



THE POST

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WELCOME TO "THE POST". YOUR E-NEWSLETTER DESIGNED TO KEEP YOU UP TO DATE WITH WHAT'S HAPPENING IN EMPLOYMENT LAW & INDUSTRIAL RELATIONS.

WHAT'S MAKING NEWS?

SHAM CONTRACTING

The Federal Court has fined a labour hire company, a South Australian fast food outlet and their directors for engaging two 15-year-old girls on sham contracting arrangements.

The FWO launched the proceedings in October 2010, but following admissions by the company and directors, Justice Bruce Lander was only required to rule on the appropriateness of the penalties negotiated with the Fair Work Ombudsman (FWO).

Justice Lander fined the Company and its Directors \$13,200 for its two breaches, and \$2,640 respectively. In each case the sums were in accord with the quantum sought by the FWO (and agreed with the Director and his Company) and amounted to 20% of the maximum available penalties.

Justice Lander gave them six months to pay the fines into Consolidated Revenue.

NO REINSTATEMENT FOR WATERFRONT WORKER WHO KICKED HIS SUPERVISOR IN THE HEAD

The Federal Court has found that a Fair Work Australia full bench had sufficient power to overturn the reinstatement of a fighting waterfront worker, but has criticised it for making "sweeping statements".

FWA Deputy President Peter Sams initially found DP World Sydney Limited unfairly dismissed the employee for serious misconduct in contravention of the company's zero tolerance workplace policy.

He accepted that "as incredible and unbelievable as it may seem", the supervisor, who had a history of threatening and bullying behaviour (and who was also dismissed as a result of the fight), had "set up" the violent confrontation and arranged for it to be captured on CCTV – yet never threw a punch.

A FWA full bench, Vice President Graeme Watson, Deputy President Reg Hamilton and Commissioner Chris Simpson refused to accept that the extenuating circumstances surrounding the fight excused the employee's conduct, finding that while he may have been provoked, he took part willingly, including kicking the supervisor in the head while he was lying on the ground.

The employee, who had worked for DP World and its predecessor, Container Terminals Australia, for 30 years, sought in the Federal Court to reverse the full bench's decision.

But Justice Anna Katzmann rejected the employee's claim that the full bench decided to overturn Deputy President Sams' decision "simply because of a difference of opinion". She also criticised the employee's legal team for the "clinical" way she said it had dissected the full bench's decision.

However, while Justice Katzmann said the full bench had "recognised the limits of its functions and powers", she criticised it for making two "sweeping statements", one being that "the dismissal of an employee found guilty of fighting at the workplace 'can only be found' to be harsh, unjust or unreasonable in extenuating circumstances".

Lambley v DP World Sydney Limited [2013] FCA 4 (10 January 2013)

BHP ADVERSE ACTION AGAINST PROTESTOR

The Federal Court has penalised BHP Coal for taking adverse action against a coal machinery operator it dismissed for holding up an anti-"scab" sign at a Bowen Basin protest and has warned companies that they must take steps to comply with industrial law changes.

In his original decision in November last year, Justice Christopher Jessup found the worker had been dismissed for participating in a lawful activity organised by the union, contrary to s347(b)(iii) of the Fair Work Act, and for representing or advancing the union's views, claims or interests (s347(b)(v)).

The judge ordered BHP pay \$7,500 in pecuniary penalties, which he described as a "fairly light weighting to the matter of specific deterrence", taking into account the "careful and considered way" BHP Coal's management investigated the employee's conduct, knowing the decision "might be challenged", including by seeking legal advice.

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 4) [2012] FCA 1454 (21 December 2012)

If you require further information on employee issues or termination matters affecting your business, please give one of the team at **Waring Legal** and **Waring Employment Advisors** a call on the numbers below.

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