DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Spotless Facility Services Pty Ltd
(AG2018/4781)

COMMISSIONER SIMPSON BRISBANE, 6 MARCH 2019

Application for approval of the Spotless BHPB WA Sites Enterprise Agreement 2018 – application dismissed.

[1] On 29 August 2018 Spotless Facility Services Pty Ltd (Spotless) made an application under s.185 of the *Fair Work Act 2009* for approval of the Spotless BHPB WA Sites Enterprise Agreement 2018 (the Agreement).

[2] The application was accompanied by a Form F17 Statutory Declaration. The Statutory Declaration included at 2.3 a statement that employees were emailed a copy of the Notice of Employee Representational Rights (NERR) on 1 May 2017.

[3] The prescribed form for a NERR is set out in *Schedule 2.1 of the Fair Work Regulations 2009*. On 31 December 2018 the Fair Work Commission Agreements Team sent email correspondence to the representative of Spotless advising an issue had been identified that may prevent the application from progressing.

[4] The issue was that the Notice of Employee Representation Rights (NERR) contained content in the coverage field in the first paragraph that differed from the coverage provided at clause 3 of the Agreement.

[5] The email correspondence indicated that the NERR does not comply with the *Fair Work Act 2009* (FW Act) as it departs from the form prescribed in Schedule 2.1 of the Regulations, and is therefore invalid.

[6] The Notice issued on 1 May 2017 included the following:

> "Spotless Facility Services Pty Ltd gives notice that it is bargaining in relation to an enterprise agreement (*Spartan Enterprise Agreement 2017*) which is proposed to cover employees that are engaged in relevant classifications performing work based at any of the following sites:
>
> - The BHP Billiton camp at Warrawandu, located at Jimblebar Access Road, off Marble Bar Road, East Pilbara 6753;

- The BHP Billiton Camp at Kurra Village, located at Newman Drive, Newman WA 6753
- The future BHP Billiton camps –
  - Kalgan's Rest, to be located at Kalgan Drive, Newman WA 6753; and
  - Whaleback, to be located at Cowra Drive, Newman WA 6753."

[7] Clause 3 of the Agreement that was later approved by employees on 16 August 2018 reads as follows:

> **"3. Where And Who The Agreement Covers**
>
> 3.1 This Agreement covers Employees of the Employer in the classifications set out in clause 17 Classifications, who are employed by the Company in relation to work performed for, or in connection with services provided to mining and resource exploration, refining, processing or development sites listed below:
>
> (a) Kurra Village – Newman Drive (Les Tutt Drive), Newman Western Australia, 6753
>
> (b) Kalgans Rest – 100 Kalgan Drive, Newman, Western Australia 6753
>
> (c) Warrawandu Village – Flatrocks Road off Great Northern Highway, Via Newman, Western Australia 6753
>
> (d) Town Maintenance work performed for BHPB in Newman, WA.
>
> (e) Mine site cleaning and maintenance work performed for BHPB at mine site serviced out of Newman, WA."

[8] Spotless requested that the matter be allocated to a member of the Commission. I listed the matter for hearing on 18 February 2019 and invited Spotless to make any submissions it wished to on the differences between the coverage clause of the Agreement and the NERR, including the different address for the Warranwanda Village, the non-inclusion of the 'future BHP Billiton camp' at Whaleback, and clauses 3.1(d) and (e) not provided for in the NERR. I also noted that the Agreement name in the Notice was *'Spartan Enterprise Agreement 2017'* whilst at clause 1 of the Agreement it is '*Spotless BHPB WA Sites Enterprise Agreement 2018.'*

[9] Mr Goos represented Spotless. Mr Goos submitted that there were not significant differences between the scope of coverage in the NERR and the Agreement. He submitted that the NERR was issued in May 2017, well before the Agreement was concluded.

[10] Mr Goos submitted the description in the NERR could have been more accurate concerning the town maintenance work, however those employees were involved in the bargaining.

[11] Mr Goos said Spotless only serviced the Warrawandu and Kurra Village camps. Mr Goos explained the reference to *'Spartan'* in the NERR by saying that the Downer group acquired the majority of shares in Spotless during 2017/18 and as part of that acquisition process the Downer employee relations team began to assist in drafting and negotiations for

enterprise agreements. Mr Goos advised the name Spartan was not a reference to the business, but was merely a naming convention for the purpose of identifying a particular contract. Spotless has now moved to a naming convention for agreements to identify the particular work or sites that the relevant enterprise agreement covers.

[12] Mr Goos explained that the difference in addresses in the NERR and the Agreement by stating that the addresses in the agreement were the addresses he was given for the camps at Kurra Village and Warrawandu Village. Mr Howard, who also made submissions at the hearing for Spotless, said he could not confirm the accuracy of the addresses however he said the different roads as described in the NERR and the Agreement for Warrawandu camp, were in effect the same road.

[13] Mr Howard said Kalgan's Rest is currently a caravan park which has been closed, and BHP is currently in the process of rebuilding the caravan park to become workers accommodation in approximately four months' time. Mr Howard said Whaleback was a village located across from the Kurra Village in Newman and it was also a caravan park, however BHP have rebuilt it to become workers accommodation and it is now serviced by one of Spotless' competitors for BHP. Mr Howard said when the NERR was issued in 2017 Spotless was optimistic about winning the contract to service the Whaleback site however was beaten by a competitor. Mr Howard was not sure whether employees were engaged at Whaleback at the time the NERR was issued however he believed this was not the case.

[14] Mr Howard provided an explanation about the nature of the town maintenance work performed for BHP in Newman (as described in the Agreement but not in the NERR). Mr Howard explained BHP owned the majority of houses and units in Newman and provides that accommodation for the BHP workforce. He said Spotless was successful in securing the contract to provide a raft of tradespeople including plumbers, electricians, air-conditioning mechanics, painters and contractors to provide maintenance services to those houses and units. Mr Howard said Spotless started that work between October and December 2017 (after the NERR was issued). He agreed that at the time the NERR was issued in May 2017 Spotless was not providing that service and won the contract at short notice following the previous contractor's withdrawal. Mr Howard said the workforce engaged by Spotless to perform this town maintenance work was a blend of former employees of the previous contractor, and new employees to fill positions still vacant.

[15] Mr Howard said the mine site cleaning and maintenance work performed for BHP occurs at Eastern Ridge and Marble Bar and is performed by staff who live at the Warrawandu Village. Mr Goos said the work was provided out of the Warrawandu Village so was the same group of workers as identified in the NERR.

[16] Mr Howard said the work was performed out of the camps at the time the NERR was issued in 2017 included cleaning, catering, administration, grounds work including lawn mowing and weeding, and housekeeping services. Mr Howard described the nature of the work as 'soft maintenance services'. It is clear from Mr Howard's submission that the soft maintenance work would not extend to the range of trades work subsequently engaged in and performed as part of the town maintenance work obtained by Spotless after the NERR was issued.

[17] I foreshadowed at the conclusion of the hearing that it would appear the inclusion of the town maintenance work for BHPB in Newman in the coverage of the Agreement was a

difficulty for Spotless, and I invited Spotless to provide any further written response to the Commission by Friday 22 February 2019 if it wished. Mr Goos indicated Spotless would respond by the end of the week. A submission was not received by the Friday however after following the matter up with Spotless the following week a written submission was filed on Wednesday 27 February 2019.

[18] The submissions addressed the requirements of section 173 and 174, and the requirement for the Commission to be satisfied the agreement has been genuinely agreed including the requirements of s.188 that the applicant has complied with subsection 180(2), (3) and (5) and subsection 181(2). The submissions also addressed the effect of the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (*Amendment Act*). I am satisfied by force of Item 28 Division 3, Schedule 4 of the *Amendment Act* that section 188 of the *Fair Work Act 2009* as amended by Schedule 2 of the *Amendment Act* is applicable to this matter.

[19] Section 188 of the FW Act was amended to include the following:

> "(2) An enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the agreement would have been genuinely agreed to within the meaning of subsection (1) but for a minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
>
> (b) The employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174."

[20] The application of section 188 as amended was recently considered in the Full Bench decision of *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318. That decision set out several relevant considerations[1] on the proper construction of s.188(2), including that:

1. Subsections 188(1) and (2) are to be approached sequentially. The first question is whether the Commission is satisfied as to the matters at s.188(1)(a)-(c). If it is so satisfied then the agreement has been genuinely agreed to and there is no need to consider s.188(2).

2. The reference to the 'employees covered by the agreement' in ss.188(1) and (2), is a reference to those employees employed and covered by the agreement at the time of the request to vote under s.181.

3. Subsections 188(1) and (2) both provide that an enterprise agreement has been genuinely agreed if the Commission is satisfied as to certain matters (i.e. those in s.188(1)(a) to (c) and ss.188(2)(a) and (b) respectively). The latitude as to the choice of the decision to be made by ss.188(1) or (2) is quite narrow in that the decision maker is required to conclude that the agreement was genuinely made if

he or she forms a particular opinion or value judgment. Assessing the genuineness of agreement under ss.188(1) and (2) involves an evaluative assessment.

4. Section 188(2) is confined to circumstances where the Commission is not satisfied that an agreement has been genuinely agreed to within the meaning of s.188(1), as a result of 'errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights'.

5. Section 188(2) does not extend to circumstances where the Commission is not satisfied that an agreement was genuinely agreed to in a more general sense, as might arise from a consideration of s.188(1)(c).

6. Section 188(2) does not apply to all procedural or technical requirements with which an employer must comply when bargaining for an enterprise agreement. The 'minor procedural or technical errors' referred to in s.188(2)(a) must be errors 'made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights' (emphasis added).

[21] I have considered the difference between the coverage of the NERR issued and the Agreement in light of the changes to s.188 by the *Amendment Act*.

[22] I have had regard to an observation of a Fair Work Commission Full Bench in *The Australian Maritime Officers' Union v Harbour City Ferries Pty Ltd* [2] that any non-trivial misdescription of coverage will render a NERR invalid with the consequence that any subsequent enterprise agreement will be incapable of approval. That this decision was made before the passage of the *Amendment Act.* It is clear that the difference between the NERR and the Agreement in this case could not be described as a trivial misdescription, and would have been invalid under the legislation prior to the passage of the *Amendment Act*. On that basis s.188(1) has not been satisfied.

[23] The question in this case given the passage of the *Amendment Act* is whether the changes to the NERR; and extension of the coverage of the Agreement to a new area of work performed by various tradespersons at accommodation in Newman not contemplated by the NERR, could fall within the discretion now given to the Commission in order to be satisfied an agreement has been genuinely agreed to in cases of minor procedural or technical errors, where employees were not likely to have been disadvantaged by those errors.

[24] Spotless has argued that it complied with its obligation under section 173 as at the time the bargaining was initiated on 1 May 2017 as it issued the NERR to all employees covered by the Agreement at that time.

[25] Spotless said that in or around June 2017 it completed an 'Amending Deed' to its principle Contract to undertake town maintenance services at Newman, Western Australia, with its client as an extension to the existing contract. It said as a result a further 15 employees (tradespersons/trades assistants) were employed to undertake town maintenance duties. I understood the submission to be that the *Spartan Enterprise Agreement 2012* currently applies to some employees and provides for trades classifications but the new

employees (engaged to undertake town maintenance work) are not covered by the scope of the *Spartan Enterprise Agreement 2012*.

[26] Spotless submitted the new employees received notifications of bargaining meetings, bargaining updates, and the notice of the ballot, participated in the explanation of the proposed agreement and participated in the Ballot. Spotless submitted that irrespective of the 'technical error' in not issuing a NERR to the new employees that these employees were bargaining for a proposed agreement.

[27] Spotless submitted it met specifically with this group of workers on 31 May 2018 as part of a broader communication to the whole workforce, and met again with them to explain the terms of the proposed Agreement on or around 1 August 2018.

[28] Spotless said these employees did not receive a copy of the NERR as they were not employed at the time of the notification. Spotless describes the categorising of this group of employees as 'new employees' as a 'minor error'. Spotless submitted this was in no way intentional and was not designed to circumvent its obligations in issuing a NERR. Spotless submitted that the Commission can be satisfied in accordance with s.188(2)(a) that the agreement would have been genuinely agreed to but for this 'minor procedural error' in not reissuing a NERR. Section 188(2)(a) and (b) must be read conjunctively, and therefore require satisfaction of both 188(2)(a) and (b).

[29] On the facts as presented this application falls foul of s.188(2)(a). Given that finding it is unnecessary to decide whether the application would have also failed to meet s.188(2)(b) but it is probably premature to form a view about that question as the matter has progressed on the basis of dealing with the NERR issue before other considerations, and final determination of the s.188(2)(b) issue may be dependent on other matters.

[30] I would accept the Spotless submission that the discrepancy between the addresses for the camps is a minor procedural or technical error and would have been no barrier to approval of the Agreement. I would also accept that the removal of Whaleback Village did not affect anything because the work never transpired and it would not be a barrier to approval. There is another matter not previously raised or addressed in submissions concerning the NERR being directed to cover work 'based at' the sites listed, whereas the Agreement is said to cover work 'in relation to work performed for, or in connection with services provided to mining and resource exploration, refining, processing or development sites' as then listed in the Agreement. As Spotless has not been asked to directly address that specific issue I will not express a view about it, and it is unnecessary to do so given the finding below.

[31] The application cannot satisfy s.188(2)(a) because the difference between the NERR issued on 1 May 2017 and the coverage of the Agreement cannot be described as a 'minor procedural or technical error' as its brings within the scope of the Agreement classifications and groups of employees not contemplated in the NERR. That change is not a 'minor procedural or technical error'. I have noted that in order to assist its argument Spotless has referred to the existence of the *Spartan Enterprise Agreement 2012* for the purpose of making the point that it included within its scope tradespersons, and these are the same classifications of trades work performing the town maintenance work performed under the scope of the contract won by Spotless after the issue of the NERR. However, as Spotless accepted, the *Spartan Enterprise Agreement 2012* did not cover that town maintenance work in Newman. Further the scope of the coverage in the *Spartan Enterprise Agreement 2012* is different to the

scope of coverage described in the NERR issued on 1 May 2017. The NERR was directed to the work being performed at the Warrawandu and Kurra Village camps which at the time did not involve trades work, and also the potential future work at camps at Kalgan's Rest and Whaleback. Mr Howard described the work performed out of the camps at the time the NERR was issued in May 2017 as including cleaning, catering, administration, grounds work including lawn mowing and weeding, and housekeeping services. Mr Howard described the nature of the maintenance element of this work as 'soft maintenance services'.

[32] Given the form of the NERR, it cannot be said that it contemplated trades work of the kind being performed under the new work won by Spotless as part of the town maintenance contract because Spotless did not know itself when it issued the NERR that it would be performing that work. I am satisfied that in all likelihood what has occurred was a mistake, and Spotless has not acted with any intention to mislead, or avoid its obligations.

[33] However, I am unable to accept that bringing within the scope of the Agreement well after the issue of the NERR, a new group of employees working in roles different to those in existence at the time the NERR was issued can be described as a minor procedural or technical error. On the basis of the significant changes to coverage of the Agreement as compared to the NERR, it cannot be relied upon and is invalid and the Agreement is incapable of approval, and consequently the application is dismissed.

[34] It is worth noting that had Spotless been able to overcome s.188(2)(a), satisfaction of s.188(2)(b) must also be met. Without deciding the issue, Spotless has submitted that the various tradespersons engaged to perform the town maintenance work, whilst not being given a NERR (which did not cover them in any event) still had the opportunity to be engaged in the bargaining process. It may not be a simple matter to make the case that the tradespersons performing the town maintenance work, and who sat outside the coverage of the NERR that was issued, and who were not given a NERR at all, were in those circumstances not likely to have been disadvantaged.

COMMISSIONER

Appearances:

Mr J. Goos on behalf of the Applicant

Hearing details:

2019,
Brisbane:
18 February

Printed by authority of the Commonwealth Government Printer

<PR705411>

[1] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 at [117].

[2] [2016] FWCFB 1151 paragraph [40].