# DECISION

*Fair Work Act 2009*
s.240—Bargaining dispute

**Construction, Forestry, Maritime, Mining and Energy Union-Mining and Energy Division**

**v**

**Peabody CHPP Pty Ltd**
(B2022/1534)

DEPUTY PRESIDENT EASTON SYDNEY, 9 JUNE 2023

*Application to deal with a bargaining dispute – discontinuance – bargaining dispute – agreement that the FWC may arbitrate – effect on discontinuance.*

**[1]** The parties to this bargaining dispute, Peabody CHPP Pty Ltd (**Peabody**) and the Mining and Energy Division (**MEU**) of the Construction, Forestry, Maritime, Mining and Energy Union, are both bargaining representatives for a new enterprise agreement to replace the *Sada Metropolitan Coal Processing Plant, Enterprise Agreement 2018* (**Sada Agreement**). Peabody is the employer covered by the Sada Agreement. A dispute arose about bargaining and the MEU applied to the Fair Work Commission to deal with the dispute.

**[2]** The MEU and Peabody agreed under s.240(4) of the *Fair Work Act 2009* (**FW Act**) that the Fair Work Commission may arbitrate the dispute about bargaining.

**[3]** The agreement reached between the parties in December 2022 was captured in an email sent to then Acting President Hatcher:

> "1. The parties will request that Deputy President Easton conduct a consent arbitration pursuant to s. 240(4) of the Fair Work Act 2009 (FW Act) of the Outstanding Matters.
>
> 2. Once Deputy President Easton confirms that he will conduct the consent arbitration, Peabody will file a notice of discontinuance in relation to application AG2022/4452.
>
> 3. The parties will respect the outcome of the consent arbitration. Following the outcome of the consent arbitration, Peabody will put to a vote an enterprise agreement in terms that reflect the arbitrated outcome, and the MEU's members will vote to approve that enterprise agreement.

> 4. Unless there is further employee industrial action (protected or unprotected) Peabody undertakes that it will not take industrial action while the consent arbitration is ongoing and until a new agreement is approved by the Commission. Similarly, the MEU and its members undertake not to take industrial action while the consent arbitration is ongoing and until a new agreement is approved by the Commission."

**[4]** Before the hearing commenced the MEU filed a Notice of Discontinuance.

**[5]** Peabody insists that the arbitration can and must proceed.

**[6]** For the following reasons I find that the MEU's discontinuance was effective and that the bargaining dispute proceedings before the Commission, including the consent arbitration process, must cease.

**Applications and Discontinuances**

**[7]** Some matters before the Commission can commence or progress on the Commission's own initiative: s.157 and ss.159-160 (varying modern awards), s.218 (varying an enterprise agreement), s.246 (bargaining assistance for the low-paid), s.302 (equal remuneration orders), s.418-9, ss.423-4 (protected industrial action), s.505, s.505A and s.508 (right of entry), s.603 (varying or revoking decisions) and ss.768AX – s768BS (copied state awards).

**[8]** Otherwise, the Commission's jurisdiction to deal with matters relies on a legal person, with proper standing, making an application.

**[9]** Section 588 gives applicants almost unfettered rights to discontinue applications, viz:

> "**588 Discontinuing applications**
>
> A person who has applied to the FWC may discontinue the application:
>
> (a) in accordance with the procedural rules (if any); and
>
> (b) whether or not the matter has been settled."

**[10]** As the Full Bench in *CEPU v CJ Manfield Pty Ltd* [2011] FWAFB 6845 said at [13]:

> "The terms of s 588 are clear. In our view they permit the unilateral discontinuation of an application made in accordance with the applicable procedural rules. The application in this matter was made in accordance with such procedural rules being the form contained in the Fair Work Australia Rules 2009."

**[11]** The most recent successor to the *Fair Work Australia Rules 2009* is the *Fair Work Commission Rules 2013,* which include the following:

> "**10 Discontinuance**
>
> (1) An applicant in an application before the Commission may discontinue the application at any time.

(2) To discontinue the application, the applicant must notify the Commission by:

(a) lodging a notice of discontinuance; or

(b) advising the Commission, or a member of the staff of the Commission, by letter, email, fax or telephone, or orally in person, that the applicant:

(i) wishes to discontinue the application; or

(ii) has settled the application; or

(iii) wishes to withdraw the application; or

(iv) no longer needs the Commission to deal with the application; or

(c) advising the Commission of the discontinuance during the course of a conference or hearing.

…

(3) To remove any doubt, this rule does not prevent the Commission from dismissing an application on its own initiative."

**[12]** A notice of discontinuance is self-executing and, once filed, it brings the application to an end (see *Mpinda v Fair Work Commission* [2022] FCA 1111 at [66] and *Narayan v MW Engineers Pty Ltd* (2013) 231 IR 89 at 91, [2013] FWCFB 2530 at [6]).

**[13]** It might be possible to set aside a discontinuance because of duress or mistake, but such a power would reside in a Court (see *Hunter v Karara Mining Ltd* [2022] FWCFB 73 at [32], *AB v Tabcorp Holdings Limited* [2015] FWCFB 523 at [11]).

**[14]** The Commission is a statutory body, meaning its powers come only from legislation. The FW Act only allows the Commission to make orders in very limited circumstances after a matter has been discontinued - essentially in relation to costs (see s.402 and s.611).

**The MEU's Discontinuance**

**[15]** The MEU relied on the terms of s.588 and the procedural rules and the absence of any qualifications or exceptions that might be said to apply to applications under s.240.

**[16]** The MEU submitted that by the terms of the statutory scheme an applicant party could discontinue its application as late as after the Commission has reserved its decision. The MEU agrees that this would not be an ideal situation, but that it is one consistent with the FW Act.

**[17]** There is no evidence as to how and why the MEU decided to file its Notice of Discontinuance, other than an indication that it was instructed to do so by its members. Some evidence was led of the communications between the MEU and Peabody between December 2022 and the filing of the discontinuance on 21 March 2023. Peabody was careful to state in its written submissions that even though it was unhappy in the circumstances, it was not critical of the MEU for following the direction of its members.

**[18]** Peabody ultimately accepted that the MEU, in its capacity as a bargaining representative that made an application under s.240, was entitled to discontinue its application. Peabody also ultimately accepted that the Commission does not have a discretion to reject a discontinuance properly made by an applicant. These two concessions were properly made.

**[19]** Peabody argued that the Commission is nonetheless seized of jurisdiction to continue to arbitrate the present dispute because of the binding agreement between the parties.

**[20]** Peabody, the MEU and its members agreed to participate in an arbitration process and then to make an enterprise agreement reflecting the outcome of the matters arbitrated by the Commission. Peabody argued that this agreement has already been put into effect, that Peabody has adhered to the agreement by discontinuing its application to terminate the Sada Agreement, and in so doing gave up a valuable right.

**[21]** Peabody argued that the December 2022 agreement "displaces and takes over from the original application" because the original application by the MEU was simply "a vehicle by which the matter came to the Commission in the first place." Peabody argued that the process becomes a "joint process" from which neither party is unilaterally able to withdraw – regardless of which party made the originating application.

**[22]** As impractical as the consequences might be, this submission must fail when measured against the words of s.588. The MEU was the applicant under s.240 and it retained its right to discontinue the application "at any time" (per Rule 10(1)).

**[23]** In this respect the agreement to arbitrate made under s.240 cannot be divorced from the bargaining dispute about a proposed agreement, which cannot be divorced from the original application made by the MEU.

**[24]** The MEU's decision to discontinue its application brought the application to an end by force of s.588. If the proceedings regarding the dispute are at an end, and there is no other proceeding on foot about the dispute, then the arbitration proceedings are also at an end.

**[25]** Peabody submitted that:

> "… It could not possibly be the case that once an agreement to arbitrate has been made and jurisdiction conferred on the Commission, that the party who filed the application has the right to withdraw, but the other party does not."

**[26]** This argument goes to the crux of Peabody's concerns, and I am sympathetic to it. However, the argument conflates two important but different notions: the capacity of an applicant to discontinue a proceeding, and the capacity of a bargaining representative to withdraw from an agreement to arbitrate under s.240.

**[27]** There is no qualification of the right of an applicant party to discontinue their application that assists Peabody, either in s.588 or in the procedural rules. As the MEU submitted:

> "There are simply no words in the FW Act, Regulations or FWC Rules to support an argument that a different and specific process for discontinuing an application made under s.240 exists."

**[28]** So far as the FW Act is concerned, the MEU was entitled to discontinue its application even if doing so was in contravention of its agreement with Peabody.

**[29]** On the current terms of s.588 and the procedural rules, an applicant can discontinue an application at any time. There may be consequences flowing from the discontinuance, such as cost consequences, but the Commission has no discretion to reject or ignore a discontinuance made in accordance with the FW Act and the procedural rules.

**[30]** The proceedings in which the Commission can deal with the present bargaining dispute cannot continue after the MEU filed its discontinuance There is no feature in the Commission's statutory function to facilitate bargaining under s.240 that alters or qualifies the effect of s.588.

**Ongoing agreement to arbitrate(?)**

**[31]** The second important issue raised by Peabody's objection to the MEU's discontinuance is the capacity of a bargaining representative to withdraw from an agreement to arbitrate under s.240.

**[32]** Peabody argued that the arbitration could continue despite the MEU's discontinuance because the agreement to arbitrate was binding on the MEU, was partly performed and that the Commission was still therefore seized of jurisdiction to continue the arbitration.

**[33]** It is quite possible that the agreement to arbitrate has survived the discontinuance, is enforceable and can provide the jurisdictional foundation for the Commission to deal with the bargaining dispute by arbitration. Once the bargaining representatives have agreed that the Commission can arbitrate a bargaining dispute, it may be that the Commission does not need the ongoing agreement of the parties to be seized of jurisdiction to complete the task (see by analogy *CFMMEU v Falcon Mining Pty Ltd* (2022) 317 IR 367 at 396, [2022] FWCFB 93 at [73]).

**[34]** Crucially, if the agreement to arbitrate has survived, the Commission's power to arbitrate is dependent upon there being a proceeding properly before it. The Commission cannot initiate its own bargaining dispute proceeding and deal with a dispute by arbitration (see paragraphs [7]-[8] above), nor can it resurrect a bargaining dispute proceeding that has ended.

**[35]** The ongoing application of the agreement made in December 2022 can only be definitively determined if a new application under s.240 is made by a bargaining representative.

**Consent arbitration proceedings generally**

**[36]** One key frustration for Peabody in this matter is the reality that in consent arbitration proceedings "the party who filed the application has the right to withdraw, but the other party does not."

**[37]** Many respondents in litigation generally hold the same view, but Peabody's concern is particularly acute because the parties have specifically agreed to refer their dispute to arbitration and one party to that agreement holds a significant advantage over the other: an applicant party can unilaterally bring an arbitration proceeding to a halt (by filing a discontinuance under s.588) for good, bad or no reason.

**[38]** The same dilemma arises in consent arbitration proceedings authorised by s.739.

**[39]** Arguably this imbalance does not arise if other parties file counter-applications (assuming that the agreement to arbitrate cannot be unilaterally withdrawn).

**[40]** However, in my observation it is rare in Commission proceedings for respondent parties to file counter-applications. It is not usually necessary to do so because a single application is ordinarily sufficient to encompass the interests of all the disputing parties.

**[41]** That said, there may be occasions when a prudent respondent party in a consent arbitration proceeding might file a counter-application as insurance against an unwanted discontinuance. In this matter neither Peabody nor its representatives have been imprudent. In fact Peabody has approached the bargaining process in the Commission in good faith and both Peabody and the MEU have been co-operative and constructive.

**[42]** No orders are required to finalise this matter because it has already concluded in accordance with the MEU's discontinuance. The Commission's file will be closed administratively.


DEPUTY PRESIDENT

*Appearances*:

Mr *A Walkaden*, for the Applicant
Mr *D Williams* of MinterEllison instructed by *Ms C Samarasinghe* for the Respondent

*Hearing details:*

2022
Sydney (By Video using Microsoft Teams)
May 17.

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