Summary of Decision

10 February 2015

Esso Australia Pty Ltd v AMWU; CEPU; AWU

(B2014/1104; B2014/1571; B2014/1570)

1. This appeal decision considers the meaning of 'genuinely trying to reach an agreement' in s.443 of the *Fair Work Act 2009* (Cth) (the FW Act). Section 443 provides that the FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:

> "(a) an application has been made under section 437; and
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> (b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted." (emphasis added)

2. Esso Australia Pty Ltd (Esso) and its upstream oil and gas workforce were covered by four enterprise agreements, each with a nominal expiry date of 1 October 2014. The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, known as the Australian Manufacturing Workers' Union (AMWU), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), and the Australian Workers' Union (AWU) were covered by one or more of the Agreements. On 10 November 2014 each of the unions made applications for protection action ballot orders.

3. Commissioner Cribb granted the applications having regard to, among other things, an undertaking provided by the unions that they would not pursue a claim said to contain non-permitted content. The Commissioner subsequently made orders for the holding of protected action ballots.

4. Esso appealed the Commissioner's decision and orders. On appeal the Full Bench was satisfied that it was in the public interest to grant permission to appeal, as there was a degree of tension between various Full Bench decisions dealing with the interpretation of s.443(1)(b) of the FW Act, but was not persuaded that the Commissioner erred in the exercise of her discretion, and dismissed the appeal.

5. One limb of Esso's appeal was that the unions were pursuing a proposed term in each agreement which was about non-permitted matters. The proposed term was a provision restricting or qualifying Esso's right to use independent contractors and as such was about 'non-permitted matters'. Esso submitted that the Commissioner should have found that at all relevant times the unions were pursuing the proposed term and accordingly each union had not been, and was not, genuinely trying to reach an agreement.

6. The Full Bench considered earlier Full Bench decisions which addressed the meaning of 'genuinely trying to reach agreement', including *Total Marine*[1], *Australia Post No. 1*[2], *Australia Post No. 2*[3], *Airport Fuel Services*[4] and *Alcoa.*[5] The Full Bench noted some tension between the views expressed in the previous decisions and that these earlier Full Bench decisions pre-dated the decision of the Full Court of the Federal Court in *JJ Richards and Sons.*[6] In *JJ Richards* the Full Court held that protected action ballot orders under s.443(1) of the FW Act may be made even though bargaining between an employer and employees had not commenced.

7. The Full Bench considered the proper construction of s.443(1)(b) and concluded as follows:

> "**[54]** The reference to the Commission being 'satisfied' means that whether or not the requisite circumstance exists is a discretionary decision. Section 443(1)(b) directs attention to the conduct of the applicant. The expression 'has been, and is', imports temporal considerations. The Commission's attention is thereby directed to the applicant's prior conduct at the time the application for a protected action ballot order is determined.[7] Given the context the reference to 'an agreement' is plainly a reference to an enterprise agreement within the meaning of Part 2-4 of the FW Act. The clear inference from s.172(1) is that the substantive terms of enterprise agreements should be confined to permitted matters, though the Commission is not required to scrutinise each agreement to ensure that all its terms are about permitted matters[8] and the statutory requirements for the approval of an agreement (ss 186-187) make no express reference to the concept of permitted matters (also see s.253).
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> **[55]** Section 443(1)(b) does not contain any words which limit the circumstances in which the Commission may be satisfied that an applicant 'has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted'. Further, the Explanatory Memorandum to what became s.443 supports the proposition that the legislature did not intend that any one factor would necessarily be determinative of the question of whether the applicant is genuinely trying to reach an agreement with the employer...
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> **[57]** Whether an applicant 'has been, and is, genuinely trying to reach an agreement' is a question of fact to be decided having regard to all of the facts and circumstances of the particular case. Such a construction of s.443(1)(b) is consistent with the judgment of the Full Court in *JJ Richards* and with a number of Full Bench decisions of the Commission (see *Total Marine; Pelican Point Power Limited v ASU*[9]*; JJ Richards No.1*[10]*; Alcoa*[11]; *JJ Richards No.2*[12]; and *Farstad* [13])...
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> **[59]** There is no legislative warrant for the adoption of a decision rule such that if an applicant is, or has been, pursuing a substantive claim which is not about a permitted matter it is not genuinely trying to reach an agreement within the meaning of s.443(1)(b). The fact that an applicant is, or has been, pursuing a claim about a non-permitted matter is relevant to whether the test posited by s.443(1)(b) has been met, but it is not determinative of the issue. A range of factual considerations may potentially be relevant...The diversity of the factual circumstances and nuances which will be found in different cases means that it is not possible to say that any particular factor or consideration will always be determinative of the result."

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[1] [2009] FWAFB 368; (2009) 189 IR 407
[2] (2010) 189 IR 262
[3] [2010] FWAFB 344; (2010) 191 IR 1
[4] (2010) 195 IR 384
[5] [2010] FWAFB 4889; (2010) 197 IR 355
[6] (2012) 201 FCR 297
[7] *Coles Supermarkets (Australia) Pty Ltd v AMIEU* [2015] FWDFB 379 at [49]
[8] See paragraph 664 of the Explanatory Memorandum to the *Fair Work Bill 2008*
[9] [2010] FWAFB 9441 at [93]
[10] [2010] FWAFB 9963 at [67] per Lawler VP and Bissett C
[11] [2010] FWAFB 4889 at [24]
[12] [2011] FWAFB 3377 at [40]-[41]
[13] [2011] FWAFB 1686 at [6]-[11]

8. The Full Bench said that a range of factors were potentially relevant to whether the test in s.433(1)(b) has been met where an applicant is, or has been, pursuing a claim about a non-permitted matter, including:

- the subject matter and timing of the claim;
- the basis upon which the claim is advanced;
- the significance of it in the negotiations;
- the claimant's belief as to whether it is a permitted matter or not;
- whether there is legal clarity about the claim's 'permitted status';
- whether the other party has disputed the claim's status; and
- whether it has been withdrawn and, if so, when and in what circumstances.

9. Esso also submitted that the Commissioner accepted the unions' undertaking and relied on it without giving Esso any opportunity to deal with it or make submissions about it and in so doing, the Commission did not afford Esso natural justice.

10. The Full Bench found that the Commissioner did not decline or otherwise refuse to hear the submissions by Esso on the relevance of the undertaking proffered by the unions. It found that Esso's representative did not seek the opportunity to make submissions on this matter and nor did he voice any objection to the unions providing the undertaking in their reply submissions. In all the circumstances there was no denial of procedural fairness.

[2015] FWCFB 210

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

- ENDS -

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