

AUSTRALIA / JUDGMENT

Alfred v Construction, Forestry, Mining and Energy Union [2012] FCA 450

COURT
FEDERAL COURT OF AUSTRALIA

Source: judgments.fedcourt.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record

FEDERAL COURT OF AUSTRALIA

Alfred v Construction, Forestry, Mining and Energy Union [2012] FCA 450

Citation: Alfred v Construction, Forestry, Mining and Energy Union [2012] FCA 450

Parties: GREGORY ALFRED v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and JOHN CONSTANTINOU

File number: VID 806 of 2010

Judge: BROMBERG J

Date of judgment: 2 May 2012

Catchwords: INDUSTRIAL LAW – freedom of association - whether demand made by union official for employees to join a union in contravention of ss 346, 348, and 349 of the Fair Work Act 2009 (Cth) – whether identity of union official alleged to have made the demand established – application dismissed

EVIDENCE – s 45(3)(c) Evidence Act 1995 (Cth) – cross examination on alleged prior inconsistent statement contained in a document – whether document should be admitted into evidence

Legislation: Building and Construction Industry Improvement Act 2005 (Cth) ss 44, 57

Evidence Act 1995 (Cth) ss 45, 140(2)

Fair Work Act 2009 (Cth) ss 12, 342, 346(a) and (b), 348, 349(1)(a), 361, 570, 793(1)(a), s 793(2)

Fair Work (Registered Organisations) Act 2009 (Cth)

Cases cited: Briginshaw v Briginshaw (1938) 60 CLR 336

Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuits Limited [2010] FCA 770

Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2008] FCA 678

Australian Building and Construction Commissioner v Abbott (No 2) [2011] FCA 308

Date of hearing: 25 and 26 October 2011

Place: Melbourne

Division: FAIR WORK DIVISION

Category: Catchwords

Number of paragraphs: 35

Counsel for the Applicant: Mr P O'Grady

Solicitor for the Applicant: Lander & Rogers

Counsel for the Respondents: Mr PG Priest QC with Ms R Shann

Solicitor for the Respondents: Slater & Gordon

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

FAIR WORK DIVISION VID 806 of 2010

BETWEEN: GREGORY ALFRED

Applicant

AND: CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

First Respondent

JOHN CONSTANTINOU

Second Respondent

JUDGE: BROMBERG J

DATE OF ORDER: 2 May 2012

WHERE MADE: MELBOURNE

THE COURT ORDERS

THAT:

1. The applicant's Application be dismissed.

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

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

FAIR WORK DIVISION VID 806 of 2010

BETWEEN: GREGORY ALFRED

Applicant

AND: CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

First Respondent

JOHN CONSTANTINOU

Second Respondent

JUDGE: BROMBERG J

DATE: 2 may 2012

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 The applicant is an Australian Building and Construction Inspector appointed under s 57 of the Building and Construction Industry Improvement Act 2005 (Cth) ("BCII Act"). There is no issue as to his standing to bring this proceeding. He seeks declarations and the imposition of penalties in relation to contraventions by the respondents of various provisions of the Fair Work Act 2009 (Cth) ("the Fair Work Act"). An alleged breach of s 44 of the BCII Act was pleaded but not pressed at trial.

2 The first respondent ("CFMEU"), is an organisation of employees registered under the Fair Work (Registered Organisations) Act 2009 (Cth). The second respondent ("Constantinou") was at all relevant times, a delegate of the Construction and General Division of the CFMEU and an "officer" of the CFMEU for the purposes of ss 12 and 793(1)(a) of the Fair Work Act.

3 All of the alleged contraventions of the Fair Work Act upon which the applicant relies relate to conduct alleged against the respondents and which the applicant claims occurred on 5 October 2009 at the Chadstone Shopping Centre in Chadstone, Victoria ("Chadstone"). The alleged conduct is the making of a representation by Constantinou to three persons – Peter Rodrigues ("Rodrigues"); Michael Pihlaniemi ("Pihlaniemi") and Paul Lorimer ("Lorimer").

4 Rodrigues is a partner in a carpentry business trading as JP Carpentry. Relevantly, JP Carpentry was engaged to perform refurbishments to a shop at Chadstone. To do so, JP Carpentry utilised Rodrigues, Pihlaniemi and Lorimer to perform the work. At the relevant time each of Pihlaniemi and Lorimer were employed by JP Carpentry.

5 The representation alleged to have been made by Constantinou is said to have been constituted by three conversations. The first conversation is alleged to have occurred prior to a site induction meeting and was in two parts – initially between Constantinou, Rodrigues, Pihlaniemi and Lorimer and subsequently between Constantinou and Rodrigues alone. The first and second conversations are pleaded in the applicant's statement of claim as follows:

[12] On 5 October 2009, at the Chadstone Site, outside the induction office, in a conversation between Mr Constantinou and Mr Rodrigues and Mr Pihlaniemi:

- (a) Mr Constantinou said words to the effect that "Where are you guys from? Are you in the union?";
- (b) Mr Pihlaniemi said words to the effect that "Do we have to be in the union?";
- (c) further or alternatively, Mr Rodrigues said words to the effect that "No, we're not. Do we need to be?";
- (d) Mr Constantinou said words to the effect that "Is that a trick question?";
- (e) Mr Rodrigues said words to the effect that "Have you got something to do with the union?".

[13] After this, Mr Constantinou asked Mr Rodrigues to follow him as he walked out to a nearby car park and, in a conversation between Mr Constantinou and Mr Rodrigues, Mr Constantinou said words to the effect that "I'm sick and tired of you fuckers coming down here and expecting the same benefits as us. If you don't join the union, you won't get on site or I'll shut the site down".

6 The third conversation is alleged to have occurred during a site induction meeting and is pleaded as follows:

[14] Later on 5 October 2010, near the end of a site induction, Mr Constantinou addressed the group of inductees, who included the JP Carpentry Workers, and said words to the following effect:

- (a) "this is a union site";

- (b) whilst patting the left pocket of his trousers "for those people that owe fees, I happen to have my book";
- (c) whilst patting the other pocket of his trousers "for those guys that are not in the union, I happen to have my receipt book"; and

then went specifically to the JP Carpentry Workers and asked words to the effect of "what's it going to be fellas?".

7 The making of the alleged representation is alleged to be a false and misleading representation that Rodrigues, Pihlaniemi and Lorimer had an obligation to become members of the CFMEU and thereby a representation made in contravention of s 349(1)(a) of the Fair Work Act. The representation is also relied upon by the applicant as constituting a threat by Constantinou to organise to take action against Rodrigues, Pihlaniemi and Lorimer with intent to coerce each of them to become members of the CFMEU and thereby a contravention of s 348 of the Fair Work Act. Further, it is alleged that by making that threat, Constantinou took "adverse action" (as defined in s 342 of the Fair Work Act) for reasons including the reason that each of Rodrigues, Pihlaniemi and Lorimer were not members of the CFMEU, refused to become members of the CFMEU, or refused to pay a fee to the CFMEU. That conduct is alleged to have contravened s 346(a) or alternatively s 346(b) of the Fair Work Act.

8 Each of the contraventions of the Fair Work Act are alleged against both Constantinou and the CFMEU. The CFMEU's alleged responsibility for the alleged conduct of Constantinou is based on s 793(1)(a) and s 793(2) of the Fair Work Act and what is further alleged to be the vicarious liability of the CFMEU for Constantinou's conduct. The applicant accepted that, in relation to each contravention alleged, if he failed to establish a contravention by Constantinou, then no finding of contravention could be made against the CFMEU. Given the way in which the case was pleaded, the concession was correctly made.

9 The applicant also correctly accepted that he bore the onus of proof in relation to each of the factual allegations, other than where the reverse onus of proof provided by s 361 of the Fair Work Act operated.

10 Further, the applicant also correctly accepted that whilst the civil standard of the balance of probabilities applies, the standard or quality of the evidence necessary to establish the factual matters which the applicant must prove, is that which is required by s 140(2) of the Evidence Act 1995 (Cth) and the test laid down in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-363. In that respect, I agree with the observation made by Logan J in *Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuits Limited* [2010] FCA 770 at [13] where (as adapted for present purposes) Logan J said:

The [Applicant] carries the burden of proving the alleged contraventions. While the proceedings are civil in character, they are nonetheless penal. Thus, though the [Applicant] must prove the contraventions on the balance of probabilities, s 140(2) of the Evidence Act 1995 (Cth) (Evidence Act) requires that; due regard be given to the nature of the cause of action or defence; the nature

of the subject matter of the proceeding; and the gravity of the matters alleged. That sub-section of the Evidence Act is a restatement of a well known passage in the judgment of Dixon J (as his Honour then was) in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 in relation to considerations which intrude in deciding whether the standard of proof in civil proceedings has been met, "the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

11 There is no issue that the applicant's application must fail in relation to each alleged contravention if the applicant fails to establish, to the *Briginshaw* standard, that the representation was made by Constantinou. As the applicant's counsel frankly put it in final submissions, if the applicant failed to prove to the requisite standard that the identity of the person who made the representation was Constantinou, then its case must fail. That was the basis upon which the case was conducted.

12 For the following reasons, I am not satisfied to the *Briginshaw* standard that, assuming the alleged representation was made by someone, it was made by Constantinou.

13 The applicant relied upon three categories of evidence to try and identify Constantinou as the person who made the representation alleged:

evidence given by Rodrigues that Constantinou identified himself during a pre-induction conversation;

evidence given by Pihlaniemi that Constantinou was introduced by name at the site induction meeting; and

evidence by Rodrigues and Pihlaniemi that, at the site induction meeting, the person who made the alleged representation filled out a receipt which he gave to Pihlaniemi which identifies the person as Constantinou.

the identification evidence of Rodrigues

14 Rodrigues had come down from Brisbane to Melbourne to perform work at Chadstone. On a day which he referred to as "the induction day" (which I accept to have been 5 October 2009), Rodrigues said that together with Pihlaniemi and Lorimer, he attended at Chadstone and went over to an area where hundreds of workers had gathered to take part in a site induction meeting. As Rodrigues and his two co-workers stood outside the venue for the induction, they had a conversation ("the first conversation") with a male person. It cannot be seriously disputed, on the evidence before me, that the person to whom Rodrigues referred had an association with a union. For the purpose of considering the evidence as to identity, and to adapt a neutral descriptor, I will refer to that person as "the union person".

15 Rodrigues's evidence in-chief was that the union person "told us his name... whilst we were standing outside waiting for the induction". The name Rodrigues said the union person gave was "John Constantinou". When asked whether anyone else was part of the conversation, Rodrigues said "Michael and Paul were there". Rodrigues gave evidence as to the content of the first conversation and said that the union person then asked him to follow him down a walkway where a further conversation ("the second conversation") occurred with Rodrigues and the union person alone.

16 For the following reasons, I am not satisfied that the evidence given by Rodrigues as to the identification of the union person is reliable and thus capable of establishing that the person was Constantinou:

Rodrigues's evidence was confused as to whether the union person introduced himself at the first conversation or at the second conversation. Despite his evidence in chief, in cross-examination Rodrigues's evidence was initially that the union person told Rodrigues his name at the second conversation. In that evidence, he said that on returning to where Pihlaniemi stood (outside the venue for the site induction), Rodrigues told Pihlaniemi that the union person had identified himself as John Constantinou. Later in cross-examination and despite the evidence just referred to, Rodrigues said that Pihlaniemi and Lormimer were present when the union person said his name;

Pihlaniemi's evidence (to which I will refer in more detail later) was that he first learned of the union person's name in the site induction meeting;

Rodrigues made a note of the pre-induction conversations he says he had with the union person in a notebook he kept and which was tendered by the respondents. He was unable to say when the note was made but his evidence suggests that he made the note within about a week of 5 October 2009. Rodrigues's note makes no reference to being told by the person he spoke to that his name was John Constantinou and does not refer to the union person by name but only as the "union guy". The note relevantly said:

Monday, pre-induction union guy spoke to me, told me to join or no start, pull me away from crown.

Having been informed by the applicant that it was an offence to provide information which was false or misleading (including by omission), Rodrigues made a written and signed statement on 7 December 2009. In that statement ("Rodrigues's statement"):

- Rodrigues did not state that the person had told him his name was John Constantinou;
- Rodrigues referred to the person as "the union man" and could not explain in cross-examination why he had so described the person despite his evidence that the person had told him his name;

- Rodrigues stated that on 5 October 2009 he spoke to various trades people on the Chadstone site and asked them if he had to be in the union to work on that site. He then asked those workers for the name of the "union man". Rodrigues was cross-examined as to why, if he had already been told the person's name, outside the site induction meeting he later had to ask others who "the union man" was. His answer failed to identify the reason and made no sense. The answer demonstrated, at best, a great deal of confusion on the part of Rodrigues and, at worst, the possibility of a fabricated but irrational attempt to explain away an inconsistency.

17 Rodrigues's memory of relevant events was generally poor including as to the names of the other persons he dealt with on or about 5 October 2009 at Chadstone. The confusion and inconsistencies in Rodrigues's evidence reflect what I consider to be both his poor recollection and his propensity to try and defend the initial evidence he gave as to identification. On the evidence before me, I consider it unlikely that if the union person gave Rodrigues his name, Rodrigues retained a reliable recollection of the name given. If he had, it is unlikely Rodrigues would have needed to ask other workers on 5 October 2009 who "the union man was". The fact that the note made by Rodrigues referred to the union person as the "union guy" also supports that conclusion. I am unable to exclude as a real and significant possibility, that the connection in Rodrigues's mind between the union person and the name "John Constantinou" is a result of a conversation Rodrigues says he had with the applicant at Chadstone sometime in late October or early November 2009. That conversation, according to Rodrigues (but not Pihlaniemi), occurred in the presence of Pihlaniemi. Rodrigues's evidence is that in that conversation, the applicant made it plain that he was investigating a person called John Constantinou. Rodrigues was also aware that the applicant was investigating a John Constantinou when he made his statement on 7 December 2009.

18 Beyond the concern I have already expressed, there is a further basis for my view that Rodrigues should not be considered a reliable witness. Rodrigues gave evidence that on the day he made his statement, he told the applicant that the fact that the "union person" had identified himself to Rodrigues as John Constantinou had been left out of his statement. Given the applicant's statutory responsibilities as an inspector, I consider it unlikely that, if Rodrigues had in fact adverted to what he says was the omission, the applicant would have taken no step to address it, either at about the time the statement was taken or subsequently. Nor did the applicant give evidence corroborating Rodrigues's account, or at all.

19 At the conclusion of the cross-examination of Rodrigues, the applicant called for Rodrigues's statement to be produced and for the Court to admit it pursuant to s 45(3)(c) of the Evidence Act 1995 (Cth). The tender was resisted by the respondents and having heard their respective submissions on that issue, the parties were content that I determine the issue with these reasons. Section 45 is in the following terms:

- (1) This section applies if a party is cross-examining or has cross-examined a witness about:

- (a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or
 - (b) a previous representation alleged to have been made by another person that is recorded in a document.
- (2) If the court so orders or if another party so requires, the party must produce:
- (a) the document; or
 - (b) such evidence of the contents of the document as is available to the party;
- to the court or to that other party.
- (3) The court may:
- (a) examine a document or evidence that has been so produced; and
 - (b) give directions as to its use; and
 - (c) admit it even if it has not been tendered by a party.
- (4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible because of Chapter 3.
- (5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

20 I accept the applicant's contention that s 45 is operative because the respondents' counsel had cross-examined Rodrigues about an alleged prior inconsistent statement. The alleged inconsistency between Rodrigues's evidence and his prior statement was constituted by the omission in the prior statement of any reference to the union person identifying himself to Rodrigues in the pre-induction conversations.

21 Section 45(3) gives the Court a discretion to admit the document containing the prior alleged representation. The circumstances in which that discretion ought to be exercised was not the subject of any detailed submissions and is not made particularly clear by s 45 itself: see Odgers "Uniform Evidence Law", 9th ed, at [1.2.4380]. In *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [120] Finn J considered that some justification was required to ground the exercise of the discretion conferred. In *Australian Building and Construction Commissioner v Abbott (No 2)* [2011] FCA 308 at [14] the discretion was exercised so as to fairly enable the court to understand the context of the cross-examination and whether the alleged inconsistency existed.

22 The only justification relied upon by the applicant was that Rodrigues's statement was probative of the extent of any inconsistency. However, it is not what the statement says but what it omits which is the subject of the inconsistency. The fact of the omission was not in issue and, in those circumstances, the contents of Rodrigues's statement could not have shed any light on the extent of the alleged inconsistency. There was therefore no forensic justification for its tender

and no other basis was relied upon. I have determined that the statement ought not be admitted into evidence.

23 Even if I had admitted the statement into evidence, its contents would not have assisted the applicant on the question of whether the union person identified himself to Rodrigues. To the contrary, the statement consistently describes the person as "the union man" when recounting events on 5 October 2009 leading up to and including the site induction meeting. It is only after the statement gives an account of Rodrigues asking for and being given the name of the "union man" by other workers that the name John Constantinou is used to describe the union person. That statement suggests that the first time Rodrigues had a name to associate with the union person was when he was given a name (correctly or not) by the other workers that he spoke to later on 5 October 2009.

identification evidence of Pihlaniemi

24 Relevantly to the question of who made the alleged representation, Pihlaniemi's evidence in-chief was that the union person was introduced at the site induction meeting. His evidence was that after some three hours of induction, the person who conducted the site induction introduced a second person as John Constantinou and that the person stood up and said that he was the union representative. It was that person that Pihlaniemi said had a receipt book for those who wanted to become members of the union and thereafter walked to the table at which Pihlaniemi, Rodrigues and Lorimer sat and said "what's it going to be boys?".

25 I am unable to accept as reliable evidence, the evidence given by Pihlaniemi that the union person was introduced at the site induction meeting as John Constantinou. In cross-examination, Pihlaniemi conceded that he had some doubt about his evidence that the union person was introduced as Constantinou.

26 The doubt in Pihlaniemi's mind is supported by a number of other matters. Firstly, despite Pihlaniemi's evidence that both Rodrigues and Lorimer were at the induction meeting and sitting next to him, Rodrigues did not give evidence that the person was introduced by name at the induction meeting. I would infer that if he had been able to give that evidence, the applicant's counsel would have sought to elicit it from him. He did not. Lorimer was not called and the failure to call him was not explained.

27 Further, Pihlaniemi did not take a note of the name or of the meeting. There is no evidence that at a time proximate to the meeting he recorded the name. Despite his evidence that only two people spoke to the meeting and that both were introduced at the meeting, he could not recall the name of the person who conducted the meeting. He could not recall the name of the Occupational Health and Safety representative at the site, and had been unable to do so in December 2009 when he gave a statement to the applicant. At the time Pihlaniemi gave a statement to the applicant, he was told by the applicant that the applicant was investigating a person called John Constantinou. Again, the evidence does not permit me to exclude, as a real and significant possibility, that Pihlaniemi adopted the name given to him by the applicant to assist his own poor recollection.

28 It seems to me that in all the circumstances, the doubt that Pihlaniemi himself conceded is likely to be well founded. The association in his mind of the union person with the name John Constantinou, is more likely to be the result of that name being identified to him by the applicant, than any reliable recollection of a name given when the union person was introduced at the site induction meeting.

The receipt given to Pihlaniemi

29 I accept the evidence of both Rodrigues and Pihlaniemi that at the end of the induction meeting, the union person approached the table at which Rodrigues, Pihlaniemi and Lorimer sat and, having told the meeting he had a receipt book for those who wanted to become members, he asked Rodrigues, Pihlaniemi and Lorimer "what's it going to be?" or words to that effect. Rodrigues then produced a credit card and paid for the memberships of each of Rodrigues, Pihlaniemi and Lorimer. The union person then wrote a receipt made out to Pihlaniemi, which Pihlaniemi kept, and which was tendered in evidence. The receipt is headed with the name of the CFMEU, is made out to Pihlaniemi and has a signature box in which the initials "JC" appear. The applicant asked the Court to infer that the receipt was given by Constantinou and on that basis find that Constantinou was the person who made the demand to join the union.

30 Whilst I would readily infer that the person who provided the receipt was collecting union dues on behalf of the CFMEU and that the initials to his name are JC, the evidence does not permit the inference for which the applicant contends.

31 There is no evidence that Constantinou was the CFMEU delegate or other official at Chadstone. There is not even evidence that Constantinou attended Chadstone at the relevant time or at all. Constantinou admits that he was at all relevant times a delegate of the Construction and General Division of the CFMEU and an officer of the CFMEU, but that is the extent of the admission. The evidence does not place Constantinou (as a delegate or otherwise) at Chadstone or even in Victoria. Rodrigues was unable to say how many union representatives were on the Chadstone site or how many were from the CFMEU. His evidence that hundreds of workers attended the site induction meeting suggests a multiplicity of union representatives. It may well be that Constantinou is the only CFMEU delegate with the initials JC, but there is no evidence before me at all from which such a finding could be made. To conclude that Constantinou was the person who gave the receipt simply because he is a delegate of the CFMEU and has a name which corresponds with the initials JC, would involve impermissible speculation.

32 Finally, I reject the applicant's reliance upon the failure of Constantinou to give evidence to explain or answer the evidence led by the applicant. That failure is said by the applicant to allow the Court to more readily draw the inferences for which the applicant contends. Even if the fact that Constantinou has a privilege against self-exposure to a penalty were to be put to one side, for the reasons I have explained, the evidence relied upon by the applicant on the question of identity failed to shift the evidentiary burden upon the respondents. In that context, the evidence called by the applicant did not call for an evidentiary response from the respondents. The fact that no evidence was called is thus explicable and not a basis for the drawing of an adverse

inference.

disposition

33 In light of my conclusion that the applicant has failed to identify Constantinou as the person who made the representation alleged and given the applicant's concession that if he failed on that issue his case failed, it is not necessary that I determine the other issues raised by the case.

34 The applicant's application should be dismissed. I will make an order to that effect.

35 No application for costs has been made by the respondents. I presume that to be the case because of the restriction imposed by s 570 of the Fair Work Act. I will make no order as to costs.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 2 May 2012

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2012/2012fca0450
CASE PAGE	https://chat.esheria.ai/case-law/australia/alfred-v-construction-forestry-mining-and-energy-union-2012-fca-450-2012

Prepared on 28 October 2026 · Esheria