DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 3, Item 16 - Application to terminate collective agreement-based transitional instrument

Mambourin Enterprises Ltd
v
Australian Education Union & another
(AG2019/3730)

Health and welfare services

COMMISSIONER CIRKOVIC MELBOURNE, 29 NOVEMBER 2019

Application for termination of the Mambourin Enterprise Inc Disability Services Victoria (Part 1) Collective Agreement 2008.

[1] Mambourin Enterprises Ltd (the Employer) has made an application pursuant to Sch. 3, Item 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to terminate the *Mambourin Enterprise Inc Disability Services Victoria (Part 1) Collective Agreement 2008* (the Agreement).

[2] The application is opposed by the Australian Education Union (the AEU) and another individual who wishes to remain anonymous (the Individual).

[3] This decision concerns the application of the Individual for confidentiality orders under s.594 of the *Fair Work Act 2009* (the Act), which, if granted, would allow the Individual to remain anonymous whilst opposing the termination application.

Background

[4] The termination application was lodged on 1 October 2019. On 8 October 2019 I issued directions by email to the Employer, directing it to serve the directions on employees and employee organisations covered by the Agreement. The directions stated that any objection to the termination application was to be filed with my chambers by 22 October 2019.

[5] On 17 October 2019 my chambers received an email from the AEU indicating its opposition to the termination application and requesting a directions hearing. On 18 October 2019, Mr Michael Sayers of Slater and Gordon Lawyers emailed my chambers indicating that he acted for the Individual who wished to oppose the termination application and to remain anonymous.

[6] On 21 October 2019, the Employer's representative wrote to my chambers seeking that "Mr Sayers' client be identified and not be treated as anonymous in the context of the application for termination of the Collective Agreement."

[7] In the afternoon of 21 October 2019, my chambers emailed Mr Sayers requesting that he provide on behalf of his client "reasons supporting an application for confidentiality under the *Fair Work Act 2009*", and "evidence that [his client] was employed by the employer at the time Mambourin Enterprise Ltd made the application to terminate the Agreement on 1 October 2019." Mr Sayers was directed to provide this material by close of business 28 October 2019.

[8] The matter was heard for directions on 25 October 2019. Permission to appear was granted to the parties. The matter was programmed for the filing of material in relation to the substantive matter, and in relation to this confidentiality issue. The AEU confirmed that it did not wish to be heard or make submissions in relation to the Individual's confidentiality request. The Employer was directed to file its submission opposing confidentiality by close of business 1 November 2019.

[9] Mr Sayers and the Employer filed their materials in accordance with my directions. In addition to submissions which were filed and served on the Employer, Mr Sayers filed confidentially in the Commission evidence to support the Individual's submissions. This included payslips, a contractual document and a brief outline of the Individual's circumstances. Mr Sayers also filed reply submissions on 13 November 2019, to which I have had regard in determining this matter.

[10] The parties confirmed that they are content for this issue to be determined on the papers.

Statutory provisions

[11] The Individual seeks confidentiality orders pursuant to s.594 (1)(b) of the Act.[1] Section 594(1) provides as follows:

594 Confidential evidence
(1) The FWC may make an order prohibiting or restricting the publication of the following in relation to a matter before the FWC (whether or not the FWC holds a hearing in relation to the matter) if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason:

> (a) evidence given to the FWC in relation to the matter;
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> (b) the names and addresses of persons making submissions to the FWC in relation to the matter;
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> (c) matters contained in documents lodged with the FWC or received in evidence by the FWC in relation to the matter;

(d) the whole or any part of its decisions or reasons in relation to the matter.

[12] Section 225 and 226 of the Act set out the matters which, if satisfied, oblige the Commission to order the termination of the Agreement.[2]

[13] Section 225 of the Act provides as follows:

225 Application for termination of an enterprise agreement after its nominal expiry date

If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:

(a) one or more of the employers covered by the agreement;

(b) an employee covered by the agreement;

(c) an employee organisation covered by the agreement.

[14] Section 226 of the Act provides as follows:

226 When the FWC must terminate an enterprise agreement

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

(a) the FWC is satisfied that it is not contrary to the public interest to do so; and

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

Legal principles

[15] In *Amie Mac v Bank of Queensland Limited & Ors* [2019] FWC 2885 ("*Amie Mac*"), a case which concerned an application for orders to stop bullying, Vice President Hatcher helpfully set out the principles which are to be considered in an application for confidentiality orders. The principles are also relevant to the present application. I have respectfully adopted the reasoning and principles set out in *Amie Mac*. In that case, Vice President Hatcher said:

> "**[6]** The principle of open justice will usually be the paramount consideration in determining whether a confidentiality order of the type sought by the respondents ought be made. The main features of that principle were usefully summarised in the NSW Supreme Court decision (Pembroke J) in *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* as follows:

"[2] The reason for the principle of open justice is that, if the proceedings of courts of justice are fully exposed to public and professional scrutiny and criticism, and interested observers are able to follow and comprehend the evidence, the submissions and the reasons for judgment, then the public administration of justice will be enhanced and confidence in the integrity and independence of the courts will be maintained: *Russell v Russell* ; *Farrelly v Farelly* (1976) 134 CLR 495 at 520 (Gibbs J). Not only does the conduct of proceedings publicly and in open view assist in removing doubts and misapprehensions about the operation of the system, but it also limits the opportunity for abuse and injustice by those involved in the process, by making them publicly accountable. Equally, public scrutiny operates as a disincentive to false allegations and as a powerful incentive to honest evidence: *J v L& A Services Pty Ltd (No 2)* [1995] 2 Qd R 10 at 45 (Fitzgerald P and Lee J). For all those reasons, the principle of open justice is not only an indispensable feature of our system, but it is also a healthy feature.

[3] There are limited exceptions to the principle of open justice. Where those exceptions apply, the courts will restrict access where appropriate. But departure from the principle of open justice is only justified where observance of the principle would in fact frustrate the administration of justice by unfairly damaging some material private or public interest. To that end, an order restricting the public availability of information will only be made if it is really necessary to secure the proper administration of justice. Such an order must be clear in its terms and do no more than is necessary to achieve the due administration of justice. Furthermore, there must be some material before the Court upon which it can reasonably reach the conclusion that it is actually necessary to make an order of that type: *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-7 (McHugh JA); *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 4)* [2010] NSWLEC 91 (Preston CJ); *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 1024 (Einstein J).

[4] The consequence of the principle of open justice is that embarrassing, damaging and inconvenient facts may occasionally come to light. That consideration has never been regarded as a reason in itself for the suppression of evidence or for an order restricting access to documents: *John Fairfax Group Pty Ltd (Receivers& Managers Appointed) v Local Court of New South Wales & Ors* (1991) 26 NSWLR 131 at 142 (Kirby P). Equally, it is common for sensitive issues to be litigated and for information that is extremely personal or confidential to be disclosed. This is sometimes an unavoidable by-product, and a necessary consequence, of the application of the principle.

[5] To avoid the consequences that sometimes follow from the conduct of proceedings publicly and in open view, parties can, and frequently do, choose to litigate their disputes by private commercial arbitration. But if they choose to litigate in court, they must accept the necessity for the Court to conduct its proceedings openly and with transparency."

[7] The above passage describes the open justice principle in relation to courts, but I consider that the passage is equally applicable to a tribunal such as this Commission which conducts its processes in a quasi-judicial fashion.

> **[8]** As identified in the passage quoted, departures from the principle of open justice may be permitted where not to do so would defeat the proper administration of justice. For example, in criminal proceedings involving an allegation of blackmail, identifying details of the target of the alleged blackmail will often be suppressed in order that the system of justice does not serve to aid the blackmailer. Genuine trade secrets and commercially confidential information may be the subject of orders restricting publication and disclosure where their exposure in the course of litigation may result in a litigant suffering the injustice of detriment at the hands of a competitor.
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> **[9]** In relation to the anti-bullying jurisdiction established by Part 6-4B of the FW Act, it is apparent that the purpose of the legislation, namely to ensure that workers can continue in their engagements at work free from the risk to health and safety caused by workplace bullying, would be defeated if the public disclosure of sensitive information during the course of anti-bullying proceedings would be likely to have the effect of rendering the relevant worker's continuing engagement unviable. However it is equally apparent that, in accordance with the open justice principle, it is not sufficient to justify the making of a non-disclosure order merely that allegations have been made which are embarrassing, distressing or potentially damaging to reputations. In an anti-bullying matter, as with other types of proceedings before the Commission such as unfair dismissal remedy applications, the findings of the Commission concerning allegations which have been made will usually appropriately resolve concerns about embarrassment, distress or damage to reputation. If findings are made that an applicant's allegations of bullying behaviour are unfounded, then the position of persons alleged to be the perpetrators of such bullying will be vindicated and the outcome will redound upon the applicant. However if allegations of bullying are found to be substantiated, then public identification of the perpetrators of that bullying is normally appropriate. In either case, the public scrutiny involved will have a deterrent effect that is in the public interest - in the former case against the making of unfounded allegations and in the latter case against engagement in bullying behaviour.
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> **[10]** If a party applies for confidentiality orders on the basis that disclosure of sensitive information is likely to endanger the viability of a continuing working engagement, then that party will need to positively satisfy the Commission that this is the case. It is not sufficient for this simply to be asserted. In this case, the respondents have submitted that de-identification was appropriate because it would:
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> (1) minimise the negative impact that any open proceedings may have on Ms Mac, particularly in relation to her ability to return to work;

> (2) minimise the negative impact that any open proceedings may have on the health of Ms Mac;
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> (3) minimise the adverse impact on the individual respondents of untested allegations, including allegations to the effect that they (being lawyers) have breached the Australian Solicitors' Conduct Rules; and
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> (4) minimise unnecessary knowledge of the proceedings amongst BOQ employees, thereby minimising the potential to adversely affect any return to work by Ms Mac.

[11] In relation to contentions (1), (2) and (4) above, if the Commission was positively satisfied that the disclosure of the names of the individuals involved in this matter would seriously endanger the ability of Ms Mac, who is currently off work because of psychological illness, to ever return to her employment with BOQ, then that would form a proper basis for the making of de-identification orders under s.593(3) of the FW Act. However the contentions in this respect did not rise above the level of generalised assertions. There was nothing in the evidence, including the medical evidence, which could form a proper basis for the conclusion that the identification of the names of the relevant individuals would be likely to prevent Ms Mac from returning to work at an appropriate time. Ms Mac herself, who had access to competent legal and medical advice, expressed no concerns on this score and was opposed to the making of de-identification orders.

[12] Contention (3) is misconceived. There is no issue of "untested" allegations here, because the allegations have been tested at the hearing and will be the subject of findings in this decision. Whilst I do not anticipate that the findings I intend to make will give any of the individual respondents concern for their reputations, the possibility of the effect of adverse findings on the reputation of individuals is not in itself a proper basis for the non-disclosure of the names of those individuals, for the reasons already discussed. For example, although in this case there is no basis whatsoever to find that any of the individual respondents have as lawyers breached the Australian Solicitors' Conduct Rules, were it necessary for me to make such a finding, the principle of open justice as well as the public interest would support the identification of the person(s) the subject of such a finding.

[13] Accordingly I do not consider there to be any proper basis for the making of the de-identification orders sought by the respondents and I reject their application in this respect."

(Footnotes omitted)

Submissions of the parties

[16] I have considered the totality of the Individual's submissions in coming to my decision and have distilled those submissions below:

- There is "uncontroversial and unquestionable evidence that establishes" that the Individual is an employee covered by the Agreement, because the employee's identity and evidence of employment was provided to the FWC;[3]

- the Individual's personal circumstances as set out in correspondence to the commission warrant the granting of an application;[4]

- the Individual's identification may cause tension and possible acrimony in the Individual's relationship with the Employer leading to possible detriment to the Individual;[5]

- the importance of giving effect to the Individual's interests in being heard for the purposes of section 226 of the Act;[6]

- the Individual, in this case, does not propose to give evidence in the hearing of the matter but, rather, simply seeks to make submissions about the likely effect of any decision to terminate the agreement;[7]

- the Individual's concerns are genuinely held;[8]

- there is no prejudice to the Employer in circumstances where the views of the employees must be considered by the Commission;[9]

- the Employer would still have liberty to apply should it later require;[10] and

- there is utility in the Individual's anonymous involvement because s.226(b) of the Act requires the Commission to take into account views and circumstances of employees.[11]

[17] I have similarly considered the Employer's submissions and distilled them below:

- it is not possible for the Employer to test or accept whether or not the unnamed Individual is an employee covered by the collective agreement in circumstances where the evidence has been withheld from the employer; [12]

- notwithstanding the power of the Commission to make confidentiality orders, the Commission should exercise that power with caution;[13]

- the principles of open justice are usually a "paramount" consideration in determining whether a confidentiality order ought be made;[14]

- there are limited exceptions to the principles of open justice such as the disclosure of sensitive information or "where its observance would in fact frustrate the administration of justice (by unfairly damaging some material private or public interest)";[15]

- the starting principle is that the order should only be granted in a manner that is fair and just and open and transparent;[16]

- there must be a sound evidentiary basis for making the order;[17]

- the Individual concerned is protected from adverse action by the general protections' regime under the FW Act;[18]

- the Individual's application at its highest cites the "other reason" for opposing the application that it "may cause tension and possible acrimony, leading to possible detriment", an allegation that is "inexact, indirect and could never substantiate an allegation of a civil remedy contravention. It is insufficient";[19] and

- the Individual's participation is of "no utility" as the Commission will have no evidentiary basis to make a determination as to the likely effect of the termination on the employee's circumstances.[20]

Consideration

[18] I have taken into account the parties' submissions and the material confidentially filed by Mr Sayers in reaching my decision. I have not provided any detail in this decision as to the confidential circumstances in that material so as to protect the Individual's identity.

[19] The parties in the matter before me do not dispute the power of the Commission to make the orders pursuant to s.594(1). The question in dispute is whether the circumstances justify the making of such an order.

[20] The Individual's case for confidentiality essentially amounts to a hypothetical concern that the Individual will suffer detriment from the employer's actions towards the Individual or from the employer's perception of the Individual after learning their identity. That said, beyond a general assertion as to the possibility of detriment to the Individual, there is a paucity of evidence before me as to the basis of the Individual's apprehension. The material before me does not rise above general assertions from the Individual's representative that the disclosure of the identity of the Individual is likely to endanger the viability of a continuing working arrangement. A mere assertion as to an apprehension as to potential detriment is in my view an insufficient basis of the granting of the order sought.

[21] The Individual's representative also referred me to the *Application by Worker A, Worker B, Worker C, Worker D and Worker E* [2016] FWC 6524, decided by Deputy President Gostencnik. I have considered that decision but in my view, the case before me has little in common with the particular circumstances before the Deputy President. I do not consider the passages cited by the Individual's representative as expressing any broader proposition than that in the circumstances of the case before the Deputy President, a confidentiality order was considered appropriate.

[22] Further, s.226 requires that I consider the views and circumstances of employees covered by the Agreement. The Individual concerned requests that the "name and any other information that may reveal the identity of [the Individual] only be shared with the FWC …" In my view "any other information" may include matters such as the employee's job title,

position description, and potential examples of work undertaken that may be linked to that position. The Commission is required to consider the employees' views and circumstances in a meaningful way. To grant the application which in effect would preserve the anonymity of the Individual may lead to a distorted picture of the factual matrix. In those circumstances, I am mindful that the employer may be deprived of an ability to challenge the position put forward by the Individual.

[23] I am sympathetic to the Individual's desire to avoid the discomfort associated with agitating their position openly with their employer. However, the principles of open justice are not to be departed from lightly and there are many cases in the Commission where applicants must pursue their rights without the comfort of an order protecting their anonymity.

[24] For the reasons above, the application for confidentiality orders is dismissed. Given the reasons for my decision to dismiss the Individual's application, it is not necessary for me to make any findings as to the employment status of the Individual, and I have not done so. It follows that if the Individual wishes to make submissions in opposition to the termination application, they must put their name to those submissions.

COMMISSIONER

Final written submissions:

- Reasons For Request For Confidentiality filed 28 October 2019;
- Submissions Opposing Confidentiality Request filed 1 November 2019;
- Reply To The Applicant's Submissions filed 13 November 2019.

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[1] A's subs paragraph 6

[2] Item 16, Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

[3] Reply To The Applicant's Submissions filed 13 November 2019 [2].

[4] Reasons For Request For Confidentiality filed 28 October 2019 [7].

[5] Ibid.

[6] Ibid [5], [11].

[7] Ibid.

[8] Ibid.

[9] Ibid [12].

[10] Ibid.

[11] Reply To The Applicant's Submissions filed 13 November 2019 [3].

[12] Submissions Opposing Confidentiality Request filed 1 November 2019 [3].

[13] Ibid.

[14] Ibid [7].

[15] Ibid [8].

[16] Ibid [10].

[17] Ibid.

[18] Ibid section C.

[19] Ibid [16].

[20] Ibid [22].