DECISION

Fair Work Act 2009
s.437—Protected action

United Workers' Union
v
Toll Transport Pty Ltd
(B2019/1302)

DEPUTY PRESIDENT CLANCY MELBOURNE, 21 NOVEMBER 2019

Proposed protected action ballot of employees of Toll Transport Pty Ltd.

[1] On 12 November 2019, the United Workers' Union (**UWU**) applied for a protected action ballot order (**the Application**). In doing so, the UWU seeks an order that those employees of Toll Transport Pty Ltd t/a Toll Customized Solutions who are members of the UWU, and who will be covered by the proposed enterprise agreement intended to replace the *Toll Customised Solutions (Chullora) Enterprise Agreement 2015,*[1] be balloted to see if they support the taking of protected industrial action.

[2] The Application was accompanied by a statutory declaration declared on 12 November 2019 by Mr Rowan Payne, an Industrial Officer of the UWU.

[3] Email correspondence was sent by the Fair Work Commission (**the Commission**) to Toll Transport Pty Ltd (**Toll**) on the same day seeking advice as to whether it opposed the Application. In a reply email, Toll advised it objected to the Application on the basis that the Commission could not be satisfied that the UWU has been, and is, genuinely trying to reach agreement.

[4] At a directions hearing conducted on 13 November 2019, the following directions were made by Deputy President Gostencnik:

a) Toll was to file in the Commission and serve on the UWU an outline of submissions, any witness statements and other documentary material upon which it intended to rely in support of its objection to the Application by no later than 4.00pm on Monday, 18 November 2019.

b) The UWU was to file in the Commission and serve on Toll an outline of submissions, any witness statements and other documentary material upon which it intended to rely in support of the Application by no later than 4.00pm on Tuesday, 19 November 2019; and

[1] [2015] FWCA 8954, AE417287, PR575475.

c) The matter was listed for hearing at 10:00am on Thursday, 21 November 2019 before me.

UWU's Evidence and Submissions

[5] Mr Jonathon Dixon, an Organiser for the UWU, gave the following evidence:

a) He attended the first bargaining meeting between the parties on 29 October 2019 together with a UWU delegate, Mr Jordan Saric, with Ms Diana Babana and Mr David Gardner attending for Toll;

b) He understood Ms Babana and Mr Gardner to be bargaining representatives for Toll;

c) He went through the union's log of claims and explained the details regarding each claim, asking whether Toll understood each claim and whether it required further details;

d) Two claims are particularly important to the UWU members;

e) The first is a claim for wage increases totalling 8% per annum throughout the life of the new agreement;

f) The second is a claim for a new clause for redundancy and severance arrangements, which provides for an affected employee to have the choice between a transfer to another site proposed by Toll or a severance package in the event of a redundancy;

g) Ms Babana did most of the talking on behalf of Toll and she responded to the first of these claims with words to the effect that the company would not agree to it;

h) In response, he explained that the UWU had achieved an 8% wage rise for employees at Chemist Warehouse distribution centres earlier in 2019 and when Ms Babana replied by saying that those Chemist Warehouse workers had started on a much lower base rate and Toll would not agree to 8%, he was left with the impression that Toll firmly opposed the wages claim;

i) In relation to the second claim, Ms Babana told him that she did not agree with the claim because she did not believe in making an employee redundant if a transfer was available and Toll was in the business of keeping people in jobs;

j) As a result of these responses from Ms Babana, he was left with the impression that these two claims would become the main themes of the negotiations to follow;

k) The UWU's other nine claims are still being pursued and he was expecting a response in relation to them and further discussions;

l) He recalls arranging a follow-up bargaining meeting to continue discussions, which he plans to attend to continue discussions in order to reach an agreement;

m) On 20 November 2019, he requested that the follow-up meeting that was planned for 2.00pm on 21 November 2019 be rescheduled to 2 or 3 December 2019.

[6] The UWU submits that whether an applicant is genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations and the Commission has held that it is not appropriate, nor possible, to establish rigid rules for the required point of negotiations that must be reached.[2] Further, although the Commission has not established a strict criteria for applicants to meet the threshold of s.443(1)(b) the *Fair Work Act 2009* (**the Act**), a normal expectation is the Applicant has clearly articulated the major items it is seeking for inclusion in the agreement, and provided a considered response to any demands made by the other side.[3]

[7] The UWU submits Mr Dixon's evidence demonstrates that the UWU clearly articulated each claim and ensured that Toll understood each claim and the evidence of Ms Babana confirms the UWU has provided Toll with a detailed list of its claims, including entire proposed clauses for its consideration.

[8] The UWU rejects the assertions of Toll that it has not given Toll an opportunity to respond to its log of claims or make a formal offer, submitting that Mr Dixon's evidence establishes Toll has made a verbal response to the UWU's two main claims in relation to wages and redundancy. Further, it submits that having been provided a copy of its log of claims on 29 October 2019, Toll has had ample time to prepare a formal written response, should it have wished to do so.

[9] The UWU rejects any suggestion that Ms Babana was simply offering personal opinions on 29 October 2019. It submits Toll knows what it is doing when it comes to bargaining and has complete control over who it has conducting negotiations. It rejects the submission of Toll that s.176(1)(d) of the Act is significant in the context of the Application.

[10] The UWU contends there is no case law proffered to support Toll's notion that it is not genuinely trying to reach agreement on the basis that it has not waited for Toll to make a formal offer before pursuing the Application. It proffers that the making of a formal offer is entirely dependent on the context of particular negotiations. The UWU submits an employer may choose not to make a formal offer until an agreement in principle is reached or alternatively, it may choose to conduct all negotiations verbally, before putting a draft agreement to a vote. As such, the UWU submits, whether or not a 'formal offer' has been, or ever is made, is not determinative of whether an applicant for a PABO is genuinely trying to reach agreement.

[11] The UWU submits:

a) It has provided a detailed log of claims to Toll;

b) It has met with Toll's representatives and clearly explained its claims and the changes it seeks in the proposed agreement;

c) Toll has provided a response to two of its significant claims;

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[2] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 at [31]-[32].

[3] Ibid.

d) The UWU has made itself available for further bargaining meetings;

e) The parties have not adopted final positions because "toing and froing" is underway and there is no impasse; and

a) It will continue to engage in negotiations, its position may alter during negotiations and it will consider the response from Toll.

[12] Having regard to this context, the UWU submits the Commission ought to be satisfied it has been, and continues to be, genuinely trying to reach agreement with Toll.

Toll's Evidence and Submissions

[13] Ms Diana Babana, Senior Manager – Human Resources for Toll, gave the following evidence:

a) On 23 October 2019, she sent an email to Mr Matt Toner of the UWU, to inform him that the Respondent was ready to commence bargaining;

b) Also on 23 October 2019, a notice of employee representational rights was issued to employees to be covered by the proposed enterprise agreement intended to replace the *Toll Customised Solutions (Chullora) Enterprise Agreement 2015* (**2015 Agreement**);[4]

c) A first bargaining meeting with the UWU was arranged on 25 October 2019. It was to take place at 1.30pm on 29 October 2019;

d) Mr Jonathon Dixon of the UWU emailed her the UWU's log of claims at 8.44am on 29 October 2019 and this was the first time she or anyone directly involved in renegotiating the 2015 Agreement had seen the UWU log of claims;

e) The first bargaining meeting between the parties took place at 1.30pm on 29 October 2019;

f) Mr Dixon went through the UWU's log of claims at this meeting, from which she understood the UWU's wage claim to be for increases of 8% each year;

g) She shared her "personal opinion" in relation to the wage claim, being that she did not think the business would agree. She said that she had said words to the effect of, "that's interesting, I don't think the business will agree" and " I have never seen the business agree to that high an increase", but that she did not say Toll would not agree to the wage claim;

h) In relation to the UWU's claim relating to redundancy, she shared her "personal opinion" in respect to making an employee redundant if a transfer was available. She said she told Mr Dixon that Toll's priority is to keep people in jobs and for this reason, she did not personally agree with voluntary redundancy;

[4] [2015] FWCA 8954, AE417287, PR575475.

i) She advised Mr Dixon that Toll was not in a position to respond as it had only received the log of claims and needed, amongst other things, to seek legal advice from Mrs Fabiana James, Toll's Senior Manager – Employee and Industrial Relations, before responding;

j) She did not provide Mr Dixon with a firm response regarding the UWU claims relating to wages and redundancy, with the only firm response she provided being that they would organise a follow-up meeting;

k) Whilst she is heavily involved in negotiations, she does not have authority to make decisions on behalf of Toll without getting sign-off from senior Toll managers, including Mrs James;

l) Her responses to the wage claim and redundancy claim were personal opinions and she did not have authority to agree or disagree to anything at the meeting on 29 October 2019;

m) On 30 October 2019, the parties agreed to next meet on 7 November 2019 for the second bargaining meeting;

n) On the morning of 7 November 2019, this second meeting was postponed due to Mrs James having to respond to alleged industrial action taken against Toll by a group of its contract carriers at another Toll site. As such, Toll and Mr Dixon agreed to reschedule the second bargaining meeting to 21 November 2019;

o) She received no indication from Mr Dixon that the UWU objected to the new date and believed that he did not have an issue with it;

p) She received the Application on 12 November 2019.

[14] Mr David Gardner, Toll's Site Operations Manager at Chullora, gave the following evidence:

a) He is heavily involved in negotiating enterprise agreements for the Chullora site, in that he attends bargaining meetings and is part of the team that makes decisions as to what claims should be agreed to, with ultimate sign-off for an agreement coming from his General Manager;

b) He understood the purpose of the 29 October 2019 meeting was for the UWU to present its log of claims to Toll so that the negotiation process could commence;

c) The 29 October 2019 meeting started with Mr Dixon explaining that he was going to read through the UWU claims and provide explanations as required;

d) Ms Babana did most of the talking for Toll at the 29 October 2019 meeting;

e) When Mr Dixon advised the UWU was proposing an 8% pay increase, Ms Babana said "that's a little high";

f) Mr Dixon and Ms Babana had some discussion regarding the agreement the UWU had reached at Chemist Warehouse before Mr Dixon continued reading through the UWU claims;

g) Ms Babana did not say that Toll did not agree to the wage claim and at no stage did she speak on behalf of Toll, nor did she make any suggestion that she was making direct decisions on behalf of Toll;

h) When the claim regarding redundancy was raised, Ms Babana said that due to Toll's size, it would have the ability to relocate staff if required but in doing so, was not speaking on behalf of the business;

i) At the end of the conversation, Ms Babana said Toll would require another meeting and it was suggested this be at the end of the following week as this would give Toll time to review the claims and draft a response. Mr Dixon said he would be on leave that week;

j) Ms Babana said that she had to talk to Toll's team and come with a counter-offer and that she needed to speak to someone in the business to arrange for them to also come, although he could not recall to whom she was referring. The meeting then finished.

[15] Toll submits whether the UWU "has been, and is, genuinely trying to reach an agreement" within the meaning of s.443(1)(b) of Act is a question of fact to be decided by reference to all of the circumstances of the bargaining in question[5] and resolving this question will frequently involve consideration of the extent of progress in negotiations and the steps taken in order to try to reach agreement.[6] Toll submits that the Commission cannot be satisfied that the UWU has met this mandatory pre-requisite.

[16] Toll submits that Ms Babana was not a bargaining representative appointed under s.176(1)(d) of the Act and it was unrealistic to expect Toll to be in a position to respond to the UWU's log of claims at the 29 October 2019 meeting when this had been received by it only five hours earlier.

[17] Toll submits the UWU has not, and is not, genuinely trying to reach an agreement because it has not given Toll an opportunity to respond to the UWU's log of claims or make a formal offer. Toll submits the proposed 21 November 2019 meeting was scheduled for the purpose of providing Toll with its first opportunity to respond to the UWU's log of claims and that in making the Application before Toll could respond, the UWU is not genuinely trying to reach an agreement. Toll submits the Application has been made prematurely without knowing whether or not it is prepared to agree to some or all of its claims.

[18] Toll submits that reaching an agreement requires "a meeting of minds" and the UWU has not facilitated this in this case because it has simply communicated what it wants.

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[5] *Esso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); The Australian Workers' Union (AWU)* [2015] FWCFB 210 at [57].

[6] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 at [32].

[19] Toll confirmed it objects to the making of a protected action ballot order on the basis that the UWU has not, and is not, genuinely trying to reach an agreement with it. It submits that to grant the Application would be to offend the objects of Part 2-4 of the Act.

Has the UWU been and is it genuinely trying to reach agreement with Toll?

[20] Section 443 of the Act deals with the circumstances in which the Commission must make a protected action ballot order. Subsections 443(1) and (2) are relevant for present purposes:

> "**Section 443 When the FWC must make a protected action ballot order**
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> (1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:
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> (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.
>
> (2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1)."

[21] The reference to the Commission being "satisfied" means that determining whether or not the requisite circumstance exists is a discretionary decision.

[22] The expression "has been, and is", imports temporal considerations, both of which are to be considered. An applicant for a protected action ballot order must satisfy both.

[23] In *Esso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); The Australian Workers' Union (AWU)*[7] (**Esso**), the Full Bench stated:

> "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*; *JJ Richards No.1; Alcoa*; *JJ Richards No.2*; and *Farstad*"[8] (references omitted)

[24] In *Total Marine Services Pty Ltd v Maritime Union of Australia*[9] (**Total Marine**) a Full Bench of Fair Work Australia relevantly stated:

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[7] [2015] FWCFB 210.

[8] Ibid at [57].

[9] [2009] FWAFB 368.

> "[31] In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations. It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied. In the course of examining all of the circumstances it may be relevant to consider related matters but ultimately the test in s 443 must be applied.
>
> [32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement..."

[25] Both decisions stand for the proposition that a decision rule should not be adopted for the purposes of determining whether an applicant for a protected action ballot order has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted. The entirety of the circumstances of the case must be taken into account.

[26] The evidence before me reveals:

- Only one bargaining meeting has taken place and it took place less than 5 hours after the UWU first served its log of claims on Toll;
- The log of claims contains eleven items but only two of them have been discussed and not in any great depth;
- The wage claim requires annual 8% increases compared to 3% per annum increases under the 2015 Agreement;
- The redundancy claim represents a not insignificant change in terms of the quantum of the severance payments and outcomes where alternative employment may be available, compared with the 2015 Agreement;
- It was conveyed to the UWU by Toll at the first meeting that it would require some legal advice before responding to the log of claims;
- The parties agreed they should meet again;
- The next day, the parties agreed on a date for a second meeting;
- After this had been done, but before the second meeting had taken place, the UWU lodged the Application.

[27] In the circumstances of this case, I am not persuaded the UWU satisfies the requirement that it "has been, and is, genuinely trying to reach agreement" with Toll. The first meeting comprised the UWU reading through and explaining its very recently exchanged log of eleven claims so that Toll understood each item. During this process, both parties made only brief, perfunctory observations and comments about the wage and redundancy claims. The evidence does not reveal discussion of substance regarding these, or any of the other nine

claims, during the first meeting. The dialogue, such as it was, amounted to nothing more than light parrying.

[28] The words "genuinely trying" in s.443(1)(b) of the Act must have some work to do. I consider they would be rendered meaningless if a protected action ballot order was made in this case. This is not to impose a high bar that is inconsistent with the intent of Parliament, suggest ambitious claims cannot be made or set a minimum period of time before an application for a protected action ballot order can be made. I have simply reached the conclusion that on the material before me, this Application has been prematurely made.

Conclusion

[29] On the basis of the material before me, I am not satisfied the UWU has fulfilled the statutory prerequisites for a protected action ballot order yet, and accordingly, I dismiss the Application.

DEPUTY PRESIDENT

Appearances:
Mr R Payne for the United Workers' Union.
Mrs F James for Toll Transport Pty Ltd.

Hearing details:
2019.
Melbourne and Sydney (Video):
November 21.

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