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Federal Circuit and Family Court of Australia
District Registry: Brisbane
Division: Fair Work

No. BRG135 of 2022

Fair Work Ombudsman
Applicant

Construction, Forestry, Maritime, Mining and Energy Union and others
Respondents

APPLICANT'S REPLY SUBMISSIONS

1. These submissions reply to the Respondents' written submissions filed 1 November 2023 (**RS**). They adopt the defined terms from the Applicant's submissions filed 4 October 2023 (**AS**).

2. These submissions deal with the following issues:

   (a) Were Mr Rielly and Mr Vonhoff exercising statutory rights of entry in accordance with Part-3 of the FW Act on 25 October 2021;

   (b) Mr Vonhoff's contravention of section 500 on 25 October 2021 – specifically whether he was requested to report to the Site office and sign in that day (and whether he subsequently refused to do);

   (c) The impropriety of the refusal to sign in by Mr Vonhoff and Mr Rielly on 25 October 2021; and

   (d) Whether Mr Rielly engaged in aggressive and threatening behaviour on 27 October 2021.

Were Mr Rielly and Mr Vonhoff *exercising* statutory rights on 25 October?

3. At RS [8-24] the Respondents submit that the Court should not accept that Mr Rielly or Mr Vonhoff were on the Site exercising rights under Part 3-4 of the FW Act on 25 October 2021. This is on the basis that the Respondents contend that Mr Rielly and Mr Vonhoff were on Site because they were invited.

4. As set out in AS, this submission cannot be sustained on the facts and the law. The Applicant makes two submissions.

5. Firstly, the contention of the Respondents that the car park was not part of the Site is not supported by the evidence. Mr Kelly and Mr Barker confirmed in evidence that the

car park was part of the Site[1] and this was never challenged in cross examination or by any other evidence. To the extent then that the Respondents' contention regarding the "invitation" is based on an assertion that the car park was not the Site, it fails for this reason alone.

6. Secondly, the Respondents' contention that Mr Rielly and Mr Vonhoff were invited onto the Site is itself not sustainable. There was no evidence that Georgiou invited the union officials on the Site voluntarily absent their statutory obligation to let them on. Indeed, having provided their entry notices, there was no lawful basis in the FW Act for Georgiou to refuse them entry (nor have the Respondents identified any).[2] The suggestion to come to the crib room was merely facilitative of Mr Rielly and Mr Vonhoff's statutory right to be on the Site.

7. Further, the Respondents' point proceeds on the premise that Mr Rielly and Mr Vonhoff simply attended the car park and were immediately invited onto the Site to the crib room. This is not what happened. In fact, upon reaching the car park, the evidence clearly established that Mr Rielly and Mr Vonhoff commenced actually exercising their rights pursuant to Part 3-4. For example, shortly after arriving at the car park Mr Rielly (in the presence of Mr Vonhoff) requested the SWMS and produced their entry notices under the WHS Act and their federal and state permits.[3] By seeking the SWMS, Mr Rielly and Mr Vonhoff were exercising their rights pursuant to s section 118(1)(d) of the WHS Act.

8. This same point renders any analogy to visiting a person's home (such as appears at RS [46]) inapt. A person in their home has a right to refuse entry to a visitor and a right to require any visitor to leave at any point where a condition of entry is not complied with. Georgiou had no such rights in this case once the entry notices were provided. Similarly, the analogy with an implied licence (see RS at [14] – [15]) is inapt as this was simply not the basis on which Mr Riley and Mr Vonhoff entered the Site for the reasons set out above.

[1] T P 25 L 20-38. Also T P 104 L 4-8.
[2] Mr Kelly confirmed his understanding of this point under cross examination – T P 54 L 4-7.
[3] See Exhibit 1, also the Affidavit of Mr Rielly at [32].

Mr Vonhoff's contraventions on 25 October – Request and Refusal

9. At RS [25-45] the Respondents contend that there is no evidence that Mr Vonhoff was requested to report to the Site office and sign in, nor that he refused to do so on 25 October 2021.

10. Firstly, the Court should accept that during the conversation, which is depicted in Exhibit 1, the requests by Mr Kelly to come to the Site office and sign in are directed to both Mr Rielly and Mr Vonhoff. Whilst it is true that Mr Rielly is leading the conversation, Mr Vonhoff was present in the car park and therefore present in the conversation. Indeed, Mr Kelly's evidence was that Mr Vonhoff was close enough that Mr Kelly could hear what Mr Vonhoff was saying[4] and that Mr Vonhoff was at one stage standing next to Mr Rielly during the conversation.[5] Mr Kelly's evidence was not directly challenged in cross examination on this point, nor was any evidence given by either Mr Rielly or Mr Vonhoff to the effect that Mr Vonhoff was so far away that he was not listening or part of the conversation.

11. The Applicant also notes that no point is taken by the Respondents in relation to the requests made by Mr Kelly in the crib room for Mr Vonhoff to sign in.[6] This is sufficient to establish a contravention of s 500 of the FW Act against Mr Vonhoff even if the Court accepts that he was never requested to sign in whilst in the car park.

12. Regarding the evidence of "refusal", it is uncontested that Mr Vonhoff did not sign in. What is pleaded by the Applicant to establish a contravention of s 500 is Mr Vonhoff's failure to sign in when requested.[7] Both the request and the failure to comply are established on the evidence (see AS in this respect at [30 to 36]).

The Impropriety of the refusal

13. Paragraphs [52 to 83] of RS contend that any refusal to comply with the requests to sign in were not improper. Whilst the Applicant repeats and relies upon AS at [37-73] there are several further matters which require specific reply.

14. Firstly, the Applicant's case, as pleaded, is that the impropriety of the Respondents' conduct lies in their failure to sign into the Site when requested in circumstances where such a request related to occupational health and safety and was a reasonable request

[4] Kelly affidavit at [43].
[5] Kelly Affidavit at [47].
[6] See AS at [15].
[7] ASOC at [29] and [48].

to make and easy to comply with. The impropriety comprises therefore a number of considerations that operate together. It is not sufficient for the Respondents to simply isolate individual elements of the impropriety[8] (i.e. safety and reasonableness) and suggest that each of these elements on their own do not amount to improper conduct. The Applicant's case is not put that way. All of the circumstances are what is relied upon by the Applicant to establish a contravention of s 500.

15. Secondly, the reasonableness of a request does not fall to "be measured by reference to the rights conferred on a permit holder".[9] These rights are obviously relevant but the rights conferred on a permit holder under the WHS Act must be balanced against the obligations of permit holders under Part 3-4 of the FW Act. Further, a permit holder's rights "*should not be construed as conferring any greater right than is necessary to achieve the statutory objective. The common law rights of an occupier, on this approach, are only to be diminished to the extent absolutely necessary to give effect to the right conferred".*[10]

16. In this case, compliance with the sign in requirements would have only taken 10 minutes and Mr Rielly accepted that it would not have troubled him practically to sign in.[11] There is no basis, in fact or law, to uphold the Respondent's rights as State permit holders to the extent that it renders the requests to sign in unreasonable.

17. Thirdly, to the extent that it is suggested at [56-63] of RS that there were alternative means by which the health and safety purposes of the sign in requirements could have been achieved, this does not render the conduct of the Respondents somehow proper. It cannot be the case that a visitor such as Mr Rielly is able to unilaterally decide how Georgiou is to comply with what are otherwise non delegable duties regarding workplace health and safety.[12] If an occupier has a policy or procedure in place in order to meet its statutory duties, it is not for a visitor to say "I'm not doing that, but here are some other things I will do instead to broadly satisfy your concern." If such a position was accepted by this Court then any builder's (or any occupier's) policy or procedures would be rendered worthless and the position of occupiers would be untenable. To put it another way, just because the Respondents considered that there were alternative options does not make the position that Georgiou insisted upon

[8] See RS [52]-[53].
[9] RS [54].
[10] *Australasian Meat Industry Employee's Union v Fair Work Australia* (2012) 203 FCR 389; [2012] FCAFC 85 at [63] (Flick J).
[11] T P 320 L 30-46.
[12] See WHS Act at s19 See also T P 280 L 31 to P 281 L4.

unreasonable, nor does it make the Respondents' defiant refusal somehow proper. The reference to *Ramsay v Menso*[13] similarly does not advance the Respondents case.

18. Fourthly, the mere fact that the Applicant no longer presses the contravention of s 499 of the FW Act is insufficient to support an inference that there was no requirement to sign in as asserted (at RS [67]). There are a range of reasons why allegations may not be pressed at trial and it should not be inferred, absent material before the Court, that the abandonment of s 499 was due to any perceived concern with its prospects of success (or lack thereof). In this case the Court heard ample evidence of the sign in requirements.[14]

19. Fifthly, to the extent it is suggested that the manner of the refusals were otherwise unobjectionable[15] this does not mean that a refusal was somehow rendered proper. The Applicant's case is that conduct was improper because it was a defiant refusal to comply with a simple and reasonable request from the occupier of the Site directed towards ensuring the safety of all persons on the Site. The fact that such refusal was not accompanied by abuse or profane language may be relevant to the objective seriousness of the conduct (at any penalty hearing) but does not in itself mean that the conduct was not improper.

20. Finally, the fact that the signs on the gates at the Site contained the wording "*All visitors must report to the site office/supervisor*" cannot give rise to an implication that visitors were able to report to a Site supervisor in lieu of complying with Georgiou's sign in requirements as is asserted at RS [77] and [79]. Rather, the practical effect of this sign, and the wording therein, was simply the chosen method for Georgiou to facilitate the commencement of the sign in process by Site visitors.

Mr Rielly's aggressive and threatening behaviour

21. The issue of whether Mr Rielly engaged in aggressive or threatening behaviours is one that the Court must resolve on the evidence. The Applicant repeats and relies upon its submissions at [74-86] and makes the following further points.

22. Firstly, there is no evidence or basis before the Court to support the assertion at RS [90] regarding the use of the word "bat." That the Respondents have their own view,

[1313] RS [58].
[14] See AS [30-32] and the references in the footnotes.
[15] RS at [68-69].

unencumbered by supporting material, about how often a "bat" is used without reference to the sporting qualifier is irrelevant.

23. Secondly, the analogy drawn by the Respondents to a café in RS [92] is inapt. The conversation in question was, even on Mr Rielly's evidence, a robust one.[16] It took place in the context of Mr Rielly's consistent and stubborn refusals to sign in and involved matters which Mr Rielly considered important and took seriously.[17] Even on the uncontested aspects of the evidence, the conversation was far removed from a barista taking a coffee order.

24. Thirdly, contrary to what is asserted at RS [94], the fact that Mr Rielly, when in Court and presumably on his best behaviour, did not lose his temper or "explode" cannot form the basis of any finding as to how he may have acted on the Site on 27 October 2021. Similarly, the reliance at RS [92] on Mr Rielly's presentation as depicted in video recordings from 25 October 2021 cannot form the basis of any finding as to his behaviour on 27 October 2021.

25. Fourthly, the fact that Mr Barker did not call the police is not relevant. There may be many reasons why a person who experiences a hostile event does not call the police. The fact that police were not called is not probative of whether the event happened.

26. Fifthly, the summary of Mr Barker's reporting and recording of the incident which appears at RS [100-102] is potentially misleading as it infers that Mr Barker had not mentioned the bat allegation. Rather, the evidence was that Mr Barker mentioned the bat allegation to his manager Mr Donald on the afternoon of 27 October 2021, he produced a written record of what happened on 28 October 2021 and also mentioned the bat allegation to Ms Webb of the ABCC in a telephone conversation on the morning of 28 October 2021.[18]

27. Finally, the contention that Mr Treagus' evidence (including his contemporaneous confirmation of Mr Barker's account) is not corroborative, but rather mere adoption of Mr Barker's evidence, is misconceived. Such a finding would essentially require the Court to accept that Mr Treagus was somehow beholden to Mr Barker or motivated by the same factors which the Respondents rely upon to assert that Mr Barker has concocted the story. There is no evidence to support either contention. Mr Treagus

[16] T P 379 L 1-32.
[17] T P 370 L 3-15 (re "union contractors"). T P 302 L 30-34 (re 457 Visas).
[18] See AS [80] and the evidence references in the footnote.

was an engineer, he did not report to Mr Barker and did not have the same interests as Mr Barker regarding safety and management of the Site. He is a degree removed from the interactions between Mr Barker and Mr Rielly and there is no basis to infer that his evidence was somehow manufactured.

Conclusion

28. The Applicant otherwise repeats and relies upon the matters set out in its written submissions filed 4 October 2023.

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15 November 2023