

Education and Employment Legislation Committee

12 October 2018

Tabled Doc#: 2
Tabled by: Ms Sandra Parker
Date: 24/10/18

Sandra Parker
Fair Work Ombudsman
414 La Trobe St,
Melbourne VIC 3000

Dear Ombudsman Parker,

I have noted with interest your recent comments regarding the upcoming political protests. I am concerned that your public comments to date may have given people the impression that if they attend these events they may be subjected to legal action. This is incorrect, and wholly at odds with the freedom of association working people enjoy in a democratic society.

Nowhere in your public comments to date have you addressed the obligations of employers under the Fair Work Act.

For example, employers who refuse leave requests because they do not wish for their employees to attend a protest may be acting contrary to the General Protections provisions of the Act.

Section 351 of the Fair Work Act clearly states that an employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's political opinion.

Note that "adverse action" is defined at section 342, and relevantly includes an employer discriminating between an employee and other employees and altering the position of the employee to the employee's prejudice.

Further, the political protests are lawful. Section 346 of the Fair Work Act states that adverse action cannot be taken against someone because that person engages in or has at any time engaged or proposed to engage in lawful activity. The maximum penalty for each breach by a corporation is \$63,000.

I am also concerned that the effect of your public comments to date may suggest that the protests are themselves illegal or unlawful, which is untrue. In doing so these comments may misrepresent both these lawful political protests and people's right to participate in them under section 347 (b)(iii) of the Act. This being the case your comments, taken on their own, may amount to misrepresentations under section 349 of the Act, which would place the office of the FWO in breach of the Act.

Of greater concern is the fact that your public comments to date may have had the effect of intimidating working people and emboldening employers who may wish to prevent their employees from attending these rallies.

I would encourage you to balance your existing public comments with a clear and unequivocal message to employers that reminds them of their obligations to allow leave to employees where it would otherwise be given, and the prospect that they too will be investigated and fined should they fail to do so on the basis of preventing people exercising their democratic rights.

Yours Faithfully,

Sally McManus
Secretary, ACTU

15th October, 2018

Sandra Parker
Fair Work Ombudsman
414 LaTrobe Street
MELBOURNE VIC 3000

Dear Ombudsman Parker

I refer to my correspondence of Friday last raising my concern at your communications concerning the ACTU Change the Rules rallies.

Since then it has come to my attention that in addition to your public comments your office has written to the Australian Industry Group about the rallies. This further material gives me greater concern that your office is engaged in a campaign to misrepresent the rights of employees in an effort to intimidate working people and embolden employers who may wish to prevent their employees from attending the rallies.

Copies of the letter from your office can be found on the following link to the Ai Group website.

https://cdn.aigroup.com.au/Workplace_Relations/working_together/AIG_MassRally_100818.pdf

This letter seeks the assistance of the Ai Group to pass on your advice concerning the rallies.

The letter asserts that if an employee withdraws his or her labour or fails to attend work to go to the rally they may contravene s417(1) of the Fair Work Act. In the context of your office's letter you are giving advice that attendance at the rally may constitute industrial action.

The letter goes on to say that pursuant to sections 470 and 474 of the Act, employees who participate in industrial action cannot be paid and must have pay deducted for attending. Again, in context your office's letter suggests that employees attending the rally must lose pay.

The letter refers to the right of employers to seek orders to stop industrial action. In context, this request to 'remind' encourages employers to seek orders against employees who wish to attend the rally.

Your letter then changes tack and becomes a threat that your office will monitor and investigate industrial action resulting from employees leaving work or failing to go to work to attend the rallies. That threat is followed by a request that employers make clear directions as to whether employees may attend the rallies, keep records of those directions and record whether employees comply with those directions, record any deductions in wages, and make records of any contact from third parties regarding the organising of industrial action.

The letter strengthens the concerns I raised with you in my correspondence of Friday. It is one-sided. It gives the strong impression that employees attending the rally will be engaging in unlawful industrial action. It is misleading.

The advice contained in the letter fails to make any reference to the right of employees to participate in lawful activities organised and promoted by their unions (s347). The rallies organised by the ACTU are lawful activities. They are political protests. The right to attend such an event is also a benefit under the Act and is a workplace right. It is unlawful for employers to take or to threaten to take action against employees to prevent them from exercising a workplace right (s340).

It also fails to warn employers that they cannot discriminate against or threaten to discriminate against employees who seek to participate in political rallies (s351).

It further ignores High Court authority such as *Lange v Australian Broadcasting Corporation* (1997) CLR 520 that laws of the parliament should not operate to infringe the requirement of freedom of political communication imposed by ss 7, 24, 64 or 128 of the Constitution.

By focussing on s417 your letter is confined in its application to a very small group of employees. Those who might otherwise be required to work on the day of the rally, have an in term enterprise agreement and who are not entitled to other leave to be absent from work. As you are aware a large part of the Australian workforce is casual, most are not covered by an in term enterprise agreement, and many of those will be entitled to seek leave that would allow them to attend the rallies.

The assertion that attendance at the rallies is industrial action is also questionable. It ignores the case law on industrial action that 'action will not be industrial in character if it is political and stands completely outside the area of disputation and bargaining' (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290). Reference to that case appears in the note to the definition in industrial action in section 19 of the Act.

Your letter is misleading and by sending it your office has acted contrary to s345 of the FW Act. I invite you to retract it. If you have sent similar letters to other employer organisations I invite you to retract those letters as well.

I ask that you reply to this letter promptly setting out the course you propose to take to rectify your contravention.

Yours faithfully

Sally McManus
Secretary, ACTU



Australian Government

Fair Work

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17 October 2018

Ms Sally McManus
Secretary
Australian Council of Trade Unions (ACTU)
Level 4/365 Queen Street
Melbourne Vic 3000

Dear Ms McManus

I refer to your letters dated 12 and 15 October 2018.

As an independent statutory agency, the Fair Work Ombudsman (FWO) takes an impartial and balanced approach to our regulatory responsibilities under the *Fair Work Act 2009* (FW Act).

In accordance with our statutory role under the FW Act, the FWO notified all workplace participants of their obligations under the Act in relation to the rallies scheduled to take place across Australia between 18 October and 20 November 2018. This notification occurred through a public statement to “employees, employers and registered organisations” on the agency’s website, as well as the agency sending information letters to industry groups and employer associations. These notifications were to educate and assist parties in order to prevent any inadvertent non-compliance.

In line with our usual approach, we will continue to review and update our website notifications and support materials to educate and assist workplace participants in relation to the upcoming rallies. I note that since 1 January 2018, the FWO’s website pages relating to industrial action have been viewed over 32,000 times, which demonstrates the significant public interest in this issue.

The approach adopted by the FWO to notify workplace participants is appropriate and consistent with its functions under section 682 of the FW Act to provide education and advice to the community, including employees and employers, to assist them to comply with Commonwealth workplace laws.

The FWO rejects any assertion that it acted contrary to the FW Act. The notifications did not contain the implications set out in your letters and did not suggest that protests or rallies are themselves unlawful. The notifications did not tell, imply or encourage employers to refuse leave but rather provided factual information in accordance with the FW Act, that an employee’s leave must be authorised by an employer.

The public notification via our website is precise, contains information relevant to the obligations of both employees and employers and directs parties to where they can obtain further information on industrial action from the FWO's website. Further, FWO's website contains extensive information relating to all parts of the FW Act, including all of the provisions referred to in your letters.

The FWO will continue to monitor compliance and, where appropriate, investigate alleged contraventions of all applicable sections of the FW Act, including the adverse action and unprotected industrial action provisions.

We trust the ACTU will assist its affiliates to ensure that they comply with the FW Act and if the ACTU becomes aware of any potential non-compliance with the FW Act, it can inform the FWO so that it can consider any allegations of non-compliance.

Your office has advised that you are unable to consider a time to meet with me until after November. However, I would welcome the opportunity to meet with you sooner, to talk about this issue.

Regards

Sandra Parker PSM
Fair Work Ombudsman