



DECISION

Fair Work Act 2009

s.319 - Application for an order relating to instruments covering new employer and non-transferring employees

Sedgman Employment Services Pty Ltd

(AG2019/3912)

BYERWEN ENTERPRISE AGREEMENT 2019

Coal industry

DEPUTY PRESIDENT ASBURY

BRISBANE, 24 DECEMBER 2019

Application for an order relating to instruments covering new employer and non-transferring employees.

BACKGROUND

[1] Sedgman Employment Services Pty Ltd (SEMS) applies pursuant to s.319(1)(b) of the *Fair Work Act 2009* (the Act) for an Order that the *Byerwen Enterprise Agreement 2019* (the Byerwen Agreement) covers non-transferring employees of SEMS who perform or who are likely to perform transferring work in respect of work covered by the Byerwen Agreement.

[2] The background to the application can be briefly summarised as follows. SEMS is a wholly owned subsidiary of Sedgman Pty Limited. SEMS employs a number of employees to work on black coal and metalliferous mine sites throughout Queensland and New South Wales, including at the Sonoma black coal mine (near Collinsville, Qld). Employees at Sonoma are covered by the site specific *Sedgman Employment Services Pty Ltd Sonoma Enterprise Agreement 2017* (Sonoma Agreement).

[3] The other relevant entity to this application is Sedgman Operations Employment Services Pty Ltd (SOES), which is also a wholly owned subsidiary of Sedgman. SOES also employs employees to perform work on black coal mine sites.

[4] In mid-2018, Sedgman commenced operating the coal handling and preparation plant at the Byerwen mine. At that time, SOES employed employees to perform work at the Byerwen site with those employees covered by the *Sedgman Coal Agreement 2015* which nominally expired on 31 December 2018.

[5] In early 2019, SOES negotiated a site-specific agreement (the Byerwen Agreement) for the employees performing work at the Byerwen site (the transferring work) and to whom the Byerwen Agreement now applies. Sedgman currently provides services to the same client for both the Sonoma and Byerwen sites. Sedgman identified that having the same employer

(SEMS), with consistency of employee terms and conditions, for both sites would also align with Sedgman's commercial arrangements.

[6] SOES bargained for the Byerwen Agreement intending that the relevant employees performing the Transferring Work at Byewen would later transfer from SOES to SEMS and be covered by the Byerwen Agreement (the transferring employees). The relevant Transferring Employees have agreed in writing to their transfer of employment on the condition that this application is approved and on the understanding that the Agreement will continue to apply to their employment.

[7] SEMS submits a transfer of business as defined in s.311 of the Act will occur when transferring employees transfer their employment from SOES to SEMS (the new employer). Pursuant to s.313 of the Act, the Byerwen Agreement will cover SEMS and the transferring employees undertaking the transferring work.

[8] SEMS applies for an order pursuant to s.319(1)(b) of the Act on the basis that unless the Commission makes an order that the Byerwen Agreement will apply to non-transferring employees of SEMS, the *Black Coal Mining Industry Award 2010* will apply to any non-transferring employees employed by SEMS and performing the transferring work, whereas the Agreement will apply to the transferring employees undertaking the same transferring work.

LEGISLATION

[9] Section 319 of the Act provides as follows:

“319 Orders relating to instruments covering new employer and non-transferring employees

Orders that the FWC may make

(1) The FWC may make the following orders:

- (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a non-transferring employee because of subsection 314(1) does not, or will not, cover the non-transferring employee;
- (b) an order that a transferable instrument that covers, or is likely to cover, the new employer, because of a provision of this Part, covers, or will cover, a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
- (c) an order that an enterprise agreement or a modern award that covers the new employer does not, or will not, cover a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer.

Who may apply for an order

(2) The FWC may make the order only on application by any of the following:

- (a) the new employer or a person who is likely to be the new employer;
- (b) a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
- (c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;

- (d) if the application relates to a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

- (3) In deciding whether to make the order, the FWC must take into account the following:
 - (a) the views of:
 - (i) the new employer or a person who is likely to be the new employer; and
 - (ii) the employees who would be affected by the order;
 - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
 - (c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;
 - (d) whether the transferable instrument would have a negative impact on the productivity of the new employer’s workplace;
 - (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;
 - (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Restriction on when order may come into operation

- (4) The order must not come into operation in relation to a particular non-transferring employee before the later of the following:
 - (a) the time when the non-transferring employee starts to perform the transferring work for the new employer;
 - (b) the day on which the order is made.”

CONSIDERATION

[10] The effect of the order sought by SEMS would be that the Byerwen Agreement applies to non-transferring employees of SEMS. I will consider each of those matters in s.319(3) in turn.

The views of the new employer

[11] I accept that SEMS is the new employer and wishes to ensure that the Byerwen Agreement applies to non-transferring employees. SEMS submits that if it employs non-transferring employees, different industrial instruments will apply to employees performing the same Transferring Work, unless the Commission makes an order that the Agreement applies to the non-transferring employees employed by SEMS. The Transferring Employees will be covered by the Agreement, and non-transferring employees will be covered by the Award. It further submits the order sought will provide consistency in terms and conditions of employment for employees who will be performing the same work

[12] Having employees who are performing the same Transferring Work, at the same site, engaged under different industrial instruments would:

- impose significant administrative burden on SEMS, particularly in terms of the following processes payroll, recruitment and onboarding, employee transfers, training and development, and general system setup;
- likely create dissatisfaction between Transferring Employees and non-transferring employees as a result of the differences in employment terms and conditions which may impact on the workforce culture and efficiency of the Applicant's operations; and
- impact operational productivity by duplicating particular processes (for example decision making processes around rosters).

[13] The views of the employer are a consideration that favours the making of the Order.

The views of employees who would be affected by the order

[14] SEMS relies on an affidavit of Mr Jeremy King, Group Manager of Operations for Sedgman Pty Limited filed in support of the application. Mr King states he discussed the proposed application with Mr Steve Pierce, District Vice President of the Construction, Forestry, Maritime, Mining and Energy Union (the CFMMEU) in discussions held on 2 May 2019 and in August 2019, and that Mr Pierce indicated no opposition by the CFMMEU to the proposed application. SEMS submits this indicates that the CFMMEU does not oppose granting the order sought. It is noted that the CFMMEU is not a bargaining representative for the Byerwen Agreement.

[15] It is Mr King's evidence that SEMS foresees that new non-transferring employees will be required to be hired due to the expansion of the Byerwen site and general employee turnover, and that the views of the non-transferring employees affected by this order are therefore not known and not able to be ascertained for the purposes of this application.

[16] Mr King also states that the transferring employees have all agreed to transfer their employment terms and conditions to SEMS provided that the Agreement will continue to apply if this application is approved.

Whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment

[17] SEMS submits the order sought from this application is for non-transferring employees performing the Transferring Work to be covered by the Agreement and that currently and pursuant to section 314 of the Act, for any non-transferring employees who perform the Transferring Work:

- the Award will apply to them while performing the Transferring Work; and
- the Agreement will not apply to them while performing the Transferring Work.

[18] Mr King states that SEMS has identified that the following terms and conditions of employment are more beneficial under the Agreement than the equivalent terms and conditions of the Award:

- “a. Clause 2.9 Redundancy - redundancy entitlements under the Agreement are more beneficial than those under the BCMI Award;
- b. Clause 4.1 Aggregated Wage - significantly higher than those under the BCMI Award;
- c. Clause 5.3 Personal Leave - 5.3.5 - accrued leave in excess of 105 hours may be paid to an employee or their nominated superannuation fund at the employee's discretion;
- d. Appendix B Annual Remuneration - significantly higher than those under the BCMI Award;
- e. Clause 4.5 Individual Performance Bonus - not provided for in the BCMI Award;
- f. Clause 4.6 Retention Allowance - not provided for in the BCMI Award;
- g. Clause 4.8 Commissioning Allowance - not provided for in the BCMI Award;
- h. Clause 4.9 Accommodation - not provided for in the BCMI Award;
- i. Clause 4.12 Clothing - not provided for in the BCMI Award;
- j. Clause 5.6.1 Long Service Leave - payment to the Employee is higher than under the Coal Mining Industry (Long Service Leave) Administration Act 1992;
- k. Annexure 3: Accident Pay - payable as per the remuneration under the Agreement;
- l. Clause 2.2.3 Job Share - not provided for in the BCMI Award; and
- m. Clause 2.6 Communication Days - not provided for in the BCMI Award.”

[19] The terms and conditions of employment outlined below are what the SEMS has identified as being less beneficial under the Agreement than the equivalent terms and conditions of the Award:

- a. Clause 2.4 Demotion - not provided for in the BCMI Award;
- b. Clause 2.11 Stand-down - not provided for in the BCMI Award;
- c. Clause 2.12 Suspension - not provided for in the BCMI Award;
- d. Clause 2.13 Abandonment of Employment - not provided for in the BCMI Award;
- e. Clause 4.1 the Wage Related Allowances as provided for under A.8.2 in the BCMI Award are not payable under the Agreement;
- f. Clause 5.2.8 - Employees can be directed to take leave with 28 days' notice where more than 210 hours of leave is accrued whereas, the BCMI Award provides for such a direction after at least 350 hours of leave is accrued;
- g. the Agreement requires employees to comply with the employers policies, procedures and processes which is not provided for in the BCMI Award;
- h. Clause 13.5 - no payment of accrued personal leave where an employee ceases employment in situations where the employee retires or is over 60 years old at the time, employer terminates the employee's employment because of ill health or death of the employee, as provided for in the BCMI Award;
- i. Clause 14.4 Retrenchment Payment - no retrenchment payment as provided for under the BCMI Award; and
- j. Clause 25.13 Cashing out of annual leave - no cashing out of annual leave as provided for under the BCMI Award.

[20] SEMS submits that on balance, non-transferring employees would:

- a. receive more beneficial terms and conditions of employment if the Agreement applied to their employment with the Applicant, as opposed to the BCMI Award; and
- b. not be disadvantaged by the order being made by the Commission that the Agreement apply to their employment with the Applicant.

[21] I accept the evidence of Mr King and this favours the making of an Order.

Nominal expiry of the Agreement

[22] The nominal expiry date of the Byerwen Agreement is 29 August 2021.

Whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace

[23] SEMS submits the relevant transferable instrument, in this case the Byerwen Agreement, would not have a detrimental impact on the productivity of SEMS and the Agreement would have significant benefits on the productivity of SEMS. Further, it submits that the Agreement applied to both Transferring Employees and non-transferring employees, it would provide the following efficiency gains for SEMS:

- Streamlined payroll and Human Resources activities, significantly reducing the administrative tasks as both Transferring Employees and Non-Transferring Employees will be on the same terms and conditions under the Agreement;
- Positive impact on workplace productivity;
- Provide client contract consistency between the Sonoma and Byerwen sites; and
- Create a positive and stable culture on-site for Transferring Employees and non-transferring employees as it would provide consistent terms and conditions across all frontline employees covered by the Agreement. Further, a unified, positive and stable culture is an important focus area for a relatively new site.

[24] I accept that submission and that this is a matter that favours the making of the Order.

Whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer

[25] SEMS does not consider that it would incur significant economic disadvantage as a result of the Agreement covering non-transferring employees. SEMS submits the terms and conditions offered to employees covered by the Agreement are generally more beneficial to employees, if the order sought is granted and the Agreement applies to both transferring employees and non-transferring employees, SEMS will incur less expenses administering two different industrial instruments for employees working on the same site. I accept that submission and that it would create economic advantage if the Order was made.

The degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer

[26] SEMS submits there is minimal business synergy between the Agreement and the Award because of the differing terms and conditions, and that there is a similarity between the Agreement's terms and conditions, and the SEMS's Sonoma Agreement, which allows for business and stakeholder efficiencies by SEMS under its commercial arrangements with the same client for those two sites.

[27] I accept that the differences between the transferrable instrument and any other instrument that covers the new employer means that there is not a high degree of synergy and this is a matter which favours making the Order.

The public interest

[28] SEMS contends that there is no disadvantage to the non-transferring employees that would result from the order sought being granted by the Commission. Rather, the order sought represents a significant advantage to non-transferring employees as the terms and conditions of employment under the Agreement are, on the balance, more favourable than the Award that would otherwise apply to those non-transferring employees.

[29] SEMS submits the public interest would be served by the Agreement applying to all SEMS employees performing the transferring Work instead of the Agreement applying to transferring Employees and the Award applying to non-transferring employees performing the same work, at the same site.

[30] It is SEM's submission that the public interest favours the order being made because granting the order will ensure job security for the current and future employees at the Byerwen site, support a positive and stable culture, and consistently provide more beneficial terms and conditions to all employees working on-site who fall within the Agreement classifications.

[31] It is in the interests of SEMS and the employees that the Order is made however there is no evidence of any general public interest consideration that is relevant to this matter. Accordingly this is a neutral consideration.

CONCLUSION

[32] Having considered the matters required by the Act, I am satisfied that the Order sought should be made. An Order will issue concurrently with this Decision that the Byerwen Agreement covers non-transferring employees of Sedgman Employment Services Pty Ltd.



DEPUTY PRESIDENT

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