FEDERAL COURT OF AUSTRALIA

Morton v Commonwealth Scientific and Industrial Research Organisation (No 3) [2019] FCA 1943

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| File number: |  |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 22 November 2019 |
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| Catchwords: | **INDUSTRIAL LAW** – pecuniary penalty for contravention of s340(1) of Fair Work Act – where respondent contends no penalty should be imposed –determination of appropriate penalty**COSTS** – where respondent contends proceeding vexatious or without reasonable cause – where adverse credibility findings made in respect of applicant – where applicant refused four offers to settle – refusal to accept offer was unreasonable conduct – costs awarded on party and party basis  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 340(1), 351(1), 361, 361(1), 546, 570 and 570(2) |
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| Cases cited: | *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407*Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Ltd* [2007] FCA 1607*Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080*McDonald v Parnell Laboratories (Aust) (No 2)* [2007] 164 FCR 591*Morton v Commonwealth Scientific and Industrial Research Organisation (No 2)* [2019] FCA 175*Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* (2008) 171 FCR 357*Ryan v Primesafe* [2015] FCA 8*Sayed v Construction, Forestry, Mining and Energy Union* (2016) 239 FCR 336*Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166; [2014] FCAFC 110*Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 |
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| Date of hearing: | Heard on the papers |
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| Date of last submissions: | 12 November 2019 (Respondent)15 November 2019 (Applicant) |
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| Category: | Catchwords |
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| Counsel for the Respondent: | Mr J Bourke QC with Ms R Sweet |
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| Solicitor for the Respondent: | King & Wood Mallesons |

ORDERS

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|  | QUD 234 of 2017 |
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| BETWEEN: | KATHERINE MARILLA MORTONApplicant |
| AND: | COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATIONRespondent |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 22 NOVEMBER 2019 |

THE COURT ORDERS THAT:

1. The respondent pay a pecuniary penalty of $7,500 for its contravention of s 340(1) of the *Fair Work Act 2009* (Cth), such amount to be paid to the applicant within 30 days.
2. The applicant pay the respondent’s costs of the proceeding incurred from 8 September 2018.

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

REASONS FOR JUDGMENT

RANGIAH J:

1. The applicant, Dr Katherine Morton, brought proceedings alleging that the respondent, Commonwealth Scientific and Industrial Research Organisation (**CSIRO**), contravened ss 340(1), 343(1) and 351(1) of the *Fair Work Act 2009* (Cth) (**the FW Act**).
2. On 29 October 2019, I delivered judgment: see *Morton v Commonwealth Scientific and Industrial Research Organisation (No 2)* [2019] FCA 175. I made a declaratory order that CSIRO had committed a contravention of s 340(1) of the FW Act and awarded compensation of $1000 in respect of that contravention. I otherwise dismissed the originating application.
3. It is necessary to consider penalty and costs. The parties have agreed that those issues may be decided on the papers.

## Background

1. Dr Morton was employed by CSIRO between 2012 and 2016. Dr Morton’s further amended statement of claim pleaded ten claims that CSIRO contravened the FW Act through the actions of various of its employees. Each of these claims contained more than one allegation of contravention of the FW Act. There were, in total, over 40 such allegations.
2. I upheld one allegation and made the following declaration:

The respondent contravened s 340(1) of the *Fair Work Act 2009* (Cth) by the action of its employee, Heather Campbell, on or about 3 August 2015, in failing to comply with the requirements of the grievance procedures under the CSIRO Enterprise Agreement 2011–2014 to perform her duties with professionalism when dealing a complaint made by the applicant against Gavin Drury.

1. I otherwise dismissed Dr Morton’s proceeding. I found that Dr Morton was not a credible witness and that a number of the allegations she made were untrue. I rejected other allegations on the basis of my rejection of Dr Morton’s evidence about the context in which incidents occurred and emails were sent. I rejected some allegations on the basis that the relevant conduct did not amount to adverse action, or that CSIRO’s employees demonstrated that adverse action was not taken because Dr Morton had exercised workplace rights. It is unnecessary, for present purposes, to repeat the findings I made. However, my reasons for judgment should be read with these reasons.

## Penalty

1. Dr Morton seeks the imposition of a pecuniary penalty in respect of CSIRO’s single contravention of s 340(1) of the FW Act. CSIRO submits that no penalty should be imposed. My findings concerning the contravention are set out at [581]–[593] of my earlier reasons.
2. Section 546(1) of the FW Act gives the Court a discretion to order that a person pay a pecuniary penalty that the Court considers is appropriate if the Court is satisfied that the person has contravened a civil remedy provision. The Court has a discretion both as to whether to order a contravener to pay a pecuniary penalty and as to the amount of any penalty.
3. In submitting that no penalty should be imposed, CSIRO relies upon *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Ltd* [2007] FCA 1607. In circumstances where the contravention of the FW Act arose out of an arguable, but erroneous, construction of a term of an industrial instrument, Gordon J declined to order any pecuniary penalty. However, that case bears no resemblance to the present case. In the present case, Ms Campbell’s conduct involved an abrogation of her responsibility under the Grievance Procedures set out in the *CSIRO Enterprise Agreement 2011–2014* to act professionally in investigating Dr Morton’s complaint against Mr Drury.
4. In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [55]–[59], the High Court emphasised that the primary purpose of civil penalties is to secure protection through deterrence, and that deterrence is the primary purpose of imposing a penalty. I consider that the need for general and specific deterrence requires that a penalty be imposed upon CSIRO.
5. At the time of the contravention of s 340(1) of the FW Act, the maximum penalty was $10,800 for individuals and $54,000 for corporations. CSIRO is a corporation.
6. There are well-established principles which guide the exercise of the Court’s discretion to determine the appropriate penalty. Although the authorities warn against applying a rigid check-list of matters, the factors recognised as being potentially relevant to the determination of the appropriate penalty include the following:
7. the nature and importance of the project where the conduct was undertaken;
8. the nature and extent of the conduct which led to the breaches;
9. the circumstances in which the conduct took place;
10. the nature and extent of any loss or damage sustained as a result of the breaches;
11. whether there had been similar previous conduct by the respondents;
12. whether the breaches were properly distinct or arose out of one course of conduct;
13. the size of the business enterprise involved;
14. whether or not the breaches were deliberate;
15. whether senior management was involved in the breaches;
16. whether the party committing the breach exhibited contrition;
17. whether the party committing the breach has taken corrective action;
18. whether the party committing the breach has cooperated with the enforcement authorities;
19. the need for specific and general deterrence.

(*Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [57]–[58]; *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [14], [28]–[30]; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at [90]).

1. I will consider the factors that are of significance to the present case.
2. CSIRO submits that Ms Campbell’s action did not involve a deliberate breach of the Grievance Procedures, but is better described as an omission. Even so, it was a deliberate omission. Ms Campbell stated in her email of 3 August 2015 that she had spoken to Mr Drury and had read the recent email exchange, implicitly acknowledging that it was necessary to do so in order to properly investigate Dr Morton’s complaint. She did neither, but wrote a misleading email to Dr Morton stating that she had done both.
3. In its written submissions, CSIRO describes Ms Campbell’s conduct as “a technical policy breach”. It is concerning that CSIRO seeks to trivialise its contravention of s 340(1) of the FW Act in this way. It reflects a lack of appreciation of the significance and seriousness of CSIRO’s obligation not to take adverse action against employees who exercise workplace rights to make complaints. It reflects a failure to acknowledge the importance of CSIRO’s obligation to comply with the Grievance Procedures it agreed to under the Enterprise Agreement, even for difficult employees.
4. I regard the contravention of s 340(1) of the FW Act as substantial and serious, and not merely technical. CSIRO has failed to understand the seriousness of the contravention, let alone express any contrition, or indicate what, if any, action it intends to take to avoid similar contraventions in the future.
5. However, I accept that there is no evidence of any previous contravention of the FW Act by CSIRO before the Court.
6. CSIRO is a large organisation. Ms Campbell’s position is as CSIRO’s General Manager for Health, Safety and Environment. She is employed in a senior management position.
7. In all the circumstances, I consider that a penalty of $7,500 is appropriate to satisfy the objectives of specific and general deterrence. In accordance with the usual practice, CSIRO should be ordered to pay the penalty to Dr Morton: see *Sayed v Construction, Forestry, Mining and Energy Union* (2016) 239 FCR 336 at [106]–[121].

## Costs

1. CSIRO submits that Dr Morton should be ordered to pay its costs on an indemnity basis. Dr Morton submits that no order for costs should be made.
2. Section 570 of the FW Act provides:

**570 Costs only if proceedings instituted vexatiously etc.**

(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

…

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party’s unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

1. CSIRO submits that costs should be awarded against Dr Morton on the basis that, firstly, the proceeding was instituted vexatiously or without reasonable cause (s 570(2)(a)) and, secondly, Dr Morton engaged in unreasonable acts that have caused CSIRO to incur costs (s 570(2)(b)).
2. CSIRO’s written submissions contain a lengthy list of factors supporting its application for costs. However, the matters of substance are:
3. Dr Morton made numerous separate allegations of contraventions of the FW Act, but succeeded only in one.
4. My reasons for rejecting the serious allegations of sexual harassment were that the events did not occur, or if they did occur, were events in which Dr Morton willingly participated and then falsely alleged that she had been offended.
5. Dr Morton’s refused several offers to settle the proceeding.
6. Dr Morton relies upon the judgment of Mortimer J in *Ryan v Primesafe* [2015] FCA 8, where her Honour said at [64]:

The policy behind s 570 is to ensure that the spectre of costs being awarded if a claim is unsuccessful does not loom so large in the mind of potential applicants (in particular in my opinion) that those with genuine grievances and an arguable evidentiary and legal basis for them are put off commencing or continuing proceedings.

1. CSIRO relies on *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208, where Flick J said at [315]:

Section 570, it may be noted, would not seem to preclude costs being awarded against an otherwise successful claimant for at least such part of a proceeding as has been unreasonably pursued.

His Honour there seems to have been referring to s 570(2)(b), rather than (a). It may be observed that s 570(2)(a) focusses upon institution of “the proceedings”, whereas s 570(2)(b) refers to a party’s “unreasonable act or omission” causing the other party to incur the costs. There is, however, an overlap between the provisions.

1. Dealing first with CSIRO’s submission concerning s 570(2)(a) of the FW Act, it is necessary to consider whether the proceedings as a whole were instituted without reasonable cause. My findings may broadly be divided into three categories. First, there were the findings which substantially depended upon the adverse view I took of Dr Morton’s credit, particularly concerning sexual harassment and sex discrimination. I accept that those allegations were made without reasonable cause. Second, there is my finding concerning the contravention upon which Dr Morton succeeded. Third, there is a category of findings which involve acceptance of the evidence of CSIRO’s witnesses, rather than substantially depending upon Dr Morton’s credit. These include allegations concerning her removal as a team leader, her discussions with Mr Drury and her complaints about leave entitlements. Although some of these allegations were close to the margin, I would not regard them as being unreasonably made, particularly having regard to the reversal of the onus of proof under s 361(1). In these circumstances, I do not think it is possible to say that the proceedings as a whole were brought without reasonable cause.
2. Dealing next with s 570(2)(b) of the FW Act, the prosecution of particular allegations without reasonable cause may be an unreasonable act that causes an opposing party to incur costs. However, having regard to the observations in *Ryan v Primesafe*, I do not consider that there should be a parsing of the various allegations in circumstances where there was a mixture of unreasonably brought, reasonably brought but unsuccessful, and successful, claims. The proceeding is more appropriately considered as a whole.
3. In *McDonald v Parnell Laboratories (Aust) (No 2)* [2007] 164 FCR 591, Buchanan J held at [30] that refusal of an appropriate offer of settlement may amount to an unreasonable act or omission, engaging s 570(2)(b) of the FW Act.
4. CSIRO made the following written offers prior to trial:
5. on 8 November 2017, a Calderbank offer for $150,000;
6. on 21 November 2017, a Calderbank offer for $175,000;
7. on 9 July 2018, a Calderbank offer and an offer under the *Federal Court Rules 2011* (Cth) for $200,000; and
8. on 4 September 2018, a Calderbank offer for $225,000.
9. Dr Morton did not accept any of these offers. Plainly, each of CSIRO’s offers considerably outweighed Dr Morton’s limited success at trial.
10. On 1 December 2016, Dr Morton filed an application in the Fair Work Commission. On 21 February 2017, she filed an application in the Federal Circuit Court of Australia. On 8 May 2017, the Federal Circuit Court transferred the proceeding to the Federal Court of Australia. On 18 and 31 October 2017, the parties participated in a Court ordered mediation. The matter did not resolve. The trial commenced on 8 October 2018.
11. Dr Morton accepts that a failure to accept a reasonable offer of compromise may constitute an unreasonable act for the purposes of s 570(2) of the Act. However, she relies upon *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166; [2014] FCAFC 110, where the Full Court said at [80]:

Caution should be exercised as to how a Calderbank offer, even a generous one, is viewed in such circumstances. Calderbank letters pre-suppose what might be a called a “costs jurisdiction”, in contrast to the usual rule an FW Act claims. To group together contractual and FW Act claims in an offer may permit the conclusion that the refusal of the offer was unwise, even unreasonable, but it does not follow that such is an unreasonable act or omission, for the purposes of s 570(2).

1. Dr Morton submits that her refusal of CSIRO’s offers was not unreasonable because, first, she was successful in obtaining a declaration that CSIRO contravened s 340(1) of the Act and was awarded some compensation in circumstances where CSIRO maintained its denial of all the allegations. Second, the factual matrix of Dr Morton’s employment was complicated, and the possibility that someone may have acted for a prohibited reason could not summarily be discounted, particularly because of the reverse-onus provision under s 361 of the FW Act. Third, the respondent admitted elements of Dr Morton’s claims in its amended defence, such as, “Dr Glencross picked up the riding crop, tapped Dr Morton on the buttocks…”. Fourth, the eventual weight given to the medical evidence could not be anticipated.
2. In considering whether it was unreasonable for Dr Morton to refuse the offers to settle, it is relevant that much of Dr Morton’s evidence concerning the sexual harassment and sex discrimination allegations was not credible. She must have known that she was at substantial risk of failing. In view of what I found to be Dr Morton’s substantial exaggerations to the psychiatrists who gave evidence, she could not reasonably have had any confidence that their evidence would be accepted. On the other hand, it is true that Dr Morton had the benefit of s 361 of the FW Act and it is also true that she succeeded in one of her allegations.
3. Taking into account Dr Morton’s partial success and the possibility that the evidence called by the respondent in relation to some allegations may not have been adequate to discharge its onus of proof, I am not prepared to find that her refusal of the offers was unreasonable prior to CSIRO’s service of the bulk of the outlines of evidence of its witnesses.
4. However, CSIRO had served the majority of its outlines of evidence by 4 September 2018. Dr Morton, with the benefit of legal advice, must have realised then that she would have to successfully challenge the credibility of many of CSIRO’s witnesses in order to achieve substantial success. Dr Morton could not have been under any illusion that she could expect to recover any substantial amount of compensation.
5. I find that Dr Morton’s failure to accept CSIRO’s offer of $225,000 made on 4 September 2018 was unreasonable conduct that caused CSIRO to incur costs. I consider that Dr Morton should be ordered to pay CSIRO’s costs following the expiry of that offer, from 8 September 2018.
6. CSIRO submits that Dr Morton should be ordered to pay costs on an indemnity basis. It is true that costs are commonly awarded on an indemnity basis where there has been a failure to accept a Calderbank offer in jurisdictions where the usual costs regime applies. However, the starting point in this case is that this is ordinarily a no costs jurisdiction. My findings upon Dr Morton’s unreasonable failure to accept CSIRO’s offer justify an award of costs on a party and party basis, but not indemnity costs.
7. I will order that Dr Morton pay CSIRO’s costs of the proceeding from 7 September 2018 on a party and party basis.

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| I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 22 November 2019