

FEDERAL COURT OF AUSTRALIA

Lunt v Victoria International Container Terminal Limited (No 1) [2019] FCA

467

File number: VID 511 of 2018

Judge: **RANGIAH J**

Date of judgment: 2 April 2019

Catchwords: **EVIDENCE** – self-incrimination – whether witness required to give evidence that may tend to prove they are liable to a civil penalty – whether the interests of justice require the witness to give evidence – where evidence is not critical to the case – witness not required to give evidence about his involvement in a picket

Legislation: *Evidence Act 1995* (Cth) ss 128(3), 128(4), 128(7) and 192
Fair Work Act 2009 (Cth) s 343

Cases cited: *Gedeon v The Queen* (2013) 280 FLR 275

Date of hearing: 1 April 2019

Date of last submissions: 1 April 2019

Registry: Victoria

Division: Fair Work Division

National Practice Area: Employment & Industrial Relations

Category: Catchwords

Number of paragraphs: 14

Counsel for the Applicant: Mr H Borenstein QC with Mr E White

Solicitor for the Applicant: Maurice Blackburn Lawyers

Counsel for the First Respondent: Mr S Wood QC with Mr N Burmeister and Ms R Sweet

Solicitor for the First Respondent: Seyfarth Shaw

Counsel for the Second,
Third and Fourth
Respondents:

The Second, Third and Fourth Respondents filed submitting
notices

REASONS FOR JUDGMENT

(DELIVERED EX TEMPORE AND REVISED)

VID 511 of 2018

BETWEEN: **RICHARD LUNT**
Applicant

AND: **VICTORIA INTERNATIONAL CONTAINER TERMINAL LIMITED (ACN 164 915 655)**
First Respondent

FAIR WORK COMMISSION
Second Respondent

THE AUSTRALIAN MARITIME OFFICERS UNION (and another named in the Schedule)
Third Respondent

RANGIAH J:

- 1 In the principal proceeding, the applicant, Richard Lunt, seeks declarations including a declaration that the approval of a particular enterprise agreement by the Fair Work Commission is void and of no effect.
- 2 The first respondent has brought an interlocutory application seeking an order that the principal proceeding be dismissed on the ground that it is an abuse of process. The first respondent alleges that Mr Lunt has not brought the proceeding for his own predominant purpose, but for the purposes of the Construction, Forestry, Maritime, Mining and Energy Union (**the Union**). On that basis, it alleges that the proceeding is an abuse of process.
- 3 Mr Lunt has deposed that:
 32. I genuinely seek the relief sought in this proceeding. I instituted this proceeding because I want to Court to declare that the Enterprise Agreement is invalid and quash it. I am concerned that the conditions in the Enterprise Agreement are substandard and that the Enterprise Agreement was voted on by 8 employees who are not representative of employees covered by the agreement.
 33. I understand that VICT has alleged that the true moving party is the Construction, Forestry, Maritime, Mining and Energy Union. This is incorrect. I am the true moving party in this proceeding.

4 The first respondent has challenged Mr Lunt's evidence through the production of evidence and by cross-examination. The first respondent seeks to establish that there is a very strong relationship between the Union and Mr Lunt, such as to demonstrate that he is carrying out the Union's purpose and not his own by bringing the principal proceeding.

5 The first respondent wishes to cross-examine Mr Lunt upon the topic of his involvement in a picket at the first respondent's terminal in November and December 2017. It seeks to demonstrate that Mr Lunt was intimately involved with that picket. If it is established that the Union organised the picket, a matter upon which I have not been addressed, then establishing that Mr Lunt was intimately involved with the picket would assist the first respondent to establish the closeness of his relationship with the Union and his willingness to help the Union to achieve its purpose.

6 The parties agreed that if Mr Lunt gives evidence about his involvement in the picket, it may expose him to a civil penalty for contravention of s 343 of the *Fair Work Act 2009* (Cth). Mr Lunt objected to giving that evidence. I determined that there were reasonable grounds for that objection and gave him the information required under ss 128(3) and (7) of the *Evidence Act 1995* (Cth) (**the Evidence Act**).

7 Mr Lunt then declined to give the relevant evidence voluntarily. The first respondent asked the Court to require Mr Lunt to give that evidence. That is the issue which I must now determine.

8 Section 128(4) of the Evidence Act provides, relevantly:

(4) The court may require the witness to give the evidence if the court is satisfied that:

...

(b) the interests of justice require that the witness give the evidence.

9 Section 192 of the Evidence Act provides:

192 Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and

- (b) the extent to which to do so would be unfair to a party or to a witness; and
- (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
- (d) the nature of the proceeding; and
- (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

10 The dispute is whether the interests of justice *require* that Mr Lunt be required to give evidence of his involvement in the picket. The applicant submits that, while Mr Lunt's evidence as to his involvement in the picket may be relevant, it is only one of a number of pieces of evidence adduced by the first respondent concerning the closeness of his relationship with the Union. The applicant submits that the interests of justice do not require that Mr Lunt give that evidence.

11 The first respondent accepts that Mr Lunt's involvement in the picket is not, of itself, crucial or critical to its case. However, it submits that such evidence is an important piece in a mosaic of evidence that establishes that Mr Lunt is not the true moving party.

12 In *Gedeon v The Queen* (2013) 280 FLR 275, Bathurst CJ (with whom the other members of the Court agreed) said:

285 A number of matters should be noted at the outset. First, the onus was on the appellant to establish that the interests of justice required the evidence to be given. That, in my opinion, is the effect of s 142 of the *Evidence Act*: see Odgers S, *Uniform Evidence Law* (10th ed, Thomson Reuters, 2012) at [1.3.13060].

286 Second, the requisite standard provided for in s 128(4)(b) of the *Evidence Act* is that the interests of justice require admission of the evidence. It is not enough that the evidence be relevant and in this case satisfy the exception to the credibility rule in s 103 of the *Evidence Act*. This relatively high standard of satisfaction is consistent with the fact that the legislation to a significant extent abrogates a basic common law right.

13 The first respondent accepted that Mr Lunt's evidence as to his involvement in the picket, while important, is not crucial or critical to its case. The first respondent has led or adduced other evidence, including that the Union is funding Mr Lunt's proceeding and that it has paid a substantial debt for him in the past, to demonstrate the closeness of their relationship.

- 14 I have considered the nature and relative importance of Mr Lunt's evidence concerning his involvement in the picket. Even assuming that it can be established that the Union organised the picket, I am not satisfied to the relatively high standard demanded that the interests of justice require that Mr Lunt should be required to give that evidence.

I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate:

Dated: 8 April 2019

SCHEDULE OF PARTIES

VID 511 of 2019

Respondents

Fourth Respondent:

CONSTRUCTION, FORESTRY, MARITIME, MINING
AND ENERGY UNION