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FEDERAL COURT OF AUSTRALIA

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Tenix Defence Pty Ltd

Evidence Act 1995 (Cth): ss 72, 75

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA v TENIX DEFENCE PTY LTD

V 23 of 2003

GOLDBERG J
20 JANUARY 2003
MELBOURNE

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GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY

V 23 of 2003

BETWEEN: **COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA**
Applicant

AND: **TENIX DEFENCE PTY LTD**
Respondent

JUDGE: **GOLDBERG J**
DATE: **20 JANUARY 2003**
PLACE: **MELBOURNE**

RULING

1 Objection has been taken by the respondent to a number of passages in the affidavits which have been tendered, read and relied upon by the applicant. Objection has been taken to passages in pars 12, 13 and 15 of the affidavit of Mark Brien, affirmed on 16 January 2003, pars 8 and 9 of the affidavit of Glenn Raymond Kelly, affirmed on 16 January 2003, and the affidavits of Paul William Smith and Lawrence Ian Tyquin, affirmed on 16 January 2003, to the extent to which they refer to pars 8 and 9 of the affidavit of Mr Kelly and verify the truth of the statements therein. Objection is also taken to part of par 3 of the second affidavit of Mr Brien, affirmed this day, 20 January 2003.

2 The substance of the objection is that each of the relevant parts of those paragraphs is rendered inadmissible by the hearsay rule in s 59 of the *Evidence Act* 1995 (Cth) ("the Act"), and do not comply with s 75 of the Act so as to be otherwise made admissible. Section 75 of the Act provides:

> *"In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source."*

3 In substance, the applicant's case depends upon being able to establish that the respondent has made statements or undertaken conduct which amounts to coercion as

prohibited by s 170NC(1) of the *Workplace Relations Act* 1996 (Cth). Paragraphs 12, 13 and 15 of Mr Brien's affidavit are in the following terms:

> "12. *On Monday 13 January 2002, I rang McClymont and asked him what Alton's position was in relation to a replacement agreement and in particular, whether Alton was prepared to make an agreement with the CEPU in the terms of the CEPU's proposed replacement agreement as set out in exhibit MB2. McClymont replied that Alton had been prepared to sign on to the agreement sought by the CEPU on the previous Friday (10 January 2003). He said however that he had been called into a meeting with Tenix management on Friday afternoon and been told that if Alton signed the proposed agreement sought by the CEPU containing the 36 hour week, Tenix would terminate Alton's contract for the provision of labour at the site.*
>
> 13. *I then asked McClymont if I could meet with the Alton employees on Tuesday 14 January 2003 to discuss with them what he had just told me. He agreed to this. He also added that if the employees attended the mass meeting on 15 January 2003 referred to in the notice of intended industrial action which the CEPU had served on Alton (Exhibit MB4 above), Tenix management had said that they would lock the employees out and not allow them to return to work afterwards and that the employees would not be paid.*
>
> 15. *On Tuesday 14 January 2003, at 2.30pm, I met with the Alton employees outside the gates of the site. Most Alton employees were present. It was reported to me by the employees that McClymont had met with them at 11.30am that day and informed them that, if they attended the mass meeting the next day, Tenix would lock them out of the site and they would not be paid. The employees also reported to me during this meeting that, in his meeting with them, McClymont had stated that, if Alton agreed to the agreement proposed by the CEPU containing the 36 hour week, Tenix would terminate Alton's contract."*

Paragraphs 8 and 9 of the affidavit of Mr Kelly are in the following terms:

> "8. *On 14 January 2003, I attended and performed work as per usual at the site. At approximately 11.30am, Scott McClymont, Managing Director of Alton, convened a meeting of all Alton employees based at the site. The meeting took place in the site shed. Approximately 25 employees attended the meeting. At the meeting, McClymont stated as follows:*
>
> > 'You have a meeting with Mark from the CEPU this afternoon. I've made it as late as possible so as to minimise the loss of pay for you as Tenix would not allow you back in once you leave for the meeting. Further, you also have a mass meeting tomorrow. If you go to that, Tenix won't allow you back on site after the meeting.'

During the meeting, McClymont also said words to the following effect:

> 'I have had a meeting with Tenix management. If Alton signs the proposed agreement with the 36 hour week in it, then Tenix will terminate my contract with them. Further, if you keep taking industrial action, Tenix will just lock you out and you will not be paid. If you put bans on, Tenix will stand you down and you will not be paid. If you attempt to work an 8 hour day, Tenix will lock you out the next day and if it is continued, Tenix may lock you out indefinitely.'

9. *During the meeting, I asked McClymont what his position was on the proposed replacement agreement. He replied that he was willing to sign it, but he couldn't now because Tenix had said that they would terminate his contract with them."*

Paragraph 3 of the second affidavit of Mr Brien is in the following terms:

"During this meeting, Mighell and McClymont had the following conversation:

Mighell: We have seen by the sheet that NECA sends out that you have indicated that you will accept the pattern EBA negotiated with NECA.

McClymont: Yes, but I have gone down to Tenix and said it is a 36 hour agreement. Now, they have said to me, look, it's 36 hours and we don't accept it."

The objection which is taken is that the statements made by Mr Scott McClymont are hearsay upon hearsay. The source of the statement made by Mr McClymont is identified, so Mr McClymont's evidence is admissible in relation to statements made by him, but the objection is that no source is identified from the camp of Tenix Defence Pty Ltd, the respondent.

Those parts which are said to be objectionable are that Mr McClymont had been called into a meeting with Tenix management and had been told that if Alton signed the proposed agreement, Tenix would terminate Alton's contract. The source within Tenix management, or the person involved with Tenix who was supposed to have made this statement, was not identified by Mr McClymont. In the same way, in par 13 the statement is made:

> *"Tenix management has said that they would lock the employees out and not allow them to return to work afterwards and that the employees would not be paid."*

In par 15, it is said that Mr McClymont had informed the employees that Tenix would lock them out of the site and they would not be paid and that Tenix would terminate Alton's contract. In each of those statements, there is no source within Tenix which is identified as the source of the statement.

In the same way, in Mr Kelly's affidavit, the statement is made by Mr McClymont that:

> *"... Tenix would not allow you back in once you leave for the meeting. Further, you also have a mass meeting tomorrow. If you go to that meeting, Tenix won't allow you back on site after the meeting."*

The statement is also made:

> *"I have had a meeting with Tenix management. If Alton signs the proposed agreement with the 36 hour week in it, then Tenix will terminate my contract with them ... Tenix will lock you out ..."*

This is said on a number of occasions. Mr McClymont also says what is attributed to him in par 9 of Mr Kelly's affidavit which is that he had said that he was willing to sign the agreement but he could not now because Tenix had said that they would terminate his contract with them. In a meeting between Mr Dean Mighell, representing the applicant, and Mr McClymont on 17 January, Mr McClymont is said to have stated:

> *"I have gone down to Tenix and said it is a 36 hour agreement. Now, they have said to me, look, it's 36 hours and we don't accept it."*

In none of the statements attributed to Tenix management is the source of the statements within Tenix identified. In my view, the opportunity to apply s 75 of the Act does not arise because evidence of the source of the statements made by Tenix is not identified by reference to a person. The fact that Mr McClymont is identified is of no assistance to the applicant in terms of admissibility, because the applicant wishes to have introduced into evidence statements which it can attribute to Tenix, namely that Tenix proposes to terminate the contract or that Tenix intends to terminate the contract. That is the relevant evidence upon which the applicant wishes to erect its case for coercion.

I am satisfied that the objection taken by the respondent to the parts of the affidavits to which I have referred are valid objections and that those parts of the affidavits to which I have referred, to the extent to which they attribute statements to Tenix, are inadmissible against Tenix. I so rule that those parts are inadmissible.

Mr Moore, who appeared for the applicant, submitted in the alternative that s 72 of the Act provided an exception again to the hearsay rule because under s 72, the hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind. I took the submission to be a reference to a person's intention.

I do not regard the statements which have been made as properly falling within s 72. Unlike the case of *Proctor & Gamble Australia Pty Ltd v Medical Research Pty Ltd* (2001) NSWSC 183 ("*Proctor & Gamble case*"), there is no attempt in the material to attribute the statements attributable to Tenix to even a range of possible people as occurred in the *Proctor & Gamble case*. I should add that when I say that no attempt is made, it is inherent in the nature of the evidence which has been given that it falls foul of the hearsay rule because of the very nature of the statement which is made. Nevertheless, the issue of admissibility has to be addressed.

In those circumstances, I will rule the following passages inadmissible:

- In par 12 of Mr Brien's first affidavit, affirmed on 16 January, the words:

  "and been told that if Alton signed the proposed agreement sought by the CEPU containing the 36 hour week, Tenix would terminate Alton's contract for the provision of labour at the site."

- In par 13, the words:

  "Tenix management had said that they would lock the employees out and not allow them to return to work afterwards and that the employees would not be paid."

- In par 15, the words:

  "McClymont had met with them at 11.30 am that day and informed them that, if they attended the mass meeting the next day, Tenix would lock them out of the site and they would not be paid."

and the words:

"McClymont had stated that, if Alton agreed to the agreement proposed by the CEPU containing the 36 hour week, Tenix would terminate Alton's contract."

- In par 8 of Mr Kelly's affidavit, the words in quotes:

"as Tenix would not allow you back in once you leave for the meeting ...
If you go to that, Tenix won't allow you back on site after the meeting."

and the words:

"then Tenix will terminate my contract with them ...
Tenix will just lock you out and you will not be paid. ...
Tenix will stand you down and you will not be paid. ...
Tenix will lock you out the next day and if it is continued, Tenix may lock you out indefinitely."

I should also add that there is an alternative objection to those passages in par 8 of Mr Kelly's affidavit. On one view, those statements are not statements attributed to Tenix but are expressions of opinion by Mr McClymont. To the extent to which they are expressions of opinion, they are not admissible; to the extent to which they are statements said to be attributable to Tenix, they fall within the vice to which I have already referred.

- In par 9, the words:

"because Tenix had said that they would terminate his contract with them."

- In Mr Brien's second affidavit, affirmed 20 January 2003, the words attributed to Mr McClymont:

"Now, they have said to me, look, it's 36 hours and we don't accept it."

- Those parts of Mr Smith's and Mr Tyquin's affidavits, to the extent to which they verify those passages in pars 8 and 9 of Mr Kelly's affidavit which I have ruled inadmissible.

That is the end of my ruling.

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I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Ruling herein of the Honourable Justice Goldberg.

Associate: Verity Quinn

Dated: 6 February 2003

Counsel for the Applicant:	Mr S J Moore
Solicitor for the Applicant:	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
Counsel for the Respondent:	Mr S J Wood
Solicitor for the Respondent:	Freehills
Date of Hearing:	20 January 2003
Date of Judgment:	20 January 2003