had raised regarding the lighting in the carpark was dealt with by Woolworths where an email is sent from a Mr Peter Campbell to Ms Sue Bevan attaching the dispute notification from RAFFWU and requesting that the carpark lights be switched on and remain on for the duration of the night;⁹
- (n) on 1 October 2020, Mr Callinan then corresponded with Woolworths about the direction to Ms Dyer to work in the grocery section rather than the dairy section and the following day, on 2 October 2020, that direction was rescinded;¹⁰
- (o) on 7 October 2020, a file note was prepared by the respondent in relation to this matter which the applicant relies upon as evidence of the corporate strategy engaged in to put some distance between the incidents which occurred regarding the petition and a proposed performance management discussion with Ms Dyer;¹¹
- (p) the applicant also points to the fact that this file note refers to a 'RAFFWU tracker', being a spreadsheet which records issues raised involving RAFFWU;
- (q) on 30 October 2020, Mr Khan directed Ms Dyer to attend a meeting which he said was to deal with a range of issues, including her conduct in relation to the petition and

⁶ Affidavit of Lauren Dyer affirmed and filed on 4 February 2022 at paragraph [23].

⁷ Affidavit of Lauren Dyer affirmed and filed on 4 February 2022 at paragraph [30].

⁸ Exhibit A at page 373.

⁹ Exhibit A at page 422.

¹⁰ Affidavit of Joshua James Callinan affirmed and filed on 4 February 2022 at JJC-4.

¹¹ Exhibit A at pages 358 and following.

notified her that if she did not attend the meeting, she might be subjected to disciplinary action; and

- (r) that meeting occurred on 11 November 2020 with Ms Dyer attending together with Mr Callinan as her support person. It is common ground that Mr Khan issued the direction to attend the meeting for reasons which included that RAFFWU had notified a dispute on Ms Dyer's behalf attaching the petition.

7 It is agreed that in issuing the direction to attend the 11 November 2020 meeting, Mr Khan's actions are to be treated as conduct of Woolworths and that Woolworths had the relevant state of mind required by the FW Act.¹²

8 It is further agreed that:

- (a) by notifying a dispute under clause 22 of the Agreement, which applied at the relevant time, RAFFWU had exercised a workplace right for the benefit of Ms Dyer within the meaning of section 340(2) of the FW Act;
- (b) the direction by Mr Khan to Ms Dyer requiring her attendance at a meeting on 11 November 2020 constituted adverse action within the meaning of item 1(c) of the section 342(1) of the FW Act; and
- (c) by issuing the said direction to attend the meeting, Woolworths contravened section 340(2) of the FW Act.

9 I agree with each of those conclusions.

10 Section 340(2) of the FW Act proscribes the taking of adverse action against a person because a third person has exercised a workplace right for the second person's benefit.

11 A person has a 'workplace right' under section 341(1) if, among other things, they are able to initiate, or participate in, a process or proceeding under a workplace instrument. The 2018 Enterprise Agreement is a workplace instrument and the dispute resolution process contained in clause 22 of that agreement is a process under such an instrument. Ms Dyer therefore had a workplace right in the relevant sense. In this case, RAFFWU exercised that workplace right by notifying a dispute on her behalf under clause 22 of the Agreement.

¹² Agreed Statement of Facts filed on 25 August 2021 at paragraph [18].

12 Adverse action is taken against an employee where, among other things, the employer alters
the employee's position to their prejudice.¹³ I am satisfied that directing the employee to attend
a meeting or face the prospect of disciplinary action does constitute altering the employee's
employment to their detriment.

13 The causal nexus between the exercise of a workplace right by RAFFWU and the adverse
action taken is quite properly conceded.

DECLARATION

14 I am also satisfied having regard to the facts in this matter that it is appropriate to make a
declaration in the terms sought. The proposed declaration reflects that a contravention has been
established on the agreed facts and the evidence before the court.

PENALTY

15 As to the question of a penalty, having found that the respondent has contravened
section 340(2) of the FW Act, I turn to consider whether, and if so, what penalty ought to be
imposed in this matter.

16 This is a single contravention.

17 In determining an appropriate penalty, the court is required to have regard to a range of factors.
In this case, the nature and extent of the conduct which led to the breach and the circumstances
in which it occurred are set out in detail above. It is particularly relevant that the breach
occurred in the context of an employee raising a safety issue, the seriousness of which was
readily acknowledged by the respondent as it was appropriately addressed within days of it
being raised. Unfortunately, however, the employee who raised the issue was then subjected
to adverse action by others within the respondent's organisation.

18 As to the nature and extent of the loss suffered as a result of the breach, I note the applicant's
evidence about the impact of the contravention on her. Her evidence is that the direction to
attend the 11 November 2020 meeting, and the meeting itself, occupied her mind, affected her
sleep and caused her to feel distressed and anxious.¹⁴ It also impacted her relationship with her
husband. I note that the respondent has taken steps to deal with these consequences in so far

¹³ *Fair Work Act 2009* (Cth), s 342.

¹⁴ Affidavit of Lauren Dyer affirmed and filed on 4 February 2022 at paragraph [49] and following.

as it has issued a written apology to Ms Dyer¹⁵ and it has made a payment to her of \$3,000 by way of compensation.¹⁶

19 It is common ground that the respondent does not have any prior history of findings of contraventions of the general protections provisions of the FW Act and therefore there is no history of similar previous conduct in the past.¹⁷

20 I note that the respondent is a large organisation with a very large workforce, whose conduct it is conceded is in breach of section 340(2) and engaged in with the involvement of senior members of staff at the store level and with senior human resources involvement. It was conceded by the respondent that this should not have happened, and that if the HR personnel involved were not aware of the organisation's obligations, they ought to have and could have easily informed themselves of their obligation and the obligation on the organisation.

21 Having said that, the respondent has demonstrated contrition. It has issued an apology to the employee in writing. It has paid the employee compensation in the sum of \$3,000. Evidence has also been given of the changes implemented both at a structural level within the respondent's business and also by way of additional training to those involved in the human resource management within the organisation about freedom of association rights and principles.¹⁸

22 In addition, the respondent has acknowledged its wrongdoing in this matter and has cooperated with the applicant, avoiding the need for a contested hearing, which would, among other things have required Ms Dyer to give evidence and be cross examined, potentially adding to her distress.

23 Finally, and importantly, in determining an appropriate penalty, the court must consider the need to impose a penalty which will have a deterrent effect both at a general and a specific level. As noted by the applicant, the objective of setting the penalty at an appropriate level is to put a price on contravention that is sufficiently high to deter repetition by the contravener or by any other person and the penalty must be set at a level which is sufficiently high to avoid it simply being regarded as an acceptable cost of doing business.¹⁹

¹⁵ Exhibit B.

¹⁶ Exhibit C.

¹⁷ Respondent's Outline of Submissions filed on 18 February 2022 at paragraph [17].

¹⁸ Affidavit of Kari Samantha Johnson sworn and filed on 18 February 2022.

¹⁹ Applicant's Outline of Submissions filed on 4 February 2022 at paragraph [16].

24 As stated, in this case, the contravention arose in response to Ms Dyer raising a concern about
employee safety, a concern which the respondent took sufficiently seriously to address
promptly. The seriousness of the contravention was added to by the fact that it was facilitated
by and enabled through advice from employees within the human resources function of the
respondent. Employees who, as rightly conceded by the respondent, should have known better.

25 Having said that, however, there are factors which militate against a more serious penalty being
imposed. In particular, the contrition demonstrated by the respondent, the steps taken to ensure
that a similar situation does not arise in future, the commitment to further training to avoid a
similar occurrence in the future as well as the manner in which the respondent has dealt with
these proceedings and the absence of any prior findings of a similar nature.

26 When all of these factors are weighed in the balance, I am satisfied that a penalty of \$10,000
is appropriate in all of the circumstances.

27 I am also satisfied that it is appropriate for that penalty to be paid to the applicant.

CONCLUSION

28 I therefore make the declaration and orders set out at the commencement of these reasons in
the terms sought by the parties.

I certify that the preceding twenty-
eight (28) numbered paragraphs are a
true copy of the Reasons for
Judgment of Deputy Chief Judge
Mercuri.

Deputy Associate: 

Dated: 22 July 2022