FEDERAL COURT OF AUSTRALIA

Lamont v University of Queensland (No 3) [2020] FCA 1005

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| File number: |  |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 10 July 2020 |
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| Catchwords: | **INDUSTRIAL LAW** – contraventions of s 340(1) of the *Fair Work Act 2009* (Cth) – whether pecuniary penalties should be imposed and in what amounts – breach of confidentiality – threat to investigate conduct of employee who had complained of harassment – failure to disclose or utilise independent report commissioned under grievance procedure – penalties imposed on employer – no penalties imposed on individual respondents  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 340 and 546  |
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| Cases cited: | *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* *(“Cardigan St Case”* [2018] FCA 957*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560*Director of the Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353*Lamont v University of Queensland* *(No 2)* [2020] FCA 720*Parker v Australian Building and Construction Commissioner* (2019) 286 IR 116  |
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| Date of hearing: | 10 July 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 20 |
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| Counsel for the Applicant: | Mr A Britt |
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| Solicitor for the Applicant: | Susan Moriarty & Associates |
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| Counsel for the Respondents: | Mr C Murdoch QC with Mr E Shorten |
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| Solicitor for the Respondents: | Minter Ellison |

ORDERS

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|  | QUD 263 of 2018 |
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| BETWEEN: | JULIAN LAMONTApplicant |
| AND: | UNIVERSITY OF QUEENSLANDFirst RespondentCLIVE MOORESecond RespondentRICHARD FOTHERINGHAM (and others named in the Schedule)Third Respondent |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 10 JULY 2020 |

THE COURT ORDERS THAT:

1. The first respondent pay a pecuniary penalty of $9,000 for its contravention of s 340(1) of the *Fair Work Act 2009* (Cth) (the **FW Act**) by breaching the confidentiality of the complaint dated 12 April 2010 made by the applicant.
2. The first respondent pay a pecuniary penalty of $12,000 for its contravention of s 340(1) of the FW Act by threatening to initiate an investigation into the applicant’s conduct on 8 July 2010.
3. The first respondent pay a pecuniary penalty of $16,000 for its contravention of s 340(1) of the FW Act by failing to comply with the requirements of the first respondent’s Staff Grievance Resolution Policy in respect of an investigative report known as the Byrom Report and ancillary dealings in respect of the Policy.
4. The first respondent pay the pecuniary penalties to the applicant within 14 days of the date of this order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

**(DELIVERED EX TEMPORE AND REVISED)**

RANGIAH J:

1. On 28 May 2020, in *Lamont v University of Queensland* *(No 2)* [2020] FCA 720, I held that the first respondent, University of Queensland (the **University**), had committed the following contraventions of s 340(1) of the *Fair Work Act 2009* (Cth) (the **FW Act**):
2. The University, through Prof Moore, took adverse action against Dr Lamont by notifying Prof Almond and Associate Prof Hutch of the contents of Dr Lamont’s letter of complaint against Prof Moore dated 12 April 2010 (the **first contravention**).
3. The University, through Prof Fotheringham, took adverse action against Dr Lamont by threatening to initiate an investigation into his conduct on 8 July 2010 (the **second contravention**).
4. The University took adverse action against Dr Lamont by setting aside the findings of the Byrom Report (the **third contravention**).
5. The University took adverse action against Dr Lamont by refusing to provide the Byrom Report to him (the **fourth contravention**).
6. The University, through Prof Keniger, took adverse action against Dr Lamont by failing to comply with the Staff Grievance Resolution Policy by not acting in a way that was impartial and fair and failing to act as expeditiously as possible (the **fifth contravention**).
7. I also held that the second respondent, Prof Clive Moore, had committed the first contravention. I further held that the third respondent, Prof Richard Fotheringham, had committed the second contravention.
8. It is necessary to consider the question of whether pecuniary penalties should be imposed and in what amounts.
9. Section 546 of the FW Act provides, relevantly:

**546 Pecuniary penalty orders**

(1) The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

…

*Determining amount of pecuniary penalty*

(2) The pecuniary penalty must not be more than:

(a) if the person is an individual—the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or

(b) if the person is a body corporate—5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).

…

1. Section 546(1) provides the Court with a discretion both as to whether to impose any penalty and as to the amount of any penalty imposed.
2. In *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68, the Full Court considered the factors that may be relevant to the exercise of discretion under s 546(1). The Full Court at [102] categorised the factors based on, “whether they relate to the objective nature and seriousness of the offending conduct, or concern the particular circumstances of the defendant in question”. The Full Court continued:

[103] The factors relating to the objective seriousness of the contravention include: the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness; whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time; if the defendant is a corporation, the seniority of the officers responsible for the contravention; the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation; the impact or consequences of the contravention on the market or innocent third parties; and the extent of any profit or benefit derived as a result of the contravention.

[104] The factors that concern the particular circumstances of the defendant, particularly where the defendant is a corporation, generally include: the size and financial position of the contravening company; whether the company has been found to have engaged in similar conduct in the past; whether the company has improved or modified its compliance systems since the contravention; whether the company (through its senior officers) has demonstrated contrition and remorse; whether the company had disgorged any profit or benefit received as a result of the contravention, or made reparation; whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law.

1. While such “checklists” of factors may be useful, they must not become a “rigid catalogue of matters for attention”: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [91]. Rather, the task of the Court, when assessing penalty, is one of “instinctive synthesis”, involving the “identification and balancing of all the considerations relevant to the contravention and the circumstances of the respondent”: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* *(“Cardigan St Case”* [2018] FCA 957 at [51]. Ultimately, the Court must “ensure that any penalty which is imposed is proportionate to the gravity of the contravening conduct”: *Director of the Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353 at [66].
2. The principal object of an order to pay a pecuniary penalty under s 546(1) of the FW Act was described by the High Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [116] as:

…deterrence: specific deterrence of the contravener and, by his or her example, general deterrence of other would-be contraveners.

1. At the time of the contraventions, the maximum penalty for a single contravention was $33,000 for a body corporate and $6,600 for an individual. The maximum penalty is reserved for the most serious contraventions: *Parker v Australian Building and Construction Commissioner* (2019) 286 IR 116 at [342]. Although I consider the contraventions in this case to be serious, they are not in that category.
2. I will commence with some general matters which apply in respect of each of the contraventions. The University is a large and well-resourced organisation. There is no evidence of any previous contraventions of the FW Act by the University. There is some, although limited, evidence of contrition, or at least attempts to resolve the disputes, by the University. In particular, I note that the University has agreed to waive a costs order made in its favour against Dr Lamont in the Federal Circuit Court, and I consider this to be indicative of some contrition. On the other hand, I would have accepted that there was a significantly greater degree of contrition had the University admitted the contraventions instead of taking them to a contested trial.
3. Each of the contraventions made some, although limited, contribution to Dr Lamont’s psychiatric condition. That has already been reflected in the award of compensation that I have made in favour of Dr Lamont, but that consequence assists to demonstrate the seriousness of the contraventing conduct.
4. The first contravention was a serious example of adverse action. It involved Prof Moore deliberately breaching the confidentiality of a complaint made against him by Dr Lamont. However, it is necessary to consider the context in which that contravention occurred. In his complaint, Dr Lamont had implied that Prof Moore’s conduct had contributed to the suicide of another staff member. There was no reasonable basis for such an implication. Prof Moore was understandably shocked, angry and outraged about that implication. That does not excuse the contravention, but does assist to explain it.
5. It is appropriate to impose a significant penalty upon the University for the first contravention. The processes that it had for dealing with complaints at that time were clearly inadequate. One of the inadequacies was the absence of a warning and reinforcement to Prof Moore that the complaint was to be kept confidential. I accept, however, that some attempts were made to delegate some of Prof Moore’s supervisory functions over Dr Lamont following the contravention. I consider that it is appropriate to impose a penalty of $9,000 upon the University in respect of the first contravention.
6. Prof Moore retired from the University in 2013. There is no need for specific deterrence of his conduct. He will, no doubt, have experienced embarrassment as a result of the public finding of contravention that has been made, and I consider that is enough. In view of the circumstances of the contravention and the fact that his employment with the University ended some seven years ago, I do not think that it is necessary or appropriate to impose a penalty upon Prof Moore.
7. The second contravention of s 340(1) of the FW Act was a threat by Prof Fotheringham to initiate an investigation into Dr Lamont’s conduct. I consider this to be a serious breach. The threat was calculated to intimidate Dr Lamont into complying with Prof Fotheringham’s demand to respond to correspondence. The threat was unjustified. It was not withdrawn, although it was not acted upon. The conduct was serious because it involved a threat to take action that could have led to disciplinary action being taken against Dr Lamont in circumstances where it was Dr Lamont who had made complaints of harassment and bullying against another staff member. I consider that general and specific deterrence requires the imposition of a penalty of $12,000 upon the University for this contravention.
8. Prof Fotheringham retired from the University in 2011. Again, the embarrassment he will have experienced by having the public finding of contravention made against him is enough. There is no need for specific deterrence. I do not propose to impose a penalty upon Prof Fotheringham.
9. The third, fourth and fifth contraventions arose from essentially the same or similar conduct. They involved dealings by Prof Keniger with the Byrom Report, which contained findings that were adverse to the University and some staff members. The contraventions arose in a single course of conduct, and I consider that it would risk excessive punishment to impose a separate penalty in respect of each contravention.
10. However, I regard the conduct involved in the third, fourth and fifth contraventions as very serious. To withhold an investigative report commissioned by the University under the Staff Grievance Resolution Policy was a gross breach of the trust that Dr Lamont was entitled to have in his employer. It may be noted that the present litigation, or at least a substantial part of it, may have been avoided if the University had acted as it was required to do under the Policy. I consider it appropriate to impose a single penalty of $16,000 upon the University in respect of the third, fourth and fifth contraventions.
11. It is necessary, under the totality principle, to examine the aggregate of the penalties that are proposed and to consider whether it is excessive: *Australian Ophthalmic Supplies* at [23], [71] and [94]. I do not consider that the aggregate is excessive.
12. Accordingly, I will impose penalties of $9,000 in respect of the first contravention, $12,000 in respect of the second contravention, and $16,000 in respect of the third, fourth and fifth contraventions upon the University. In accordance with the usual practice, it is appropriate that the pecuniary penalties be paid to the applicant.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 16 July 2020

SCHEDULE OF PARTIES

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| Respondents |  |
| Fourth Respondent: | MARTIN CROTTY |
| Fifth Respondent: | PETER HØJ |