

From: Ken McKell [<mailto:kmckell@amic.org.au>]
Sent: Tuesday, 27 June 2017 11:09 AM
To: Chambers - Ross J
Cc: garrysmynname@gmail.com
Subject: AM2015/1 - Family and Domestic Violence Leave Case

To Jo Richardson, Associate to The Hon. Justice IJK Ross.

Please find attached above a short submission by Mr Garry Johnston acting on behalf of the Australian Meat Industry Council (AMIC) in matter AM2015/1 in response to the Statement issued by his Honour on 23rd June 2017.

The AMIC will be appearing in the hearing scheduled for 1pm on 28th June 2017 through video link from Sydney.

Regards,

Ken McKell

Ken McKell
Manager, Human Resources
Australian Meat Industry Council
PH: (02) 9086 2222
FX: (02) 9086 2201
Mobile: 0417 445 165

FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

(S.156 of the Fair Work Act)

FAMILY AND DOMESTIC VIOLENCE CLAUSE

(AM2015/1)

SUBMISSION TO THE AUSTRALIAN MEAT INDUSTRY COUNCIL

IN RESPONSE TO STATEMENT 23 JUNE 2017

1. This short submission of AMIC concerns the Statement of the President of the *Fair Work Commission* 23 June last in matter AM2015/1. In paragraph 5 of the Statement there is reference to a hearing of the matter for 28 June 2017. Although the Statement used the word ‘hearing’ the Notice of Listing refers to the matter being listed for ‘Mention’. AMIC assumes, for abundant caution, the matter is for short ‘hearing’.
2. Relevantly, the President issued a decision 18 May 2017 referring, apparently, questions of law to the Federal Court under s.608 of the Fair Work Act 2009 (Cth). The stated case pursuant to s.608 concerned future process of AM2015/1 and the interpretation of s.622. This followed the resignation of Vice President Watson.
3. The referral to the Federal Court became file number VID618/2017 and the Court undertook a Case Management Hearing on 22 June last. A perusal of the transcript of the Federal Court of 22 June shows that the Court, as constituted, expressed serious concerns about the competence of the application and whether competence could be cured given the applicant was the President.
4. In the 23 June Statement (referred to in paragraph 1 above) the President stated that consideration was being given to discontinuing the special case and, the Commission itself, determining the reconstitution issue. Hence, the listing for 28 June.

The Reconstitution Issue

5. AMIC has submitted on a number of occasions since the issue of future direction of AM2015/1 arose in February 2017 as follows:
 - As part of the 4 yearly review pursuant to s.156 of the FW Act, a Full Bench was constituted to hear the ACTU claim AM2015/1 (the Family & Domestic Violence clause) being a claim to vary all modern awards.
 - The Full Bench fully heard the claim, adjourned proceedings and reserved its decision¹ pending publishing. AMIC made submissions before the Full Bench during the hearing of the matter opposing the ACTU claim. The presiding member of the properly constituted Full Bench correctly published a decision² while the two other members of the Full Bench have not published their decisions at this point.
 - FWC characterised a ‘common issue’ claim as one that:
‘.....simply related to the process adopted for hearing and determining the claim (and) does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards..’³ (our emphasis).
 - Whilst certainty of outcome is of primary importance, AMIC is of the view that there appears to be no valid legal reason why, concerning the ACTU clam, the two (2)

¹ PN3071 of transcript 2 December 2016

² [2017 FWCFB 1133

³ [2014] FWC 8583 at [15]

members of the Full Bench who have not handed down decisions cannot hand down their decision and that their decisions, along with the already published decision, constitute the decision of the Full Bench.

- The only remaining administrative action required is for the other Full Bench members to publish and their decisions stand alongside that of the former Vice President. What subsequent action may be required following publication is not relevant at this point.
- Once published, in our view, the decision of the two (2) remaining members of the Full Bench will either (a) bring the matter to conclusion or (b) require other steps which a newly constituted Bench can perform with the issuing of new directions if needed. This procedure has been adopted during the 4 year review when a member of FWC had resigned and a Bench re-constituted.
- Protocol evolved might suggest that decisions of Full Benches of FWC should be handed down contemporaneously but protocol is not the issue and is not binding.

If reconstitution occurs

6. If, after a consideration of any further submissions the President is of the view that a Full Bench needs to be re-constituted AMIC favours a very cautionary approach.
7. Certain parties have already made comments on this point. For example, ACCI in 3 April 2017 submissions at paragraph 4.27. Although submitting for matter AM2016/5 where Vice President Watson was a member of another Full Bench before resigning, MUA on 4 May submitted any new member should not issue a separate decision. MUA expressed that view because of the stage the matter had reached which was not dissimilar to AM2015/1.
8. Of course, parties can only express a view on this discretionary matter if reconstitution of the Full Bench in AM2015/1 occurs. We note however, AIG's earlier comments in submissions concerning media comments made since the resignation of Vice President Watson⁴. The comments may be correct or otherwise but transparency is required as is certainty.
9. Irrespective of s.622(3) matter AM2015/1 concluded with evidence tested and final submissions heard and then adjourned. If any newly appointed member issues a decision or joins with another decision the far reaching consequences of this claim should be considered. We are after all dealing with a claim that seeks an extra ten (10) days leave made available for all employees including casuals.

27 June 2017

⁴ AIG – 10 May 2017

Australian Meat Industry Council