DECISION

Fair Work Act 2009
s.739—Dispute resolution

Construction, Forestry, Maritime, Mining and Energy Union, Matthew Howard
v
Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal
(C2021/7023)

Black coal mining

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 9 NOVEMBER 2021

Application for the Commission to deal with a dispute in accordance with a dispute settlement procedure in an enterprise agreement – application for interim relief concerning the implementation of a requirement that employees be vaccinated against COVID-19 as a condition of site entry – serious question to be tried – balance of convenience weighs against the granting of interim relief – application for interim relief refused

Introduction and background

[1] The CFMMEU and Mr Howard have made an application pursuant to s 739 of the *Fair Work Act 2009* (Cth) for the Fair Work Commission (***Commission***) to deal with a dispute under the dispute settlement procedure in the *Mt Arthur Coal Enterprise Agreement 2019* (***Agreement***).

[2] Mt Arthur Coal Pty Ltd (***Mt Arthur***) employs the employees who work at the Mt Arthur open cut coal mine (***Mine***), which is located approximately five kilometres south of Muswellbrook in the Hunter Valley of New South Wales. Mt Arthur is a wholly owned subsidiary of Hunter Valley Energy Coal Pty Ltd, which operates the Mine. Mt Arthur and Hunter Valley Energy Coal Pty Ltd are members of the BHP group of companies (***BHP***).

[3] Mt Arthur employs about 724 employees who work at the Mine and are covered by the Agreement (***Employees***). It also employs about 256 employees who work at the Mine but are not covered by the Agreement. In addition to the workers employed by Mt Arthur to work at the Mine, there are about 1,000 workers who work at the Mine but are employed or engaged by other entities.

[4] The CFMMEU represents about 700 Employees. Mr Howard is the secretary of the Bayswater Lodge of the CFMMEU. The Bayswater Lodge is the name of the local group of members of the CFMMEU who are employed by Mt Arthur to work at the Mine.

[5] Mt Arthur has announced a requirement or direction that all workers at the Mine, including the Employees, must be vaccinated against COVID-19 as a condition of site entry (***Site Access Requirement***). The Site Access Requirement requires the Employees:

(a) to have at least a single dose of an approved COVID-19 vaccine by 10 November 2021; and

(b) be fully vaccinated by 31 January 2022.

[6] Mt Arthur has announced that if Employees attend the Mine after midnight on 9 November 2021 they will not be permitted access to the Mine unless they have provided Mt Arthur with evidence that they have had at least a single dose of an approved COVID-19 vaccine.

[7] As at 5 November 2021:

(a) 552 of the 724 Employees had provided Mt Arthur with evidence that they had had at least a single dose of an approved COVID-19 vaccine;

(b) 172 of the 724 Employees had not provided Mt Arthur with evidence that they had had at least a single dose of an approved COVID-19 vaccine;

(c) 247 of the 256 employees of Mt Arthur who work at the Mine but are not covered by the Agreement had provided Mt Arthur with evidence that they had had at least a single dose of an approved COVID-19 vaccine; and

(d) 9 of the 256 employees of Mt Arthur who work at the Mine but are not covered by the Agreement had not provided Mt Arthur with evidence that they had had at least a single dose of an approved COVID-19 vaccine.

[8] The applicants contend that the Site Access Requirement is not a lawful and reasonable direction. Mt Arthur submits that it is. The following question is to be arbitrated by a Full Bench of the Commission on 24 and, if necessary, 25 November 2021:

> "Whether the direction as set out in attachments 1 and 2 to the application filed by the CFMMEU in proceedings C2021/7023 is a lawful and reasonable direction in respect to employees at the Mt Arthur mine who are covered by the Mt Arthur Coal Enterprise Agreement 2019."

[9] The Full Bench has indicated to the parties that it will endeavour to hand down its decision in the arbitration within 10 days of the hearing on 24/25 November 2021.

[10] The applicants have applied to the Commission for interim relief in the following terms:

> "Until the determination of the Full Bench by arbitration of dispute C2021/7023, it is ordered that Mt Arthur Coal Pty Ltd take no steps to dismiss, discipline or otherwise

prejudice the employment of any production and engineering employees who fail to present to Mt Arthur Coal Pty Ltd evidence of being vaccinated against COVID-19."

[11] Although not express in the words of the interim relief sought by the applicants, it was made clear by the applicants in their submissions that, in the period prior to the Full Bench delivering its decision in this matter, they seek to permit unvaccinated Employees to work at the Mine without satisfying the requirement that they have at least a single dose of an approved COVID-19 vaccine by 10 November 2021.

[12] In support of their application for interim relief, the applicants tendered statements made by Mr Howard, Mr Ian Johnson, Production Operator employed by Mt Arthur, and Mr Peter John Colley, Research Director of the CFMMEU, none of whom were required for cross examination at the hearing of the application for interim relief. The applicants also tendered a number of documents which were attached to the original application filed in the Commission.

[13] The applicants declined to provide any undertaking as to damages in support of their application for interim relief.

[14] Mt Arthur relief on two affidavits made by Mr Drew Pearson, solicitor for Mt Arthur. Mr Pearson was not required for cross examination.

[15] Mt Arthur also gave undertakings in the following terms to the Commission in support of its opposition to the application for interim relief:

1. In the event that an employee to whom the Agreement 2019 applies (Employee) refuses to comply with the requirement that they have at least a single dose of an approved COVID-19 vaccine by 10 November 2021 (***Site Access Requirement***), Mt Arthur will not implement the outcome of any disciplinary process associated with the Employee's refusal to comply with the Site Access Requirement until:

    a. the decision of the Full Bench in this matter is delivered; and

    b. the relevant Employee who is subject to the disciplinary process has had an opportunity to consider their position in light of the decision of the Full Bench.

2. If the outcome of the present dispute, whether determined by the Full Bench or, if an application is made for judicial review of the decision of the Full Bench, the court to which the application for judicial review is made, is that the Site Access Requirement was not a lawful and reasonable direction for Mt Arthur to give an Employee, then Mt Arthur will, in respect of each Employee who has refused to comply with the Site Access Requirement and not worked for Mt Arthur in the period between 10 November 2021 and the date on which the Full Bench delivers its decision in this matter (***Interim Period***), compensate the Employee for any unpaid wages that the Employee would have been paid if the Site Access Requirement had not been imposed on them and they worked for Mt Arthur in their usual position during the Interim Period. For the avoidance of doubt, this obligation to compensate an Employee for lost wages does not apply to any part of the Interim Period during which the Employee was paid annual leave or long service leave.

[16] Both parties filed detailed written submissions and made oral submissions at the hearing.

[17] In determining the application for interim relief, I have had regard to the evidence tendered by each party, together with the written and oral submissions advanced by each party.

[18] I heard the application for interim relief today. Given the urgency of the application and the commencement of implementation of the Site Access Requirement at midnight tonight, my reasons for decision in relation to the applicants' application for interim relief are necessarily brief.

A preliminary issue - does the disputes procedure in the Agreement require that unvaccinated Employees not be prevented from working while the dispute is being dealt with by the Commission?

[19] The dispute settlement procedure in the Agreement relevantly provides:

> "22.1 DISPUTES PROCEDURE
>
> In the event of any dispute about any matters arising under this Agreement or in relation to the National Employment Standards or arising in the course of employment, there shall not be any stoppage of work either by the Company or employee, and if such dispute is not settled, it shall be processed in accordance with Clause 22.2 - GRIEVANCE PROCEDURE of this Agreement.
> …
>
> 22.3.2 Work Arrangements
>
> When a dispute occurs, work shall proceed in accordance with the reasonable direction of the Company, the employee's recognised skills, competence and training and safe working practices whilst the matter is progressed according to 22.2 - GRIEVANCE PROCEDURE.
>
> No party to the dispute or grievance shall be prejudiced as to the final outcome when following the disputes/grievance procedure, and the parties to the dispute will ensure that resolution of the matter will be addressed as quickly as possible."

[20] Of related relevance is the following provision in clause 6.1 of the Agreement:

> "The Company may direct an employee to carry out such duties as are within the limits of the employee's skills, competence and training provided that the duties are within safe working practices and statutory requirements."

[21] The applicants submit that the disputes procedure in the Agreement requires that the unvaccinated Employees not be prevented from working by Mt Arthur while the dispute is being dealt with. The words "stoppage of work… by the Company" extend, so the applicants contend, to Mt Arthur stopping employees from working if they are not vaccinated. The applicants submit that the word "stoppage" should be given a broad meaning so as to include

the act of stopping, cessation of activity, cessation of work as a protest, and strike.[1] They also submit that the expression "stoppage of work" means a cessation of working activity, and the circumstances in which this may occur are diverse.[2]

[22] I do not accept the applicants' argument that the disputes procedure in the Agreement requires that the unvaccinated Employees not be prevented from working by Mt Arthur while the dispute is being dealt with. There is no suggestion in the evidence that the imposition of the Site Access Requirement will stop any work, in the sense of the duties undertaken by workers at the Mine, from happening at the Mine. It is clear that the work associated with operating the Mine will continue after the Site Access Requirement is implemented at the Mine. All that will change is that Employees who refuse to comply with the Site Access Requirement will not be permitted to attend on the Mine. Those Employees will stop working at the Mine for so long as they exercise their choice to refuse to comply with the Site Access Requirement or it is determined to be an unlawful or unreasonable direction by the Full Bench, but work will continue. Mt Arthur is not ceasing any working activity. It is implementing a genuine measure in an attempt to reduce the health and safety risks associated with a known hazard. There is no serious question to be tried in relation to this issue.

Applicable principles to the application for interlocutory relief

[23] There is no contest between the parties that I have the power in these proceedings to grant interim relief.[3]

[24] The approach taken by courts to applications for interlocutory injunctive relief are applicable to applications to the Commission for interim relief.[4] In order to qualify for the discretionary relief sought by the applicants, they must establish that they have a *prima facie* case and that the balance of convenience favours the grant of an injunction.[5] The issue of whether there is a *prima facie* case and whether the balance of convenience favours the interim relief are related questions.[6]

[25] The applicants must establish a *prima facie* case, "in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief".[7] The degree of probability of success required involves an impressionistic assessment of the apparent sufficiency of the applicant's evidence. That assessment will be influenced both by the nature of the proceedings and the nature of the orders sought.[8] But it does not involve any forecast of the likely result of the proceedings and does not require an applicant to satisfy the court about the likely ultimate balance of probability.[9]

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[1] *City of Wanneroo v AMWU* [2008] AIRC 135 at [30]

[2] *Peninsula Grammar School v Independent Education Union of Australia* [2021] FWCFB 844 at [37]

[3] Section 589(2) of the Act; *CEPU v Telstra Corporation* (PR933892) per Lawler VP (***CEPU v Telstra***); *NTEIU v University of New South Wales* (PR956425) per Duncan SDP

[4] *CEPU v Telstra* at [88]

[5] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 (***ABC v O'Neill***) at [81]-[84]

[6] *QNurses First Inc v Monash Health* [2021] FCA 1372 at [19]-[20]

[7] *ABC v O'Neill* at [19] and [65]-[71]; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at [153]

[8] Ibid at [65]-[71]

[9] *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622-3

***Prima facie* case**

Some relevant facts

[26] On 31 August 2021, BHP announced to all employees within the BHP group, including the Employees, that it was commencing an assessment into whether it should require vaccination as a condition of site entry to all of its workplaces in Australia.

[27] On 7 October 2021, BHP announced that it was implementing the Site Access Requirement across all of its workplaces in Australia, including at the Mine.

[28] In the period between 7 October 2021 and 4 November 2021, BHP communicated and updated a series of detailed questions and answers to matters relating to the Site Access Requirement. It is apparent from those questions and answers that individual consideration will be given by BHP and Mt Arthur to issues raised by individual employees concerning matters such as medical conditions, conditions listed as contraindications or precautions in the ATAGI Clinical Guidance on COVID-19 Vaccination, pregnancy, or religious beliefs. There is no suggestion in the evidence before the Commission that there is a dispute between Mt Arthur and any Employee who has raised their individual circumstances with Mt Arthur.

[29] Mt Arthur has a range of measures in place at the Mine to reduce the risk of Employees and any other persons attending the Mine contracting COVID-19 or transmitting it to others at the Mine. Those measures include rapid antigen testing before Employees enter the Mine each day, social distancing, regular cleaning, and reduced capacity limits in indoor areas on the open cut Mine.

[30] To date, there have been no cases of COVID-19 detected at the Mine.

[31] The Employees are not fly-in fly-out workers; they reside in a range of locations, some close to the Mine and others much further away, such as Tamworth, Port Stephens, Lake Macquarie, the Central Coast, and Dungog.

Submissions

[32] The applicants submit that there is a serious question to be tried as to both the lawfulness and the reasonableness of the Site Access Requirement. They contend that the Site Access Requirement is unlawful because it was introduced without complying with the consultation requirements in s 47 of the *Work Health and Safety Act 2011* (NSW) (***WHS Act***). The applicants submit that the Site Access Requirement was introduced without any real consultation and was presented to employees of Mt Arthur as a *fait accompli*. They also contend that if there was any consultation, it was by BHP and not by Mt Arthur, as required by the WHS Act. Further, the applicants allege that relevant information including risk assessments has not been provided to the Employees.

[33] The applicants also rely on the alleged deficiencies concerning consultation in support of their contention that there is serious question to be tried as to the reasonableness of the Site Access Requirement. On that question they further submit, first, that the Site Access

Requirement is not specifically directed at or formulated with regard to the circumstances of the Mine; it applies to a variety of BHP group workplaces across Australia. Secondly, the applicants contend that the specific circumstances at the Mine demonstrate that the Site Access Requirements is not reasonable, including the fact that there are no public facing roles for Employees at the Mine, social distancing is possible at the Mine, the business is not an essential service, many of the production and engineering employees at the Mine work alone on equipment aboveground, other employees work in large and well-ventilated areas, the Employees do not interact at work with people with an elevated risk of being infected with COVID-19 (unlike medical professionals, flight crew, border control or hotel quarantine workers), there are no fly-in fly-out workers at the Mine, the measures in place at the Mine are adequate to protect Employees and others who attend the Mine, there is currently a small incidence of community transmission in the areas where the Employees reside, vaccination rates in the community are high and escalating further, and it is highly unlikely that working at the Mine would be the cause of, or result in, transmission of COVID-19. Thirdly, the applicants submit that BHP's rationale for introducing mandatory vaccinations, namely "opening up" by governments, provides no reason for introducing mandatory vaccinations. On the contrary, the applicants contend that the fact that governments are opening up in the context of increased vaccination rates actually provides a reason for not introducing mandatory vaccination. To that end, the applicants point to the fact that the New South Wales government has not seen fit to make any public health orders or other requirements for vaccination by coal mine workers, nor has any regulator taken action to make COVID-19 vaccinations mandatory in the coal mining industry, and no other coal mines in New South Wales have a mandatory vaccination policy.

[34] Mt Arthur submits that the Commission's power to make interim orders is conventionally exercised to preserve the current state of affairs pending a full and considered hearing.[10] Mt Arthur contends that the applicants' interim order, if made, would not operate in this way. It is submitted that the status quo is that health and safety controls must be complied with. The Site Access Requirement is one such control, and it is underpinned by the obligations that Mt Arthur has under the WHS Act and at common law; the Employees have similar obligations. Mt Arthur submits that the interim order would disturb, rather than preserve, that state of affairs. It is contended that that is not a proper exercise of the Commission's power to make interim orders. Even if it were, Mt Arthur submits that it is not something that the Commission would do in the context of an interlocutory hearing, particularly where health and safety is at risk, and the Commission has not heard from the Employees who are at risk.

[35] Mt Arthur submits that there is no serious question to be tried in relation to the lawfulness of the Site Access Requirement. It contends that, having regard to the relevant provisions of the WHS Act, the Site Access Requirement is within the scope of the Employees' employment. It also contends that any failure to comply with its consultation obligations under the WHS Act would not make the Site Access Requirement an unlawful direction; the only consequence would be that Mt Arthur would be liable to the remedies prescribed by the WHS Act, which do not include the invalidation of a decision made without consultation.

[36] Mt Arthur also submits that there is no serious question to be tried in relation to the reasonableness of the Site Access Requirement. It contends that a direction must be reasonable if its object and purpose is an employer's compliance with its statutory and common law duties

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[10] *Health Services Union v Victorian Hospitals Industrial Association and Others* (2012) 221 IR 1; [2012] FWAFB 2901 at [9]

as an employer (in particular those that concern a serious subject such as the health and safety of its Employees). It also submits that once a direction to be vaccinated satisfies the test of lawfulness, it will axiomatically be reasonable, substantially for the same reasons. Mt Arthur further submits that the Site Access Requirement reflects Mt Arthur's specific circumstances and is otherwise reasonable in circumstances where New South Wales has experienced sustained COVID-19 community transmission for several months, including cases of COVID-19 in Local Government Areas from which Mt Arthur draws its workforce, the Delta variant of COVID-19 is the predominant strain in Australia, it is highly transmissible, and causes more severe illness than other variants, with the consequence that the Employees are susceptible to transmission of COVID-19, the New South Wales government has progressively removed hard controls against COVID-19 transmission upon the reaching of certain double-dose vaccination thresholds across the state, the removal of hard controls against COVID-19 transmission increases the likelihood of increased community transmission (particularly in regional areas with lower vaccination rates), the fact that alternative safety controls exist (such as social distancing and rapid antigen testing regimes) does not mean that the Site Access Requirement is not reasonable in and of itself.

Consideration

[37] I accept that the Commission's power to make interim orders is conventionally exercised to preserve the current state of affairs pending a full and considered hearing.[11] However, I do not accept Mt Arthur's contention that the current state of affairs is that health and safety controls such as the Site Access Requirement must be complied with. The current state of affairs is that the Employees are permitted to attend the Mine and work regardless of whether they have received at least their first vaccination against COVID-19. The ultimate question to be determined in the arbitration of the dispute between the parties in this matter is whether the Site Access Requirement is a lawful and reasonable direction.

[38] There are two aspects to the lawfulness of any direction given by an employer to an employee. First, the direction must relate to the subject matter of the employment in order to be lawful in the relevant sense.[12] Secondly, the direction must not involve any illegality.[13] A direction to an employee will involve illegality if (a) it requires the employee to engage in an unlawful act or (b) the giving of the direction is contrary to a law or a legal obligation. For example, a direction to an employee to work at a particular location would involve illegality if it was given in circumstances where the employee had a contractual right to work in a different location and the employee did not consent to the change in location.

[39] Having regard to the obligations owed by Mt Arthur and the Employees under the WHS Act and at common law on the topic of work health and safety, it is clear that the Site Access Requirement relates to the subject matter of the Employees' employment with Mt Arthur. As to whether the Site Access Requirement involves any illegality, it does not require an employee to engage in an unlawful act. The issue is whether the Site Access Requirement involves illegality in the sense that it is unlawful because it was imposed in circumstances where the consultation requirements of the WHS Act were allegedly not met. In my view, there is a weak

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[11] *CEPU v Telstra* at [85]

[12] *R v Darling Island Stevedoring and Lighthouse Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621-622

[13] Ibid

prima facie case in relation to this question. It is weak because the WHS Act prescribes the consequences for failing to comply with the consultation requirements in s 47, namely a maximum penalty of 1,155 penalty units, and does not prescribe the invalidation of any decision made in connection with a failure to consult in accordance with s 47.

[40] Whether a direction is reasonable is essentially a question of fact and balance.[14] The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of applicable instruments governing the relationship are relevant considerations to the question of whether a direction is reasonable.[15] It does not need to be demonstrated by the employer that the direction issued by it was the preferable or most appropriate course of action, or in accordance with "best practice", or in the best interests of the parties.[16] It has been held that a policy or direction will be reasonable if a reasonable employer, in the position of the actual employer and acting reasonably, could have adopted the policy.[17] Unreasonableness may also be applied to a decision which lacks an evident and intelligible justification.[18]

[41] As to the reasonableness of the Site Access Requirement, there is no serious question on the material before the Commission that:

(a) All COVID-19 vaccines currently available in Australia substantially reduce the risk that the vaccinated person will be infected with COVID-19.[19]

(b) All COVID-19 vaccines currently available in Australia substantially reduce the risk that, if the vaccinated person is infected with COVID-19, they will become seriously ill or die.[20]

(c) All COVID-19 vaccines currently available in Australia substantially reduce the risk that, if the vaccinated person is infected with COVID-19, they will infect someone else.[21]

(d) A single dose (i.e. the first dose) of any of the COVID-19 vaccines currently available in Australia significantly reduces the risk that, if the vaccinated person is infected with COVID-19, they will become seriously ill or die.[22]

(e) COVID-19 poses substantial risks to health and safety, and will continue to do so even after it becomes endemic and vaccination rates are high.[23]

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[14] *McManus v Scott-Charlton* (1996) 70 FCR 16 at 30C

[15] *R v Darling Island Stevedoring and Lighthouse Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621-622

[16] *Briggs v AWH* (2013) IR 231 159 at [8]

[17] *Woolworths Ltd v Brown* (2005) 145 IR 285

[18] *Amie Mac v Bank of Queensland Limited* [2015] FWC 774 at [90], applying *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76]

[19] Ex R1 at [6]

[20] Ibid

[21] Ibid

[22] Ibid

[23] Ibid

(f) Vaccination against COVID-19 is a practicable measure to reduce the risks to health and safety associated with COVID-19. Indeed, the CFMMEU's policy position is that it strongly supports "the vaccination of the highest possible number of Australians as the most practical measure to prevent serious illness and death from the COVID-19 virus".[24]

(g) Mt Arthur and all the Employees are subject to stringent non-delegable duties to take every reasonably practicable step to ensure the health and safety of everyone that works at the Mine.[25]

[42] There are, however, serious questions as to whether (a) Mt Arthur complied with its consultation obligations before implementing the Site Access Requirement and (b) the Site Access Requirement is tailored to, and was formulated having regard to, the particular circumstances of the Mine and the Employees who work on it. These questions involve disputed facts. It is not appropriate in this interlocutory application to either decide or forecast the likely decision on those issues.[26] In light of these considerations, I am satisfied that the applicants have established a *prima facie* case on the question of whether the Site Access Requirement was a reasonable direction.

Balance of convenience

[43] A range of considerations are relevant to the question of balance of convenience. If the interim relief sought is not granted, Employees who refuse to comply with the Site Access Requirement will not be able to work at the Mine, and will not earn income from Mt Arthur, in the period from 10 November 2021 until at least the date on which the Full Bench hands down its decision in this matter, which is likely to be in early December 2021. Relevant to this consideration is that the Employees are paid fortnightly in arrears. They will next be paid on 11 November 2021 for their work in the period from 24 October 2021 to 6 November 2021 (inclusive). This payment will not be impacted by the making, or not making, of an order for interim relief. Payments for the period from 7 November 2021 to 20 November 2021 (inclusive) are due to be made on 25 November 2021. Employees who refuse to comply with the Site Access Requirement will not be paid any wages on 25 November 2021. They will also not receive any wages in the period from 26 November 2021 until early December 2021, when the Full Bench expects to deliver its decision in the arbitration. There is no doubt that an absence of income from Mt Arthur during these periods will cause difficulties, inconvenience and hardship to at least some of the Employees, although I do not have evidence about their individual circumstances. The impact of these considerations is limited by reason of there being a relatively short period of time between the implementation of the Site Access Requirement at midnight tonight and the likely delivery of the Full Bench's decision on the arbitration in early December 2021, together with the undertaking by Mt Arthur to compensate the Employees for any unpaid wages in the relevant period if Mt Arthur is unsuccessful in this matter.

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[24] Application filed by the applicants in the Commission at Question 2.1 [17]

[25] WHS Act and at common law

[26] *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533 at 535

[44] The financial inconvenience to the Employees (and their families) who refuse to comply with the Site Access Requirement is not the only inconvenience associated with a decision not to grant the interim orders sought by the applicants. I accept that there are non-remuneration related benefits associated with work[27] and the Employees who refuse to comply with the Site Access Requirement will be deprived of these benefits for a limited period of time. Further, Employees who refuse to comply with the Site Access Requirement will be required to show cause why their employment should not be terminated. This will be a stressful situation for such Employees and their families, although it is ameliorated somewhat by the undertaking given by Mt Arthur not to implement the outcome of any disciplinary process associated with the Employee's refusal to comply with the Site Access Requirement until the decision of the Full Bench in this matter is delivered and the relevant Employee who is subject to the disciplinary process has had an opportunity to consider their position in light of the decision of the Full Bench.

[45] The applicants also submit that it is preferable to make orders that would maintain the status quo until the Full Bench determines the substantive application. This will avoid any loss of remuneration by the Employees who do not comply with the Site Access Requirement.

[46] On the other hand, if the interim orders sought by the applicants were made, there would be Employees attending the Mine who had not received at least their first dose of an approved COVID-19 vaccine. On the evidence before the Commission, it follows that the making of the interim order would expose persons who attend the Mine, including the Employees, to increased risk to their health and safety, by removing a control measure that Mt Arthur wishes to put in place to reduce the risk of serious illness or death to them. I accept that this risk is small because of factors such as the fact that the Mine is an open cut coal mine where workers are often working on their own or a reasonable distance from other workers, a range of measures have already been put in place at the Mine to address the risks associated with COVID-19,[28] the fact that there have been no cases of COVID-19 detected at the Mine, and the rates of vaccination in the community generally and specifically in the areas where the Employees reside are high and continue to increase. But the relaxation of hard controls by the New South Wales government has resulted in greater freedom of movement of people within the state and it is not possible to operate a large open cut coal mine such as the Mine without workers coming in reasonably close proximity to at least some other workers on their way into the Mine or during their shift at the Mine. The consequence of the risk eventuating is very serious for the Employees, all other workers and visitors who attend the Mine, and all their families and persons with whom they come into contact. The risks include serious illness and death.

[47] In my view, the balance of convenience does not favour the making of the order sought for interim relief. My assessment is that the risks associated with making an order for interim relief outweigh the inconveniences that will be encountered if I do not make such an order. Those inconveniences will endure for a relatively brief period of time until the Full Bench delivers its decision in the arbitration. I have also had regard to the strength of the applicants' *prima facie* case in assessing the balance of convenience in this matter.

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[27] *AMWU v Eaton Electrical Systems Pty Ltd* (2005) 139 IR 260 at 266; *CFMMEU v BHP Coal Pty Ltd* [2011] FCA 971 at [29]; *QNurses First Inc v Monash Health* [2021] FCA 1372 at [39]

[28] See paragraph above [26] above

[48] In forming my assessment as to the balance of convenience, I have not had regard to the fact that the applicants were invited but declined to provide an undertaking as to damages. I agree with the observations of Vice President Lawler in *CEPU v Telstra* that "the legal and policy considerations that underlie the requirement of an undertaking as to damages when a Court issues an interlocutory injunction are equally applicable where the Commission make an order in the nature of an interlocutory injunction".[29] The fact that the Commission may not have the power to enforce an undertaking, with the consequence that the undertaking may need to be given in the form of a deed in favour of the party to be restrained,[30] goes to the mechanism by which the obligation may be obtained, but does not undermine the rationale for the giving of an undertaking as to damages in support of an application for interlocutory orders. The absence of such undertakings, or other appropriate assurances, from the applicants in this case further pushes the balance of convenience in favour of Mt Arthur.

Conclusion

[49] For the reasons given, the application for interim relief is dismissed.

DEPUTY PRESIDENT

Appearances:

Mr S Crawshaw SC and Mr P Bates on behalf of the CFMMEU and Mr Howard.

Mr I Neil SC and Ms J Alderson on behalf of Mt Arthur.

Hearing:

2021.
Newcastle (by video conference):
November, 9.

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[29] *CEPU v Telstra* at [89]

[30] *CEPU v Telstra* at [89] (footnote 88)