Unions, Vicarious Liability and Quasi-criminal Conduct

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This note considers two recent intermediate appellate court decisions concerning the circumstances in which an employer union will be vicariously liable for the actions of its employed organisers in quasi-criminal proceedings.

Introduction

In what circumstances will an employer union be vicariously liable for the actions of an employed organiser in quasi-criminal proceedings, such as proceedings for contempt of court, that is, for present purposes, disobedience of an order of the court? If a trade union is prohibited by court order from engaging in certain conduct, and one of its employed organisers engages in that prohibited conduct, will the union be held responsible where it has not authorised the particular actions of the organiser? While this question has not yet been addressed by the High Court it has been considered recently by two intermediate appellate courts in Australia: *Evenco Pty Ltd v. Australian Building Construction Employees and Builders Labourers Federation (Qld Branch) & Ors* [2001] 2 Qd.R 118, a decision of the Queensland Court of Appeal; and *Hanley v. Automotive, Engineering, Printing & Kindred Industries Union* (2000) 102 IR 359, a decision of the full Federal Court.

In this paper I intend to outline the tests discussed by the Queensland Court of Appeal and the full Federal Court to determine when an employer union will be vicariously liable for the actions of its organisers in quasi-criminal proceedings. It appears that there is now some uncertainty as to the proper test in such circumstances, or as the full Federal Court said in *Hanley*:

> [T]here is a discernible tension . . . concerning vicarious liability in what might broadly be described as 'penal' or 'quasi-criminal' proceedings between those which require only that it be shown that the relevant acts were done in the 'course of employment', and those which require positive proof of authority to do the acts (at [66]).

Evenco at first instance

In late 1986, Evenco, a labour hire company, initiated proceedings against the defendant union, the CFMEU, seeking damages for intimidation and interference with contract: *Evenco Pty Ltd v. Amalgamated Society of Carpenters, Joiners, Bricklayers & Plasterers of Australasia Union of Employees, Qld* [1999] QSC 53 (23 March 1999) at [12], per Chesterman J. Those proceedings were discontinued by Evenco following an undertaking given by the CFMEU, which

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was incorporated in the Court's order made on 2 March 1987, that it would, amongst other things, 'refrain from any act or omission, having the object:

> (c) Of directly or indirectly preventing or hindering the lawful supply by the Plaintiff of labour on hire to such other person (at [13]).

In mid 1997, Spinks, an organiser employed by the CFMEU, told Sarcon Building Services, a contractor carrying out plastering works at the Southport Law Courts redevelopment project, that it could not use labour supplied by Evenco (at [76]).

Spinks' conduct, Chesterman J found, was in breach of the undertaking given by the CFMEU in 1987 as his conduct was to 'prevent or hinder the lawful supply of labour' by Evenco to Sarcon (at [76]). While there was no evidence that the CFMEU had authorised Spinks' conduct, Chesterman J found that the union was liable because Spinks was acting in the 'course of employment' and his conduct 'was not casual or accidental', and thus in contempt of court (at [76]).

In finding the CFMEU liable, Chesterman J followed a long line of English authority commencing with *Rantzen v. Rothschild* (1865) 14 WR 94 in 1864 and including *Re Supply of Ready Mixed Concrete (No 2); Director-General of Fair Trading v. Pioneer Concrete (UK) Ltd* [1995] 1 All ER 135, a decision of the House of Lords in 1994. In that later decision, Lord Nolan stated that an employer company will be in contempt of court where its servants, 'acting in the course of their employment', disobey an injunction, provided that their conduct is not 'merely casual or accidental and unintentional' (at 156).

Further, Chesterman J applied the 'course of employment test'. In so doing, his Honour stated that attention should focus not on whether Spinks was authorised to do what he did but 'rather, the question should be was the employee performing a function of a kind which he was employed to do?' (at [70]). Spinks, Chesterman J said, was doing the sorts of things he was employed to do.

> He was to argue and remonstrate with employers and contractors to secure what he was instructed were the appropriate terms and conditions for building workers who were or might become members of the CFMEU (at [70]).

And, given that Spinks' conduct was not 'casual or accidental', the CFMEU is 'in breach of the undertaking and has committed a contempt of court' (at [76]).

EVENCO ON APPEAL

On appeal, Chesterman J's decision was upheld, although the appellate judges were not unanimous in their reasons for so doing: *Evenco Pty Ltd v. Australian Building Construction Employees and Builders Labourers Federation (Qld Branch) & Ors* [2001] 2 Qd.R 118 (McMurdo P, Pincus JA and Williams J).

McMurdo P accepted that the trial judge, Chesterman J, used the term 'in the course of employment' interchangeably with the term 'acting within the scope of his authority' and said:

> It is . . . settled law that a master or principal is liable if his or her servant or agent breaches an undertaking given by the master or principal in circumstances where

> he or she is acting on behalf of and within the scope of the authority conferred by the master or principal (at [5]).

And further:

> Whilst there was no evidence that Spinks had specific authority to act as he did in offending the undertaking, his actions were committed in the course of his employment whilst he was performing a function consistent with his duties as union organiser; the necessary authority may be tacit (at [6]).

Pincus JA, however, considered the English decisions followed by Chesterman J at first instance and said that such authority should not be followed in Australia. His Honour rejected the 'course of employment' test. Rather:

> The proper rule is that the employer must be shown to have authorised the act complained of or shown not to have taken proper steps to prevent it. (at [27] [37]).

On the facts as found in *Evenco*, Pincus JA said Spinks was not authorised to do what he did. Importantly, Pincus JA said:

> The fact of authority had to be proved beyond reasonable doubt and there was nothing to prove it. Inferences from what union organisers generally do could not fill the gap, nor could it be filled by judicial knowledge (at [23]).

Nevertheless, Pincus JA held the union liable for Spinks' actions as it has not taken reasonable steps to ensure compliance with the undertaking. Spinks, it seems, was unaware of the undertaking. While training courses for new organisers had included instruction on the undertaking for some years after 1987, by the time Spinks completed the course this was no longer so.

Finally, Williams J accepted that Chesterman J had applied the proper test, that is the 'course of employment test' (at [107]). However, his Honour said that if this test was not the correct test he agreed with Pincus JA's conclusion that there was no evidence that Spinks had been authorised to do what he did. Further, the CFMEU was in contempt because it had not taken all reasonable steps to ensure compliance with the undertaking (at [108]).

HANLEY

In *Hanley* an organiser employed by the AMWU, Dowling, was found by the full Federal Court to have engaged in conduct in contravention of section 170NC(1) of the *Workplace Relations Act 1996* (Cwlth). Section 170NC(1) prohibits a person from engaging in threatening conduct with the intention of coercing another person to enter into a certified agreement. In short, in October 1998, Dowling visited a worksite where he became aware that a subcontractor, Pondeljak, was not party to a certified agreement. Amongst other things, Dowling told Pondeljak that as Pondeljak did not have a certified agreement he could not work on site and that he would not be working on site until he signed a certified agreement. The full Court found such conduct to be in breach of section 170NC(1).

The Court then considered whether the AMWU was liable for Dowling's conduct. The applicant argued that the union was liable for Dowling's conduct on three grounds:

(1) directly liable at common law;
(2) vicariously liable at common law; or
(3) by operation of section 349 (at [63]).

Directly liable at common law

Applying *Tesco Ltd v. Nattrass* [1972] AC 153, the Court said that in order for the union to be directly liable at common law 'it is necessary to show that Dowling was, as a matter of law, acting not merely as a servant, representative, agent or delegate of the Union, but rather as the "directing mind and will" of the Union when he engaged in conduct that contravened s. 170NC(1)' (at [64]). This, the Court said, could not be shown. Dowling was acting as an employed organiser of the Union. He could not be characterised as the Union's 'directing mind and will' (at [65]).

Vicarious liability

The full Court found the union vicariously liable at common law for Dowling's conduct.

The Court referred first to the 'course of employment test' articulated by Chesterman J in *Evenco* and upheld on appeal by McMurdo P and Williams J. It then discussed in some detail the decision of Pincus JA and concluded:

> There is force in Pincus JA's view in *Evenco* that in proceedings of a 'quasi-criminal' nature, such as proceedings for civil contempt, vicarious liability should not be determined by the strict application of the 'course of employment' test. A less stringent approach would expose a body corporate to liability by virtue of the conduct of an employee, however aberrant it might be, as long as it could be characterised as 'in the course of employment'. The same considerations apply . . . to proceedings for a penalty in respect of proscribed conduct and intent under s. 170NC. Consequently, to establish vicarious liability under s. 170NC it is necessary to adduce evidence which establishes, on the balance of probabilities, that the act complained of was authorised (at [75]).

The Court continued stating that:

> If it is sought to be proved that an act was authorised, actual authority must be shown, although that authority might be a broad one . . . Furthermore, it is well established that, once authority to engage in certain tasks is proved, vicarious liability extends to unauthorised modes of performing those tasks . . . If it is sought to be proved that the employer is liable because he or she failed to take proper steps to prevent the acts complained of (in, for example, contempt proceedings involving breaches of an undertaking), it must be shown that there were circumstances which required the employer to take steps and that the steps, if any, taken by the employer were insufficient to avoid vicarious liability' (at [76]).

The Union had argued before the Court that the applicant had not established that Dowling was authorised by the Union to do what he did. This submission,

the Court said, ignores the way in which the case was pleaded. In its defence, the Union had admitted that Dowling was 'authorised to act on behalf of the Union in respect of industrial and employment disputes concerning the Union and its members', at least to the extent that his conduct was lawful (at [81]).

The qualification that Dowling's authorisation extended to only lawful conduct did not assist the Union, the Court said. Dowling was authorised to 'act on behalf of the Union in respect of industrial and employment disputes concerning the Union and its members'. His conduct in breach of section 170NC involved 'an industrial or employment dispute concerning the Union and its members' (at [82]). He was therefore authorised to do what he did and hence the Union was vicariously liable for his actions.

Section 349

The Court also found the union liable under section 349.
Section 349(2) provides:

> Any conduct engaged in on behalf of a body corporate by:
>
> (a) an officer, a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority: or
>
> (b) . . . shall be taken, for the purposes of this Act, to have been engaged in also by the body corporate.

The Court was 'satisfied that Dowling was acting 'on behalf of the Union', and further, that he was acting 'within the scope of his apparent authority' when he engaged in the conduct that contravened s. 170NC (at [78] and [85]).

COMMENT

The vicarious liability of unions (and indeed any other corporation) in proceedings for contempt, as well as other quasi-criminal proceedings, flowing from the actions of employees has been little considered in Australia. Pincus JA noted, for example, that the issue has not been considered by the High Court (at [28]). The position following *Evenco* and *Hanley* is, in my opinion, unsatisfactory.

Evenco and *Hanley* raise important and fundamental issues. First, should a union, or any corporation for that matter, absent legislation, be vicariously liable for the quasi-criminal acts of its employees? At common law it is exceptional for a corporation to be liable for the criminal conduct of its employees (Ford *et al.* 1999: 683). And, as Spender J said in *Forestview Nominees Pty Ltd v. Perron Investments Pty Ltd* (1999) 93 FCR 117, a decision not cited in either *Evenco* or *Hanley*:

> [I]f all proceedings for contempt have to be seen as criminal in nature, there is no room for the imposition of vicarious liability. At the core of the notion of criminal responsibility is the requirement of mens rea (at 121).

Further, his Honour said:

> The law in Australia has resolutely rejected any notion of imputed criminal liability (at 121).

This accords with Lord Denning's view in *Heatons Transport (St Helens) Ltd v. Transport and General Workers' Union* [1973] AC 15:

> Disobedience to the orders of the court is an offence of a criminal character . . . It requires a guilty mind (at 50).

At the very least, if tortious concepts such as vicarious liability are to be imposed to fix liability on employers for the quasi-criminal conduct of employees there needs to be judicial discussion of the policy reasons for the adoption of such a course. The law of tort involves different policy considerations to that of crime being concerned, broadly speaking, with compensation rather than punishment.

Second, if it is accepted that a union may be vicariously liable for the quasi-criminal acts of employed organisers, what is the proper test for fixing liability? Is it the course of employment test as articulated by Chesterman J, and upheld on appeal by McMurdo P and Williams J? Or is it the two pronged test formulated by Pincus JA? That is, was the organiser authorised to do the act complained of or, failing authorisation, did the union take proper steps to prevent that act?

The 'course of employment test' has some difficulties. As noted above, reliance on concepts derived from tort seems misplaced when considering liability for quasi-criminal acts. Further, the full Federal Court does not seem to have favoured the 'course of employment test' preferring the test put forward by Pincus JA.

If nothing else, decisions such as *Evenco*, *Hanley* and, in the broader context, *Forestview Nominees*, illustrate that there is considerable uncertainty at the intermediate appellate level in Australia as to the proper test for determining vicarious liability of employer unions in quasi-criminal proceedings, such as contempt.

REFERENCE

Ford HAJ, Austin RP, Ramsay IM (1999) *Ford's Principles of Corporation Law*. Sydney, Butterworths.