



Case Summaries

Case 1 - Jim Pearson Transport v Transport Workers' Union of Australia [2007] AIRC 559

On 5 April 2007, Jim Pearson Transport Pty Ltd (JPT), a distribution company, was given notice by the Transport Workers Union (TWU) of its intention to inspect JPT's premises and records for suspected breaches of the *NSW Occupational Health and Safety Act 2000* (the OHS Act).

The TWU's notice advised JPT that the inspection would be carried out by officials with the relevant permits pursuant to s.756 of the *Workplace Relations Act 1996* (Cth) (the WR Act) and provided JPT with 24 hours written notice of the inspection as required by s.757 of the WR Act.

The notice advised JPT that the purpose of the inspection was to investigate suspected breaches of the OHS Act, including but not limited to fatigue management, remuneration, driving hours and the maintenance of plant and equipment. The notice outlined the kinds of documents JPT was required to produce.

On 12 April 2007, TWU officials attended JPT's premises during working hours to conduct the inspection and requested documents including GPS reports. JPT agreed to provide TWU access to these documents on 18 April 2007. However, JPT filed an application in the AIRC for orders against the TWU for a right of entry dispute under Part 15 of the WR Act.

The orders sought by JPT were that:

- the permit holder had not provided reasonable grounds for suspecting a breach in accordance with s.754 of the WR Act;
- the inspection of documents was for all driver employees including non-members; and the permit holder had not complied with s.748 of the WR Act which concerned the rights of permit holders after entering premises.



The TWU advised the New South Wales Industrial Relations Commission of a dispute seeking directions that the requested records be made available for a suspected breach of the OHS Act and the relevant award.

Findings of the AIRC – Senior Deputy President Hamberger

Certain restrictions which apply to right of entry to investigate breaches of the Act, awards or agreements do not apply to right of entry for OH&S purposes. For example, provisions requiring a permit holder to have reasonable grounds for suspecting a breach in exercising right of entry under s.747 of the WR Act; and the burden of proof in establishing the existence of reasonable grounds for suspecting a breach under s.754 do not apply to right of entry for OHS purposes under Division 5 of Part 14 of the WRA.

The TWU had met the requirements of Division 5 of Part 15 of the WRA and were able to exercise the powers contained in the OH&S Act.

Summary of the Law

In exercising right of entry for OHS purposes under the WR Act an official must be a permit holder exercising this right during working hours.

At least 24 hours written notice of intention to exercise right of entry must be provided to the occupier of the premises before entry can occur.



Case 2 - Building Industry and Special Projects Inspectorate v McDonald (2006) WAIRC 03664

In September 2005 the Building Industry and Special Projects Inspectorate (the Inspectorate) applied under s.49J(5) of the *Industrial Relations Act 1979 (WA)* (IR Act) to revoke or suspend the Western Australian Industrial Relations Commission's authorisation issued to Mr Joe McDonald of the CFMEU in August 2002.

The Inspectorate submitted that in February 2004 when Mr McDonald exercised his power of entry he acted in an improper manner at the construction site occupied by Pindan Pty Ltd. It was argued that Mr McDonald intentionally and unduly hindered an employer or employees during their working time.

The day before Mr McDonald visited the site, there were activities undertaken relating to erecting a tower crane. The site was visited by the Building Industry Taskforce and Worksafe and discussions were held concerning whether employees would remain on site during the crane's erection. The CFMEU's position was that they had a difficulty with the safety of erecting the tower crane when people were working on site.

Examples of Mr McDonald's alleged behaviour included stating to the site's employees that he would sit on any load that the cranes tried to lift, and climbing onto the cranes entry walkway and positioning himself between the crane operator and the crane's cabin.

Findings of the WAIRC

On the evidence presented, the Inspectorate failed to establish that Mr McDonald had engaged in improper conduct or that there had been intentional and undue hindrance of an employer or employee in their working time.



Summary of the Law

- The right of an authorised representative to enter premises under s.49H(1) of the *IR Act* cannot be negated because of a difference of opinion between the parties as to whether:
 - there is or is not a breach; or
 - discussions with employees should be held.
- For s.49J(5) of the *IR Act* to be invoked there must be a finding that a person acted in an improper manner in the exercise of the power granted to him and that he unduly hindered the work. The *Occupational Health and Safety Act 1984 (WA)* is mentioned under s.49I of the *IR Act* which enables an authorised representative to enter into any premises where there are relevant employees for the purpose of investigating any suspected breach.
- There can be “due hindrance” of an employer or employees during their working time because the legislation under s.49J(5)(b) of the *IR Act* recognises that hindrance must be both intentional and undue.