[2017] FWCFB 2101

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Construction, Forestry, Mining and Energy Union
v
CSRP Pty Ltd
(C2016/7635)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER BISSETT

SYDNEY, 19 APRIL 2017

Appeal against decision [[2016] FWCA 8835] of Commissioner Roe at Melbourne on 9 December 2016 in matter number AG2016/7292

Introduction

[1] The Construction, Forestry, Mining, and Energy Union (CFMEU) has filed a notice of appeal under s.604 of the *Fair Work Act 2009* (FW Act) in which it seeks permission to appeal and appeals against a discretionary decision[1] (Decision) of Commissioner Roe made on 9 December 2016 approving the *CSRP Enterprise Agreement 2016* (Agreement). The Agreement was approved after the Commissioner accepted certain undertakings proffered by CSRP Pty Ltd (CSRP), the employer covered by the Agreement. The CFMEU was not a bargaining representative in relation to the Agreement. It did not have a member who was employed by CSRP when the Agreement was made and it did not make, nor seek to make any submissions concerning whether the Agreement should be approved.

[2] The Agreement is expressed to cover all employees of CSRP at any operational site above the 26th parallel that is owned or operated by Fortescue Metals Group Ltd or a subsidiary thereof, employed in a classification for which the Agreement makes provision.[2] At the time when the Agreement was made there were 13 employees covered by the Agreement. CSRP did not at that time employ any casual or part-time employees amongst the 13 employees covered by the Agreement. Another enterprise agreement titled *Fortescue Team Member Agreement 2013* was in operation and contained substantially identical terms to those contained in the Agreement. The CFMEU is covered by that agreement and the employer covered by it is a related entity to CSRP.

[3] It is not in contest that the Agreement operates in the mining industry. The CFMEU is entitled under its rules to enrol as members and to represent the industrial interests of various employees engaged in the mining industry. It is also not in contest that the CFMEU has as

---

[1] [2016] FWCA 8835

[2] See Agreement clause 1 and 16 (Definitions, specifically "Employee" and "Site")

members persons who are employed in the mining industry, and in particular has a number of members who are employed by entities related to CSRP, who perform the same or similar work for the related entities as the employees engaged by CSRP perform under the Agreement.

[4] The CFMEU is also covered by enterprise agreements operating in the mining industry which cover employees engaged in classifications that are covered by the Agreement, specifically locomotive drivers. It has an interest in the terms and conditions of employment of persons engaged as locomotive drivers in the mining industry and it appears more than remotely possible that the CFMEU will enrol as members, employees who are to be engaged as locomotive drivers by CSRP and who will be covered by the Agreement.

Grounds of Appeal

[5] The grounds of appeal raised by the CFMEU may be broadly summarised as follows. First, it is said that the Commissioner erred in being satisfied that the Agreement was genuinely agreed to by the employees covered by the Agreement as required by s.186(2)(a) of the FW Act. The first ground of appeal has two limbs as follows:

(a) Clause 5.5 of the Agreement, which purports to permit a set off of payments or benefits which an employee receives in excess of an entitlement under the Agreement, against a "claim for under payment" of another entitlement under the Agreement, has the effect of allowing CSRP to vary the entitlements of the Agreement at its sole discretion. The CFMEU maintains that an agreement containing a term permitting one party to unilaterally vary the terms of that agreement, is not an enterprise agreement capable of being genuinely agreed to under the FW Act; and

(b) The material before the Commissioner did not disclose that the employees who voted to approve the Agreement had sufficient authenticity or moral authority to make the Agreement and in particular there was insufficient evidence to allow the Commissioner to make a finding that the employees who voted to approve the Agreement had a sufficient interest in the terms of the Agreement.

[6] Secondly, it is said that the Commissioner erred in being satisfied that the terms of the Agreement did not contravene s.55 of the FW Act as required by s.186(2)(c). The specific provisions of the Agreement said to contravene s.55 are clause 5.5, to which reference is made above, clause 7.5, which deals with public holidays and clause 8.1, which, *inter alia,* deals with the taking and cashing out of annual leave.

[7] Thirdly, it is said that the Commissioner erred in being satisfied that the Agreement did not contain any unlawful terms as required by s.186(4) of the FW Act. The specific provision which is said to be an unlawful term is clause 14 of the Agreement which deals with "no extra claims", when read in conjunction with clause 2 of the Agreement, which deals with the Agreement's operation.

Consideration

Standing

[8] Before we turn to a consideration of the grounds of appeal we need to determine the issue of the CFMEU's standing to bring this appeal, which was challenged by CSRP. The CFMEU contended that it is a person aggrieved by the Decision because it has an interest beyond that of an ordinary member of the public in the Decision. The CFMEU contended that although it was not a bargaining representative in relation to the Agreement, did not have a member covered by the Agreement when it was made and was not represented in the proceedings leading to the approval of the Agreement, it has eligibility coverage under its rules and members in the mining industry. It said that the CFMEU's membership included, but was not limited to, approximately 470 members who were locomotive drivers operating in the iron ore industry, including over 60 members employed by related entities of CSRP who performed the same work as locomotive drivers covered by the Agreement at locations that are covered by the Agreement. It relied on the witness statement of Mr Gary Wood, the District Secretary of the Western Australian District Branch of the CFMEU, to make good these propositions.

[9] The CFMEU contended that its locomotive driver membership and its interest in the terms and conditions under which locomotive drivers are employed in the mining industry was of significance, as CSRP had expressed equivocation about whether it even intended to employ locomotive drivers presently or in the future. The CFMEU pointed to the fact that locomotive drivers employed by a related entity of CSRP and the CFMEU were covered by another enterprise agreement which has a nominal expiry date of 23 May 2017. Therefore, it had an interest in the terms and conditions received by those members. The CFMEU also expected to enrol as members employees covered by the Agreement should locomotive drivers be employed by CSRP. The CFMEU also pointed to the fact that it was covered by other enterprise agreements which apply to locomotive drivers in the mining industry.

[10] For its part, CSRP contended that the CFMEU did not have standing to bring this appeal. It contended that the expression "*person aggrieved by the decision*" in s.604(1) of the FW Act required the appellant to show a "special interest" in challenging the decision over and above that of the general public. It said that the CFMEU needed to show actual or apprehended impingement of a legal right and that a mere belief or concern was insufficient. CSRP contended that although a decision might offend the purposes and objectives of an organisation, that fact did not have the result that the organisation was a "*person aggrieved by the decision*". CSRP contended that in the context of a statutory review or appeal, much depended upon the nature of the particular decision and the extent to which the interest of the applicant rose above that of an ordinary member of the public, however the matters relied upon by the CFMEU did not constitute a relevant special interest.

[11] Section 604(1) of the FW Act provides that a "*person who is aggrieved by a decision*" may appeal a decision by applying to the Commission. In *CEPU and AMWU v Main People Pty Ltd*[3] a Full Bench of the Commission considered the issue of standing in circumstances where the appellant unions sought to appeal the approval of an enterprise agreement. The Full Bench said:

> "[6] The respondent submitted that neither of the appellants are a 'person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public'. Neither union was a bargaining representative for the Agreement, nor was there any evidence that any

[3] [2014] FWCFB 8429

employee of the respondent at the time of the vote to approve the Agreement was a member of either union. Further there was no evidence that any subsequent employees of the respondent had asked the appellants to represent their interests in relation to the Agreement.

[7] The appellants have the right to represent employees under the terms of the Agreement. Moreover, given the nature of the respondent's business, and the industry within which it operates, we are satisfied that it is likely that some members of the appellants will be employed by the respondent in the future, in classifications covered by the Agreement. In the circumstances of this case we consider that this gives the appellants an interest in the decision to approve the Agreement beyond that of an ordinary member of the public. Accordingly, we are satisfied that the appellants have standing to appeal the decision to approve the Agreement."[4]

[12] The reference in the last passage quoted above to "the right to represent employees under the terms of the agreement" should properly be understood to be a reference to the respective unions' right under the rules of the organisations to enrol as members employees covered by the agreement and to represent the industrial interests of those employees, rather than referring to any right conferred by the agreement itself. We consider that the reasoning and conclusion set out above is applicable to the question of standing raised in this appeal and we are not persuaded by CSRP's submissions that the decision in *Main People* and decisions of the Commission which have followed it are materially distinguishable or that those decisions are clearly wrong and ought not to be followed.

[13] Although none of the employees who voted to approve the Agreement were members of the CFMEU, and the CFMEU was not a bargaining representative for the Agreement, we consider that the CFMEU has the requisite interest in the Decision, in that it has rules coverage in the mining industry and it is likely, to the extent that CSRP employs persons under the Agreement in the future, that some will be members of the CFMEU. We therefore reject the challenge to the standing of the CFMEU to bring the appeal. We turn to consider the appeal grounds raised by the CFMEU.

Whether the Agreement has been genuinely agreed to by the employees covered by the Agreement?

[14] As is evident from our summary of the appeal grounds, the CFMEU maintains that the Commissioner erred in concluding that the Agreement was genuinely agreed to by the employees covered by the Agreement on two bases. We deal with each in turn below.

Clause 5.5

[15] Clause 5.5 of the Agreement provides:

"Any payment or benefit which an Employee receives from CSRP, which exceeds an entitlement under this Agreement, can be set off against a claim for under payment of another entitlement under this Agreement."

---

[4] Ibid at [6]-[7]; See also *Transport Workers' Union of Australia v ALDI Foods Pty Limited as General Partner of ALDI Stores (A Limited Partnership)* [2016] FWCFB 91 at [20] – [23] and *CEPU v Sustaining Works Pty Limited* [2015] FWCFB 4422 at [18] – [19]

[16] The CFMEU submitted that clause 5.5 had the effect of permitting CSRP to vary the entitlements of the Agreement at its sole discretion and as such it was inimical to the purpose and policy of the FW Act and was unable to be the subject of genuine agreement. The CFMEU pointed to the various mechanisms under the FW Act, which provided for the variation of an enterprise agreement or the operation of terms of an agreement[5], and said that an agreement or a term of an agreement permitting one party to unilaterally vary the terms of that agreement was not an enterprise agreement capable of being genuinely agreed to under the FW Act.

[17] The CFMEU also submitted that the "total value of entitlements" provision in clause 5.5 meant that an employee asked to approve the Agreement could not have known what benefits or entitlements he or she would have a right to receive under the Agreement, or when that benefit or entitlement would be received. Therefore, at the time employees were asked to approve the Agreement by voting for it, an employee would have no way of knowing that for which he or she was being asked to vote.

[18] We are not persuaded that the Commissioner erred in the manner or for the reasons suggested by the CFMEU. We agree with the submissions of CSRP that the CFMEU's contentions in support of this ground of appeal were founded upon a misreading of the effect of clause 5.5 of the Agreement. The terms of clause 5.5 do not permit unilateral variation of any term of the Agreement. Putting to one side any question of the legal efficacy of clause 5.5, the term does not relieve CSRP of any obligation under the Agreement. The clause is engaged only if a claim of underpayment of an entitlement under the Agreement is made by an employee. Clause 5.5 would allow CSRP, in the event of an employee claim of underpayment, to rely upon over-Agreement payments made to that employee as a set off for part or all of the underpayment. Self-evidently, it would not relieve CSRP of the liability that attaches to a contravention of the terms of an enterprise agreement by reason of s.50 of the FW Act.

[19] There is however a real question as to the legal efficacy of clause 5.5 of the Agreement (putting to one side its impact on the NES discussed later in this decision) in as much as the term does not identify the particular provisions of the Agreement in relation to which over Agreement payments would operate as a set off. Moreover, there is no indication as to any time connection between an over Agreement payment or condition being made or given to an employee and the time at which a payment or entitlement for which a claim of underpayment is made was due. Overall the term appears to us to be uncertain.

[20] Nonetheless, we are not persuaded that uncertainty or questionable legal efficacy in relation to one term of an agreement is a sufficient basis to doubt whether the employees who were asked to approve the Agreement by voting for it, genuinely agreed to the Agreement.

[21] This limb of the first ground of appeal is rejected.

Lack of authenticity and moral authority

---

[5] See Subdivision A of Division 7 of Part 2-4 of the FW Act; Subdivision B of Division 7 of Part 2-4 of the FW Act; Division 5 of Part 2-4 of the FW Act

[22] At the time the Agreement was made 13 employees were covered by it. None of these employees were engaged by CSRP as locomotive drivers, nor were any of the employees employed in a casual or part-time capacity.

[23] The CFMEU pointed to the following matters:

(a) The Agreement contained 21 classifications across 8 levels and 5 classification groups. The classifications included locomotive drivers, but none of the 13 employees were employed in that classification. There was no material before the Commissioner disclosing which of the 21 classifications in the Agreement might have been relevant to the 13 employees who were asked to vote to approve the Agreement;

(b) The Agreement operated at all operational sites (including mining, port and rail) above the 26th parallel that were owned or operated by Fortescue Metals Group Ltd or a subsidiary;

(c) The Agreement contained provision for, amongst other employees, part time and casual employees. No employee voting on the Agreement had a direct interest in the terms of the Agreement with respect to casual or part-time employees;

(d) There were no employee bargaining representatives in relation to the Agreement; and

(e) The material before the Commissioner disclosed that no bargaining had taken place in relation to the Agreement.

[24] The CFMEU therefore contended that the Commissioner erred in finding that the employees covered by the Agreement genuinely agreed to the Agreement because the material before the Commissioner did not disclose sufficient authenticity or moral authority in the Agreement making process to allow such a finding.

[25] We are not persuaded that the Commissioner erred in the manner suggested by the CFMEU. There was, in our view, sufficient information in the employer's statutory declaration filed by CSRP in support of its application for approval of the Agreement to support the Commissioner's finding that he was satisfied that the Agreement had genuinely been agreed to by the relevant employees. Throughout the employer's statutory declaration there are questions and corresponding answers concerning the relationship between the employees voting to approve the Agreement and the coverage of the Agreement.[6] Moreover, although there was no contradictor during the proceedings which led to the approval of the Agreement, the CFMEU did not seek to elicit any evidence during the hearing of the appeal which might be probative of the issue.

[26] An enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the Commission is satisfied of the matters set out in s.188 (a)-(c) of the FW Act. There is no suggestion that the Commissioner erred in being satisfied that CSRP had complied with the provisions of the FW Act to which reference is made in paragraphs 188(a) and (b). The relevant enquiry to which issue was taken in this appeal was satisfaction of the

---

[6] See for example questions 2.3, 2.4, 2.5, 2.6, 2.7 and 2.10 of the employer's statutory declaration in support of an application for approval of an enterprise agreement

matter in paragraph 188(c), namely the absence of reasonable grounds for believing that the Agreement had not been genuinely agreed to by the employees.

[27] The Commission cannot be satisfied of that negative proposition ("*no other reasonable grounds*") without considering whether there are "*reasonable grounds*" for so believing. We agree with the submissions of CSRP that in the absence of finding "*reasonable grounds*" for so believing, the Commission will inevitably be satisfied that there are "*no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees*".

[28] Furthermore, we agree with the submissions of CSRP that there was sufficient material in the employer's statutory declaration to support the Commissioner's finding that he was satisfied that the Agreement had been genuinely agreed to by reference to the matters in s.188. Moreover, there was nothing on the face of the material in the statutory declaration which required the Commissioner to conduct, or suggested that he should conduct, further inquiries before he could be satisfied of the matter in s.188(c) and consequently s.186(2)(a).

[29] We are also not persuaded in the circumstances of this case that there was any significance in the fact that the 13 employees who were asked to vote to approve the Agreement were not employed across all of the classifications or modes of employment for which provision is made in the Agreement.

[30] Finally, there is no general requirement that there be evidence of bargaining as a condition precedent to the approval of an enterprise agreement or of satisfaction that an agreement was genuinely agreed to by employees. That which is required is an explanation of the terms of the agreement and satisfaction that the approval of the agreement would not be inconsistent with or undermine good-faith bargaining as contemplated by s.187(2) of the FW Act.

[31] The structure of the enterprise agreement-making provisions of the FW Act contemplates that enterprise agreements may be made and approved within a short period of time. It is not uncommon for an employer to issue a notice of employee representational rights to requisite employees, propose an agreement to those employees, comply with the relevant pre-approval steps and then request the employees vote to approve the agreement. All of this may occur within a period of less than one month. Bargaining, in the sense of an employer proposing an agreement to relevant employees, receiving and considering counterproposals from employees (or their bargaining representatives), and negotiating a final agreement with relevant employees, may not necessarily take place. Nonetheless, provided the requisite preapproval steps have been complied with and the Commission is satisfied of the matters set out in ss.186 and 187 of the FW Act, such an agreement is no less legitimate under the FW Act than one that has been bargained for with bargaining representatives over many months.

[32] The second basis of the first ground of appeal is also rejected.

Terms contrary to the national employment standards

[33] Section 55 of the FW Act contains the interaction rules between the NES and a modern award or enterprise agreement, and relevantly provides that an enterprise agreement must not exclude the NES or any provision of the NES. That section also provides that an enterprise agreement may include terms that are ancillary or incidental to the operation of an

entitlement of an employee under the NES and terms that supplement the NES, provided that the effect of any such term is not detrimental to an employee in any respect when compared to the NES. A provision of an enterprise agreement need not expressly exclude the NES in order to fall foul of s.55(1). A provision of an enterprise agreement which in its operation would result in an employee not receiving the full benefit of the NES also contravenes the prohibition.[7]

[34] Section 186(2)(c) of the FW Act relevantly provides as one of the requirements which must be satisfied in order that an enterprise agreement may be approved, that the Commission be satisfied that the terms of the agreement do not contravene s.55. For the purposes of s.186(2)(c), a term or terms of an enterprise agreement will contravene s.55(1) if that term or those terms exclude the NES or a provision of the NES. If one or more terms of an enterprise agreement are ancillary or incidental to the operation of an entitlement under the NES or supplement the NES, such term or terms will contravene s.55(4) of the FW Act if the effect of that term or those terms is detrimental to an employee in any respect when compared to the NES.

[35] The CFMEU contended that three provisions of the Agreement contravened s.55 of the FW Act and consequently that the Commissioner erred in being satisfied that the Agreement did not do so pursuant to s.186(2)(c) of the FW Act.

[36] First, it said that clause 5.5 of the Agreement, to which earlier reference has been made, excluded the NES or, in the alternative, was detrimental as compared to the NES, to the extent that it allowed any payment or benefits received by an employee which exceeded an entitlement in the Agreement to be set off against a claim for underpayment of another entitlement under the Agreement. The CFMEU also contended that the clause, in effect, allowed for the pre-payment of annual leave in a manner held to be inconsistent with ss.87(1), 90(1) and 93 of the FW Act by a five-member Full Bench of the Commission in *Re Canavan Building Pty Ltd.*[8] The CFMEU contended that clause 5.5 has a similar effect in respect of s.117, which deals with the of notice of termination or payment in lieu of notice and s.119, which deals with redundancy pay entitlements.

[37] CSRP argued that the CFMEU's contention was based on a misreading of the impugned term. It said that the capacity to set off under clause 5.5 did not have the effect of allowing CSRP to pre-pay annual leave or to avoid providing notice of termination or payment in lieu of notice, or to avoid redundancy payments to an employee.

[38] Whilst we accept that clause 5.5 is not in terms a provision that is an annual leave cashing out term, we do not accept CSRP's argument that the term does otherwise result or have the effect on an employee that is detrimental when compared to the NES. Moreover, in its effect, the term may result in the cashing out of annual leave by reference to an earlier over Agreement payment. One example will suffice. It seems to us that if an employee covered by the Agreement makes a valid claim that he or she has not been paid or given some or all of that employee's entitlement to annual leave when annual leave is taken, CSRP has the right under clause 5.5 to refuse to pay the amount claimed on the basis that it had previously paid, or given to, the employee some payment or benefit which exceeded that employee's

---

[7] *Canavan Building Pty Ltd* [2014] FWCFB 3202; 244 IR 1 at [36]; see also *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124 at [29]

[8] [2014] FWCFB 3202; 244 IR 1 at [55]

entitlement under the Agreement. Whether dressed up as a set-off or otherwise, in every practical sense such a scenario is a prepayment of annual leave. That is, the earlier over Agreement payment has been made and may be set off against some or all of the annual leave amount claimed as an underpayment, with the result that under the term, annual leave is cashed out without the safeguards provided for in s.93 of the FW Act required of such terms.

[39] Moreover, the operation of clause 5.5 in the example above would have the result of excluding that employee's entitlement to be "*paid annual leave*" as required by s.87(1) and the entitlement to payment of annual leave found in s.90 of the FW Act. In these respects, the term is detrimental to an employee compared to the NES.

[40] For the same reasons, clause 5.5 in its operation could also have the effect of excluding other NES entitlements, in particular the entitlement to paid personal leave in s.96 and to redundancy pay in s.119.

[41] We turn to the second provision identified by the CFMEU. Clause 7.5 of the Agreement provides the follow:

> **"7.5 Public holidays**
>
> CSRP will recognise public holidays in accordance with the FW Act as they apply to Employees in the relevant State or Territory in which the Agreement operates at a particular time.
>
> Employees will be required to work on public holidays that fall within Rostered Hours. Employees agree that a request by CSRP to work on a public holiday is reasonable, having regard to the operational requirements of the business. The Composite Hourly Rate includes compensation in recognition of the need for Employees to work Rostered Hours on public holidays."

[42] The CFMEU contended that clause 7.5 has the effect of requiring an employee to work on a public holiday without allowing an employee to refuse to work on reasonable grounds in accordance with s.114(3) and (4) of the FW Act.

[43] CSRP contended that the CFMEU did not explain why the sub-clause should be read in the manner suggested by the CFMEU, and that it did not address how such a requirement excluded or was detrimental to any rights an employee might have under ss.114(3) and (4) of the FW Act. CSRP maintained that an employee's right under s.114(3) was a right to refuse an employer request that the employee work on a public holiday. Accordingly, the right did not arise until that request was made. Further, the right of refusal turned on the employer request not being reasonable or the refusal being reasonable. That was to be determined by reference to the various factors listed in s.114(4), being a broad range of considerations contemporaneous to the request and the refusal. The factors included the operational requirements of the employer and whether the employee could reasonably expect that the employer might request work on the public holiday.

[44] CSRP further contended that the first and last sentences of the second paragraph of clause 7.5 of the Agreement stated the employer's need to work on public holidays that fell within Rostered Hours, and the requirement of employees to work on such days. The second sentence confirmed the employee's agreement that *"a request by CSRP"* to work on a public

holiday was reasonable given operational requirements. Accordingly, these sentences contemplated, but did not constitute, an employer request under s.114. CSRP said that so understood, clause 7.5 of the Agreement left room for the exercise of an employee refusal under s.114(3) upon a relevant request by CSRP.

[45] We also reject this contention. On a plain and ordinary reading of the second paragraph of clause 7.5 of the Agreement, the clause compels an employee to work on a public holiday that falls within that employee's rostered hours. The clause purports to engage with parts of s.114 but not all of it.

[46] Section 114 commences by prescribing an entitlement that an employee be absent from his or her employment on a day or part day that is a public holiday in the place where the employee is based for work purposes. It thereafter allows an employer to make a request that an employee work on a public holiday and allows the employee to refuse the request in one of two circumstances: first, if the request is not reasonable or, second, if the employee's refusal is reasonable. The first sentence of the second paragraph of clause 7.5 is directly contrary to the position under s.114. It provides that employees "*will be required to work on public holidays that fall within Rostered Hours*". The second sentence seeks inelegantly to clothe that which is a requirement to work with the features of a request by providing for an acknowledgement by employees that the request is reasonable, having regard to the operational requirements of business.

[47] On any fair reading of the provision there is no room for an employee to refuse to work on a public holiday that falls within that employee's rostered hours because as the first sentence makes clear, that employee will be required to work on such day. In these circumstances the effect of clause 7.5 is to exclude the operation of ss.114(1) and (3) of the FW Act.

[48] The third provision of the Agreement identified by the CFMEU as excluding the NES was clause 8.1. The relevant parts of that clause with which issue is taken provide:

> "**8.1 Annual leave**
>
> . . .
>
> Leave applications must be approved in writing by CSRP and CSRP can direct how annual leave will be taken, including a requirement that annual leave be taken in accordance with the cycle of Rostered Hours.
>
> . . .
>
> CSRP and an Employee may agree in writing to the cashing out of an amount of accrued paid annual leave (up to a maximum of 2 weeks in a 12 month period) subject to the remaining accrued entitlement to paid annual leave being no less than 4 weeks. The written agreement must be signed by both parties, dated and must state the amount of leave to be cashed out and the payment to be made.
>
> . . ."

[49] The CFMEU contended that the first paragraph reproduced above excluded the NES or alternatively was detrimental as compared to the NES because the right conferred on CSRP to direct how annual leave will be taken did not provide that the direction applied to a particular circumstance nor did it require that the direction be reasonable as required by s.93(3) of the Act.

[50] As to the second paragraph reproduced above, which regulates how an amount of accrued annual leave may be cashed out, the CFMEU said that it excluded the NES or alternatively was detrimental compared to the NES because the provision allowed for the cashing out of annual leave without specifying that an employee must be paid the full amount that would have been payable to the employee had the employee taken the leave that the employee had forgone in accordance with s.93(2) of the FW Act.

[51] CSRP accepted that the first paragraph of the annual leave provision reproduced above was a term that which allowed it to require an employee to take annual leave in accordance with the cycle of Rostered Hours. However, it contended that the CFMEU had not explained why the term should be construed as allowing an unreasonable requirement, and that there was no reason to construe the term in this way. To the contrary, the proper approach to construction should proceed on the assumption that the parties objectively intended the term to have legal effect. Approached in this way, CSRP submitted that the term should be construed as allowing a requirement that an employee take annual leave in accordance with their Rostered Hours, provided the requirement is reasonable.

[52] CSRP also submitted that the CFMEU had not explained how such a requirement could ever be unreasonable. This was because the Agreement covered employees who would be working at mining sites in remote locations, so that the Rostered Hours of employees will inevitably involve swing cycles. Such roster arrangements could reasonably require employees to take annual leave in a way that accorded with the fly-in, fly-out schedule for their swing cycle.

[53] CSRP's contentions summarised above must also be rejected.

[54] Section 88 of the FW Act provides as follows:

> **88 Taking paid annual leave**
>
> (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
>
> (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

[55] Section 88(1) provides for agreement between an employer and an employee about when annual leave is to be taken by the employee and the duration of that leave. Pursuant to s.88(2), an employer must not unreasonably refuse to agree to a request by an employee to take paid annual leave. Self-evidently, clause 8.1 of the Agreement has the effect of denying an employee the opportunity of reaching agreement with CSRP about when annual leave may be taken and the duration of leave whenever CSRP gives the requisite direction to take annual leave for which provision is made. At the very least, the clause will, in the face of a direction, limit the days on which annual leave may be taken by agreement. There is no scope under clause 8.1 to reach agreement to take annual leave, except for leave taken in advance of its accrual.

[56] As we earlier have observed, s.55 of the FW Act contains rules concerning the interaction between the NES and relevantly, an enterprise agreement. Subsection 55(4) provides the following:

> **55 Interaction between the National Employment Standards and a modern award or enterprise agreement**
>
> . . .
>
> *Ancillary and supplementary terms may be included*
>
> (4) A modern award or enterprise agreement may also include the following kinds of terms:
>
> > (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
> >
> > (b) terms that supplement the National Employment Standards;
>
> but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.
>
> **Note 1**: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
>
> > (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
> >
> > (b) that specify when payment under section 90 for paid annual leave must be made.
>
> **Note 2**: Supplementary terms permitted by paragraph (b) include (for example) terms:
>
> > (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
> >
> > (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).
>
> **Note 3**: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.
>
> . . .

[57] We consider that the third paragraph of clause 8.1 (reproduced earlier) is a term that is not permitted by s.55(4) of the FW Act because it is detrimental to employees in the respect that we have already identified, namely that it denies an employee the full benefit of s.88 of the FW Act.

[58] The impugned paragraph of clause 8.1 of the Agreement must therefore depend for its efficacy on it being a term of the Agreement permitted by s.93(3) of the FW Act. That section provides as follows:

> **93 Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave**
>
> *Terms about requirements to take paid annual leave*
>
> (3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.
> . . .

[59] The essence of s.93(3) is that it permits terms to be included in an enterprise agreement which require an employee to take paid annual leave in particular circumstances if the requirement is reasonable, or which allow for an employee to be required to take annual leave in particular circumstances if the requirement is reasonable.

[60] The impugned paragraph is a term that on its face requires an employee to take annual leave during any part of the year and for any number of days that CSRP may direct. The effect of a direction given by CSRP to an employee to take annual leave pursuant to that paragraph, as we have already observed, is to limit the circumstances in which an employee may take annual leave by agreement with his or her employer in accordance with s.88 of the FW Act. The provision does not identify any "*particular circumstances*" in relation to which the requirement that an employee take annual leave would be invoked. We therefore doubt that the provision may properly be described as a term in an agreement which requires, or allows an employee to be required "*to take paid annual leave in particular circumstances*". It seems to us that for a term of an enterprise agreement to come within the permissible scope of s.93(3), the term itself must describe the "*particular circumstances*" in which the employee is required, or in which the clause permits the employee to be required, to take annual leave.

[61] The third paragraph of clause 8.1 is no more than a conferral upon CSRP of an unfettered right to direct an employee to take annual leave. No particular circumstances in which the power to require an employee to take annual leave will be exercised is disclosed. In our view, it is not a provision which is permitted by s.93(3). In this regard we note and adopt that which was said by a Full Bench of the Commission in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd*:[9]

> "[28] Section 93(3) permits an enterprise agreement to include terms requiring an employee (or allowing an employee to be required) to take annual leave in particular circumstances provided the requirement is reasonable. In considering whether a requirement is reasonable the term imposing the requirement must relate to particular circumstances in which annual leave will be required to be taken and must on its face be reasonable or enable the consideration of relevant considerations earlier identified before the requirement is imposed in relation to a particular employee. Our conclusion that clause 14.2.1(b) of the Agreement is not a term permitted by s.93(3) is based on

---

[9] [2015] FWCFB 3124 at [28]

the circumstances of this case and the text of clause 14.2.1(b). Issues such as the capacity for personal circumstances to be taken into account when imposing a requirement, the ability to take an annual leave entitlement as a block and the need to travel long distances to take a period of annual leave, amongst others, will be relevant in considering the reasonableness of a requirement to take annual leave in particular circumstances that may be contained in particular agreements."[10]

[62] As to the penultimate paragraph in clause 8.1 (reproduced as the second paragraph earlier above), CSRP submitted that the CFMEU's contentions had no substance and were based on a technical and pedantic reading of the cashing out provision in clause 8.1 of the Agreement. CSRP submitted that clause 8.1 made regular references to "*paid annual leave*" and that at the time the Agreement was made, the established meaning of those words was "*annual leave at the employee's base rate of pay for the employee's ordinary hours of work in the period*". The cashing out provision in clause 8.1 referred to "*the cashing out of an amount of accrued paid annual leave*". CSRP submitted that on a proper construction of those words, the "*cashing out*" implicitly required the full cash value of the "*paid annual leave*" to be the subject of the written cashing out agreement. In the context in which these words appear, they should not be construed as allowing a compromise or discount of the cash value of the "*paid annual leave*".

[63] Section 93 relevantly provides:

93 Terms about cashing out paid annual leave

(1) A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.

(2) The terms must require that:

(a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and

(b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and

(c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

[64] As is apparent from the above, s.93(2) sets out that which a cashing out term in enterprise agreement must require. There are three matters that a cashing out term must require. The penultimate paragraph in clause 8.1 addresses the first requirement in its first sentence and the second requirement in its second sentence. On a plain reading of the penultimate paragraph, it does not in terms require that an employee must be paid at least the full amount that would have been payable to the employee had the employee taken leave that the employee has forgone as required by s.93(2)(c). It is, with respect, no answer to the criticism levelled against the provision by the CFMEU that the paragraph makes reference to

[10] Ibid at [28]

"*the cashing out of an amount of accrued paid annual leave*". This is also true of s.93(2)(a) and (b). Nonetheless, the Parliament sought fit to also legislate for the requirement in s.93(2)(c). The cashing out provision of the Agreement does not speak to that requirement and as a consequence is not a term supported by s.93 of the FW Act. There is nothing pedantic or technical about the issue raised with the cashing out provision of the Agreement. The term does not contain one of the three requirements of a permitted cashing out term as set out in s.93(2)of the FW Act.

Whether the agreement contains unlawful terms

[65] Section 186(4) of the FW Act requires as a condition precedent to the approval of an enterprise agreement that the Commission be satisfied the agreement does not contain any unlawful terms. Section 194 sets out the meaning of an "unlawful term" and relevantly provides that an unlawful term is an "objectionable term". Section 12 of the FW Act relevantly provides that an objectionable term is a term that has the effect of requiring or permitting, or purporting to have the effect of requiring or permitting, a breach of the general protections set out in Part 3-1 of the FW Act.

[66] The relevant provisions with which issue is taken are clause 14 of the Agreement which deals with "*no extra claims*", read in conjunction with clause 2 of the Agreement, which deals with the Agreement's operation.

[67] Clause 14 of the Agreement provides:

> **"14. No extra claims**
>
> The Employees and CSRP agree that while this Agreement is in operation, there will be no claims or bargaining in respect of any industrial matters, regardless of whether they are or are not a subject of this Agreement."

[68] Clause 2 of the Agreement provides:

> **"2. Terms of this Agreement**
>
> This Agreement will come into operation 7 Days after it is approved by FWC and will nominally expire 4 years from the date on which it is approved by FWC **(Nominal Expiry Date).** It will continue to operate past its Nominal Expiry Date until it is either replaced by another agreement or lawfully terminated."

[69] The CFMEU contended that the Commissioner erred in finding that he was satisfied that the Agreement did not contain an unlawful term. It contended that clause 14 was an unlawful term because it had the effect of, or purported to have the effect of, permitting employees to be injured in their employment, or their position prejudiced, by permitting employees to be exposed to civil remedy provisions for breach of an enterprise agreement for seeking to exercise the workplace right of bargaining for an agreement, contrary to s.340 of the FW Act.

[70] This ground of appeal is rejected. To the extent that clause 14 when read in conjunction with clause 2 of the Agreement purports to prohibit claims being made or bargaining being sought in circumstances in which the FW Act would permit such conduct,

that clause would have no legal effect.[11] Thus, a purported breach by an employee of a legally ineffective provision of the Agreement cannot expose any employee to the consequences of the civil remedy provisions of the FW Act.

Disposition

[71] As is apparent from our reasons above we have concluded that the CFMEU has made good the second ground of its appeal. We are persuaded that permission to appeal should be granted because error in the Decision has been established and the nature of the error identified raises for consideration the proper administration of the agreement approval powers of the Commission. The erroneous conclusion that the requirements in s.186(2)(c) had been met is jurisdictional in nature in that satisfaction of that requirement is, amongst other matters, a precondition to the exercise of the enterprise agreement approval power.

[72] For the reasons given we would uphold the appeal.

[73] Section 56 of the FW Act relevantly provides that a term of an enterprise agreement has no effect to the extent that it contravenes s.55. It would be open to us to do nothing and allow s.56 to have operational effect on the provisions affected by the challenge mounted in ground two of the notice of appeal. However, we do not think it is desirable, when there is an opportunity to take rectification action, to allow an agreement to continue operating with provisions of doubtful legal efficacy. Moreover, employees covered by the Agreement and those who in the future will be covered by the Agreement deserve to understand their rights and obligations under the Agreement without recourse to a lawyer or the legal niceties of s.56. For that reason we propose to quash the Decision and to re-hear the application for the approval of the Agreement for ourselves.

[74] On the basis of the material before us we are satisfied that in all respects, save for those earlier identified, the Agreement meets the requirements in ss.186 and 187 of the FW Act. As is evident from our reasons above, we have a concern that the Agreement does not meet the requirements set out in s.186(2)(c) of the FW Act. That concern might be met by a written undertaking given by CSRP. We will therefore give CSRP an opportunity to provide a written undertaking and, if we are satisfied that the written undertaking meets the concern and otherwise satisfies s.190 of the FW Act we would propose to approve the Agreement.

Order

[75] We order that:

(a) permission to appeal is granted;

(b) the appeal is upheld;

(c) the Decision to approve the Agreement ([2016] FWCA 8835) is quashed.

[76] We will allow CSRP 14 days from the date of this decision to provide any written undertaking it proposes.

---

[11] See *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84

VICE PRESIDENT

Appearances:

Mr R Reitano, Counsel for the CFMEU.
Mr R Dalton, Counsel for CSRP Pty Ltd.

Hearing details:

2017.
Melbourne:
27 February.

Printed by authority of the Commonwealth Government Printer

<Price code C, PR 591854>