

NOTICE OF FILING

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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: VID333/2015
File Title: Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union & Ors
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 2/12/2016 1:20:41 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Second Amended Statement of claim

(filed pursuant to an Order of North J made on 2 December 2016)

No. VID333/2015

Federal Court of Australia

District Registry: Victoria

Division: Fair Work

DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE

Applicant

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and others named in the schedule

Respondents

The Applicant

1. The Applicant is and was at all relevant times:
 - a. a statutory appointee of the Commonwealth, appointed by the Minister for Employment by written instrument pursuant to s 15(1) of the *Fair Work (Building Industry) Act 2012* (Cth) (**FWBI Act**);
 - b. a Fair Work Building Industry Inspector pursuant to s 59A of the FWBI Act;
 - c. a person with standing under s 59C of the FWBI Act and s 539(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) to apply for orders in relation to contraventions of s 500 of the FW Act.

The Respondents

2. The First Respondent (**CFMEU**) is and was at all relevant times:
 - a. an "organisation" within the meaning of s 12 of the FW Act registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**);
 - b. a body corporate by virtue of s 27 of the FWRO Act, able to be sued in its registered name;

Filed on behalf of (name & role of party)	The Applicant		
Prepared by (name of person/lawyer)	Will Spargo		
Law firm (if applicable)	Lander & Rogers		
Tel		Fax	
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- c. an “industrial association” within the meaning of s 12 of the FW Act and s 4(1) of the FWBI Act whose membership rules allow membership by persons whose employment consists of or includes building work; and
- d. a “building association” and a “building industry participant” for the purposes of s 4(1) of the FWBI Act.

3. The Second Respondent (**Travers**) is and was at all relevant times:

- a. an official of the CFMEU within the meaning of s 12 of the FW Act;

Particulars

The annual return lodged by the CFMEU on 31 March 2014 included Travers in the list of “*CFMEU Construction and General Division Victoria/Tasmania Divisional Branch Office Bearers*” as at 2 January 2014.

Travers’ “office” was described as “*Branch Council Members Central Victoria*” and his “occupation” was given as “*union official*”.

- b. an officer of the CFMEU within the meaning of section 12 of the FW Act acting in that capacity;
- c. an employee of the CFMEU;
- d. an organiser within the Construction and General Division of the CFMEU;
- e. a “building industry participant” within the meaning of s 4(1) of the FWBI Act; and
- f. a “permit holder” within the meaning of s 12 of the FW Act, being the holder of an entry permit issued under s 512 of the FW Act in his capacity as an official of the CFMEU.

Particulars

Travers held an entry permit pursuant to section 512 of the FW Act which came into force on 15 April 2013 and is due to expire on 15 April 2016.

4. The Third Respondent (**Hall**) is and was at all relevant times:

- a. an official of the CFMEU within the meaning of s 12 of the FW Act;

Particulars

The annual return lodged by the CFMEU on 31 March 2014 included Hall in the list of “*CFMEU Construction and General Division Victoria/Tasmania Divisional Branch Office Bearers*” as at 2 January 2014.

Hall’s “office” was described as “*Branch Council Members Melbourne Metropolitan Zone*” and his “occupation” was given as “*union official*”.

- b. an officer of the CFMEU within the meaning of section 12 of the FW Act acting in that capacity;

- c. an employee of the CFMEU;
- d. an organiser within the Construction and General Division of the CFMEU;
- e. a “building industry participant” within the meaning of s 4(1) of the FWBI Act; and
- f. a “permit holder” within the meaning of s 12 of the FW Act, being the holder of an entry permit issued under s 512 of the FW Act in his capacity as an official of the CFMEU.

Particulars

Hall held an entry permit pursuant to section 512 of the FW Act which came in to force on 10 April 2013 and is due to expire on 10 April 2016.

McConnell Dowell

- 5. At all relevant times McConnell Dowell Constructors (Aust) Pty Ltd (ACN 002 929 017) (**McConnell Dowell**) was:
 - a. the head contractor for the Papa Uniform Golf (PUGS) Taxi Lane Replacement Project being undertaken at Melbourne Airport (**the Project**);
 - b. a “constitutional corporation” within the meaning of s 12 of the FW Act;
 - c. an “occupier” of “premises” within the meaning of s 12 of the FW Act;
 - d. the employer of Mr Rod Duggan (**Duggan**);
 - e. the employer of Mr Luke Naughton, a Project Manager (**Naughton**);
 - f. the employer of Mr Gavin Carter, a Site Supervisor (**Carter**); and
 - g. the employer of Mr David White, an Operations Manager – Southern Region (**White**).

The Project

- 6. At all relevant times, the Project:
 - a. was “building work” within the meaning of s 5 of the FWBI Act;

Particulars

The work involved the demolition and replacement of structures that formed or are to form part of land, being concrete slabs.

- b. was on Commonwealth land;
- c. was accessible via Gate 22, Operations Road, Melbourne Airport; and
- d. consisted of the following “premises” within the meaning of s 12 of the FW Act:

- i. a fenced, gated and signed site compound consisting of offices and amenities including a lunch room and first aid room and a car park (the **Site Compound**);
- ii. some distance away from the Site Compound, the work site for the replacement of the PUGS taxi lanes at Melbourne Airport;

hereinafter referred to as the **Project premises**.

Mr Duggan

7. At all relevant times Duggan was:
- a. a labourer employed on the Project who performed work on the Project premises;
 - b. a health and safety representative for a workgroup at the Project; and
 - c. a person whose industrial interests the CFMEU was entitled to represent.

Particulars

Pursuant to the Registered Rules of the CFMEU, Duggan was eligible to be a member of the CFMEU.

Events of 17 June 2014

8. On 17 June 2014 Travers and Hall attended at and entered the Project premises, specifically the Site Compound (the **Entry**).
9. The Entry was for the purpose of holding discussions with Duggan in accordance with s 484 of the FW Act.

Particulars

Travers' and Hall's purpose on 17 June 2014 is to be found or inferred from the following matters which occurred on 17 June 2014 at the Project premises:

- A. In response to a request by Naughton for Travers and Hall to leave to the Project premises, Travers said words to the following effect:

"I'm just catching up with my mate Rod".

"We (Travers and Hall) are chatting to Rod about a safety issue, but go ahead and call the police or whoever you need to".

- B. In a telephone conversation with White at about 12:55 pm in relation to Travers' and Hall's presence on the Project premises, Travers said words to the following effect:

"If he calls the police I won't leave, I'm here to talk to Rod, another 5 minutes and we (Travers and Hall) will be leaving".

10. Travers and Hall did not give an “entry notice” pursuant to s 487 of the FW Act or any other notice in writing at least 24 hours prior to the entry onto the Project premises on 17 June 2014.
11. At or about 12.42pm, being a time after the Entry, Travers and Hall were present in the lunch room in the Site Compound of the Project premises speaking to Duggan.
12. Naughton, in the company of Carter, approached the lunch room in the Site Compound and requested Travers and Hall to leave the Project premises.

Particulars

The conversation in which Naughton requested Travers and Hall to leave the Project premises was to the following effect:

Naughton: Guys, I’m gonna have to ask you to leave the site, you haven’t given me 24 hours’ notice in accordance with the right of entry process.

Travers and Hall: No, we don’t have to give 24 hours’ notice.

Travers: I’m just catching up with my mate Rod.

Naughton: I understand but I still have to ask you to leave.

Travers: We are chatting to Rod about a safety issue, but go ahead and call the police or whoever you need to.

13. Naughton then left the lunch room in the Site Compound, made a telephone call to White and told him what had occurred. White instructed Naughton to ask Travers and Hall to leave the Project premises and, if they refused to do so, to contact the Police.
14. Naughton returned to the lunch room in the Site Compound and again requested Travers and Hall to leave the Project premises.

Particulars

The conversation in which Naughton requested Travers and Hall to leave the Project premises was to the following effect:

Naughton: Guys, I’m gonna have to ask you to leave as you haven’t given 24 hours’ notice.

Hall: No, we are not leaving. Who is giving you directions?

Naughton: David White.

Travers: I will call David White.

Naughton: I am going to call the police.

15. At or about 12.51pm, Naughton called ‘000’ and informed the police operator of the situation.

16. At or about 12:55 pm or 12:56 pm, White received a telephone call from Travers.

Particulars

The conversation between White and Travers was to the following effect:

Travers: Luke has told me he wants me to leave or he will call the police.

White: You know the rules, we have to do this, you can't be there, if you don't want to leave then we have no choice but to call the police.

Travers: If he calls the police I won't leave, I'm just here to talk to Rod, another 5 minutes and we will be leaving.

White: It is out of our hands, Luke has to do what he has to do.

Travers: If you do that you are starting a war and it will be no different to what we have done with Kane.

17. At or about 1.16pm, approximately four Australian Federal Police (**AFP**) officers arrived at the Project premises.

Particulars

The AFP officers introduced themselves and took the names and dates of birth of Travers, Hall, Duggan, and Naughton. Whilst doing so, Travers said words to the effect of: "We know our rights, if the authorities are called, we wait, it's our policy".

18. Shortly after these events at or about 1.37pm, Travers and Hall left the Project premises and returned to their vehicle, which was parked at a car park of a building site adjacent to the Project premises.

ALLEGED CONTRAVENTIONS

Alleged contraventions by Travers – section 500 of the FW Act

19. By reason of the matters pleaded in paragraphs 3 and 7 to 9 above, Travers was exercising, or seeking to exercise, rights in accordance with Part 3-4 of the Act, specifically s 484, on 17 June 2014 at the Project premises.
20. By reason of the matters pleaded in paragraphs 3 and 7 to 18 above, Travers failed to comply with Subdivision C, Division 2, Part 3-4 of the FW Act on 17 June 2014 and acted in an improper manner by:
- (a) entering and remaining in attendance on the Project premises, including but not limited to the lunch room in the Site Compound, without having provided written notice of entry as required under s 487 of the FW Act;
 - (b) holding discussions with Duggan at a time that was not during a mealtime or other break as required under s 490(2) of the FW Act;

Particulars

Duggan was not on a mealtime break at the time of the discussions. His rostered lunch break was to commence at 1pm.

- (c) refusing to comply with the request made by Naughton that he and Hall should leave the Project premises immediately;
- (d) remaining in attendance on the Project premises for a purpose other than holding discussions pursuant to s 484 of the Act;

Particulars

Travers told each of Naughton, Carter and White (over the telephone), that he further refused to leave the site because Naughton was calling the police. Travers did not leave the premises until approximately 1.37pm after four AFP officers had arrived in response to Naughton's call and taken the details of those involved.

- (e) threatening retaliatory action by the First Respondent.

Particulars

Travers told White over the telephone words to the effect that if Naughton were to call the police "*you are starting a war and it will be no different to what we have done with Kane.*"

- 21. By reason of his conduct on 17 June 2014 at the Project premises referred to in paragraphs 19 and 20 above, Travers acted in an improper manner when exercising, or seeking to exercise, a right under Part 3-4 of the FW Act and thereby contravened s 500 of the FW Act.

Alleged contraventions by Travers – section 348 of the FW Act

- 21A. By his conduct on 17 June 2014 at the Project premises referred to in paragraph 16 above, Travers requested White that McConnell Dowell not call the police to attend at the Project premises in relation to the attendance of Travers and Hall there that day (the Request).
- 21B. The Request was a lawful request made by Travers in his capacity as an official of the CFMEU.
- 21C. In the premises, compliance with the Request was industrial activity within the meaning of section 347(b)(iv) of the FW Act.
- 21D. By his conduct on 17 June 2014 at the Project premises referred to in paragraph 20(e) above, Travers threatened to take action against McConnell Dowell with intent to coerce McConnell Dowell to comply with the Request.
- 21E. In the premises, Travers' conduct referred to in paragraph 21D hereof contravened section 348 of the FW Act.

Alleged contraventions by Hall – section 500 of the FW Act

22. By reason of the matters pleaded in paragraphs 4 and 7 to 9 above, Hall was exercising, or seeking to exercise, rights in accordance with Part 3-4 of the Act, specifically s 484, on 17 June 2014 at the Project premises.
23. By reason of the matters pleaded in paragraphs 4 and 7 to 18 above, Hall failed to comply with Subdivision C, Division 2, Part 3-4 of the FW Act on 17 June 2014 and acted in an improper manner by:
- (a) entering and remaining in attendance on the Project premises, including but not limited to the lunch room in the Site Compound, without having provided written notice of entry as required under s 487 of the FW Act;
 - (b) holding discussions with Duggan at a time that was not during a mealtime or other break as required under s 490(2) of the FW Act;

Particulars

Duggan was not on a mealtime break at the time of the discussions. His rostered lunch break was to commence at 1pm.

- (c) refusing to comply with a request made by Naughton that he and Travers should leave the Project premises immediately;
- (d) remaining in attendance on the Project premises for a purpose other than holding discussions pursuant to s 484 of the Act.

Particulars

Travers told each of Naughton, Carter and White (over the telephone), that he further refused to leave the site because Naughton was calling the police. Travers did not leave the Project premises until approximately 1.37pm after four AFP officers had arrived in response to Naughton's call and taken the details of those involved.

Hall was present when those statements were made and remained on the Project premises and in the company of Travers after those statements were made. Hall did not leave the Project premises until approximately 1.37pm after four members of the AFP had arrived in response to Naughton's call and taken the details of those involved.

24. By reason of his conduct on 17 June 2014 at the Project premises referred to in paragraphs 22 and 23 above, Hall acted in an improper manner when exercising, or seeking to exercise, a right under Part 3-4 of the FW Act and thereby contravened s 500 of the FW Act.

CFMEU – sections 363 and 793 of the FW Act

25. Travers and Hall were acting within the scope of their actual or apparent authority as officers of the CFMEU when they engaged in the conduct alleged in this Statement of Claim.

Particulars

Sub-rule 48(b) of the registered rules of the Construction and General Division of the CFMEU provides that organisers “*shall visit shops and jobs where members of the Divisional Branch and other workers eligible to join are employed and endeavour to enrol new members*”.

On 17 June 2014, at about 1 pm, during the time Travers and Hall remained in attendance on the Project premises, White called Ralph Edwards, President of the CFMEU’s Construction and General Division Victoria/Tasmania Divisional Branch. White requested Edwards to intervene and ask Travers to comply with the rules. Edwards indicated that he would not be instructing Travers to do that and considered Travers should be able to speak to the union representative.

26. By reason of the matters pleaded in paragraphs 2, 3, 4 and 25 above, and pursuant to ss 363 and 793 of the FW Act, the CFMEU is taken:
- a) to have engaged in the conduct by Travers and Hall that is alleged in this Statement of Claim;
 - b) to have had the state of mind of Travers and Hall in relation to the conduct of each of them alleged in this statement of claim.
- 26A. By reason of the matters pleaded in paragraphs 25 and 26 above, the CFMEU is taken to have contravened s 348 of the Act on each occasion that provision was contravened by Travers.
27. By reason of the matters pleaded in paragraphs 25 and 26 above, the CFMEU is taken to have contravened s 500 of the FW Act on each occasion that provision was contravened by Travers and Hall.

CFMEU - section 550 of the FW Act

28. Further or alternatively to the CFMEU's liability under section 793 of the FW Act, by reason of the matters in paragraphs 2 to 4, and 25 above, the CFMEU:
- a) was, directly or indirectly, knowingly concerned in or party to Travers' and Hall's contravention of section 500 as alleged in paragraphs 21 and 24 above;
 - b) was a person "involved in" the contravention within the meaning of section 550(2) of the FW Act; and
 - c) by the operation of section 550(1) of the FW Act, is taken to have contravened

section 500 of the FW Act on each occasion that provision was contravened by Travers and Hall.

CFMEU - liability at common law

29. Further or alternatively to the CFMEU's liability under sections 793 or 550 of the FW Act:
- a. when Travers and Hall engaged in the conduct alleged in this statement of claim they did so within the scope of their actual authority as officers of the CFMEU to engage in conduct of that class of acts;
 - b. further or alternatively to (a) above, the CFMEU did not take proper steps to prevent the acts of Travers and Hall alleged in this statement of claim which constituted their contraventions of section 500 of the FW Act;
 - c. further or alternatively to (a) and (b) above, there was a close connection between the acts of Travers and Hall alleged in this statement of claim with their employment with the CFMEU.
30. By reason of the matters in paragraphs 2 to 4 and 29 above, the CFMEU is vicariously liable at common law for the acts or liabilities of Travers and Hall constituting the contravention of section 500 of the FW Act alleged in paragraphs 21 and 24 above.

Relief claimed

31. The Applicant claims the relief specified in the Application.

Date: ~~5 November 2015~~ 2 December 2016

.....
Lander & Rogers
Lawyers for the Applicant

This second amended pleading was prepared by Robert O'Neill of Counsel and Will Spargo, lawyer.

Schedule

No. VID333/2015

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

Respondents

Second Respondent: Mark Travers

Third Respondent: Adam Hall

Date: ~~5 November 2015~~ 2 December 2016

Certificate of lawyer

I, Will Spargo, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~5 November 2016~~ 2 December 2016

A handwritten signature in black ink, appearing to read 'Will Spargo', with a stylized flourish at the end.

Signed by Will Spargo
Lawyer for the Applicant