FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v Clarke [2007] FCAFC 87

INDUSTRIAL LAW – industrial action by workforce contrary to greenfields certified agreement – whether Union and its representatives were party to, or concerned in, industrial action by attending workforce meetings and advising against it – whether Union and representatives liable for breach of dispute resolution procedures of certified agreement

INDUSTRIAL LAW – whether conduct of job representative elected pursuant to a certified agreement attributable to Union

AGENCY – whether job representative elected pursuant to a certified industrial agreement agent for Union

WORDS AND PHRASES – *"party to, or concerned in"*

Federal Court of Australia Act 1976 (Cth), s 25(5)
Workplace Relations Act 1996 (Cth), ss 4(8), 84, 127, 170LL, 170LT, 170LY, 170LZ, 170M, 170MN, 178, 347

Construction, Forestry, Mining and Energy Union v Clarke [2006] FCA 245; 149 IR 224 reversed
Construction, Forestry, Mining and Energy Union v Clarke (2005) 144 FCR 226 related
Construction, Forestry, Mining and Energy Union v Clarke (2007) 156 FCR 291 related
Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1 applied
Ashbury v Reid [1961] WAR 49 cited
Australian Workers' Union v Stegbar Australia Pty Ltd [2001] FCA 367 cited
Briginshaw v Briginshaw (1938) 60 CLR 336 cited
Browne v Dunn (1893) 6 R 67 (HL) applied
Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employ Union (No 2) (1987) 15 FCR 64 considered
Coulton v Holcombe (1986) 162 CLR 1 applied
Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (2002) 117 FCR 588 cited
Flower & Hart v White Industries (Qld) Pty Ltd (1999) 87 FCR 134 applied
Giorgianni v The Queen (1985) 156 CLR 473 applied
MWJ v The Queen (2005) 80 ALJR 329; 222 ALR 436 applied
R v Tannous (1987) 10 NSWLR 303 cited

Waterways Authority v Fitzgibbon (2005) 221 ALR 402; (2005) 79 ALJR 1816 applied
Zhang v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 30 applied

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, MICHAEL POWELL AND WALTER VINICIO MOLINA v MARCUS THOMAS CLARKE
WAD 88 OF 2006

TAMBERLIN, GYLES AND GILMOUR JJ
8 JUNE 2007
PERTH

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY **WAD 88 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**
First Appellant

MICHAEL POWELL
Second Appellant

WALTER VINICIO MOLINA
Third Appellant

AND: **MARCUS THOMAS CLARKE**
Respondent

JUDGES: **TAMBERLIN, GYLES AND GILMOUR JJ**

DATE OF ORDER: **8 JUNE 2007**

WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. The appeal against the judgment of 17 March 2006 be allowed and the orders of 17 March 2006 be set aside.

2. In lieu thereof, the appeal from the orders of the Industrial Magistrate's Court of Western Australia of 28 April 2005 be allowed and the orders of 28 April 2005 be set aside.

3. The proceeding in the Industrial Magistrate's Court of Western Australia be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY **WAD 88 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**
First Appellant

MICHAEL POWELL
Second Appellant

WALTER VINICIO MOLINA
Third Appellant

AND: **MARCUS THOMAS CLARKE**
Respondent

JUDGES: **TAMBERLIN, GYLES AND GILMOUR JJ**

DATE: **8 JUNE 2007**

PLACE: **PERTH**

REASONS FOR JUDGMENT

THE COURT:

1 This case concerns accessorial liability in relation to breaches of provisions of the *Workplace Relations Act 1996* (Cth) as it stood in 2004 ("the Act") relating to a greenfields certified agreement. On 17 March 2006 a judge of the Court dismissed an appeal from judgment and orders of the Industrial Magistrate's Court of Western Australia imposing penalties upon the Construction, Forestry, Mining and Energy Union ("the Union"), Michael Powell and Walter Vinicio Molina for breach of s 170MN of the Act in engaging in industrial action contrary to the terms and conditions of a certified agreement (*Construction, Forestry, Mining and Energy Union v Clarke* [2006] FCA 245; 149 IR 224). Notwithstanding that the Chief Justice had determined pursuant to s 25(5) of the *Federal Court of Australia Act 1976* (Cth) that the appellate jurisdiction of the Court be exercised by a single judge (*Construction, Forestry, Mining and Energy Union v Clarke* (2005) 144 FCR 226), it has been held, in this

case, that there is an appeal from that judge to the Full Court (*Construction, Forestry, Mining and Energy Union v Clarke* (2007) 156 FCR 291).

2 On 26 May 2004 the Australian Industrial Relations Commission certified an agreement between Barclay Mowlem Construction Ltd ("the Company") and the Union entitled "Barclay Mowlem Construction Ltd, Thornlie Railway Station and Bridges – Structural Work Project Certified Agreement 2004–2005" ("the Certified Agreement") pursuant to s 170LT of the Act. The Certified Agreement came into operation from 26 May 2004 and was to remain in force until 1 July 2005. To be certified, the Agreement had to pass a "no disadvantage" test (s 170LT(2); Pt VIE). The Certified Agreement was what was described as a "greenfields agreement" made pursuant to s 170LL of the Act. In the case of the establishment of a new business, an agreement can be made between an employer and a union prior to the employment of any of the persons to be employed (s 170LL(1)). Thus, in addition to the Company and the Union, all employees of the Company who were engaged on the Thornlie rail extension structural work project in the classifications detailed in the Certified Agreement (not necessarily all the workers on the site) were bound by the Certified Agreement (s 170M). Clause 1.6 of the Certified Agreement was as follows:

> "***1.6 NO EXTRA CLAIMS***
> *This Agreement is made in full and final settlement of all claims in relation to this project and the parties shall not make any further claims for the period of operation of the Agreement. The parties agree that the wages, allowances and employment conditions set out in this Agreement cover all circumstances, conditions and disabilities associated, with the Project."*

The Certified Agreement operated to the exclusion of any other Federal or State awards, orders or agreements that would otherwise apply had it not been for the making of the Certified Agreement (cl 1.5; s 170LY, s 170LZ).

3 There was an elaborate dispute resolution procedure established by cl 4.5 of the Certified Agreement, the preamble to which was as follows:

> *"Where any questions, disputes or difficulties arise, the provisions of this Section shall be applied in resolving the matters, Provided always that work shall continue in the usual manner without loss of time or wages and without bans or limitations so as to allow the steps below to be followed:"*

A seven step procedure was laid down escalating the level of resolution step-by-step until reference to the Australian Industrial Relations Commission. It was to be noted that there was a role in steps 1–4 for the elected job representative to, in effect, accompany the employee who raises the issue with representatives of the Company. The organiser of the Union comes in at step 5 and the Union State Secretary at step 6.

4 The job representative is provided for by cl 7.3 which is in the following terms:

> *"**7.3 JOB REPRESENTATIVES***
> *The Company supports the continuing role for the job representative when requested by an employee in handling of questions, disputes or difficulties in accordance with subsection 4.5 Grievance Resolution Procedure.*
>
> *Any employee elected to the position of job representative shall be recognised as such by the Company and will have reasonable work time, when mutually convenient, to undertake matters related to employees of the Company, when so required by those employees, in accordance with the procedure outlined in subsection 4.5 of this Agreement.*
>
> *The Company shall ensure that the Job representative is provided with adequate resources to perform their representative role."*

5 Section 170MN (so far as relevant) was as follows:

> ***"170MN Industrial action etc. must not be taken until after nominal expiry date of certain agreements and awards***
>
> *(1) From the time when:*
>
> *(a) a certified agreement; or*
>
> *(b) an award under subsection 170MX(3) (which deals with the exercise of arbitration powers on termination of a bargaining period);*
>
> *comes into operation until its nominal expiry date has passed, an employee, organisation or officer covered by subsection (2) must not, for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement or award, engage in industrial action.*
>
> *(2) For the purposes of subsection (1), the following are covered by this subsection:*
>
> *(a) any employee whose employment is subject to the agreement or*

award;

(b) an organisation of employees that is bound by the agreement or award;

(c) an officer or employee of such an organisation acting in that capacity."

6 Section 178 (so far as is relevant) was in the following terms:

"178 Imposition and recovery of penalties

(1) Where an organisation or person bound by an award, an order of the Commission (whether under this Act, the Registration and Accountability of Organisations Schedule or otherwise) or a certified agreement breaches a term of the award, order or agreement, a penalty may be imposed by the Court or by a court of competent jurisdiction.

…

(5A) A penalty for a breach of a term of a certified agreement may be sued for and recovered by:

(a) an inspector;"

7 The respondent, Marcus Thomas Clarke, an inspector appointed pursuant to s 84 of the Act, commenced proceedings against the Union and Michael Powell and Walter Vinicio Molina in the Industrial Magistrate's Court of Western Australia on the basis that the respondents had:

(a) failed to comply with the Certified Agreement, contrary to s 178 of the Act; and

(b) contravened s 170MN by engaging in industrial action for the purpose of supporting or advancing claims against the Company in respect of the employment of its employees who were subject to the Certified Agreement.

A statement of claim was attached which was the subject of later amendment. It was alleged that Powell and Molina (amongst others) were each agents or representatives of the Union. Each was, in fact, employed full time by the Union as an organiser. It is significant to note that there was no allegation that the job representative was such an agent or representative.

8 It was alleged that the employees of the Company took industrial action by withdrawing their labour and going on strike:

(a) from approximately 11.00 am on 9 July 2004 to 11 July 2004 (inclusive);

(b) from approximately 7.25 am on 29 July 2004; and

(c) from approximately 11.00 am on 19 August to 20 August 2004 (inclusive).

9 It was alleged that the Union engaged in that industrial action in that it was directly or indirectly a party to or concerned in that conduct (cf s 4(8) of the Act) by reason of:

(a) certain representatives or agents of the Union attending the meetings of employees as particularised; and

(b) certain representatives or agents of the Union conveying information and claims relating to the industrial action to representatives of the employer as particularised.

It was alleged that the pleaded conduct of the Union breached cl 4.5 of the Certified Agreement in that the Union did not follow the dispute resolution procedure set out therein.

10 The allegation that there was a contravention of s 170MN was limited to the industrial action on 29 July 2004. In support of the allegation that the purpose of the industrial action was supporting and advancing claims against the employer in respect of the employer's employees, three occurrences were relied upon:

(1) a discussion between Molina and the employer on 15 June 2004 requesting a special project allowance of $132.00 per week rather than $110.00 per week as specified in the Certified Agreement;

(2) on 29 July 2004 Powell informed the employer by its agent that the issue in respect of which the industrial action was being taken included the amount of the special project allowance and the payment of redundancy entitlement to employees who were terminated on grounds other than redundancy or who resigned; and

(3) on 12 August 2004 a meeting between Molina and Powell and two other representatives of the Union with representatives of the employer in which claims were made on behalf of the employees including the amount of special project allowance and the redundancy entitlement.

11 It was alleged that the Union and each of Molina and Powell engaged in the industrial action. That was supported by a reference to a meeting on 29 July 2004 between Powell and

Molina and another representative of the Union with employees at the site "as a consequence of which meeting the employees commenced the industrial action" on 29 July 2004 and to the information given by Powell to the Company on 29 July 2004, to which reference has already been made.

12 It is difficult to be certain as to the precise findings made by the Industrial Magistrate. The reasons for judgment do not deal in terms with the pleaded case. As will appear, they go beyond the pleaded case. The orders simply imposed penalties without stating the precise breach or breaches of the law for which they were imposed.

13 A number of grounds of appeal were raised in the notice of appeal to the Court. One significant issue was whether evidence that the individual appellants and the Union (through them) did not advance, procure or encourage the withdrawal of labour by the employees but, rather, took positive steps to prevent it, was considered by the Industrial Magistrate. That issue was emphasised in the appellants' submissions.

14 Prior to the occasions when the workforce took industrial action on 29 July and 19 August 2004, Powell attended a meeting of the workforce as a representative of the Union. The uncontradicted evidence of Powell, Molina, Levy and Aleknavicius was that, on each occasion, Powell, on behalf of the Union, spoke against motions put by a member of the workforce from the floor of the meeting, to take industrial action. Furthermore, he advised the workforce that there was a procedure in place and that there would be significant adverse consequences in the event that industrial action was taken, including the making of s 127 *Workplace Relations Act* orders against them involving loss of pay. The "procedure" from the context of his evidence, was clearly a reference to the dispute resolution procedure under the Certified Agreement. He told the meeting, in this respect, that "we've got to follow the procedure and we're bound to it". Furthermore, Aleknavicius, a member of the Union who attended the meeting on 29 July 2004, gave evidence to the effect that, when a strike motion was put from the floor for the removal of labour, Powell actually spoke against this motion. Levy, the site steward, gave evidence to the same effect.

15 Powell gave evidence repeatedly both in chief and in cross-examination that he had, in effect, advised the meetings on each occasion not to take industrial action. It was never suggested to him in cross-examination that he did not give that advice or that in giving it he

was not being genuine and that his statements were no more than a colourable pretence. The opposition of the Union, Powell and Molina to the taking of industrial action was central to their answer to the applications against them before the Industrial Magistrate. It was accordingly necessary, in our opinion, for him to deal with that central factual issue. It was claimed by the appellants that he did not do so.

16 When the primary judge came to express his conclusions in his reasons for judgment, the first heading was 'Whether Conduct of Union Members is Conduct of Appellants' and the second was 'Effect of Steps Taken by Appellants to Prevent Industrial Action'. In answering the first question, unfavourably to the appellants, the primary judge did not refer to, or consider, the effect of the evidence given as to the steps taken on behalf of the Union to prevent industrial action and encourage adherence to the Certified Agreement including the dispute resolution procedure. That, as the structure of the judgment shows, was to be given separate consideration. However, in considering that second question, the primary judge rejected the relevance of that evidence for reasons which are not supported by the respondent ([2006] FCA 245; 149 IR 224 at [46]–[67]). The result was that an important, perhaps crucial, aspect of the appellants' case was never considered. Appealable error having thus been established, the appeal to this Court must be allowed and this Court must consider the substance of the appeal from the orders of the Industrial Magistrate's Court of Western Australia for itself (*Zhang v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 30 at [17]). As the jurisdiction being exercised by the primary judge was appellate, this does not create any particular difficulties in this case.

17 It becomes necessary to consider the Industrial Magistrate's reasons more closely. It was found that the workforce did go on strike at the times alleged without the dispute resolution procedures being applied. It was found that the issues in dispute centred on the special project allowance, redundancy and inclement weather clauses. The Industrial Magistrate rejected the existence of any serious safety concerns being the basis for withdrawal of labour. Even if they were, the procedures set out in cl 6.1 were not followed. It was concluded that the workers withdrew their labour in pursuance of their claims in relation to the three issues identified.

18 It is difficult to follow the reasons of the Industrial Magistrate as to the evidence. The evidence of various witnesses was set out but, with some exceptions, no conclusion was stated as to whether the evidence was accepted in whole or in part or rejected in whole or in part. There is particular difficulty in relation to what the Industrial Magistrate described as the Union's claim that it did nothing to encourage the workforce to withdraw their labour but tried to prevent the strikes and direct the workforce towards the dispute resolution procedures. The Industrial Magistrate summarised the evidence of Powell, Aleknavicius, Molina and Levy, to which we have referred. Levy gave evidence that it was he who arranged for the Union officials to attend the site each time they did and that he was instrumental in gathering of workers for the meetings, including collecting them from the various site areas. The Industrial Magistrate did not expressly reject any of the evidence.

19 The Industrial Magistrate dealt with the claim by the appellants that they played no part in the industrial action taken by the employees in the following way:

> *"In my view that claim cannot be substantiated on the evidence and there is an irresistible inference that the union by its officers mentioned in these proceedings played a significant part in the activities which lead to the withdrawal of labour and, in turn, the breach of the agreement."*

20 It was found that the Union was not happy about the three issues of concern to the workers and it pursued them until two of them were resolved in its favour and that there was no evidence of any bona fide attempt by the Union to follow the dispute resolution procedures of cl 4.5. After referring to s 4(8) of the Act, the Industrial Magistrate found as follows:

> *"In this case the union by its officers including its organisers and site steward called, arranged and attended the three meetings which resulted in the withdrawal of labour. They had direct involvement in the industrial action and, in my view, at least with the knowledge of the outcome of the meeting on 9 July 2004, it was foreseeable that a similar outcome was likely following the next two meetings as the three issues had still not been resolved and the union had not engaged in the steps provided for in the dispute resolution procedure.*
>
> *I find therefore the Respondents did engage in industrial action for the purpose of supporting and advancing claims against the employer herein as claimed and the Respondents are in breach of section 170MN of the Act."*

21 A lively issue on this appeal has been whether the Industrial Magistrate implicitly rejected the evidence of the witnesses called for the appellants to the effect that the workers withdrew their labour of their own volition, notwithstanding advice to the contrary from the Union officials. Three factors lead us to find that there was no such rejection. In the first place, the Industrial Magistrate did not say that any evidence was rejected. In a matter of such central importance, it would be expected that an express finding would be made. It certainly should have been made (*Waterways Authority v Fitzgibbon* (2005) 221 ALR 402; (2005) 79 ALJR 1816 per Kirby and Heydon JJ at [85]–[87] and at [129]–[130] per Hayne J). In the second place, the state of the evidence, the cross-examination of the witnesses and the submissions which were made on the part of the respondent would not have justified such a finding. Had the Industrial Magistrate properly considered the issue, he could not, on the evidence, in our view, have concluded either that the statements made by Powell on behalf of the Union at the three meetings were not made or that they were not genuinely made. This is so because it was never put to Powell or Molina that the statements were either not made or were not genuinely made (*Browne v Dunn* (1893) 6 R 67 (HL); *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 16; *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134 at [51]; *MWJ v The Queen* (2005) 80 ALJR 329; 222 ALR 436 per Gummow, Kirby and Callinan JJ at [38]–[40]). Furthermore, Aleknavicius said that the workforce was not only angry with the employer but also with the Union for, in effect, failing to resolve the three issues in favour of the workforce. Again there was no challenge to this evidence. There was no submission on behalf of the respondent that the evidence should be rejected. In the third place, the wording of the crucial last two paragraphs of the judgment, which are set out above, is consistent with the evidence as to what occurred at the meetings by those called for the appellants being accepted. There is no reference in the crucial finding, one way or another, to the evidence concerning the attempt to dissuade the members from withdrawing labour.

22 Some other aspects of the judgment need to be noted. One is that the findings in relation to breach of s 170MN do not appear to be limited to the withdrawal of labour on 29 July 2004, that being the only breach pleaded. Rather, there seems to have been a global finding about all of the three occasions of withdrawal of labour.

23 Next, there is the reference to the role of what was called the site steward, Levy, calling, arranging and attending the three meetings which resulted in the withdrawal of the labour. It will be recalled that the statement of claim did not allege that any action by Levy was attributable to the Union. It is argued on appeal for the respondent that Levy did speak for the Union and that his conduct did bind the Union and that, therefore, the Industrial Magistrate was entitled to have regard to it in implicating the Union and the other two appellants. On such an important matter, the respondent should not be allowed to change its case on appeal (*Coulton v Holcombe* (1986) 162 CLR 1).

24 In any event, the better view is that the actions of Levy did not bind the Union or the other appellants in the relevant sense and that the position taken in the pleading was correct. Reference was made by counsel for the respondent to a statement by Wilcox J in *Concrete Constructions Pty Ltd v Plumbers & Gasfitters Employ Union (No 2)* (1987) 15 FCR 64 at 78:

> *"As is notorious, the function of a job delegate is to act as the link between the union members on a particular job and management. On the site the job delegate is the voice of the union. When the job delegate speaks to management about the union position on an industrial matter prima facie he or she speaks for the union."*

That is a statement of fact about the position in 1987 on a commercial building site in Sydney. The evidence for that finding is not made clear. It is said to be "notorious". It is quite possible that the evidence was that there was a practice on union controlled sites of planting a known union activist as the site delegate, regardless of the wishes of the employer or the rank and file. A correct conclusion of fact on the evidence in that case has little to do with the situation under a greenfields certified agreement in Western Australia in 2004 concerning a civil engineering project. Levy was an employee of the Company, not of the Union. Whilst the position of a job delegate might be recognised by the rules of the Union in some circumstances (eg: rule 57), those rules conferred no power to bind the Union in situations like this. There has been no suggestion in this case that Levy was a Union activist who was manoeuvred into the position to do the Union's bidding. There is no evidence in this case indicating any express or implied authority in Levy or similar elected job representatives to bind the Union. On the contrary, the Certified Agreement makes it clear that the job representative is elected by the workforce, not nominated by the Union. None of

the normal methods of proving agency are applicable in this case (cf *Australian Workers' Union v Stegbar Australia Pty Ltd* [2001] FCA 367 at [20]–[21]). In any event, it is conceded by counsel for the respondent that Levy was not an agent for either of the individual appellants.

25 It should also be noted that the Industrial Magistrate did not find that the evidence as to what was said by the Union officials to discourage the workforce from striking was not genuine and known by the workforce not to be genuine but, rather, was covert encouragement so seeking to avoid responsibility for breaches of the Certified Agreement and the Act, the "wink and a nod" point as it was described in submissions. No doubt, there could be such cases. It is not difficult to imagine that, on a militant site, Union officials could covertly organise industrial action and yet not be implicated in any overt action. However, that finding was not made in this case. It could hardly have been properly made in view of the fact that that hypothesis was inconsistent with the evidence of the witnesses, was not squarely put to and explored with the witnesses, and was only faintly adverted to (if at all) in submissions.

26 Stripped to its essentials, the case for breach of s 170MN was that the organisers attended the meeting on 29 July 2004 arranged by the job representative at the request of the workers but counselled against strike action and urged compliance with the dispute resolution procedures and the Certified Agreement generally. Nonetheless, the employees decided to strike. After the meeting, the job representative and the Union organiser consulted with the employer's representative and conveyed the reason for the stoppage. In our respectful opinion, those actions could not reasonably be held to make either the Union or the organisers a party to, or concerned in, the withdrawal of labour so as to conclude that they engaged in the particularised industrial action pursuant to s 4(8) of the Act. Regardless of the precise words of the accessorial provision, such liability depends upon the accessory associating himself or herself with the contravening conduct – the accessory should be linked in purpose with the perpetrators (per Gibbs CJ in *Giorgianni v The Queen* (1985) 156 CLR 473 at 479–480; see also Mason J at 493 and Wilson, Deane and Dawson JJ at 500). The words "party to, or concerned in" reflect that concept. The accessory must be implicated or involved in the contravention (*Ashbury v Reid* [1961] WAR 49 at 51; *R v Tannous* (1987) 10 NSWLR 303 per Lee J at 307E–308D (agreed with by Street CJ at 304 and Finlay J at 310)) or, as put by

Kenny J in *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 117 FCR 588 at [34], must participate in, or assent to, the contravention.

27 There was no proper basis for the finding by the Industrial Magistrate that on the evidence there was "an irresistible inference" that the Union by its officers (Powell and Molina) played a significant part in the activities which led to the withdrawal of labour.

28 Even accepting that Levy was a representative of the Union as distinct from merely an employee representative, the fact that he arranged the meetings and invited Powell and Molina to attend requires to be seen in context. Plainly the workforce wanted the Union to take up its concerns about the three issues with management. The meetings were called at the request of the workers. There is no finding and no evidence which would support a finding that the meetings were called by the Union for the purpose of taking industrial action. The conduct of the Union is to be seen in its entirety, but most importantly with reference to the position which it adopted at the meetings when the workforce voted for industrial action to be taken.

29 The communication by Powell and Molina (with Levy) to Company representatives after the meetings had concluded and the workforce had left the site, again requires to be seen in the light of the position taken by the Union at the meetings. Clearly, the Union as a party to the Certified Agreement had an interest in resolving the problems which had surfaced and the Company was entitled to be told what was happening. Although the dispute resolution procedure was not strictly followed, Levy, as job representative, had a legitimate role in keeping the Company informed as to events on the site. There was no complaint as to this by the Company nor was there any evidence of any contemporaneous suggestion by the Company that the Union had participated in the decision of the workforce to go on strike. There was no evidence of the Union representatives making threats of industrial action at these meetings.

30 The finding of breach of s 170MN cannot stand.

31 It is unclear whether the Industrial Magistrate made a formal finding of breach of the Certified Agreement by the appellants in not following the dispute resolution procedures

based upon s 178 of the Act. In our opinion, no such finding could have been properly made. There is a question as to whether the dispute resolution procedure was intended to apply to "extra claims" that were prohibited under the Certified Agreement. If it did, the procedure assumes that an employee (or employees) will take the issue to the Company representative accompanied, if they request it, by the job representative. The Union has no initiating role in relation to that procedure. An organiser has no role until various steps have been taken. As it happened, the job representative did attend upon the Company representative on each occasion, although he did not play an active role. The reality was that the decision by the workers to withdraw labour was a fundamental breach of the dispute resolution procedure in each case in which it occurred. Indeed, the dispute resolution procedure was not applicable once the withdrawal of labour occurred. Even if the accessorial provision (s 4(8)) could apply in circumstances such as these, it had no relevance in the present case given the lack of any encouragement, incitement or adoption of the breach of the dispute resolution procedures on the part of the organisers concerned.

32 In considering the foregoing, it is necessary to bear in mind that the proceedings were penalty proceedings and that the standard of proof referred to in *Briginshaw v Briginshaw* (1938) 60 CLR 336 was to be applied.

33 The appeal against the decision of the primary judge must be allowed and the orders of 17 March 2006 set aside. In lieu thereof, the appeal from the orders of the Industrial Magistrate's Court of Western Australia should be allowed and the orders of 28 April 2005 set aside. In view of our findings on the substance of the matter, there would be no utility in remitting the matter to the Industrial Magistrate's Court of Western Australia for further hearing. The proceeding in that Court should be dismissed. Costs were not sought in the notice of appeal, no doubt because of the provisions of s 347 of the Act as it stood and s 842 as it is now.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tamberlin, Gyles and Gilmour.

Associate:

Dated: 8 June 2007

Counsel for the Appellants:	Mr RC Kenzie QC, Mr T J Dixon
Solicitor for the Appellants:	Mr T Kucera of the Construction, Forestry, Mining and Energy Union
Counsel for the Respondent:	Mr AG Southall QC, Mr RC Hooker
Solicitors for the Respondent:	Freehills
Date of Hearing:	21 May 2007
Date of Judgment:	8 June 2007