

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v. BHP COAL PTY LTD (B23/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 132

Date of judgment: 13 December 2013

Date of grant of special leave: 16 May 2014

In May 2012, BHP Coal Pty Ltd (“the respondent”) terminated the employment of Mr Henk Doevendans after 24 years of service. Mr Doevendans, who was a member of the Construction, Forestry, Mining and Energy Union (“the appellant”) and a representative on one of its committees, had participated in industrial action three months earlier at the respondent’s Saraji Mine. During protests against workers driving to the mine within a stop-work period, Mr Doevendans repeatedly held up a sign that read “SCABS – *no principles – no guts*” (“the Sign”).

The appellant commenced Federal Court proceedings against the respondent under the *Fair Work Act* 2009 (Cth) (“the FW Act”), claiming that the company had dismissed Mr Doevendans unlawfully on account of his participation in industrial action and/or his role as an officer of the appellant. During the trial Mr Geoff Brick, the general manager of the Saraji Mine, gave evidence that Mr Doevendans’ employment had been terminated because his repeated waving of the Sign over three days amounted to harassing behaviour that was contrary to both the respondent’s conduct policy and the culture being developed at the Saraji Mine. Mr Brick also believed that Mr Doevendans’ antagonistic behaviour was unlikely to change.

On 7 November 2012, Justice Jessup ordered the respondent to reinstate Mr Doevendans to his position (as a machinery operator) at the Saraji Mine. His Honour found that the respondent had contravened s 346(b) of the FW Act by taking adverse action against Mr Doevendans because he had engaged in industrial activity. That activity was of two types. The first, in line with s 347(b)(iii) of the FW Act, was Mr Doevendans’ participation in a lawful activity organised by the appellant, as his behaviour which the respondent had taken into account included his waving of the Sign during protests that were a part of that activity. The second type of industrial activity, under s 347(b)(v), was Mr Doevendans having advanced the interests of the appellant by holding up the Sign in an effort to prevail upon other workers at the mine to join in the stoppage of work.

On 13 December 2013, the Full Court of the Federal Court (Dowsett and Flick JJ; Kenny J dissenting) allowed the respondent’s appeal. The majority held that Justice Jessup’s finding of contravention by the respondent could not stand, as it was inconsistent with his Honour’s acceptance of evidence given by Mr Brick that the industrial activity of Mr Doevendans had played no part in the decision to terminate his employment. Justice Kenny however held that it was open on the evidence for Justice Jessup to find that the respondent had contravened s 346(b) of the FW Act by reference to the criterion of s 347(b)(v).

This was because the message on the Sign represented the view of the appellant (which had produced signs and stickers bearing similar messages), a view which Mr Doevendans had advanced by holding the Sign up during protests.

The grounds of appeal include:

- In the circumstances of the instant case where:
 - the employee was dismissed for holding up a sign whilst attending a lawful and peaceful protest organized by an industrial association;
 - the sign was one of a number purchased by the industrial association for the purpose of the protest;
 - the industrial association encouraged attendees at the protest to hold up the signs; and
 - the sign held by the employee bore words which expressed the views and interests of the industrial association;

the Full Court erred in finding that, in dismissing the employee for holding the aforementioned sign at the aforementioned protest, the employer did not dismiss the employee because he participated in a lawful activity organised or promoted by an industrial association, within the meaning of s 346(b) and s 347(b)(iii) of the FW Act.