FEDERAL COURT OF AUSTRALIA

Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Red & Blue Case) [2015] FCA 1125

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| Citation: | Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Red & Blue Case) [2015] FCA 1125 |
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| Parties: | **DIRECTOR OF FAIR WORK BUILDING INDUSTRY INSPECTORATE v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and RALPH EDWARDS** |
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| File number: | VID 310 of 2014 |
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| Judge: | **JESSUP J** |
|  |  |
| Date of judgment: | 23 October 2015 |
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| Catchwords: | **INDUSTRIAL LAW** – Union officer threatening to organise, or organising, action against scaffolding contractor with intent to coerce contractor to employ a particular person – Adverse action against contractor because contractor did not comply with union request to employ person – Liability of union for acts of officer – Compensation for contractor. |
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| Legislation: | *Building and Construction Industry Improvement Act 2005* (Cth) ss 43 and s 69  *Evidence Act 1995* (Cth) ss 59, 69, 81, 87, and 88  *Fair Work Act 2009* (Cth) ss 12, 342, 346, 347, 355, 361, 363, 545, 793, and Pt 3-1  *Fair Work (Building Industry) Act 2012* (Cth) Pt 1 of Ch 2  *Federal Court of Australia Act 1976* (Cth) s 51A  *Occupational Health and Safety Act 2004* (Vic)  *Workplace Relations Act 1996* (Cth) ss 799, 809 and Pt 16 |
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| Cases cited: | *Australian Commonwealth Shipping Board v Federated Seamen’s Union of Australasia* (1925) 35 CLR 462  *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378 |
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| Date of hearing: | 10-12 March, 27, 28 July 2015 |
|  |  |
| Place: | Melbourne |
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| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 143 |
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| Counsel for the Applicant: | M Follett |
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| Solicitor for the Applicant: | Lander and Rogers |
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| Counsel for the Respondents: | E White |
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| Solicitor for the Respondents: | Slater and Gordon |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 310 of 2014 |

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| BETWEEN: | DIRECTOR OF FAIR WORK BUILDING INDUSTRY INSPECTORATE  Applicant |
| AND: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION  First Respondent  RALPH EDWARDS  Second Respondent |

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| JUDGE: | JESSUP J |
| DATE OF ORDER: | 23 OCTOBER 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The respondents pay to Red & Blue Scaffolding (Aust) Pty Ltd compensation in the sum of $18,084.00.

2. The proceeding be listed for hearing at 10:15 am on 23 November 2015 for the purpose of hearing the parties on the following questions:

* 1. the penalties, if any, proper to be imposed on the respondents in respect of their conduct found to have been in contravention of ss 355 and 346 of the *Fair Work Act 2009* (Cth); and
  2. the interest, if any, proper to be ordered under s 51A of the *Federal Court of Australia Act 1976* (Cth) in respect of the said compensation payment.

3. The operation of Order 1 above be stayed pending the determination of the matters referred to in Order 2 above.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 310 of 2014 |

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| BETWEEN: | DIRECTOR OF FAIR WORK BUILDING INDUSTRY INSPECTORATE  Applicant |
| AND: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION  First Respondent  RALPH EDWARDS  Second Respondent |

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| --- | --- |
| JUDGE: | JESSUP J |
| DATE: | 23 OCTOBER 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

1. In this proceeding, the applicant, the Director of the Fair Work Building Industry Inspectorate under Pt 1 of Ch 2 of the *Fair Work (Building Industry) Act 2012* (Cth), alleges that the respondents, the Construction, Forestry, Mining and Energy Union (“the union”) and the President of the Victorian and Tasmanian Construction and General Branch of the union, Ralph Edwards, contravened certain provisions of Pt 3-1 of the *Fair Work Act 2009* (Cth) (“the FW Act”) by taking action against Red & Blue Scaffolding (Aust) Pty Ltd (“Red & Blue”) in respects to which I shall refer.

**THE FACTS**

1. The business of Red & Blue is the hire of scaffolding to the building and construction industry. Having been engaged by a builder to supply scaffolding, Red & Blue will deliver the scaffolding to the site concerned, erect the scaffolding on site and, at the end of the hire period, dismantle the scaffolding and remove it from site. It is apparent that the two main periods when persons employed or engaged by Red & Blue are required to work on a building site are when the scaffolding in question is being erected and dismantled (which situations should be understood to include procedures in which Red & Blue is required to go on site to move or to alter previously erected scaffolding). Red & Blue’s customers tend to be the head builders in control of building operations on the sites concerned.
2. On 13 November 2012, in the course of the launching of a swing stage scaffold by Red & Blue at a construction site in Lygon Street, a section of pipe, about a metre long, fell from the scaffold and injured someone below. Eventually, Red & Blue was prosecuted in connection with that incident, fined $15,000 and required to pay nearly $4,000 in costs. On the following day, 14 November 2012, there was a further incident involving Red & Blue, this time at a site in Lothian Street, North Melbourne.
3. The incidents referred to in the previous paragraph are not now relevant in themselves, but they led to a meeting between a director of Red & Blue, Bruno Notarfrancesco, and Mr Edwards at the office of the union in the weeks which followed. In his role as president of the relevant branch of the union, Mr Edwards was responsible for the organisation of various industry sectors in which the union had a presence, including the contract scaffolding sector. The evidence of these two men about this meeting, while not entirely on all fours, was broadly consistent. Mr Notarfrancesco said that he asked Mr Edwards whether there were any experienced scaffolders that he could recommend, because, at the time, Red & Blue was looking for advanced scaffolders for particular jobs (although, in his evidence, Mr Notarfrancesco made it clear that the scaffolders on the Lygon Street job did all have advanced scaffolder tickets). Mr Edwards’ evidence was that his understanding of Red & Blue’s problem was that its experienced scaffolders were leaving or about to leave their employments, in which context Mr Notarfrancesco said to him, “If you’ve got someone who has got an advanced ticket and is experienced, I would be interested in talking to them.” Mr Edwards said that he would see what he could do to find people who fitted that bill.
4. On the last Thursday of every second month, the union held meetings of its members employed in the contract scaffolder sector. At the meeting for February 2013, Mr Edwards mentioned the incidents referred to above, and the fact that Red & Blue was in need of some skilled people. He said that, if anyone was interested in putting their hand up for a job interview, he would arrange it. He raised the issue again at the next contract scaffolders’ meeting, which was held in early May 2013 (since the last Thursday in April was Anzac Day). He invited those who were not working to put their names forward, and he would seek an interview for them.
5. At the time, Robert Cannon, a scaffolder with an advanced ticket, was engaged for what he initially thought would be four weeks on a job in Altona. It is not clear from his, or from Mr Edwards’, evidence whether he attended the February or the May contract scaffolders’ meeting, but he was clear that he was present at one such meeting when Mr Edwards inquired whether anyone was interested in applying for a job with Red & Blue. From the context, I think it more likely that it was the meeting in early May that prompted Mr Cannon to express such an interest. His job at Altona commenced in May and, as I said, was to have been for four weeks only. The inference that Mr Cannon would have been thinking about where he would next be working is a reasonable one, and I draw it. It is uncontroversial that he did ask Mr Edwards to put his name forward for a job with Red & Blue. As things happened, and unexpectedly so far as Mr Cannon was concerned, the job in Altona ran beyond the anticipated four weeks, and he remained working there until some time in August. By then, however, he had told Mr Edwards that he was interested in the employment opportunity with Red & Blue.
6. For the sake of the narrative, and also because they provide some confirmation of the union’s case that Red & Blue was in need of experienced scaffolders, I mention here two other events which occurred in May 2013. The first was that, on 6 May, Red & Blue received an improvement notice issued under the *Occupational Health and Safety Act 2004* (Vic) in respect of a suspended scaffold at a construction site at 786 Elizabeth Street. The second event was that, at the end of May, Red & Blue’s foreman, Eyup Sanli, contacted Mr Edwards with a request that he secure two places in a training course for the advanced scaffolding ticket run by the union. Mr Edwards was able to secure those places, and one of the scaffolders employed by Red & Blue, Laurie Underdown, and Mr Sanli himself, ultimately completed the course.
7. Returning to Mr Cannon’s circumstances, at about the start of June 2013 Mr Edwards contacted Mr Notarfrancesco by telephone. The evidence given by these two men about the conversation which ensued had much in common, but differed in important respects also. It was common ground that Mr Edwards told Mr Notarfrancesco that he had found someone for him to employ. Mr Edwards says that he told Mr Notarfrancesco that the person was experienced, and was “a good worker and a good scaffolder”. His evidence as to what he told Mr Notarfrancesco was the following:

And I said, “Well, look, I’ve been trying to help you improve the gene pool, in terms of your scaffolders and I’m having difficulty finding people who are prepared to work for you. You don’t have the best reputation in town, but this bloke is actually capable of doing the job and that would probably help your business a great deal. I will get him to ring you and you sort it out with him about an interview and if you give him the job – good, he needs the work. He doesn’t want to go interstate. It would be good for your business to have some experienced people coming back to your company.”

Under cross-examination, Mr Notarfrancesco resisted the suggestion that Mr Edwards proposed that he should interview the person before taking him on. Mr Notarfrancesco also denied that the person of interest was experienced and “had good safety skills and qualifications and … an advanced scaffolders ticket”. There was little contention, however, and I would find, that Mr Notarfrancesco would have understood Mr Edwards’ call as referable to his own offer, made some months previously, to consider for employment any experienced scaffolder that Mr Edwards might refer to him.

1. It is also common as between Mr Edwards and Mr Notarfrancesco that the latter did not immediately take up the suggestion that he should employ, or interview, the scaffolder referred to by the former. As Mr Notarfrancesco recalls the conversation, he told Mr Edwards that he was not looking for employees at the time because he had no work. As Mr Edwards recalls the conversation, Mr Notarfrancesco said that he was not “particularly interested”.
2. Beyond that, the evidence of Mr Edwards and Mr Notarfrancesco about this conversation differed in important respects. According to Mr Notarfrancesco, Mr Edwards told him that the scaffolder in question was to be employed as a shop steward – in Mr Edwards’ words as related by Mr Notarfrancesco – “someone to keep me honest.” Mr Edwards said that this scaffolder was finishing at the site where he was then working in four weeks, and was to be employed by Red & Blue when he finished. Mr Edwards asked Mr Notarfrancesco to think about it and let him know. Mr Notarfrancesco thought about it there and then, and told Mr Edwards that Red & Blue was not employing scaffolders at the time. According to Mr Edwards, there was no mention of a shop steward in this conversation. Also, the suggestion, contained in evidence later given by Mr Edwards, that the conversation ended on the note that he would have the scaffolder ring Mr Notarfrancesco to arrange an interview, was rejected by Mr Notarfrancesco in his evidence. He said that there was, in that conversation, no mention of an interview. Rather, it was a matter of Mr Edwards simply telling him that he had found someone for Red & Blue to employ, and that person was to be employed.
3. What happened next was also the subject of controversy in the evidence. According to Mr Edwards, he contacted Mr Cannon and suggested that he ring Mr Notarfrancesco directly about the job. This was still in early June 2013 (in fact Mr Edwards said that he made that contact on the day after he had spoken to Mr Notarfrancesco). Mr Cannon also gave evidence that he contacted Mr Notarfrancesco, arranged for an interview, and had the interview, all in early June 2013. The fact that Mr Notarfrancesco did interview Mr Cannon is common ground, but he (Notarfrancesco) placed the interview in July, well after other events which became important. There is some objective support for Mr Notarfrancesco’s recollection, to which I shall return in due course.
4. What Mr Cannon said provided the basis for his own placement of the interview in early June was, I would have to say, inconclusive. From the terms and the manner in which Mr Cannon gave his evidence, I am satisfied that he had no such actual recollection of the events of mid‑2013 as would have permitted him to discriminate between early June and mid-July in the placement of his interview with Mr Notarfrancesco. He said that he had consulted his “Incolink” records (not produced in evidence), which showed that he received a redundancy payment in June. From that, I presume, he concluded that that was about when he would have been seeking an interview for another position. But he agreed, as was the case, that his work at Altona extended well beyond the initial four weeks, which leaves open the possibility that he would not have been looking for another position until some time subsequent to June at the earliest.
5. Returning to the evidence of Mr Notarfrancesco, he said that, in the period subsequent to his telephone conversation with Mr Edwards (he said that there might have been two such conversations, but nothing turns on that), Red & Blue commenced to experience difficulties getting on to some commercial sites. Regrettably, this aspect of the applicant’s case was not as clear as it might have been. No direct evidence was led as to the circumstances in which these difficulties arose. Counsel for the respondents was, understandably, meticulous in taking objection to any indirect evidence which, under colour of being no more than part of the narrative, served as the basis for making inferences adverse to his clients. An example of indirect evidence of this kind was that given in chief by Mr Notarfrancesco about a construction site called the La Scala site, to which I shall turn in due course below. He said that he went to that site, met with someone called Raff who was the director of the builder, “and that’s when it was mentioned”. Mr Notarfrancesco was, quite properly I would hold, stopped by counsel for the applicant from stating what it was that Raff had told him. However, in final written submissions made on behalf of the applicant, it was argued that the respondents’ case did not provide “any clear or plausible explanation for the slowdown in work for Red & Blue on commercial sites” in the period presently under discussion. The respondents did not have to provide such an explanation. If the applicant wanted the court to find that the respondents were implicated in the presumptive slowdown in work, it was for him to lead the necessary evidence.
6. It is a fact, however, that on 13 June 2013, Red & Blue laid off four of the scaffolders then employed by it, Mr Underdown, Terry McNamara, Hariom Pal and Jessie Nunn. As will appear, they were given to believe, by whoever laid them off – it was not Mr Notarfrancesco directly – that the union was responsible in some way, and that it was to the union that they should make their complaint.
7. At about this time, Mr Notarfrancesco contacted his solicitor, Steva Pajic. Under cross‑examination, Mr Notarfrancesco said that he told Mr Pajic “what was going on with us and the CFMEU, that we weren’t getting any work and I was made to put on this Strawbs” (the nickname by which Mr Cannon went).
8. Mr Notarfrancesco also rang the Fair Work Hotline. His inquiry came to the attention of Simon Caruana, an inspector in the Office of the Fair Work Building Industry Inspectorate. On 14 June 2013, he telephoned Mr Notarfrancesco, who advised him that he had been receiving some pressure to employ someone he did not want to employ, and wanted some advice about his position. That led to a visit by Mr Caruana and a fellow-inspector, Shad Heyman, to the Red & Blue premises at Tullamarine that same day, 14 June. There they held a meeting with Mr Notarfrancesco and Mr Pajic, commencing at about 11:00 am.
9. Meanwhile, Messrs Underdown, McNamara, Pal and Nunn were doing something about the fact that they had been laid off the previous day. They went to the office of the union, and secured a meeting with Mr Edwards. They told him that they had been laid off, or “sacked”, and they gave him to believe that they understood, from what they had been told by Red & Blue, that it was the union’s fault. As Mr Edwards put it in his evidence, they told him that they had been “sacked by Bruno and he’s blaming you.” Over a period which Mr Edwards estimated at about half an hour, the scaffolders related what had happened to them, and Mr Edwards asked them about their termination pay and about the notice they had been given. He went through what he described as “the usual compliance with the [Enterprise Bargaining Agreement (“EBA”)] issues”. At least one of the scaffolders had brought pay slips with him, and Mr Edwards perused them, with a view to working out if they had been terminated, “whether they were up-to-date with their payments, and so on.”
10. According to the evidence of Mr Underdown, Mr Edwards told the scaffolders that he was trying to organise a shop steward to look after them (I note that, in his evidence, Mr Underdown consistently used the term “shop stewardess”, but nothing turns on that minor misunderstanding on his part). Mr Underdown said – relating, as I understand him, the substance of what Mr Edwards said to the scaffolders – that Mr Edwards was helping them because there was such a big turnover of workers at Red & Blue, workers were being sacked for no reason (which was why they went to see Mr Edwards) and he was going to organise with Mr Notarfrancesco to get a shop steward to look after them. Mr Edwards told them that, if Mr Notarfrancesco did not take on a shop steward, it would make it harder for him to get work on a commercial site. At this stage of his evidence (ie in chief), Mr Underdown said that Mr Edwards did not say that he would make it harder for Mr Notarfrancesco to get work on commercial sites: indeed, Mr Underdown said, “he was actually trying to look out for us. He was helping us out.” As to the identity of the shop steward to whom Mr Edwards referred in this conversation with the scaffolders, Mr Underdown said that he (Edwards) had someone in mind, but did not mention his name.
11. Under cross-examination by counsel for the applicant, by leave, Mr Underdown, now having the advantage of reference to the transcript of an interview which he gave to an investigator on the staff of the applicant on 29 July 2013, went little further in his evidence about this aspect of the meeting with Mr Edwards on 14 June 2013. He confirmed that Mr Edwards had said that, if Mr Notarfrancesco did not take on a shop steward, “we” would not be allowed on commercial sites. According to the transcript, when asked what Mr Edwards said in the meeting, Mr Underdown told the investigator that he told them that Mr Notarfrancesco had to get a shop steward to look after them, and that he (Edwards) “had someone”. Over the objection of counsel for the respondents, extracts of the transcript of the interview on 29 July 2013 was subsequently admitted into evidence pursuant to s 69 of the *Evidence Act 1995* (Cth) (“the Evidence Act”).
12. Turning to the evidence of Mr McNamara, he said in chief that he was not “exactly clear” on what happened at the meeting with Mr Edwards on 14 June 2013, since it occurred so long before he gave his evidence. Subject to that, he said that the scaffolders had been stood down from their employments and had been “told it was because of the union.” It was for that reason that they went to see Mr Edwards. He told them that he and Mr Notarfrancesco had been discussing some safety issues with Red & Blue; and that there were health and safety issues that had been investigated several times by WorkSafe, and pay issues. Mr McNamara was unable to recall whether Mr Edwards had said anything about a monthly shop stewards’ meeting.
13. Mr McNamara too was interviewed by the applicant’s investigator on 29 July 2013. Cross-examined by counsel for the applicant, by leave, and reminded of that interview, Mr McNamara said, with reference to the question whether Mr Edwards had said that Mr Notarfrancesco needed to employ a shop steward, that he did not “know at the time that terminology was relevant”. He (McNamara) added, “I referred to it as a shop steward myself”. He was, I infer, referring to so much of his interview as was recorded in the transcript thereof as follows:

MR McNAMARA: But he did ask that – he just said that because of a number of complaints and issues that he has heard about and been informed of – we’re not aware of any of them, bar that swing stage – that he was insisting that Bruno employ someone who has vast experience in advanced scaffolding and that he had provided three names and all he has to do was employ them to work, as like a shop steward.

1. Mr McNamara was shown the transcript of his interview with the investigator, in which it was recorded as follows:

MR McNAMARA: There had been – Ralph had told us this in a meeting as well, the shop steward’s monthly meeting – I think it takes place on a Wednesday, the middle of every month – basically every shop steward in Melbourne was told to put a line through Red and Blue.

MS SHARPE: Okay.

MR McNAMARA: And no staff or equipment from Red and Blue was to be allowed on any site and he said that he had been told that and unitl he’s been told otherwise, he’s not allowed to let us in.

MS SHARPE: Okay. So did Ralph tell you that in the meeting that you had - - -

MR McNAMARA: Yeah,

MS SHARPE: - - - at the CFMEU - - -

MR McNAMARA: Yeah, that every shop steward in Melbourne had to be informed that we weren’t allowed on site.

At the outset of this passage, Mr McNamara was actually responding to a question from the investigator as to events at a construction site in Maribyrnong on 22 June 2013, to which I refer in more detail below. In the course of answering that question, he strayed into the area of his meeting with Mr Edwards on 14 June 2013, for which purpose I set out the passage here. The “he” referred to in the third paragraph of the passage was the shop steward at the Maribyrnong site. In his evidence in court, Mr McNamara said that he could not recall Mr Edwards using the expression “put a line through”, but it was not an expression that he himself would use.

1. Cross-examined by counsel for the respondents, Mr McNamara agreed that he and the other scaffolders wanted to discuss their dismissal with Mr Edwards. He agreed that he took a wage slip to the meeting because he was concerned about the wages he had been paid by Red & Blue. He agreed that he discussed his dismissal, and what could be done about any wage claim, with Mr Edwards. He agreed that Mr Edwards offered to help him find work. He agreed that Mr Edwards said that Red & Blue had had a number of serious safety issues over the then recent past. He agreed that Mr Edwards said that WorkSafe were investigating Red & Blue. It was suggested to Mr McNamara that Mr Edwards did not discuss what had occurred at monthly stewards’ meetings, to which his response was “I’m not sure.” He agreed that Mr Edwards had told him and the other scaffolders that he (Edwards) had had earlier discussions with Mr Notarfrancesco, who had said that he was going to do things to make sure his safety was up to appropriate standards; but, Mr McNamara agreed, Mr Edwards went on to say that Mr Notarfrancesco had not done what he had agreed to do in this regard.
2. Mr Pal’s evidence was that, when the scaffolders met with Mr Edwards, he (Pal) said to him (Edwards), “Ralph, why not allowed for the build up of scaffolding over there. Any jobs when I go there, I am not allowed”. Mr Edwards’ response was, “Guys, I have no problem with you, I have a problem with Bruno”.
3. Turning to the evidence of Mr Edwards, when asked under cross-examination, whether the scaffolders asked him why they were not being allowed on commercial jobs, Mr Edwards said only that they had told him that they had been sacked, and said it was for lack of work. He did not recall them telling him that they had been prevented from getting onto sites by union delegates. One of them told him that their boss had told them that there was a lack of work, that it was all the union’s fault, and that they should go and see the union about it. Mr Edwards denied that he told the scaffolders that the reason they were not being allowed on jobs was because Mr Notarfrancesco did not have a shop steward. He denied that he told them that Mr Notarfrancesco had to get a shop steward to look after them. He denied that he told them that he had a person in mind in this respect.
4. It is common ground that, after some discussion with the scaffolders from Red & Blue on 14 June 2013, Mr Edwards made a telephone call to Mr Notarfrancesco. The clearest evidence as to the lead-in to that call was that set out in the transcript of Mr McNamara’s interview with the investigator. According to that transcript, Mr Edwards said to the scaffolders:

Look, lads, I’ll let you know now that I’ve given parameters for Bruno to work within in order to be reinstated with the union and I’ll ring him now and confirm that for you just so you know that I’m not the one dickin’ you about heres ...

Mr Edwards denied that he had said what was attributed to him by Mr McNamara in this passage.

1. As chance would have it, when Mr Edwards rang Mr Notarfrancesco, the latter was in the meeting to which I have referred at para 16 above. When Mr Notarfrancesco’s mobile phone rang and he saw that it was Mr Edwards calling, he placed the phone on loud-speaker mode, the result of which was that every person at the meeting heard both sides of the conversation which followed. For their part, the four scaffolders in Mr Edwards’ office heard Mr Edwards’ contribution to the conversation.
2. Before turning to the evidence led in relation to this telephone conversation, I should mention a very odd aspect of it. I have already referred to Mr Cannon, and it seems to be uncontroversial that, at the time, he was the man whom Mr Edwards’ had in mind as suitable for employment by Red & Blue (whether as a matter of recommendation or as a matter of insistence). In the evidence of the conversation to which I next refer, however, there is no mention of Mr Cannon by name. Rather, at least according to the recollections of some of those who heard the conversation, it was a Robert Connolly whom Mr Edwards mentioned. As will appear, there is a handwritten record, taken by Mr Caruana as the conversation proceeded, in which the name “Connolly” is mentioned. That was consistent with the recollection of Mr Notarfrancesco and of Mr Heyman. It seems clear beyond argument that Mr Edwards did refer to Mr Connolly rather than to Mr Cannon. But the case has been conducted – on both sides – as though it was Mr Cannon to whom Mr Edwards was referring. Mr Edwards was not cross-examined about this oddity. There was no suggestion made to him that he had in fact mentioned a Mr Connolly and no attempt was made to explore how and why a person by that name had been mentioned. In the circumstances, I have no option but to ignore the oddity, while noting, for the benefit of the reader of these reasons, that Mr Edwards, while having Mr Cannon in mind, identified Mr Connolly as the scaffolder whom Mr Notarfrancesco ought to consider.
3. According to the transcript of Mr McNamara’s interview with the investigator on 29 July 2013, the first thing that Mr Edwards said to Mr Notarfrancesco on the telephone was, “Have you decided anything from our last conversation?” According to Mr Notarfrancesco, however, Mr Edwards commenced by saying, “Congratulations. You’re out of business. You’ve just got rid of your employees. You know what I wanted you to do. You didn’t have to go down this track, Bruno. All you had to do was employ Robert Connolly and all this would have been okay.” Mr Notarfrancesco said, “But I wasn’t employing anybody”, to which Mr Edwards responded, “I thought you were smarter than that, Bruno, but obviously you’re not.” According to Mr Notarfrancesco’s evidence, in this conversation Mr Edwards “said things like”, “You know how it works, Bruno. This is how it works. I tell you who to employ and how to employ. You’re basically out of business.” In response to counsel’s question in chief as to whether Mr Edwards said anything about how he wanted him to employ Robert Connolly, Mr Notarfrancesco responded, “Well, he wanted me to employ Robert Connolly as a full-time employee” in the capacity of “a shop steward”. Asked whether Mr Edwards had said anything about the rules of the union, Mr Notarfrancesco responded, that he, Edwards, had said that “these are the rules. You know what the rules are.” Mr Notarfrancesco adhered to this evidence under cross-examination.
4. According to Mr Edwards’ evidence-in-chief, the first thing he did in his telephone conversation with Mr Notarfrancesco on 14 June 2013 was to ask him why he had sacked his employees, what was going on in that regard, whether he had paid them off in accordance with the EBA and whether “all their compliances” were up to date. On the subject of safety issues, Mr Edwards said that Mr Notarfrancesco, “as usual … had a whinge about life is too hard and it’s not fair and all these safety requirements and it’s not … a level playing field, etcetera”. He said that Mr Notarfrancesco raised the fact it was so difficult because he had been prosecuted by WorkSafe, that he was constantly being questioned about his work practices and so on. He said that he, Edwards, commented that he had gone out of his way from 2011 to try and build a decent relationship with him (Notarfrancesco), and that he had tried to find people who were skilled and experienced who would work for him, despite the fact that he did not have the best reputation in town. He said that he (Edwards) kept trying to come back to the issue of the termination of the four employees, and whether or not they had been properly terminated and what they had been paid, as well as indicating to Mr Notarfrancesco that there were matters, in evidence by their payslips, where he was not paying them in accordance with the EBA and the award. He said that he (Edwards) had tried to find someone for him (Notarfrancesco). He said that he had had great difficulty in finding anyone willing to work for him, but Mr Cannon had indicated that he was, for personal reasons, desperate to find work in Victoria. But Mr Notarfrancesco had offered Mr Cannon work on an Australian Business Number (“ABN”), which Mr Edwards suggested, in his evidence, was not appropriate for labourers, and was an insult for Mr Cannon who just wanted to work on the EBA.
5. Mr Edwards was asked twice (in separate parts of his examination-in-chief) whether he had asked Mr Notarfrancesco to employ Mr Cannon. First, he was asked whether he told Mr Notarfrancesco that he wanted him to employ Mr Cannon, to which he replied, “I suggested to him that he would have a good employee in Mr Cannon but if he didn’t want to employ him, well, that was his problem. If he couldn’t attract appropriate people, well, he was only making a rod for his own back as far as his scaffold safety was concerned.” Secondly, he was asked whether he made any request or demand that Mr Notarfrancesco employ Mr Cannon, to which he replied, “No. That was done and dusted.” The latter response was, of course, a reference to Mr Edwards’ factual case that it was in early June 2013 that Mr Cannon had had his unproductive interview with Mr Notarfrancesco, to which I refer elsewhere in these reasons.
6. According to Mr Edwards, it was Mr Notarfrancesco who first said, “You just want a shop steward”. To this, Mr Edwards responded, “Look, shop stewards are union business. We have rules. We have a procedure for the election of shop stewards”. Mr Notarfrancesco did say, at one point, that he already had a shop steward, to which Mr Edwards responded, “Well, I am not talking to you about shop stewards. The situation is I know of no person who is claiming to be your shop steward who is known to the union as a shop steward.” He told Mr Notarfrancesco that he wanted to talk about the issues that were pertinent to the termination of the four scaffolders, because, as Mr Edwards put it in his evidence, “at that point he had no employees.” Asked whether, at any stage in this telephone conversation, he suggested to Mr Notarfrancesco that, if he wanted to solve his problems, he should hire a shop steward, Mr Edwards responded in the negative. He also denied that Mr Notarfrancesco asked him who he (Edwards) wanted him to employ. He did not say anything to Mr Notarfrancesco about what he (Edwards) would do in the future in relation to Red & Blue. He said that he “simply asked him to have a meeting to deal with the issues about the termination of his employees”, a proposal to which Mr Notarfrancesco did not respond.
7. Although it was not always clear from Mr Edwards’ evidence-in-chief in what order various things were said in this conversation, he did say that the conversation included a discussion about Red & Blue’s occupational health and safety standards. He said that, in response to Mr Notarfrancesco going on about the state of the scaffolding sector, he “gave him a little lecture about his health and safety performance.” He (Edwards) said that he (Notarfrancesco) was a disgrace. He (Edwards) referred to a series of incidents to which he (Notarfrancesco) did not seem to have much regard. He did not look to employ decent people even when he (Edwards) tried to find people for him. He hadn’t changed much over the time that he had known him and known about him, despite his own efforts to start a decent working relationship with him about health and safety.
8. In his evidence, Mr Edwards said that, towards the end of the conversation when Mr Notarfrancesco was indicating that he had sacked the four scaffolders and was not going to have them back, he (Edwards) made a comment to the effect of, “Well, you sack your employees and you’re a contract scaffolder, you basically haven’t got a business left because if you’re a contract scaffolder you’re providing labour. If you’ve got no labour, well, you ain’t got no business.” It did not make sense to Mr Edwards. He suggested to Mr Notarfrancesco that they should have a discussion about it face-to-face, and “work out what in fact really was going on”, because none of it made sense to Mr Edwards.
9. Under cross-examination by counsel for the applicant, Mr Edwards denied that the general substance of his discussion with Mr Notarfrancesco was why the latter had not decided to employee a shop steward. He denied that he asked Mr Notarfrancesco whether he had thought any more about putting Mr Cannon on. He could not recall Mr Notarfrancesco saying that he did not want to employ anyone at that time, but he volunteered that he did say that he had no work, which was why he had sacked the four scaffolders. He denied saying to Mr Notarfrancesco, “I’m telling you what I want you to do.” Asked whether he had said to Mr Notarfrancesco, “I thought you were smarter than that but obviously you’re not”, Mr Edwards agreed only that he remembered saying, apropos the sacking of his workforce, that he thought he was smarter than that. He denied that he made that comment in response to Mr Notarfrancesco saying that he was not going to employ a shop steward. He denied telling Mr Notarfrancesco that he was asking him to “put a bloke on to keep you honest”. He denied saying, “You know how it works. I tell you who to employ and how to employ them.” As to whether he said, “If you can’t oblige me, then hard luck”, he agreed only that he possibly made that comment in the context of meeting him about the sacking of the scaffolders, thus: “If you can’t oblige me to have this meeting to discuss the matter, well, hard luck”. He denied telling Mr Notarfrancesco that, to solve his problems, he needed to hire a shop steward to look after his employees. He denied saying, “If you want to be in business you need to have a working relationship with me.” He agreed that Mr Notarfrancesco said that he already had someone in the role of shop steward and that the workers had voted on it. He denied that he told Mr Notarfrancesco that “the rules of the union are that we choose who is a shop steward”, but he did agree that he referred to the rules and said that he did not know of anyone who claimed to be the shop steward – or “job delegate”, which he said was “the proper term” – or of any suggestion that anyone wanted to be the job delegate. He said, in his evidence, that he told Mr Notarfrancesco that he was not ringing him to discuss shop stewards – that was nothing to do with him (Mr Notarfrancesco) – and that he was concerned to have “some kind of discussion about what he had done to his four employees and why he wasn’t prepared to have that discussion because clearly there was a failure to carry out his EBA.” He denied that Mr Notarfrancesco suggested to him that he might engage Mr Cannon on an ABN, but he agreed that, at some stage, he (Edwards) said that ABN numbers were “not acceptable”. He did not remember using the term “bullshit” in that regard. He denied that Mr Notarfrancesco had asked who it was that he wanted him to employ and that his response was “Robert Cannon” or “Robert Connolly”. When asked whether he said that such a person came with his personal recommendation, he responded, “Not in that conversation, no.” When asked whether, in response to Mr Notarfrancesco saying that he did not want to employ anyone, he said “Well done, Bruno. You’ve just sacked your workforce. You will be out of business”, Mr Edwards’ answer was “Not the way you’ve put it, no.” He denied that he was saying to Mr Notarfrancesco that if he continued to defy him about employing Mr Cannon as a shop steward, he (Edwards) would make sure that he (Notarfrancesco) could not get on to any commercial sites, and would put him out of business.
10. I turn next to the evidence of those who overheard this telephone conversation or half of it, commencing with those who were present at the premises of Red & Blue. Unaided by his notes, Mr Caruana recalled that Mr Edwards had said, “You’re not a very smart man, Bruno. If you want to stay in business you need to do business with the union. I want you to employ someone to keep you honest.” Mr Notarfrancesco replied, “I’ve already got someone doing that role.” To this, Mr Edwards said, “You’re not a very smart man, Bruno. I thought you were smarter. Well done, you’ve just sacked your own workforce.” Mr Notarfrancesco then asked, “Who do you want me to hire?”, to which Mr Edwards responded, “Robert Connolly.” Mr Notarfrancesco asked, “Well, how do I know he is any good?” Mr Edwards responded, “He comes with my personal recommendation.” Mr Notarfrancesco next asked, “How about I employ him under an ABN so that if the relationship doesn’t work out we can end the relationship?”, to which Mr Edwards responded, “I don’t want none of that ABN bullshit.” According to Mr Caruana, at some point in the conversation Mr Edwards said, “The rules of the union are that you do business with us,” or something to that effect. As to the role in which, as demanded by Mr Edwards, Mr Connolly would be employed, Mr Caruana recalled that it was “an OH&S position”. When Mr Notarfrancesco said, “I don’t want to employ him”, Mr Edwards’ response was “Well done, Bruno. You’ve sacked your own workforce.”
11. Over the objection of counsel for the respondents, I allowed Mr Caruana to refer to notes which he had taken in the meeting on 14 June 2013, as the conversation between Mr Notarfrancesco and Mr Edwards was proceeding. Assisted by those notes, Mr Caruana recalled that, at one point in the conversation, Mr Edwards had said, “To solve that problem, hire a shop steward”; and “The rules of the union is [sic], ‘We choose who is a shop steward’; and “None of that ABN bullshit. You’ve sacked your employees. Well done. You’re out of business. Who do you want me to hire Robert Connolly.” Mr Caruana’s notes as such were then tendered without objection. I shall refer to them further below.
12. Under cross-examination, Mr Caruana accepted, when it was put to him, that Mr Edwards said to Mr Notarfrancesco that he had some safety problems, and that he had an opportunity to employ someone who was experienced in advanced scaffolding and safety issues. Mr Edwards also said, “I want you to employ someone to keep you honest.” Assisted by his notes, Mr Caruana agreed that the first part of the conversation was about occupational health and safety problems, and the employment of someone in an “OH&S” position. He agreed that Mr Edwards had said that he had found somebody, adding, “You could have solved the problem about having a health and safety rep”. Referring to his notes, Mr Caruana said that it was Mr Edwards who had said, “To solve that problem, hire a shop steward.” He withdrew the evidence which he had given in chief (before he had access to his notes) that Mr Edwards had demanded the employment of Mr Connolly in “an OH&S position”, adding, “That’s not to say that the words occupational health and safety or OH&S wasn’t [sic] said, but I’ve written down the words shop steward because that’s what I heard on the day.”
13. Mr Heyman said that the primary theme of the conversation was about Mr Notarfrancesco taking on a shop steward that Mr Edwards had suggested. Mr Edwards had said “shop steward” a couple of times during the conversation. He said he wanted Mr Notarfrancesco to take on a shop steward “to keep him honest.” The name “Robert Connolly” was mentioned. Mr Notarfrancesco asked, “How do I know this guy is any good?”, to which Mr Edwards’ response was “You have my personal guarantee”, or, according to Mr Heyman, “recommendation.” Mr Edwards also made “comments along the lines of, ‘If you want to do business you’ve got to have a working relationship with us. We decide who the shop steward is. The union rules.’” Assisted by his notes, Mr Heyman recalled Mr Edwards saying, “I’m telling you what I want.” Mr Heyman’s notes as such were tendered without objection.
14. When Mr Heyman was under cross-examination, there were many things put to him by counsel for the respondents about who said what in this conversation which he could not recall, but neither could he deny. There was, however, one thing which he did deny, albeit not forcefully. It was suggested to him that, after the first part of the conversation was centred on issues of safety, and the advisability, in Mr Edwards’ insistence, of having “a health and safety rep” in the workforce, it was Mr Notarfrancesco who first used the words “shop steward”. Mr Heyman’s response was “No, I don’t believe that to be the case. I believe that Ralph Edwards brought up the issue of the shop steward or first used that term.”
15. Messrs Caruana and Heyman were the only witnesses whose notes of this conversation between Mr Notarfrancesco and Mr Edwards were tendered. Mr Caruana’s notes were taken as the as the conversation proceeded. Mr Heyman’s notes were taken when he returned to his office, about 40 minutes later. Although both accepted under cross-examination that their notes were not comprehensive, as longhand notes of a spoken conversation rarely would be, no suggestion was made that the notes were other than separate, independent, records of the same event. Set out below is a table containing the substance (although not always the precise form) of each entry in the notes of these two investigators. I have aligned passages where the notes are obviously referring to the same part of the conversation. From this, the places where one of the investigators omitted to record something which the other recorded may be noted.

|  |  |
| --- | --- |
| **Mr Caruana’s Notes** | **Mr Heyman’s Notes** |
|  |  |
| 11:50 am Ralph Edwards phone call. | At 11:55 am Bruno received call from Ralph Edwards. |
|  | Bruno put on speaker phone. |
| I’m telling you what I want you to do. | Edwards said “I’m telling you what I want”. |
| You’re not very smart Bruno. |  |
| What I’ve asked you to do is put a bloke on and keep you honest. | “I have asked you to put on a bloke and keep you honest.” |
| Everything done safely. |  |
| If you can’t oblige with me, then hard luck. |  |
| To solve that problem, hire a shop steward. |  |
| To look after your employees. |  |
| I’ve got someone. |  |
| If you want to be in business you have to have a working relationship with me. | “If you want to have a business you have to have a working relationship with me.” |
| Bruno – We already have a guy in that position, the guys voted on it. | “Bruno – I already have a shop steward.” |
| The rules of the union are we choose who is a shop steward. | “Ralph “It’s the union rules we decide who is appointed. |
| Direct employee under an EBA |  |
| None of that ABN bullshit |  |
| You’ve sacked your employees. Well done you’re out of business. |  |
| Who do you want me to hire. | Bruno asked who person was. |
| Robert Connolly. | Ralph responded with Robert Connolly. |
|  | Bruno asked how do I know he is any good. |
| My personal recommendation. | Ralph said “he comes with my personal recommendation”. |
| You’re not a smart man thought you would know better. |  |
|  | Ralph Edwards made comments about employees not being paid – forced to take sickies, not being paid travel. |
|  | Ralph wanted to arrange meeting for next week. |
| 12:00 phone call ended. | Phone conversation approx 10 min length. |

1. Mr Pajic said that the conversation between Mr Notarfrancesco and Mr Edwards pertained to the former’s refusal to appoint an individual who had been “requested” by the latter. Mr Pajic did not recall the “exact title” of the position to which this individual was to be appointed, but it had “something to do with safety”. Mr Notarfrancesco said that he would appoint someone, but Mr Edwards said that he wanted a particular person appointed. Mr Pajic recalled that a name was mentioned in this regard, but he could not recall what it was. Under cross-examination, Mr Pajic accepted that the person whom Mr Edwards wanted appointed would be “something to do with OH&S”; and that the expression “HSR or health and safety rep” was mentioned. It was when the word “rep” was used that Mr Notarfrancesco first mentioned the title “shop steward”. It was in response to this that Mr Edwards said, “Well, look, that’s a matter for the union who it appoints for shop stewards”.
2. In chief, Mr Underdown was not asked for his recollection of the course of the telephone conversation on 14 June 2013 between Mr Edwards and Mr Notarfrancesco. Under cross‑examination, however, Mr Underdown agreed with a number of propositions put to him by counsel for the respondents. He agreed that, in the phone call, Mr Edwards asked Mr Notarfrancesco if he had sacked his workers. He agreed that Mr Edwards said that he had found an experienced, qualified, scaffolder who could look after safety on site – someone who would be a good occupational health and safety representative. He agreed that Mr Edwards said, “Well, Bruno, you’ve sacked your workforce. You’re putting yourself out of business”; “You need to be serious about addressing safety issues”; “You need to be serious about complying with occ health and safety laws”; “You need to be serious about keeping proper records”. He agreed that Mr Edwards said (and here, as elsewhere in this paragraph, I use the words of cross-examining counsel rather than of Mr Underdown himself) that, in circumstances where Mr Notarfrancesco did not have experienced scaffolders and good occupational health and safety representatives, he was now dealing with a situation where WorkSafe was prosecuting him. When it was put to Mr Underdown that Mr Edwards did not tell Mr Notarfrancesco that he had to employ a shop steward, he responded, “It was more to employ someone to look after us.” He agreed with counsel that “it was to look after you in terms of occ health and safety”. And he agreed that Mr Edwards also said, in the conversation with Mr Notarfrancesco, that, if the latter did not have someone to look after occupational health and safety, and get people with appropriate qualifications, and if he had WorkSafe prosecuting him, “of course you were going to go out of business”.
3. The transcript of Mr Underdown’s interview on 29 July 2013 tells a rather different story, however. Unprompted, he told the investigator that, when Mr Edwards and Mr Notarfrancesco were talking on the phone, “they seemed like they ... had their own issues”. Mr Edwards “was saying that [Mr Notarfrancesco] had to take on this shop [steward] or Red & Blue gets closed down”.
4. In chief, the only useful evidence given by Mr Pal (whose first language, self-evidently, was not English) about Mr Edwards’ conversation with Mr Notarfrancesco was that the former said to the latter, “Bruno, you come to the office and meet me and all things are sorted”. Mr Pal was not asked about this conversation in cross-examination.
5. In chief, Mr McNamara said that, in his telephone conversation with Mr Notarfrancesco, Mr Edwards said, “Have you looked into any of the issues that we’ve discussed?” One of the “issues” was (in Mr McNamara’s words) “about employing a more experienced scaffolder.” Asked whether Mr Edwards said anything about a shop steward, Mr McNamara replied in the negative. He could not recall whether Mr Edwards had said anything about what would happen if Mr Notarfrancesco did not do as he was being requested.
6. Most of Mr McNamara’s evidence under cross-examination consisted of him agreeing, with or without some slight qualification, with what was put to him by counsel for the respondents. He agreed that, in the phone conversation between Mr Notarfrancesco and Mr Edwards, the latter asked the former to confirm that he had sacked his workforce. He agreed that Mr Edwards said that that wasn’t surprising after all the safety issues that Red & Blue had been having. He agreed that Mr Edwards told Mr Notarfrancesco that he had been trying to help him to bring his safety standards up to a sufficient standard. He agreed that Mr Edwards said that he had tried to help Mr Notarfrancesco by arranging for two of Red & Blue’s employees to go on an advanced scaffolder ticket course. On the question whether Mr Edwards said that he had, as previously discussed, managed to find him (Mr Notarfrancesco) someone who was appropriately qualified as an advanced scaffolder, Mr McNamara’s evidence was that Mr Edwards said that he had three potential candidates, with “vast experience in advanced scaffolding”; and who would be able to look after safety. He agreed that Mr Edwards said that he had arranged for these people to have an interview with Mr Notarfrancesco. Mr McNamara did not remember whether there was any discussion about the time that such an interview would occur: he was not sure whether the interview occurred “before or after that meeting”. Suggesting to Mr McNamara that the interview had occurred before the meeting on 14 June 2013, counsel put it to him that Mr Notarfrancesco said to Mr Edwards, “You’re only going to employ him on an ABN”. This must have been a mistake on counsel’s part, but it prompted a response from the witness that Mr Edwards had said something about an ABN but he (McNamara) was not clear on what it was about. Mr McNamara agreed that, at no stage in the conversation, did Mr Edwards make a demand that Mr Notarfrancesco, or Red & Blue, employ a shop steward, nor that they employ “anyone in particular”. But he did suggest that Red & Blue had to employ someone with more experience in advanced scaffolding than current employees. Mr McNamara agreed that Mr Edwards said that, by sacking his workforce, Mr Notarfrancesco would put himself out of business. He agreed that Mr Edwards said that Mr Notarfrancesco’s safety problems really had to be sorted out, and that he had to be serious about addressing the safety issues; and also that he had to be serious about complying with the occupational health and safety laws. He agreed that Mr Edwards made an offer to Mr Notarfrancesco that he was able to work with him if he came in to meet him to try and work through how to get to the appropriate safety standards. He agreed that Mr Edwards said something about the fact that, because of its problems with safety standards, Red & Blue was facing WorkSafe investigations and prosecutions.
7. In due course, I shall have to resolve the contested issues of fact arising from the evidence given about the events of 14 June 2013, but at this stage I propose to continue with the narrative.
8. ABD Group (“ABD”) was the builder at a site in Maribyrnong called the La Scala site. It hired scaffolding from Red & Blue over the period April-June 2013. The first of Red & Blue’s relevant invoices addressed to ABD related to labour, transport and the hire period from 24 April to 21 May. A subsequent invoice took that up to 31 May 2013, and an invoice dated 4 June 2013 was for, amongst other things, the dismantling of some scaffolding. On 12 June 2013, Red & Blue invoiced ABD for labour (presumably involved in installation) and for the first four weeks of the hire of scaffolding for “stretcher stair” and “stair ramp”. In each case, the period invoiced ran from 12 June 2013 to 9 July 2013.
9. According to an unsigned work docket raised by Red & Blue, the work to be done on 22 June 2013 at the La Scala site involved the dismantling and relocation of the existing stair access on a ramp, the removal of excess material and transport of scaffolding parts from the site. As events transpired, Red & Blue was not permitted to dismantle its scaffolding on that site, either on 22 June 2013 or at any other time. It was not permitted to enter the site. Some person or persons unknown at some stage dismantled the Red & Blue scaffolding and left it on the nature strip outside the site, from where Red & Blue collected it. That was irregular, to say the least: Mr Notarfrancesco said that it was “a well-known practice within the industry that you don’t touch other people’s equipment”. The space at the foot of the work docket for a signature on behalf of the customer, ABD, to vouch that the work referred to had been carried out was not completed.
10. The two scaffolders from Red & Blue who were to have dismantled the scaffolding at the La Scala site on 22 June 2013 were Mr Pal and Mr McNamara. In his evidence, Mr Pal said that he had previously been involved in erecting the scaffolding. That occurred without incident. On 22 June, he arrived at the site at about 7:00 am. He was met by the union shop steward for the site, Terry Harris, who went by the nickname “Guv”. Mr Harris told Mr Pal that he was not allowed on site, because there was a union problem with “Bruno” (Mr Notarfrancesco). Mr Pal did not carry out the work that he was sent to do on this site on that day.
11. In his evidence Mr McNamara said that he arrived at the La Scala site at 7:00 am on 22 June. A short time later, Mr Sanli arrived in the Red & Blue truck. They were scheduled to remove excess scaffolding from the site. They did not do it. Mr McNamara was not “completely sure” why they did not remove the scaffold. He spoke to Mr Harris, who told him that he could not enter the site and (in Mr McNamara’s words in his evidence) that he (Harris) was “sorry he couldn’t let us in”. He said something along the lines that his hands were tied.
12. Under cross-examination, by leave, by counsel for the applicant, Mr McNamara was taken to the transcript of his interview with the investigator on 29 July 2013, to which I have already referred. He accepted the truth of his statement to the investigator that, upon arrival at the La Scala site, he spoke to Mr Harris. He was then referred to the following passage in the transcript:

MR MCNAMARA: And he just asked me had things been resolved between Bruno and Ralph, and I said, “I don’t know. I’m unaware of that.” And he (indistinct) and he then phoned – I think he phoned Michael, or did he? I think he made a phone call anyway and said but to the best of his knowledge until he’s been told otherwise by Ralph or his own supervisor, that we couldn’t be granted permission on site and we weren’t allowed to remove any of our gear that was not in use from a stair thread that we had built the week previous, the leftover gear was there because it was too busy to crane it up so we said we’d just get that on the truck and get it out of the way and we weren’t allowed to do that.

In court, Mr McNamara’s evidence was that Mr Harris did make the inquiry referred to in the first sentence of this passage. But he said that the substance of what is set out in the third sentence, or at least so much of it as commences “until he’s been told otherwise …”, was something that Mr Sanli, who also spoke to Mr Harris, told him. Under persistent cross-examination, Mr McNamara adhered to his evidence that he did not recall Mr Harris telling him why the Red & Blue scaffolders were not allowed on site. When it was put to him that that evidence was inconsistent with what he had told the investigator on 29 July 2013, his response was that that was the reason why he did not sign a copy of the transcript and send it back to the investigator, a rationalisation which I cannot accept, since the transcript was printed from an electronic recording of the interview. Both from the passage set out above and from that reproduced in para 26 above, it is clear that Mr McNamara did tell the investigator that Mr Harris gave him to understand that until he had been told otherwise by Mr Edwards or his own supervisor, Red & Blue was not to be allowed on site on account of some problem involving Mr Edwards and Mr Notarfrancesco.

1. While dealing with what Mr Harris said to Mr McNamara at the La Scala site on 22 June 2013, I refer back to para 22 of these reasons. As there noted, the first three passages in the extract of the transcript of the interview between Mr McNamara and the investigator, set out in that paragraph, are concerned with this subject. If what Mr McNamara told the investigator is to be believed, Mr Harris had said that Mr Edwards had said that every shop steward in Melbourne had been told to put a line through Red & Blue.
2. Mr Edwards said that he had known Mr Harris for many years. Mr Harris regularly attended the union’s shop stewards’ meetings. Mr Edwards denied that, at a shop stewards’ meeting prior to the conversation which he had with Mr Notarfrancesco at about the start of June 2013 (see para 5 above), he instructed shop stewards to put a line through Red & Blue. Other than at shop stewards’ meetings, and at health and safety representatives’ meetings, Mr Edwards said that he had not had any contact with Mr Harris prior to 22 June 2013. He had also had social conversations with Mr Harris prior to that time, but he did not believe he discussed Red & Blue with him. He found out about the events of 22 June 2013 at the La Scala site only afterwards. When it was put to Mr Edwards, under cross-examination, that “people like Terry Harris [were] told by you not to let Red & Blue on site until issues have been sorted out between Bruno and yourself”, Mr Edwards’ response was “I didn’t speak to Terry Harris”.
3. According to Mr Notarfrancesco’s evidence, for about three weeks after his telephone discussion with Mr Edwards on 14 June 2013, “my hands were tied at that stage – I couldn’t work, I couldn’t do anything”. On the applicant’s case, Red & Blue’s experience at the La Scala site was an instance of that. As a result of the position in which he found himself, it was after about those three weeks that he invited Mr Cannon in for an interview. For about the next week or so, according to Mr Notarfrancesco, Mr Edwards “allowed us to go on some of the sites to clear some of the sites because I was employing Robert [Cannon]”. This evidence by Mr Notarfrancesco was not tested in detail under cross-examination, since it was the respondents’ case – and this aspect was tested – that the interview had already occurred about six weeks previously.
4. Ms Sharpe, the applicant’s investigator who conducted the interviews on 29 July 2013, was contacted by Mr Notarfrancesco on 9 July 2013 and told that he had arranged an interview with Mr Cannon for 15 July 2013. Ms Sharpe spoke to Mr Notarfrancesco again on 16 July 2013, when he told her that he had interviewed Mr Cannon the day before. Although there were some formal objections to Ms Sharpe’s evidence, she was not challenged on the accuracy of her recollections in relevant respects. She was an impressive witness in this as in other respects, and I accept her evidence. Mr Notarfrancesco’s recollection of the general flow of events after 14 June 2013 was consistent with it. The respondents produced nothing objective from which to support their contention that the interview took place in early June. I find that it occurred on 15 July 2013.
5. It is common ground that the interview did not go well. At base was a difference in expectations as between Mr Cannon and Mr Notarfrancesco. Mr Cannon had assumed that, if he were given a job, he would be paid the rate prescribed in the enterprise agreement for all work. Mr Notarfrancesco’s position was that that rate would be paid when Mr Cannon was working on commercial jobs, but, because Red & Blue’s work was not confined to commercial jobs, a lesser rate would be paid when Mr Cannon was working, for example, on residential jobs. As I interpret what Mr Notarfrancesco was here proposing, he would engage Mr Cannon as a contractor, under an ABN, on jobs of the latter kind. Unsurprisingly, Mr Cannon did not react well to that distinction, and the interview ended rather abruptly.
6. ABD was also the builder at a site in Yarra Street, South Yarra. Red & Blue had provided scaffolding at that site over the period August-November 2012; and again in June and the first week of July 2013. The most recent invoice for the hire of scaffolding ran from 1 to 3 July 2013. The notation “off hire 10/7/13” appears in hand on that invoice, from which I infer that Red & Blue’s scaffolding, which had been on site since 3 June, was not removed on 3 July as intended but remained there until 10 July. Although not the subject of specific evidence, I note that this is consistent with Mr Notarfrancesco’s evidence that, once he had agreed to interview Mr Cannon, Red & Blue was permitted to remove some of its scaffolding from some sites (accepting, as I do, Ms Sharpe’s evidence that it was on about 9 July that Mr Notarfrancesco did agree to interview Mr Cannon).
7. On 16 July 2013, Red & Blue forwarded to ABD a draft contract for execution for a further period of scaffolding hire at the Yarra Street site. The hire period was for a minimum of four weeks. This draft was forwarded to Red & Blue at 3:27 pm on 16 July, under cover of an email which stated, “Truck is loaded and ready”. From the history of dealings between ABD and Red & Blue, and from the fact that Red & Blue did in fact attend at the site on 17 July with its scaffolding, the inference that ABD accepted the terms of this draft is easily drawn, and I do so.
8. At or just before 7:00 am on 17 July 2013, four of Red & Blue’s scaffolders arrived at the Yarra Street site: Messrs Pal (who drove the truck), Underdown, McNamara and Nunn. Of them, the first three gave evidence. Mr Pal said that, when he arrived at the site, there was a “union man” called Con who said, “Guys, I can’t help you; you’re now [sic – not] allowed.” He did not say why the Red & Blue scaffolders were not allowed. It is common ground that “Con” was Con Giannakos, the union’s shop steward at the Yarra Street site.
9. In chief, Mr Underdown said that he arrived at the Yarra Street site after the Red & Blue truck, and was told by Mr Pal that the shop steward on the site, who was unknown to Mr Underdown, had told him (Pal) that they were not to enter the site. Mr Underdown said that he and the other scaffolders were told to wait on the other side of the street for their boss to arrive. Under cross-examination, by leave, Mr Underdown was shown the transcript of his interview with the investigator on 29 July 2013, and agreed that he must have said what he was there recorded as saying. In response to an open question, he had told the investigator that the shop steward’s name was Con. He said that he was with the other scaffolders when Con told them that they were not allowed on site. He (Con) did not say why. I accept the evidence of what Mr Underdown told the investigator in preference to his acceptance of the proposition pressed upon him in cross-examination by counsel for the respondents that Mr Giannakos did not speak directly to Mr Underdown and the other scaffolders. But I also accept Mr Underdown’s evidence that Mr Giannakos did not tell them, at least in his own hearing, why they were not allowed on site. There is a passage in the transcript of the interview with the investigator in which Mr Underdown is recorded as having stated the reason that was given by Mr Giannakos for the scaffolders not being allowed on site, but it is unclear whether Mr Giannakos said that directly to Mr Underdown or it was information that came to the latter by another route (a viable possibility, given that a representative of Red & Blue, Michael Notarfrancesco, attended the site that morning, discussed matters with site management and then had a discussion with Red & Blue’s scaffolders).
10. Mr McNamara arrived at the Yarra Street site independently, after the truck and the other three scaffolders had arrived. They informed him that they were not unloading the truck. They did not say why. Under cross-examination, by leave, Mr McNamara maintained that Mr Giannakos had not told him, or told a group of which he was a part, the reason why the scaffolders were not to enter the site. However, the transcript of the interview which Mr McNamara had with the investigator on 29 July 2013 records the following exchange:

MS SHARPE: Okay. Can you tell me what happened then?

MR MCNAMARA: Pretty much the same thing. We turned up at it, our truck fully loaded with scaffold, ready to do what we’d been asked and Con I believe is the shop steward there, he was the same. He said until Ralph Edwards tells him otherwise, we’re not to be allowed on site.

And the following interchange:

MS SHARPE: Did you talk to anyone else at the site that day about any issues with the unions or Ralph or CFMEU or - - -?

MR MCNAMARA: No.

MS SHARPE: No? Was there any – no, I think - - -

MR MCNAMARA: Con just explained to us again the same thing, until he gets further information on to the issues between Bruno and Ralph, that he can’t let us on site. He was very apologetic about it. He didn’t want to do it, but he said he had to.

In these passages, when Mr McNamara said “the same” and “the same thing”, he was, of course, comparing what Mr Giannakos said with what Mr Harris had said on the La Scala site.

1. In responding to the questions of counsel for the applicant about the passages set out above, Mr McNamara was not convincing, his evidence varying from an adherence to his earlier position that he had not heard directly from Mr Giannakos what the reason was for Red & Blue not being allowed on the site to a professed inability to recall the conversations which he recounted to the investigator. Under cross-examination by counsel for the respondents, Mr McNamara readily agreed that he did not engage in conversations with anyone, be it ABD managers or Mr Giannakos, about why Red & Blue was not permitted on site, since that was more properly the function of Red & Blue management. I must say that I found that concession by Mr McNamara quite unhelpful.
2. Once it was apparent to the Red & Blue scaffolders that they would not be allowed on the Yarra Street site, one of them telephoned a member of Red & Blue’s staff, Michael Notarfrancesco, who promptly went to the site, arriving at about 8:00 am. He asked the scaffolders if they knew why they were not allowed on site, and was told that they did not. So Mr Notarfrancesco went to see Mr Giannakos. He told him (as Mr Notarfrancesco put it in his evidence) “that there was [sic] a few issues Red & Blue had with the union office and he suggested that I get Bruno and get him to speak to Ralph, so they could sort their issues out.” Mr Giannakos added, “Get him and put him in a car and take him to the office.” He (Giannakos) said that his instructions came from his “superiors”.
3. Mr Edwards gave evidence that he knew Mr Giannakos, and that he knew he was the union delegate on the Yarra Street site. In chief, he said that, prior to 17 July 2013, he had not had any “personal or private discussions” with Mr Giannakos. He said that, other than at a delegates’ meeting, he did not see Mr Giannakos “socially”. He said that, prior to 17 July 2013, he had not had any discussions with Mr Giannakos about Red & Blue. Under cross-examination, Mr Edwards denied that he had instructed all the union’s shop stewards, including Mr Giannakos, not to allow Red & Blue on to their various sites, including the Yarra Street site.
4. Red & Blue did not do any scaffolding work on the Yarra Street site on 17 July 2013 or subsequently. It has not been engaged by ABD at any time, on any commercial site, since.

**ADMISSIBILITY OF EVIDENCE OF STATEMENTS MADE BY SHOP STEWARDS**

1. In my reasons to date, I have set out the substance, and in some instances the detail, of the evidence that was given at trial. However, the evidence of what was said by Mr Harris and Mr Giannakos on 22 June and 17 July 2013 was received subject to the respondents’ objection. It is now necessary to resolve that objection.
2. Counsel for the respondents submitted that everything said by Mr Harris and Mr Giannakos on their respective sites to scaffolders employed by Red & Blue, and in one instance to Michael Notarfrancesco, was inadmissible as hearsay. Expressed in those terms, the objection was, in my view, too sweeping. Under the hearsay rule, evidence of a previous representation by a person is not admissible to prove the existence of a fact that, it can reasonably be supposed, was intended to be asserted by that person: Evidence Act, s 59(1). Thus it was not hearsay for the Red & Blue scaffolders to give evidence that, at the La Scala and Yarra Street sites, it was Mr Harris and Mr Giannakos, respectively, who told them not to enter the sites.
3. But, to the extent that Mr Harris and Mr Giannakos said, or implied, that their instructions had come from Mr Edwards, or that it was Mr Edwards with whom Red & Blue had a problem (and evidence to like effect), the evidence was hearsay. It was at this point that counsel for the applicant submitted that the evidence fell within the exception to the hearsay rule for which s 81(1) of the Evidence Act provides, admissions. If made with the authority of one or both of the respondents, it seems clear that the things said by Mr Harris and Mr Giannakos were “admissions”: see the definition of that term in the Dictionary in the Evidence Act.
4. With respect to the matter of authority, the applicant relies on ss 87 and 88 of the Evidence Act, which provide:

**87 Admissions made with authority**

1. For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:

(a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made; or

(b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person’s employment or authority; or

(c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

(2) For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove:

(a) that the person had authority to make statements on behalf of another person in relation to a matter; or

(b) that the person was an employee of another person or had authority otherwise to act for another person; or

(c) the scope of the person’s employment or authority.

**88 Proof of admissions**

For the purpose of determining whether evidence of an admission is admissible, the court is to find that a particular person made the admission if it is reasonably open to find that he or she made the admission.

1. It is established on the pleadings that each of Mr Harris and Mr Giannakos was, at the relevant time, a shop steward representing the interests of the union and its members on the site concerned. That circumstance does not travel the distance required by the applicant under s 87, since it does not establish any of the matters arising under paras (a), (b) or (c) of subs (1). Neither does it address the position of Mr Edwards. But it provides context, as does the respondents’ admission that each of Mr Harris and Mr Giannakos was an “officer” of the union as defined in s 12 of the FW Act.
2. Other circumstances which provide context for the application of s 87(1) are the following. First, it was Mr Harris and Mr Giannakos who informed the Red & Blue scaffolders that they were not to enter the sites concerned. Secondly, there is nothing in the evidence to suggest that there was, on either of those sites, a site-specific problem which would have prevented Red & Blue from carrying out its contracted work there. The inference that the reason for Mr Harris and Mr Giannakos acting as they did was a broader issue or concern is, in my view, a natural one. Thirdly, Mr Edwards regularly held shop stewards’ meetings, which implied a degree of coordination. The prospect that individual shop stewards were, in effect, randomly giving effect to their own idiosyncratic agendas as to who should, and should not, be allowed onto their sites is a most unlikely one. Fourthly, on 14 June 2013, Mr Edwards had informed the four Red & Blue scaffolders who saw him at the union’s office that every shop steward had been told that Red & Blue was not to be allowed on sites. Fifthly, the timing of the actions of Mr Harris and Mr Giannakos on 22 June and 17 July was strongly consistent with what had, in each case, been a then recent event, in one case involving Mr Edwards himself and in the other case involving his nominee Mr Cannon, which proved a motive for Mr Edwards to take action against Red & Blue. And sixthly, neither Mr Harris nor Mr Giannakos was called by the respondents. I am bound to assume that nothing which either might have said about the source of his authority to exclude Red & Blue from the site in question would have assisted the respondents.
3. I take that view that it is reasonably open to find that, on 22 June and 17 July 2013, Mr Harris and Mr Giannakos, respectively, had authority, on behalf of Mr Edwards and the union, to say everything which they are recorded as having said in the evidence in this case. Indeed, I make a finding to that effect. Not only did they have that authority, but it is the natural inference that Mr Edwards and the union intended that they should make it clear to the Red & Blue scaffolders that it was Mr Notarfrancesco’s unresolved problem with Mr Edwards that was the reason for Red & Blue not being allowed on those sites.
4. Additionally, I take the view that it is reasonably open to find that, on those days, the statements made by Mr Harris and Mr Giannakos were made in furtherance of a common purpose that they had with each of Mr Edwards and the union. I also make a finding to that effect. It is true that, interpreted in one way, those statements bespoke a certain reluctance on the part of the makers to give effect to the instructions which they clearly had from Mr Edwards. But the fact that they did give effect to the instructions, perhaps in preference to their own instincts, makes it clear where their priorities lay. However reluctantly, they associated themselves with, and acted conformably with, the respondents’ purpose.
5. To decide the present case, therefore, I admit into evidence, and take into account, everything said by Mr Harris and Mr Giannakos on 22 June and 17 July 2013 respectively.

**RESOLUTION OF FACTUAL DISPUTES**

1. I turn next to the resolution of the factual disputes presented by the evidence referred to above, commencing with the telephone conversation between Mr Notarfrancesco and Mr Edwards in early June 2013.
2. A starting point is that it was Mr Edwards who contacted Mr Notarfrancesco. On any view, his project was to find employment for Mr Cannon after he finished his existing job at Altona. Mr Edwards’ version of what he said to Mr Notarfrancesco – see para 11 above – was, I would have to say, an unlikely one. If he had genuinely been trying to convince Mr Notarfrancesco that Mr Cannon (although not mentioned by name) was a good scaffolder who should be employed, I doubt that he would have told him that he (Notarfrancesco) did not have “the best reputation in town”, or that he was trying to help him improve his “gene pool”. This kind of language was, I would find, introduced by Mr Edwards into his evidence because it lined up with the kind of case that the respondents were running in court.
3. If Mr Notarfrancesco had told Mr Edwards that he was not interested in taking on another scaffolder, which Mr Edwards related in his evidence, it is, in my view, unlikely that Mr Edwards would have told Mr Notarfrancesco that he would get the person he had in mind to ring him. For there to have been any point in Mr Cannon ringing Mr Notarfrancesco, the latter must at least first have agreed to give him an interview. Further, the objective evidence points strongly to Mr Notarfrancesco having interviewed Mr Cannon on 15 July 2013 (see para 57 above), rather than at any time proximate to this telephone conversation in early June. For this reason, and for the reasons set out in para 12 above, I reject Mr Cannon’s evidence that the interview took place in early June; and I likewise reject Mr Edwards’ evidence that he told Mr Notarfrancesco that he would have the scaffolder in question ring him for an interview.
4. I had the clear impression that Mr Notarfrancesco was telling the truth about his conversation with Mr Edwards as he recalled it. Although it would be unrealistic to expect anyone to retain a precise recollection of the course of a conversation held nearly two years previously without notes, in his evidence Mr Notarfrancesco was clear as to the essence of the message that was conveyed by Mr Edwards. For Mr Edwards to have told him that the scaffolder he had in mind was to finish the job on which he was then working in four weeks, as Mr Notarfrancesco recalls, would have been consistent with facts which the court knows to be more or less uncontroversial. Under cross-examination, Mr Notarfrancesco’s denials of the proposition put to him by counsel for the respondents that Mr Edwards did not tell him that he had to employ the scaffolder as a shop steward were consistent and convincing. I had the impression that Mr Notarfrancesco clearly recalled Mr Edwards telling him that he was to employ this person as a shop steward, and I accept his evidence in that regard.
5. As I have noted earlier in these reasons, the evidence as to Red & Blue’s experience on building sites in the period between this telephone conversation and 13 June 2013 is not entirely satisfactory. But it is clear, and I would find, that, on that day, four scaffolders were laid off by Red & Blue and were given to believe that the union was responsible. At about the same time, Mr Notarfrancesco contacted his solicitor and, on the following day, he rang the Fair Work Hotline. These are not the actions of a man whose scaffolders had been excluded from a building site on account of safety concerns, as the respondents would have the court believe.
6. Turning then to the events of 14 June 2013, I commence by noting that Messrs Underdown, McNamara and Pal were workers in the building and construction industry who had been called by the regulator to give evidence against their own union. To a greater or lesser extent, this introduced, in my observation, a certain tension into the environment in which they gave their evidence-in-chief. By contrast, Mr McNamara in particular, and Mr Underdown to some degree, appeared to be uncommonly ready to accede to propositions put to them under cross-examination. It was not submitted on behalf of the applicant that there was anything untoward going on in this respect, but the overall dynamics of the presentation of the evidence of these men is something which has unavoidably influenced the impressions I gathered of the reliability of their evidence.
7. For this reason, additionally to the circumstance that it was not seriously challenged by counsel for the respondents, I place considerable store by Mr Underdown’s evidence-in-chief that Mr Edwards told the scaffolders, at their meeting with him on 14 June 2013, that he was trying to organise a shop steward to look after them. I also accept his evidence, prompted by reference to the transcript of his interview with the applicant’s investigator on 29 July 2013, that Mr Edwards told the scaffolders that, if Mr Notarfrancesco did not take on a shop steward, they would not be allowed on commercial sites. Although not of great significance in itself, Mr Pal’s evidence that Mr Edwards had told the scaffolders that he had a problem with Mr Notarfrancesco was consistent with the applicant’s case as to the position being taken by Mr Edwards at the time.
8. I had the distinct impression that Mr McNamara had set his mind on giving counsel for the applicant as little assistance as he could, and that he moulded his answers accordingly. Much more reliable, in my view, was the transcript of his interview with the investigator on 29 July 2013, to which I have referred at paras 21-22 above. That transcript speaks for itself, and I need add nothing to it here.
9. I find that, when he met the scaffolders on 14 June 2013, Mr Edwards told them, in substance, that he had been trying to get Red & Blue to employ a shop steward, and that he had conveyed the instruction to the union’s network of shop stewards on commercial sites that, until that requirement was complied with, Red & Blue were not to be allowed on to sites of that character. In this area of the case, I reject Mr Edwards’ denials.
10. Consistent with that finding is the evidence of what Mr McNamara told the investigator about Mr Edwards’ words to the scaffolders as he was about to put his call through to Mr Notarfrancesco, as set out in para 26 above. That there were “parameters” within which Mr Notarfrancesco was required to work “in order to be reinstated with the union” is, I would have to say, chillingly consistent with the applicant’s case. Indeed, according to what Mr McNamara told the investigator, to make that clear to Mr Notarfrancesco was the purpose of the call which Mr Edwards was about to make: “… I’ll ring him now and confirm that for you ….” Mr Edwards would not have been impressed by Red & Blue’s tactic, as he would have seen it, of sending four union members to the union office to complain about their state of unemployment. He wanted to demonstrate to them that he was not the one “dickin’ [them] about”. I reject Mr Edwards’ denial of having said these things.
11. Turning to the telephone conversation between Mr Edwards and Mr Notarfrancesco which followed, there is one circumstance which stands front and centre in the court’s consideration of the various versions of that conversation which were given by the witnesses. Mr Caruana could hear both sides of the conversation, and he made a note of it as the conversation proceeded. He was independent of both the union and Red & Blue, and knew, at that stage, little of the background to the controversy between them. He was employed in a professional capacity, and it was not suggested to him that his notes were slanted, or adjusted, to present a distorted record of the conversation. Of course, they were not a complete record, and were nothing like a verbatim record, but, so far as they go, I have no hesitation in accepting their accuracy.
12. Mr Heyman’s notes were not taken during the course of the conversation, but they provide a useful, and apparently reliable, confirmation of the flow of the conversation as recorded by Mr Caruana.
13. As reported in Mr Caruana’s notes, Mr Edwards’ opening comments were, I would find, a reference to what he had discussed with Mr Notarfrancesco in their telephone conversation in early June. As it seemed to Mr Edwards, the penny had not dropped with Mr Notarfrancesco. It was in this sense that Mr Notarfrancesco was “not very smart”. As a result, Mr Edwards had to make it clear: “I’m telling you what I want you to do.” It was in this context, as Mr Caruana accepted under cross-examination, that Mr Edwards referred to the importance of workplace safety, his requirement being to “put a bloke on”. On any view, putting a bloke on was what Mr Edwards wanted Mr Notarfrancesco to do. The next comment – “If you can’t oblige with me, then hard luck” – implied the prospect of some prejudicial consequences if Mr Notarfrancesco did not comply. Mr Edwards then, for the first time it seems, referred to Mr Notarfrancesco’s situation as a “problem” which could be solved by him hiring a shop steward to look after his employees.
14. Mr Edwards’ next comment, about the need for Mr Notarfrancesco to have a working relationship with him, raised an essential precondition of Red & Blue being “in business”. The message for Mr Notarfrancesco, self-evidently, was that Mr Edwards had it within his power to put Red & Blue out of business. Mr Edwards’ insistence that it was the union which chose, or approved, a shop steward was consistent with the applicant’s case that Mr Edwards was demanding not that the employees of Red & Blue choose a shop steward for themselves, but that Red & Blue take into its employ a scaffolder of the union’s nomination who would thenceforth be the shop steward for those employees. I reject Mr Edwards’ evidence, and the respondents’ case, that it was Mr Notarfrancesco who first mentioned a shop steward in this conversation, and that Mr Edwards’ only comment on the subject was that the identity of a shop steward was not Red & Blue’s concern because it was dealt with under the union rules. Rather, Mr Edwards’ reference to the choice of a shop steward under the union rules was in response to Mr Notarfrancesco’s complaint that his employees had already voted on who the shop steward would be. The sense of Mr Edwards’ response to that complaint was that it was “we” – ie the full-time union officers – not the employees, who decided who would be the shop steward in a particular case, and they did so pursuant to the union rules.
15. Having observed that Red & Blue had sacked its employees, Mr Edwards’ next comment – “Well done, you’re out of business” – was, of course, a heavily ironical one, and would reasonably have been understood as menacing. It was at this point that Mr Notarfrancesco asked Mr Edwards who it was that he wanted him to hire. The person in question was identified as Robert Connolly. As noted above, this must have been the name used by Mr Edwards, albeit that he had Mr Cannon in mind.
16. There were, of course, elements in the conversation between Mr Edwards and Mr Notarfrancesco other than those which I have emphasised above. As Mr Caruana’s notes suggest, there was an exchange about the difference between engagement under an ABN and employment under the relevant enterprise agreement. Further, as Mr Heyman’s notes suggest, Mr Edwards referred to some conditions of employment which did not, obviously, have his approval, in which respect I infer that his comments were based on what he had been told by one or more of the scaffolders who had come to the union office that day. Neither of these areas of discourse is directly relevant to the present inquiry.
17. Mr Heyman’s notes suggest that, at the end of the conversation, Mr Edwards told Mr Notarfrancesco that he wanted to meet him the following week (14 June being a Friday). There is other evidence to the same effect. Mr Edwards’ request to meet is significant in this way. Mr Notarfrancesco did not meet with Mr Edwards during the course of the following week. It was on the very next day – Saturday 22 June 2013 – that Red & Blue was prevented from entering the La Scala site. The timing of that event was, it must be said, consistent with the applicant’s case that it was Mr Notarfrancesco’s refusal to accede to Mr Edwards’ demand to employ someone as a shop steward that led to the action against Red & Blue of which the respondents are accused.
18. Not having the benefit of notes which they took at the time, it is understandable that Mr Notarfrancesco and Mr Edwards would not recall this conversation in anything like the ordered sequence that may be observed from Mr Caruana’s notes. They would tend to recall significant features of it, which were important to them. Here it must be remembered that it was Mr Edwards who made the call, and it was Mr Notarfrancesco, correspondingly, who was, for the most part, the listener. Obviously the comment about Red & Blue no longer being in business, however it was expressed, had an impact on Mr Notarfrancesco. The other major item in Mr Notarfrancesco’s recollection was that Mr Edwards wanted him to employ this person called Robert Connolly as a shop steward. From the way he gave this evidence, Mr Notarfrancesco’s clear recall of these major elements in the conversation was palpable. Aside from the matter of sequence, there was nothing in Mr Notarfrancesco’s evidence in relevant respects which was inconsistent with Mr Caruana’s notes.
19. By contrast, while there is some limited consistency between those notes and Mr Edwards’ evidence, the latter generally bore little or no relationship with the former. Much of Mr Edwards’ evidence in relevant respects was, I would have to say, a tendentious reinterpretation of the conversation. For example, if Mr Notarfrancesco had in fact had a “whinge” about safety requirements, about the absence of a level playing field, about being constantly questioned about his work practices, and about being prosecuted by WorkSafe, it is most unlikely that Mr Caruana would have made no reference to it in his notes; and, I would add, he was not cross-examined about the absence of any such reference from those notes. Likewise, Mr Edwards’ evidence that he told Mr Notarfrancesco that he was “not talking … about shop stewards” was so strikingly inconsistent with Mr Caruana’s notes that I cannot, realistically, take it seriously.
20. Overall, despite its fulsomeness and lengthy elaborations, I do not accept Mr Edwards’ evidence of his conversation with Mr Notarfrancesco on 14 June 2013, save to the limited extent that it lined up with Mr Caruana’s notes.
21. With respect to the other witnesses, I would have to say that I found the evidence of Mr Pajic of little assistance. It struck me that his recollection of the conversation had nothing like the focus, at the level of detail, that would make his evidence useful in making distinctions of the kind that presently confront the court.
22. As mentioned above, the only evidence given directly by Mr Underdown in relation to this telephone conversation was given in cross-examination. Although it was cross-examination, and counsel was entitled to lead, that practice was employed to such an extent that I was left without any real sense of how the witness recalled the flow, and content, of the conversation. Not having given any relevant evidence-in-chief, Mr Underdown was not being cross-examined with a view to undermine what he had already said. It would, with respect, have been more helpful to the court if, once the subject was broached in cross-examination, the witness had been asked to recount what he recalled of the conversation. In the way it was done, however, the process had the appearance of Mr Underdown acceding to a series of propositions that came from counsel’s instructions. Counsel was, of course, entitled to proceed in this way, and I express no criticism of him. But I was little assisted by this evidence in my understanding of how the conversation proceeded. As implied in para 44 above, I found much more revealing Mr Underdown’s unprompted statement to the investigator on 29 July 2013 that, in the conversation which was then only about six weeks previous, Mr Edwards had told Mr Notarfrancesco that he had to take on a shop steward or Red & Blue would be closed down.
23. What I have said above about the course of Mr Underdown’s cross-examination applies more so in the case of Mr McNamara’s cross-examination by counsel for the respondents. I am unable to place any weight on that evidence, given in the way that it was. Mr McNamara’s readiness to agree with propositions of some detail put to him by counsel stands in stark contrast to his professed inability to recall a number of the events of June and July 2013. When cross-examined by counsel for the applicant, for example, about what he had told the investigator on 29 July 2013, he said that he did not remember much of the interview. When it was put to him that his recollection, on that date, of the events at the La Scala site on 22 June 2013 would have been better than it was when he gave evidence (11 March 2015), his response was, “Probably just equally as bad. I don’t have a very good memory for things like this.” In the circumstances, I do not accept Mr McNamara’s evidence, given in chief, that, in the conversation with Mr Notarfrancesco on 14 June 2013, Mr Edwards did not say anything about a shop steward.
24. For the reasons I have given, I find that, on 14 June 2013, Mr Edwards telephoned Mr Notarfrancesco in response to four scaffolders, then recently laid off by Red & Blue, complaining to him about that circumstance. In the conversation that followed, Mr Edwards referred to something that he had previously required Mr Notarfrancesco to do. He reiterated that that thing was the employment of a particular person, whom he identified as Robert Connolly (but he had Mr Cannon in mind), as a shop steward. He said that, if Mr Notarfrancesco wanted to be in business, he needed to have a working relationship with him (Edwards), which comment was intended to convey, and would reasonably have been understood as conveying, that the alternative to the employment of this person as a shop steward was to go out of business.
25. From there I turn to the events on the two sites which have been the subject of evidence in the applicant’s case. As a preliminary, I should say something about the nature of Red & Blue’s business, and the consequences of that for the kind of industrial pressure which, I would find, was placed upon that business by the respondents. A large part of Red & Blue’s income, I infer, came from the hire of scaffolding which had previously been installed. Without causing substantial grief to parties whom the respondents would regard as innocent, there would have been nothing that they could have done in relation to the use of such scaffolding, or to the builder’s regular making of hire payments to Red & Blue. What the respondents needed, I infer, was an occasion when workers from Red & Blue were actually required to enter a building site for some such purpose as the delivery, erection, alteration or dismantling of scaffolding.
26. Such an occasion arose at the La Scala site on 22 June 2013. It should first be said that any suggestion that Red & Blue was in trouble, either with ABD or with WorkSafe, on account of the safety standards to which it adhered on that site cannot be taken seriously. ABD was a long-standing customer of Red & Blue. The scaffolding in question was already in place. There is no evidence of any improvement notice addressed to Red & Blue in relation to this site, notwithstanding the respondents’ ability to produce such a notice in relation to another site. The shop steward for the site, Mr Harris, was not called. From all that appears, the attendance of the scaffolders employed by Red & Blue at the La Scala site was absolutely conventional in all respects, and would not have been inhibited by any legitimate circumstance which appears in the evidence.
27. It was Mr Harris who told Mr Pal that he was not allowed on site. He said that it was because of a union problem with Mr Notarfrancesco. As related by Mr McNamara to the investigator on 29 July 2013, Mr Harris told him that Mr Edwards had said that that every shop steward in Melbourne had been told to put a line through Red & Blue. He said that, until he was told otherwise by Mr Edwards or his own supervisor, the scaffolders from Red & Blue did not have permission to enter the site. Mr Harris’ intervention in the matter of Red & Blue’s access to the site was something which required explanation by the respondents. Save to provide denials, Mr Edwards effectively gave no evidence about the events concerned. That was not, in my view, a satisfactory place to leave the matter. The applicant presented a strong inferential case which required a better response from Mr Edwards. The facts are these. First, Mr Edwards was the full-time official of the union responsible for the scaffolding sector. Secondly, Mr Edwards ran what I would describe as a tight ship in the area of his organising responsibilities: he chaired regular meetings, at the union office, of members employed in the sector and regular meetings of shop stewards. His was not a hands-off approach. Thirdly, he had a specific interest in Red & Blue, and in the employment of Mr Cannon in particular. Included in that, of course, was the threat which I have found he made on 14 June 2013 (only eight days previously). Fourthly, the evidence is conspicuously devoid of any reason why Mr Harris would have taken it upon himself to exclude Red & Blue from the site. Indeed, fifthly, Mr Harris appeared to be apologetic for the way he treated the Red & Blue scaffolders, going to the extent of saying that his hands were tied. Sixthly, in conversation with Mr McNamara, Mr Harris referred to something that was unresolved as between Mr Notarfrancesco and Mr Edwards, and to the fact that he could not allow the scaffolders on to the site without approval from his supervisor or Mr Edwards. And seventhly, as I have stressed above, Mr Harris was not called.
28. Mr Edwards may well have known nothing of the details of the happenings on the La Scala site, but the proven actions of Mr Harris, the union’s own shop steward on the site, and the consistency of those actions with what I have found to be Mr Edwards’ stated intentions apropos Red & Blue, required a response of more substance from him. It is as though the court is being asked to accept that the president of the branch, and the man with organising responsibility for the scaffolding sector, carries no responsibility for a group of union members in that sector being denied access to a building site by one of the union’s own representatives. There was no suggestion that, when he found out about Mr Harris’s actions, Mr Edwards investigated the matter to find out why he had acted in that way. Whether or not Mr Edwards had instructed Mr Harris directly, and whether or not he knew, specifically, of the events of 22 June 2013, the only realistic interpretation of those events, including the statements made by Mr Harris – referring to Mr Edwards as they did – is that Mr Edwards intended that Red & Blue should not be permitted to enter the La Scala site. The inference that, in preventing Red & Blue from entering the site on that day, Mr Harris was acting on the instructions of Mr Edwards is a compelling one, and I draw it in the absence of evidence from Mr Harris or of any other benign explanation from the respondents.
29. From there, the narrative takes one next to Mr Notarfrancesco’s agreement to interview Mr Cannon. Consistently with Mr Notarfrancesco’s evidence that, from that point, the union permitted Red & Blue some access to sites on which its scaffolding stood, there is no suggestion that Red & Blue was inhibited in removing the scaffolding which it had at the Yarra Street site in the period leading to 10 July 2013. As noted above, Red & Blue contracted with ABD for the delivery and erection of further scaffolding, to be done on 17 July 2013. The making of that contract is inconsistent with ABD having had any safety or other legitimate concerns about Red & Blue’s work.
30. It was not any representative of ABD who prevented the Red & Blue scaffolders from entering the Yarra Street site on 17 July 2013. It was Mr Giannakos, the union’s shop steward. Going by the statements made by Mr McNamara to the investigator on 29 July 2013 – which, for reasons already explained, I prefer to his denials given in court – Mr Giannakos told him that, until Mr Edwards advised him otherwise, the Red & Blue scaffolders were not to be allowed to enter the site (or, as Mr McNamara put it elsewhere in those statements, he could not let them on to the site until he had further information about the issues between Mr Notarfrancesco and Mr Edwards). Mr Giannakos’ later comments to Michael Notarfrancesco were consistent with what he had said to Mr McNamara: he referred to issues which Red & Blue had with the union office, and suggested that Bruno Notarfrancesco should go immediately to speak with Mr Edwards.
31. As with Mr Harris at the La Scala site, the evidence about the events of 17 July 2013 at the Yarra Street site required explanation by Mr Giannakos. The reasoning set out in para 103 above applies equally to the actions of Mr Giannakos on this site. Additionally, Mr Giannakos’ action was taken only two days after the acrimonious conclusion to the interview between Mr Notarfrancesco and Mr Cannon. The evidence is conspicuously devoid of any reason why Mr Giannakos would have taken it upon himself to exclude Red & Blue from the site. Indeed, in saying to Mr Pal, “guys, I can’t help you”, Mr Giannakos was absolving himself from responsibility for what he was doing; and, in Mr McNamara’s words to the investigator, Mr Giannakos was “very apologetic” about that. In conversation with Mr McNamara, Mr Giannakos said that he could not allow the scaffolders to enter the site until he had heard from Mr Edwards; and he referred to issues existing as between Mr Edwards and Mr Notarfrancesco, pending further information about which he could not allow the scaffolders on site. In the absence of evidence from Mr Giannakos, the inference that, in preventing Red & Blue from entering the site, he was acting on the instructions of Mr Edwards is a strong one, and I draw it.

**THE APPLICANT’S CASE AGAINST MR EDWARDS**

1. That brings me to the statutory bases of the applicant’s claims, commencing with those made against Mr Edwards. With respect to the telephone conversation between him and Mr Notarfrancesco on 14 June 2013, the applicant relies on s 355(a) of the FW Act, which provides:

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

(a) employ, or not employ, a particular person; …

The applicant contends that Mr Edwards threatened to organise or to take action against Red & Blue with intent to coerce it to employ Mr Cannon. Despite the Cannon/Connolly confusion to which I have referred, it was not submitted on behalf of the respondents that, if otherwise I should find that this provision had been contravened, the person whom Mr Edwards wanted Red & Blue to employ was not a “particular person” within the meaning of it.

1. On the findings which I have made above, there was a threat made by Mr Edwards on 14 June 2013. It was a threat to put Red & Blue out of business. It is true that it was not put in so many words by Mr Edwards, but what he said to Mr Notarfrancesco was reasonably to be so understood. As Isaacs J said in an analogous context in *Australian Commonwealth Shipping Board v Federated Seamen’s Union of Australasia* (1925) 35 CLR 462 at 476, “[i]rregular acts are not likely to be regularly authorized or encouraged.” At least as much, in my view, can be said about threats.
2. It also follows from the findings above that Mr Edwards’ intent, in making the threat, was to move Red & Blue to employ Mr Cannon. That inference is readily available on the evidence. Likewise, it is to be inferred, first, that Mr Edwards intended that the action which he threatened to take would negate Red & Blue’s choice in the matter of the employment of Mr Cannon, and secondly, that that action, if taken, would have been unlawful, illegitimate or unconscionable: see *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378, 388 [43]. Given the nature of the threat, no other conclusion is reasonably open.
3. In making findings as to Mr Edwards’ intent on 14 June 2013, I have placed no reliance on s 361 of the FW Act. In the submissions made on behalf of the applicant, it was treated as self-evident that s 361 applied to so much of s 355 as dealt with the matter of intent. Although counsel for the respondents said nothing on the subject, I regard the position as unclear at best. Section 355 makes a distinction between organising and taking action, on the one hand, and threatening to do so, on the other hand. Section 361 applies only to the mental element involved in taking action. In terms, it does not apply to a threat to take action. Historically, the prohibitions now to be found in s 355 were located in s 43 of the *Building and Construction Industry Improvement Act 2005* (Cth) (“the BCII Act”). Their antecedents were not in Pt 16 of the *Workplace Relations Act 1996* (Cth) (“the WR Act”), to which the reverse onus provision, then s 809, applied. No such provision applied to s 43 of the BCII Act. Section 361 now does apply to s 355, of course, but its extension beyond its actual terms, ie to threats, would be more than a mere continuation of a pre-existing legislative regime. It would be law reform of a kind which went unmentioned in the relevant Explanatory Memorandum. The result of applying s 361 as proposed by the applicant would, of course, be to expose a respondent to penal liability in a case in which the relevant applicant had not independently proved the facts relied on. Before taking such a step, and in the face of the plain language of s 361, I would require a more definite indication of legislative intention than the history of the legislation, and the parliamentary materials, disclose.
4. With respect to the Red & Blue scaffolders being denied entry to the La Scala site on 22 June 2013, the applicant relies again on s 355(a) of the FW Act. Here the first question is whether the action taken by Mr Harris, in preventing the Red & Blue scaffolders entering the site, was organised by Mr Edwards. Given the findings I have made above, that question must be answered in the affirmative.
5. The next matter is whether the action organised by Mr Edwards was unlawful, illegitimate or unconscionable. The action in question was, of course, to deny Red & Blue access to the work for which it had been contracted on the site that day, and to deny it access to scaffolding items which it owned. This amounted to a direct interference in the performance of the contract between Red & Blue and ABD and, while there is no suggestion of liability in tort in this proceeding, the circumstances are clearly sufficient to justify the conclusion that Mr Edwards’ conduct was illegitimate.
6. In relation to Mr Edwards’ intent, I have found that his relevant wrongdoing under s 355 was by way of organising, rather than of directly taking, action. The question arises whether the reverse onus provisions of s 361 apply to conduct which amounts to organising someone else to take action but not to the taking of action as such. They do not do so in terms. What I have said about threats in para 111 above applies equally, *mutatis mutandis*, here. For reasons which I there expressed, I am not disposed to rely on s 361. But the applicant’s case is a sufficiently obvious one, in my view, to sustain the inference, which I draw, that Mr Edwards’ intent was to negate Red & Blue’s choice in the matter of the employment of Mr Cannon. From the tenor of Mr Edwards’ conversation with Mr Notarfransesco on 14 June 2013, Red & Blue would reasonably have supposed that the treatment it received at the hands of Mr Harris at the La Scala site was neither isolated nor referable to some local difficulty arising on that site as such. I find that, in organising that action, Mr Edwards intended to negate Red & Blue’s choice, and thus to coerce it.
7. With respect to the Red & Blue scaffolders being denied entry to the Yarra Street site on 17 July 2013, the applicant relies again on s 355(a) of the FW Act. Again, the first question is whether the action taken by Mr Giannakos was organised by Mr Edwards. Given the findings I have made above, that question must be answered in the affirmative.
8. In other respects, the facts and the law with respect to the events of 17 July 2013 are not relevantly distinguishable from those which relate to 22 June 2013. Here too there was a contravention of s 355(a) on the part of Mr Edwards.
9. In relation to the action taken against Red & Blue on the La Scala and Yarra Street sites on 22 June and 17 July 2013, the applicant also, or alternatively, relies on s 346(b) of the FW Act, which provides:

A person must not take adverse action against another person because the other person:

…

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); …

1. It is alleged that Red & Blue engaged in industrial activity when it refused to comply with Mr Edwards’ request that Mr Cannon be employed. Here the applicant relies on s 347(b)(iv) of the FW Act, which provides:

A person ***engages in industrial activity*** if the person:

…

(b) does, or does not:

…

(iv) comply with a lawful request made by, or requirement of, an industrial association; …

1. The applicant says that Mr Edwards’ request for the employment of Mr Cannon was made in the telephone conversation which he had with Mr Notarfrancesco in early June 2013. That seems clearly to be the case, and I so find. Further, the request was repeated when Mr Edwards spoke again to Mr Notarfrancesco on 14 June 2013. As such, the request (on each occasion) was lawful, albeit that the threat with which the request was backed up was not. It is also uncontroversial that Red & Blue did not comply with the request.
2. From there the applicant goes to item 7(c) in the table in s 342(1) of the FW Act, which includes as “adverse action” for the purposes of s 346 action by an industrial association, or an officer thereof, against an independent contractor that has the effect, directly or indirectly, of prejudicing the contractor in relation to a contract for services. By s 342(2)(b) of the FW Act, “adverse action” includes “organising such action”.
3. Red & Blue was an independent contractor. When its scaffolders were prevented from entering the La Scala site and the Yarra Street site on 22 June and 17 July 2013, it was, I find, prejudiced in relation to the contracts for services which it had with ABD. Those prejudices were, directly, the doings of Mr Harris and Mr Giannakos respectively. I have found that Mr Edwards organised them. But I would go further and find, even without recourse to s 342(2)(b), that Mr Edwards’ organising of what was directly done by the two shop stewards amounted to action which had the indirect effect of prejudicing Red & Blue in relation to those contracts. I find, therefore, that Mr Edwards took adverse action against Red & Blue in the senses indicated.
4. The next question is whether Mr Edwards took that adverse action because Red & Blue did not comply with his lawful request to employ Mr Cannon. Given the findings I have made in the context of s 355 earlier in these reasons, the question needs only to be stated in that form for an affirmative answer to be obvious. I reach that conclusion without recourse to s 361 of the FW Act.
5. For the above reasons, I hold that Mr Edwards took adverse action against Red & Blue in contravention of s 346 of the FW Act on each of 22 June and 17 July 2013 by taking action that had the effect, directly (in the sense of organising as brought in by s 342(2)) and indirectly, of prejudicing Red & Blue in relation to its contracts with ABD at the La Scala and Yarra Street sites, respectively, because Red & Blue had not complied with his lawful request to employ Mr Cannon.

**LIABILITY OF THE UNION**

1. On the findings made to date, the individual who contravened ss 355 and 346 of the FW Act was Mr Edwards. The applicant contends that the union also directly contravened those provisions or, alternatively, that it is vicariously liable for Mr Edwards’ conduct.
2. To establish the direct liability of the union, the applicant relies upon s 363 of the FW Act, the presently relevant provisions of which are as follows:

(1) For the purposes of this Part, each of the following is taken to be action of an industrial association:

…

(b) action taken by an officer or agent of the industrial association acting in that capacity;

…

(3) If, for the purposes of this Part, it is necessary to establish the state of mind of an industrial association in relation to particular action, it is enough to show:

(a) that the action was taken by a person, or a group, referred to in paragraphs (1)(a) to (e); and

(b) that the person, or a person in the group, had that state of mind.

(4) Subsections (1) to (3) have effect despite subsections 793(1) and (2) (which deal with liabilities of bodies corporate).

1. Mr Edwards was an officer of the union, and was acting in that capacity when he did the things which amounted to contraventions of ss 355 and 346. This would seem to produce the result, under s 363, that those things were also done by the union. The only reservation I have as to that conclusion is similar to that expressed in para 83 above. For s 363(1)(b) to operate, there must have been “action taken”. Section 355 makes a distinction between taking action and organising action. There may be an argument – not, I stress, advanced by counsel for the respondents – that the deeming provisions of s 363 have no operation in relation to organising action. Here I would take a different view from that which I took in relation to s 361. Historically, a provision with an indistinguishable policy focus from that of s 363(1) of the FW Act was to be found in s 69(1) of the BCII Act, and it applied to “conduct” prohibited under s 43 of that Act, including organising action. Although the explanation for the enactment of s 363(1) was probably to be found in s 799(2) of the WR Act, its presence in the FW Act, apropos the enactment of s 355, was a matter of legislative reorganisation rather than of law reform. In the circumstances, the view I take is that, as a matter of construction, organising action is comprehended by the expression “action taken” in s 363(1) of the FW Act.
2. The application of s 363 to adverse action taken in contravention of s 346 of the FW Act is less problematic. By s 342(2), “adverse action” includes organising such action, the result of which is that to organise action is treated as taking action. The operation of s 363 is, therefore, invoked.
3. Alternatively to s 363, the applicant relied on s 793 of the FW Act to attribute Mr Edwards’ conduct to the union. Subsections (1), (2) and (3) of that section provide as follows:

*Conduct of a body corporate*

(1) Any conduct engaged in on behalf of a body corporate:

(a) by an officer, employee or agent (an ***official***) of the body within the scope of his or her actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.

*State of mind of a body corporate*

(2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

(a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and

(b) that the person had that state of mind.

*Meaning of* ***state of mind***

(3) The ***state of mind*** of a person includes:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person’s reasons for the intention, opinion, belief or purpose.

1. It is established on the pleadings that, relevantly to the facts of the case, Mr Edwards was acting in his capacity as an officer of the union, and was so acting within the scope of his actual or apparent authority for or on behalf of the union. This is, in my view, sufficient to attract the operation of subss (1) and (2) of s 793 of the FW Act.
2. For the reasons I have given, I hold that, by the operation of ss 363 and 793 of the FW Act, the union contravened ss 355 and 346 of that Act to the same extent as Mr Edwards did.

**COMPENSATION**

1. The applicant seeks orders, pursuant to s 545 of the FW Act, requiring the respondents to pay compensation to Red & Blue for the damage it has suffered as a result of conduct found to have been unlawful in this proceeding.
2. I shall commence with the narrow, and relatively uncontroversial, front of the applicant’s compensation claims. He contends that Red & Blue should be compensated, under s 545(2)(b) of the FW Act, for the loss that it suffered because of the contraventions of ss 355 and 346 in respect of the respondents’ conduct on the La Scala and Yarra Street sites referred to earlier in these reasons. As to the La Scala site, Red & Blue was prevented from carrying out work on 22 June 2013 for which it would have invoiced ABD the sum of $2,904.00. As to the Yarra Street site, Red & Blue’s quotation of 16 July 2013, which, it is clearly to be inferred, had been accepted by ABD, was for labour, transport and four weeks’ hire, in the total sum of $15,180.00. Those services were not provided. That Red & Blue had sustained losses to these extents was not seriously contested by the respondents, either in their counsel’s cross-examination of Mr Notarfrancesco or in their final submissions.
3. In the circumstances, I propose to require the respondents to pay to Red & Blue compensation in the sum of $18,084.00. The applicant also seeks an order under s 51A of the *Federal Court of Australia Act 1976* (Cth) for the payment of interest on this sum. I shall hear the parties on that claim, both with respect to entitlement and with respect to calculation.
4. On a somewhat broader front, the applicant contends that Red & Blue should also be compensated for the lost opportunity to obtain future work from ABD. Between 26 March 2012 and 17 July 2013, Red & Blue invoiced ABD a total of $386,512.04 for scaffolding services provided across eight commercial construction sites. As noted earlier in these reasons, after 17 July 2013, Red & Blue received no further commercial work from ABD. The applicant claims that the respondents should be required to compensate Red & Blue for the lost opportunity which is to be inferred from this diminution in revenue.
5. In his Statement of Claim, the applicant alleged that, “by reason of the contraventions … alleged herein”, Red & Blue suffered loss and damage. The only contraventions so alleged (other than one which was abandoned and does not need to be mentioned) were those I have found to have occurred in relation to the La Scala site on 22 June 2013 and to the Yarra Street site on 17 July 2013. Beyond the sums referred to above arising directly from the loss of the work on the sites as such, the applicant did not prove that Red & Blue had suffered any loss because of those contraventions (within the terms of s 545(2)(b)), or by reason of the contraventions (within the terms of the applicant’s pleading). My reasons for that conclusion fall into three broad categories.
6. First, I am not satisfied that the reason for the diminution in Red & Blue’s work from ABD (against an assumed baseline represented by the period March 2012 to July 2013) was the respondents’ contraventions of ss 355 and 346. No representative of ABD gave evidence in the case. There was, therefore, no direct evidence of why ABD discontinued using Red & Blue on commercial jobs. Neither was there any reason advanced why evidence of this kind might not have been called. Rather, the applicant’s case was that a direct relationship between the contraventions and the diminution of ABD work was readily to be inferred. I do not accept that case. Here it must be remembered that the absence of direct evidence on the matter had nothing to do with the respondents. They could not have called evidence on this subject. The court would not, therefore, be the more inclined to draw an inference favourably for the applicant because of the way the respondents conducted their case. Had the applicant called evidence from ABD that the diminution in its use of Red & Blue for scaffolding services was the direct result of its experience on the La Scala and Yarra Street sites, that evidence would have been unsurprising and consistent, probably, with what one would expect. But that is not enough to justify the finding of fact which the applicant seeks.
7. Secondly, there is the problem of quantification. Even if it were to be assumed that the diminution in the flow of ABD work to Red & Blue after 17 July 2013 was the result of the conduct of the respondents found to have been in contravention of ss 355 and 346, the court has no way of knowing what the value of that work would have been in the normal course. No doubt that would depend on such matters as the amount of work that ABD itself had in the months and years after 17 July 2013, on the nature of that work (ie the extent to which scaffolding would be required) and on the stages which that work had reached at various times. Without having at least some evidence on these matters, any award of compensation to Red & Blue would be based on little more than speculation. Presumably, information of the kind that would have removed this inquiry from the realm of speculation could have been readily obtained from ABD itself, but the court was not exposed to it.
8. Thirdly, the whole of the applicant’s inferential case operated at what I would call the revenue level. That is to say, in addition to everything else, the court was being asked to base its award upon the inferred amount by which the revenue which Red & Blue derived from ABD work fell short of what it would otherwise have been. But this could never be a satisfactory measure of Red & Blue’s loss. Had Red & Blue done the work which the applicant asks the court to infer that it lost, it would have been required to incur costs, including, for example, the wages paid to scaffolders. No attempt was made, in the applicant’s evidentiary case, to take these cost savings into account. That is to say, in accounting terms, no attempt was made to estimate the amount by which the gross profit of Red & Blue was diminished as the result of the presumed loss of work from ABD.
9. In part to overcome these evidentiary deficiencies, counsel for the applicant submitted that it was open to the court to make a monetary award in favour of Red & Blue under subs (1) of s 545 of the FW Act. That is the foundational provision which empowers the court to make any order it “considers appropriate” in consequence of its finding that there has been a contravention of a civil remedy provision. It was pointed out, in this regard, that subs (2) of the section does not limit subs (1). That is true, of course, but it does not mean that subs (1) can always function as a kind of fall-back provision after the evidentiary failure of a case which primarily, and naturally, requires consideration under para (b) of subs (2). It is sufficient in the present case for me to express the conclusion, which I reach without hesitation, that it is not appropriate for the court to employ guesswork or speculation to require the respondents to pay a particular amount to Red & Blue where the applicant might have, but did not, construct a detailed evidentiary case under subs (2)(b).
10. On the broadest front, the applicant contends that Red & Blue should also be compensated for the lost opportunity to obtain future work from clients other than ABD. In part, it will be apparent that my reasons for rejecting this claim, which I do, align with those expressed above in relation to ABD itself. In part also, however, they involve additional considerations. It may be that it would not be realistic to expect the applicant to have called evidence from all other significant building and construction companies operating in the commercial sector, but it is likewise much more difficult to perceive the necessary causal link between the contraventions proved in this case and Red & Blue’s failure to secure scaffolding work from such companies. I certainly would not be prepared to hold it to be more probable than not that the circumstance that Red & Blue was prevented from entering two sites on two days nearly a month apart caused all those companies to satisfy their scaffolding needs from other sources.
11. Recognising that difficulty in the applicant’s case, his counsel submitted that the respondents had imposed, and given effect to, a “black ban” against Red & Blue across the whole commercial construction sector in Melbourne. The evidence on which that submission was based was that of Mr McNamara in his interview with the applicant’s investigator on 29 July 2013 that Mr Edwards had told the four scaffolders laid off on 13 June 2013 that Red & Blue would not be allowed on any site. This submission must be rejected. The existence of a broad-based black ban was not alleged in the Statement of Claim, either as a contravention of the FW Act or otherwise. For the court to make a monetary award by reference to the effect of such a ban – assuming it to have been established in point of fact – would be to require the respondents to pay for conduct not found, nor even alleged, to have been unlawful.
12. For the foregoing reasons, the only compensatory order I propose to make is that referred to in para 133 above.

**PENALTIES**

1. I shall list the proceeding for the purpose of receiving the parties’ submissions on the question of the penalties, if any, proper to be imposed on the respondents in respect of their conduct found to have been in contravention of ss 355 and 346 of the FW Act.

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| --- |
| I certify that the preceding one hundred and forty-three (143) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup. |

Associate:

Dated: 23 October 2015