[2021] FWC 4871

The attached document replaces the document previously issued with the above code on 9 August 2021.

Corrected incorrectly numbered paragraphs [12] through [44].

Jeremy Lappin
Associate to Deputy President Saunders

Dated 9 August 2021

DECISION

Fair Work Act 2009
s.437—Protected action

Construction, Forestry, Maritime, Mining and Energy Union
v
Thiess Pty Limited
(B2021/608)

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 9 AUGUST 2021

Proposed protected action ballot of employees of Thiess Pty Limited.

Introduction and background

[1] The Construction, Forestry, Maritime, Mining and Energy Union (***CFMMEU***) has made an application under s 437 of the *Fair Work Act 2009* (***Act***) for a protected action ballot order in relation to production and engineering employees of Thiess Pty Ltd (***Thiess***) working at the Mt Arthur south coal mine in the northern district region of New South Wales who are members of the CFMMEU and who would be subject to an enterprise agreement which the CFMMEU is seeking to negotiate with Thiess (***Employees***).

[2] The CFMMEU filed a declaration made by Mr Jeffrey Drayton, District Vice President of the CFMMEU, on 30 July 2021 in support of the application for a protected action ballot order.

[3] Thiess filed and served a response dated 2 August 2021, an outline of submissions dated 4 August 2021, and a statement of Scott Moran, Group Employee Relations Manager at Thiess, dated 4 August 2021. In response, the CFMMEU filed and served submissions dated 6 August 2021 and statements dated 5 August 2021 made by each of Mr Drayton and Mr Dennis Edwards, an Employee and President of the CFMMEU's lodge at the Mt Arthur south coal mine.

[4] I listed the application for a protected action ballot order for hearing on Monday, 9 August 2021. On Sunday, 8 August 2021, Thiess informed the Commission that it did not press a number of the arguments made in its written submissions and said it was agreeable to the application being determined on the papers. The CFMMEU consented to that course of action.

[5] By consent of the parties, I have determined the CFMMEU's application for a protected action ballot order on the papers. Those papers are the documents to which I have referred in the previous four paragraphs.

[6] The notification time for the proposed enterprise agreement was 6 April 2021. The nominal expiry date of the Thiess Mt Arthur Coal Enterprise Agreement 2018 (***2018 Agreement***) which covers the Employees was 11 May 2021.

Legislation

[7] Section 443 of the Act governs when the Commission must make a protected action ballot order. It provides:

> "**443 When the FWC must make a protected action ballot order**
>
> (1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:
>
> (a) an application has been made under section 437; and
>
> (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).
>
> (3) A protected action ballot order must specify the following:
>
> (a) the name of each applicant for the order;
>
> (b) the group or groups of employees who are to be balloted;
>
> (c) the date by which voting in the protected action ballot closes;
>
> (d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.
>
> (3A) For the purposes of paragraph (3)(c), the FWC must specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable.
>
> (4) If the FWC decides that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the protected action ballot, the protected action ballot order must also specify:
>
> (a) the person that the FWC decides, under subsection 444(1), is to be the protected action ballot agent; and
>
> (b) the person (if any) that the FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.
>
> (5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer

than 3 working days, the protected action ballot order may specify a longer period of up to 7 working days.

Note: Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee."

[8] I am satisfied that the CFMMEU has made an application under s 437 for a protected action ballot order.

Principles re genuinely trying

[9] As to the question of whether a bargaining representative has been and is genuinely trying to reach an agreement, Flick J said the following in *JJ Richards & Sons Pty Ltd v Fair Work Australia*:[1]

"58. It is ultimately concluded that s 443(1)(b) is to be construed such that Fair Work Australia cannot reach a state of satisfaction that an "*applicant ... is ... genuinely trying to reach an agreement with the employer*" unless:

- an applicant has approached the employer and informed the employer of the general ambit of that for which agreement is sought; and

- the employer has foreshadowed – even in the most general of terms – its attitude as to the proposed agreement.

More may be required. Much may well depend upon the factual scenario in which the terms of s 443(1)(b) are to be applied. But such a minimum statement of that which is required is sufficient to dispose of the present *Application*. Contrary to the submissions advanced on behalf of the Applicants, the terms of s 443(1)(b) do not require:

- bargaining to have commenced within the meaning of and for the purposes of s 173, found within Part 2-4, of the *Fair Work Act*.

59. So much, it is concluded, follows from the natural and ordinary meaning of the phrase "*trying to reach an agreement* ...". It is difficult to conclude that any person can try to reach an agreement with another in the absence of a disclosure of that for which consensus is sought. One person may wish to reach an agreement with another. But, until the general content of the proposed agreement is disclosed, it cannot be said that he has even attempted to reach an agreement. Until disclosed, it is not known whether the other person will readily embrace the proposed agreement or shun it or (perhaps) embrace the concept of an agreement but wish to vary one or other of its terms. Until disclosed, the person seeking agreement has not even tried to solicit the response of the other. Unless the disclosure is genuinely with a view to reaching agreement, it could well be said that the attempt to reach an agreement falls short of a person even trying to reach agreement. The addition of the word "*genuine*" – on one approach to

[1] [2012] FCAFC 53

> construction – perhaps adds little. But the addition of that term serves to emphasise the importance of a person actually trying to solicit agreement. Until a proposed agreement has been disclosed to the prospective parties, and a response solicited, an applicant has not even tried to reach agreement – let alone genuinely tried to reach agreement.
>
> 60. The Transport Workers' Union, in the present proceeding, satisfied that requirement by writing to J.J. Richards on 24 December 2010. Rightly or wrongly, J.J. Richards indicated its response in the terms it did in its letter dated 7 January 2011. That exchange of correspondence was sufficient to satisfy the precondition to the exercise of the power conferred by s 443(1)."

[10] In *Total Marine Services Pty Ltd v Maritime Union of Australia*[2], the Full Bench expressed the following views about s.443(1)(b):

> "[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. At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted."

[11] The Full Bench in *Esso Australia Pty Ltd v AMWU & Ors*[3] made the following observations about paragraphs [31] and [32] of the earlier Full Bench decision in *Total Marine Services Pty Ltd v Maritime Union of Australia*:

> "[35] For our part, for reasons we articulate later, we agree with the observations in paragraph [31] and the first three sentences of paragraph [32] of *Total Marine,* set out above. We note that the observations which follow the first three sentences in paragraph [32] are *obiter* and although we do not consider that they should be understood as attempting to establish any binding decision rule, nonetheless they are, with respect, somewhat inconsistent with the earlier expressed proposition (with which we agree) that it is not useful to articulate any alternative test or criteria to the words of s.443(1)(b). We note that similar reservations were expressed by the majority of the Full Bench in *JJ Richards and Sons Pty Ltd v TWU* (*JJ Richards No.1*) and by the Full Bench in *Farstad Shipping (Indian Pacific) Pty Ltd v MUA (Farstad).*"

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[2] [2009] FWAFB 368

[3] [2015] FWCFB 210

[12] In light of these authorities, I will proceed on the basis that 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.[4] No one factor is necessarily determinative of the question of whether an applicant is, or has been, genuinely trying to reach an agreement.[5] No alternative test or criteria to the words of s 443(1)(b) should be applied.[6] In addition, no specific stage must be reached in the negotiations in order for there to be a finding that an applicant is, and has been, genuinely trying to reach an agreement with the employer.[7]

[13] The expression "has been, and is" in s 443(1)(b) imports temporal considerations.[8] It is necessary for the Commission to reach the requisite level of satisfaction both (a) at the time the application for a protected action ballot order is made and determined and (b) at an earlier time.

Non-permitted matters

[14] If an applicant for a protected action ballot order is, or has been, bargaining for a non-permitted matter, that is relevant to, but not determinative of, the question of whether the applicant, is and has been, genuinely trying to reach agreement with the relevant employer. So much is clear from the following statement by the Full Bench in *Esso Australia Pty Ltd v AMWU & Ors* (at [59]):

> "There is no legislative warrant for the adoption of a decision rule such that if an applicant is, or has been, pursuing a substantive claim which is not about a permitted matter it is not genuinely trying to reach an agreement within the meaning of s.443(1)(b). The fact that an applicant is, or has been, pursuing a claim about a non-permitted matter is relevant to whether the test posited by s.443(1)(b) has been met, but it is not determinative of the issue. A range of factual considerations may potentially be relevant in that context, including but not limited to the subject matter of the claim, the timing of the advancement of the claim, the basis upon which the claim is advanced, the significance of the claim in the course of the negotiations, the claimant's belief as to whether the claim is about a non-permitted matter or not, where there is legal clarity about the permitted status of the claim, whether the other party has placed in contest whether the claim is about a permitted matter, and whether such a claim has been withdrawn and, if so, when and in what circumstances. The diversity of the factual circumstances and nuances which will be found in different cases means that it is not possible to say that any particular factor or consideration will always be determinative of the result."

[15] When determining whether a particular clause in an enterprise agreement or a proposed enterprise agreement is about matters pertaining to the employment relationship, it

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[4] *Esso Australia Pty Ltd v AMWU & Ors* [2015] FWCFB 210 at [57] & [69]

[5] Ibid at [55]

[6] Ibid at [35]

[7] *AMWU v HJ Heinz Company Australia Ltd* [2009] FWA 322 at [20]

[8] Ibid at [54]

is principally the subject matter of the clause that is to be considered, rather than the precise terms of the clause or claim.[9]

Relevant facts and circumstances

[16] Thiess carries out contract mining for Mt Arthur Coal Pty Ltd, a subsidiary of BHP, at the Mt Arthur coal mine in the Hunter Valley. The Mt Arthur mine is generally considered to consist of two pits, colloquially known as Mt Arthur North and Mt Arthur South. Mt Arthur North is operated by Mt Arthur Coal Pty Ltd. Mt Arthur South is operated by Thiess.

[17] It has been widely reported that BHP is looking to sell the Mt Arthur coal mine.

[18] Thiess issued a notice of employee representational rights to the Employees on 6 April 2021. Since that time there have been six bargaining meetings. The first was held on 5 May 2021 and the sixth bargaining meeting took place on 27 July 2021.

[19] At the first bargaining meeting the CFMMEU tabled its log of claims. In the period between the first bargaining meeting and the sixth bargaining meeting the CFMMEU has changed its initial position in relation to matters including production bonus, redundancy pay, training, rosters, classification rates and crib windows.

[20] The parties have agreed on some matters during bargaining but they remain apart in relation to other matters such as personal leave, annual pay increases and the dispute resolution procedure. In addition, there is a difference between the parties concerning the scope of the proposed enterprise agreement. The CFMMEU wants the scope of the proposed enterprise agreement to remain the same as the 2018 Agreement. Clause 1.3 of the 2018 Agreement provides:

> "**1.3. Application of Agreement**
>
> 1.3.1. This is a standalone Agreement and shall apply as a minimum to all Employees engaged in the classifications prescribed in Clause 3.1 employed by Thiess at the Mt Arthur Coal Mine.
>
> 1.3.2. This Agreement will not apply to employees of Thiess Pty Ltd who perform work in areas of the Mt Arthur Coal Mine, that:
>
> > a) as at the date of approval of this Agreement, was being performed by employees of Mt Arthur Coal Pty Ltd, in those areas of the Mt Arthur Coal Mine; and
> >
> > b) where such performance would result in the involuntary displacement of the employment of employees of Mt Arthur Coal Pty Ltd."

[21] Thiess wants clause 1.3.2 of the 2018 Agreement deleted from the proposed enterprise agreement. Thiess's rationale for proposing the deletion of this clause is to give it the best possible position to operate over the entirety of the Mt Arthur mine if BHP sells it. Thiess's

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[9] *Wesfarmers Premier Coal Limited v The Automotive Food Metals Engineering Printing and Kindred Industries Union (No 2)* [2004] FCA 1737, per French J (as his Honour then was) at [92]

ability to operate over the entirety of the Mt Arthur mine is currently constrained by clause 1.3.2 of the 2018 Agreement.

[22] On 27 July 2021, Thiess advised the bargaining representatives that it wanted to take its proposed enterprise agreement to a vote of employees. There is no suggestion in the evidence that such a vote has been held.

[23] On 30 July 2021, the CFMMEU applied for a protected action ballot order.

Submissions

[24] The CFMMEU contends that it is, and has been, genuinely trying to reach an agreement with Thiess. It submits that a protected action ballot order should be made.

[25] Thiess filed and served written submissions in which it contended that the CFMMEU is not, and has not been, genuinely trying to reach an agreement. In particular, Thiess submitted that clause 1.3.2 of the 2018 Agreement does not pertain to the employer-employee relationship, or is otherwise being pursued for the benefit of persons other than those who would be covered by the proposed agreement. Thiess contends that the CFMMEU's position in relation to clause 1.3.2 is motivated by a desire to protect (a) the jobs of employees of Mt Arthur Coal Pty Ltd (or any principal that may subsequently assume operation of the mine) and/or (b) the conditions of employment of employees of Mt Arthur Coal Pty Ltd (or any principal that subsequently assumes operation of the mine).

[26] Thiess submitted that an applicant cannot be, or have been, genuinely trying to reach agreement if the applicant is pursuing claims that are at odds with, and indeed would be to the detriment of, the interests of those employees it represents in bargaining for the agreement in relation to which the protected action ballot order is sought.

[27] Thiess also contended as follows in its written submissions in relation to the form of questions proposed by the CFMMEU:

> "17. Although the application is dressed to look like four separate questions, each order in effect asks the employees to endorse the same action:
>
> > *Do you, for the purpose of advancing claims in the negotiation of an Enterprise Agreement with Thiess Pty Ltd, authorise industrial action in the form of an unlimited number of stoppages of work.*
>
> 18. The second part of each question, beginning with the prefix "including consecutive stoppages of…", does not actually limit the action for which the authorisation is sought. The questions are thus apt to mislead, insofar as they suggest that the longest single stoppage authorised by the ballot would be of 48 hours in duration, when in actuality the ballot, if successful, would authorise the organisation of one (or more) <u>indefinite</u> stoppages.
>
> 19. The proposed questions also fail to make readily apparent to employees the frequency with which the authorised action could then be organised.

> 20. The questions proposed in the Application not being sufficiently clear to enable employees to make an informed choice, the Application should not be granted."

[28] On 4 August 2021, I invited the parties to give consideration to potentially amending the questions for ballot as follows, if a protected action ballot order were made:

> "Do you, for the purpose of advancing claims in the negotiation of an Enterprise Agreement with Thiess Pty Ltd, authorise industrial action in the form of an unlimited number of 2 hour stoppages of work, including consecutive 2 hour stoppages of work ~~two (2) hours in duration~~?

[29] The parties were informed that they would be given an opportunity to make submissions in relation to these proposed amendments at the hearing.

[30] On Friday, 6 August 2021, the CFMMEU submitted that it had 'no issue' with the proposed amendment to the questions for ballot.

[31] On Sunday, 8 August 2021, the solicitors for Thiess sent an email to the Commission in the following terms:

> "In relation to the hearing for the matter above, we do not press:
>
> 1. the submissions on whether the union is genuinely bargaining; and
>
> 2. the submissions in paragraph 19 of the Respondent's Outline of Submissions dated 4 August 2021 relating to the frequency of the action.
>
> We otherwise rely on our written submissions concerning the clarity of the questions.
>
> We are agreeable to the application being determined on the papers and note that the CFMMEU has indicated they would have no issue accepting the questions on the terms proposed by Deputy President Saunders."

[32] Thiess did not make any submissions in relation to the proposed revised form of questions for ballot.

Consideration

[33] The parties have participated in six separate bargaining meetings over a period of almost three months. I have read the notes of the bargaining meetings attached to Mr Moran's statement, together with the statements of Mr Drayton and Mr Edwards in response.

[34] It is clear that each party has communicated what they are seeking to the other party and explained the basis for their proposals and responses to the other side's proposals. Negotiations have reached a stage where Thiess has indicated that it wants to put its proposed enterprise agreement to a vote.

[35] There are matters which remain unresolved between the parties, but the existence of such disputes does not suggest in the circumstances of this matter that the CFMMEU is not, or has not been, genuinely trying to reach an agreement with Thiess.

[36] One of the most disputed unresolved matters is the scope of the proposed enterprise agreement. The CFMMEU does not want any change to the scope of the 2018 Agreement. Thiess wants the scope of the proposed enterprise agreement broadened so that it will be in the best possible position to operate over the entirety of the Mt Arthur mine if BHP sells the mine.

[37] In my view, the dispute over the scope of the proposed enterprise agreement pertains to the relationship between Thiess and its employees who will be covered by the proposed enterprise agreement. The coverage of an enterprise agreement made between a single employer such as Thiess and its employees is important to, and pertains to, their relationship because it determines both the identity of the employees of the employer (Thiess) and the work they perform which will be covered by the proposed enterprise agreement.

[38] The dispute between the parties in relation to the deletion of clause 1.3.2 has a number of different dimensions. As Thiess contends, the removal of that clause will enhance its ability to operate a larger part of the Mt Arthur mine if the mine is sold. That, in turn, may increase the job security of, and potential opportunities for, employees of Thiess who currently work in Mt Arthur South because Thiess would need more employees to operate part of Mt Arthur North. The corollary of that proposition is that the job prospects and conditions of employment for employees of Mt Arthur Coal Pty Ltd who currently work in Mt Arthur North may be reduced if the mine is sold and Thiess is given the right to operate across all or part of Mt Arthur North. Implicit in that assessment is the unstated but true premise that employees of Mt Arthur Coal Pty Ltd who work in Mt Arthur North earn significantly more than the employees of Thiess who work in Mt Arthur South. That pay differential also means that some employees of Thiess may be unwilling to agree to the deletion of clause 1.3.2 from the 2018 Agreement because that may decrease their future prospects of obtaining a higher paying job in Mt Arthur North. This short analysis of the different interests involved in the proposed change to the scope of the enterprise agreement serves to reinforce the fact that the proposal by Thiess to delete clause 1.3.2 from the coverage provisions of the proposed enterprise agreement is a matter which pertains to the relationship between Thiess and its employees who will be covered by the agreement.

[39] I accept that the questions which an applicant proposes to the employees to be balloted must be expressed with sufficient clarity so that the employees can make an informed choice on whether to authorise the action in question.[10]

[40] I was concerned that the original form of questions proposed by the CFMMEU may not have been sufficiently clear as to the duration for which one or more stoppages of work may be taken. The expression "unlimited number of stoppages of work" in the original form of question did not contain any information as to how long each stoppage may be. In contrast, the revised form of question I proposed to the parties for their consideration makes clear that employees are being asked about stoppages of work for a particular duration (e.g. 2 hours), which stoppages may be consecutive. In addition, it is clear from the revised form of question that consecutive stoppages of a particular duration (e.g. 48 hours) may be taken, with the result that a stoppage of work may extend for much longer than the initial period of, say, 48 hours. I consider that questions in this revised form are expressed with sufficient clarity so

[10] *NUW v Fresh Exchange Pty Ltd* [2009] FWA 221 at [10]

that the employees can make an informed choice on whether to authorise the action in question.

[41] For the reasons given, I am satisfied that the CFMMEU has been, and is, genuinely trying to reach an agreement with Thiess. I am also satisfied that the other statutory requirements for a protected action ballot order have been met.

Conclusion

[42] I grant leave to the CFMMEU to amend its application by changing the form of questions to be put to employees to that set out in paragraph [17] above. Thiess has been given notice of, and an opportunity to make submissions in relation to, this amendment.

[43] In light of my findings set out above, a protected action ballot order must be made pursuant to s 443(1) of the Act.

[44] The order [PR732630] will be issued concurrently with this decision.

DEPUTY PRESIDENT

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<PR732629>