DECISION

Fair Work Act 2009
s.229 - Application for a bargaining order

Construction, Forestry, Maritime, Mining and Energy Union
v
MSS Strategic Medical and Rescue Pty Ltd
(B2023/239)

DEPUTY PRESIDENT COLMAN MELBOURNE, 17 MARCH 2023

Application for bargaining order to prevent vote on enterprise agreement.

[1] This decision concerns an application made by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) for a bargaining order under s 229 of the *Fair Work Act 2009* (Act), the effect of which would be to restrain MSS Strategic Medical and Rescue Pty Ltd (MSS) from proceeding with an employee vote on a proposed enterprise agreement, and to require MSS to attend further meetings with the CFMMEU. The company's proposed agreement would cover employees of MSS employed as emergency services officers at the Loy Lang A power station and mine operated by AGL in the Latrobe Valley in Victoria.

[2] The application was filed on Tuesday 14 March 2023. The CFMMEU sought an urgent hearing in advance of the vote that commences on 20 March 2023. I heard the application on Thursday 16 March 2023. Mr Andy Smith, a CFMMEU organiser, gave evidence for the union. Mr Brett Lamont, the national manager of MSS, gave evidence for the company. The background to this matter is as follows.

[3] MSS has a contract with AGL to provide medical and emergency services at the Loy Yang A site. It employs some 23 employees to provide these services. Mr Smith gave evidence that in April 2022, on application by the CFMMEU, the Commission issued a majority support determination in relation to a proposed enterprise agreement that would cover MSS and the employees. On 13 May 2022, the CFMMEU provided MSS with its log of claims. The first bargaining meeting between MSS and the CFMMEU occurred on 31 May 2022. Subsequent meetings occurred on at least 11 further occasions over each of the following months of 2022.

[4] Mr Smith said in his evidence that the last bargaining meeting of the parties occurred on 16 December 2022, and that on 24 January 2023 the union received a letter from the company stating that bargaining was at an impasse. Mr Smith said that he did not agree that there was an impasse, because the parties had yet to discuss many of the key issues in any depth, and the question of what should be the scope of the agreement had not been discussed at all.

[5] Mr Lamont's evidence was that Mr Smith's suggestion that MSS had ceased to bargain with the CFMMEU after 16 December 2022 was completely inaccurate. Mr Lamont said that on 1 December 2022, MSS had presented the CFMMEU with an offer, and that on 7 December

the union rejected it, and declined to attend a meeting the following day on the basis that there was nothing to discuss. He said that on 8 December 2022 the company had given the union a further offer, which it rejected on 13 December 2022, without providing any feedback. On 15 December 2022, MSS had again presented the union with an offer and a meeting request for the following day. On 16 December 2022, the union rejected the offer and stated that it would proceed with protected industrial action. On 21 December 2022, the company advised the union of its availability over the Christmas and New Year period. Nothing of note occurred over the holiday period. Then on 20 January 2022, Ms Michelle Carter, the company's people manager, wrote to Mr Smith, stating that MSS was now providing the union with an updated and final offer. On 23 January 2023, Mr Smith replied, stating that the membership had unanimously rejected the offer.

[6] On the evening of 23 January 2023, Ms Carter wrote to Mr Smith, stating that the company had made significant concessions and had now *'given all that we will give and made all the concessions we will make'.* She asked that the union reconsider the final offer, and said that if the offer was not accepted, the company would consider bargaining to be at an impasse, and would put the agreement to a vote. On 24 January 2023, Ms Carter sent Mr Smith a table setting out the CFMMEU's latest claims, the company's responses, and its reasons for those responses. She reiterated that the company would regard bargaining to be at an impasse if the final offer was not accepted.

[7] The CFMMEU did not agree to the proposed agreement. MSS put its proposed agreement to a vote of employees, which occurred from 6 to 9 February 2023. Employees voted not to approve the agreement, by a margin of 13 to 10.

[8] Mr Lamont said that following the vote on the agreement he spoke to employees and asked them what things were important to them, and that the feedback he received was that the most important issues concerned sick leave and annual leave being paid at 12 rather than 7.6 hours for 12-hour shifts.

[9] Mr Smith's evidence was that in the week commencing on 13 February 2023, he contacted Mr Lamont on multiple occasions trying to arrange a meeting, but Mr Lamont did not agree to bargain. Mr Lamont denied that he had refused to bargain, and said that he had contacted Mr Smith on 13 February 2023 to arrange a meeting and discuss a way forward, but that despite an exchange of texts, no meeting eventuated. Mr Smith agreed in cross-examination that there had been an attempt by the two to align their diaries.

[10] On 15 February 2023, Mr Smith sent Mr Lamont an email, in which he stated that the union was still open to meeting to discuss *'the outstanding items, which at this point appear to be sick leave and annual leave'*. On 16 February 2023, Mr Lamont replied, stating that he would have some discussions with senior management and get back to Mr Smith. Mr Lamont said that on 28 February 2023 he instructed Chris Morgos, the company's industrial relations manager, to speak with Mr Smith about whether the union would support the proposed agreement if it included clauses addressing the personal and annual leave issues that had been raised by employees. Mr Lamont said that he understood that the outcome of the discussion between Mr Morgos and Mr Smith was that the union wanted to discuss various other conditions.

[11] In early March 2023, there was an exchange of correspondence between representatives of the company and the union as to whether the union would support the proposed agreement if the personal and annual leave matters were included. On 3 March 2023, the CFMMEU and

MSS participated in a conciliation conference before Commissioner Cirkovic, convened pursuant to an application made by the CFMMEU under s 240 of the Act, however the conference did not result in an agreement.

[12] On 6 March 2023, Mr Morgos wrote to the CFMMEU, enclosing a proposed enterprise agreement. Mr Morgos stated that MSS had listened to *'the key one or two issues from most of the 23 employees'* following their rejection of the agreement, and that it had now amended the proposed agreement to include two additional items relating to personal and annual leave. Mr Morgos said that MSS was not willing to reopen bargaining and discuss other issues. He said that the revised proposal was the best offer that the company could make for the period 2023 to 2026, and that, while he understood that the CFMMEU had at least eight additional claims, the union had already *'extracted'* everything that the company would give. Mr Morgos said that he considered bargaining to be at an impasse and that unless the union indicated by 7 March 2023 that it agreed with the proposal, the company would submit the agreement to a vote of employees. Mr Morgos attached to his letter the revised agreement, and a revised table listing the union's claims and the company's responses.

[13] Later that day, Mr Smith replied to Mr Morgos, stating that the union was disappointed that MSS had approached employees directly about bargaining, and that the good faith bargaining requirements required that parties refrain from conduct that undermines freedom of association or collective bargaining. Mr Smith said that he had marked up the company's proposed agreement to reflect the union's log of claims and that this represented a *'substantial compromise'* as some twenty claims had been dropped, leaving only five matters left in dispute (the CFMMEU compromise offer). He further stated that the good faith bargaining requirements necessitated that bargaining representatives give genuine consideration to proposals from other representatives, and reasons for responses. He requested an opportunity to meet with the company to discuss the union's offer.

[14] Mr Lamont's evidence was that he genuinely considered the CFMMEU compromise offer. He said that the offer did not involve any new claims, and that the claims had previously been costed. Despite this, Mr Lamont said that he had several internal discussions about the offer, and spoke to some colleagues who did further costings, but he concluded that the company could not accept the offer.

[15] On 8 March 2023, Mr Morgos replied to Mr Smith's letter, stating that the company considered bargaining to have reached an impasse, and that, having made the final changes to the agreement in respect of personal and annual leave, the company had nothing more to give. Mr Morgos said that MSS rejected the union's suggestion that it had not observed the good faith bargaining requirements. He asked the CFMMEU to encourage its members to support the agreement, and said that a *'no'* vote would achieve nothing and delay wage increases.

[16] On 9 March 2023, MSS wrote to employees and advised that it would be putting its *'best and final offer'* to a vote commencing at 9.00am on 20 March 2023.

[17] On 10 March 2023, Mr Smith wrote to Mr Morgos, notifying him that the CFMMEU believed that the company was in breach of the good faith bargaining requirements, and requesting that MSS withdraw the ballot and cease negotiating with employees directly without the involvement of the CFMMEU. In his letter, Mr Smith stated that unless MSS confirmed in writing to the union that it would do these things, the CFMMEU would file an application in

the Commission seeking urgent bargaining orders. The letter stated that the union proposed to rely on the letter in connection with the notification requirement in s 229(4) of the Act.

[18] On 14 March 2023, the company's solicitors wrote to the CFMMEU, advising that MSS would not agree to withdraw the ballot and that a further meeting with the CFMMEU would have no utility.

[19] Mr Smith said in his statement that he does not consider bargaining to be at an impasse, and that he believes that MSS and the union are close to reaching an agreement. He said that the parties are apart only in relation to the following terms: the nominal life and scope of the agreement; notice that employees must give when resigning; a minor increase in annual leave entitlements sought by the union; and a minor increase to a payment that is made to employees if MSS loses its contract with AGL. Mr Smith set out in his statement various reasons supporting the merit of the union's position on these matters, including its position that the scope of the agreement be confined to the Loy Yang A site, rather than covering any work that might in the future be undertaken by MSS in the Latrobe Valley. Mr Smith said that he believes that MSS has not genuinely considered the CFMMEU compromise offer, and that MSS has refused to meet the union to discuss its offer. He said that since 16 December 2023, the company had not met with the union and had shown no desire to bargain with it.

[20] Mr Lamont's evidence was that he strongly disagreed with Mr Smith's view that the parties were close to agreement. He said that the claims that the CFMMEU continues to press are substantial and would not be agreed to by the company. In particular, the company will not agree to a two year deal, as there are too many commercial and operational implications. Mr Lamont said that he had considered the CFMMEU compromise offer. He denied that the company had refused to bargain since 16 December 2022.

Statutory framework

[21] Section 229(1) of the Act allows a bargaining representative for a proposed enterprise agreement to apply for a bargaining order. Section 230(1) provides that the Commission may make an order if the requirements in s 230 have been met. Those requirements are as follows:

- the employer has agreed to bargain; or a prescribed instrument, including a majority support determination, is in operation (s 230(2)); and
- one or more of the bargaining representatives have not met, or are not meeting the good faith bargaining requirements (s 230(3)(a)(i)); or the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement (s 230(3)((a)(ii)); and
- the applicant for the order has complied with the notification requirements in s 229(4), unless the exception in s 229(5) applies (s 230(3)(b)); and
- the Commission is satisfied that it is reasonable in all the circumstances to make the order (s 230(1)(c)).

[22] A bargaining order must be in accordance with the requirements of s 231, which deals with what a bargaining order must specify (s 230(4)).

[23] Section 228(1) sets out the good faith bargaining requirements. It states:

> "(1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:
>
> (a) attending, and participating in, meetings at reasonable times;
>
> (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
>
> (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
>
> (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
>
> (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
>
> (f) recognising and bargaining with the other bargaining representatives for the agreement."

[24] In *Construction, Forestry, Mining and Energy Union (Mining and Energy Division) v Tahmoor Coal Pty Ltd* (2010) 195 IR 58 (*Tahmoor*) a Full Bench considered whether the conduct of a ballot for the approval of a proposed enterprise agreement without the agreement of the other bargaining representatives constituted a breach of the good faith bargaining requirements. At [30] the Full Bench stated:

> "Although there may be circumstances in which the conduct of a ballot without the agreement of other bargaining agents constitutes a breach of the good faith bargaining requirements, it will not always be so. There is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot. In this case the Commissioner and the parties all referred to the notion of "impasse" as the touchstone by which to judge whether an employer who puts a proposed agreement to a ballot without the agreement of the other bargaining agent thereby fails to observe the good faith bargaining requirements. There was some debate about whether "impasse" had been reached at the relevant time. The Commissioner found that "negotiations for an enterprise agreement have reached a stalemate, or using Tahmoor's words: "an impasse". Another way of approaching the matter, as the CFMEU intimated in its submissions, might be to ask whether there had been a reasonable opportunity to discuss Tahmoor's latest proposal. Yet another formulation might be to ask whether negotiations had reached such a stage that the employer was entitled to put its proposal to a ballot in order to see if progress could be made."

Summary of submissions

[25] The CFMMEU submitted that the Commission should be satisfied that each of the conditions for the making of a bargaining order had been made out. It was clear that the union had lodged a valid application, that a majority support determination had been made, and that

the union had complied with the notification requirement in s 229(4) by sending to MSS its letter of 10 March 2023. The CFMMEU further contended that the requirement of s 230(3)(a)(i) was satisfied because MSS had not met, and was not meeting, five of the six good faith bargaining requirements. In this regard, the CFMMEU contended that the *'vice'* in the company's conduct was the following:

- MSS had refused to attend a bargaining meeting with the union since 16 December 2022.
- The company had submitted its revised agreement for a vote commencing on 20 March 2023 without first meeting with the union to discuss the CFMMEU compromise offer, and without genuinely considering the offer or giving reasons for rejecting it.
- It had proceeded to a ballot without ever discussing with the union the key issue of the scope of the proposed agreement, and without discussing in depth the conditions that would apply in relation to personal and annual leave, public holidays, overtime, the term of the agreement and travel allowance.
- It had proceeded to a ballot without first discussing with the union the revised agreement with the union.
- It had unilaterally put the revised agreement to a vote when bargaining had not reached an impasse, stalemate or deadlock.

[26] The CFMMEU contended that this conduct demonstrated that MSS had not met, and was not meeting, the good faith bargaining requirements in ss 228(1)(a), (c), (d), (e) and (f). The CFMMEU did not specifically link each of these alleged vices to particular good faith bargaining requirements, however it is evident that the union contends, at a minimum, that the alleged refusal to meet with the union since 16 December 2022 was contrary to 228(1)(a), and that the alleged failure to respond to the CFMMEU compromise offer or to consider it was contrary to the requirements in s 228(1)(c) and (d).

[27] The CFMMEU further contended that the company's decision to put the revised agreement to a vote was capricious or unfair conduct that undermines freedom of association or collective bargaining (s 228(1)(e)), in circumstances where MSS had not met with the CFMMEU to discuss the company's revised proposed agreement or the union's compromise offer, or any reasons for rejecting that offer, and when various matters have not been discussed at length and the question of scope had not been discussed at all, and when there was in fact no impasse in negotiation, contrary to the assertion of the company. In the latter regard, the union contended that there had been progress in negotiations: the company had revised its offer after the earlier agreement was voted down, and the union had made a recent and substantial compromise offer, which Mr Lamont acknowledged had brought the parties closer together. The company had simply declared that bargaining had reached an impasse and had proceeded to put its proposed agreement to a vote. The union said that this was contrary to the company's obligation to refrain from conduct of the kind described in s 228(1)(e) of the Act.

[28] The CFMMEU contended that, by its conduct above, and in particular by failing to meet and discuss the outstanding issues, MSS had effectively failed to recognise it as a bargaining representative, contrary to the good faith bargaining requirement in s 228(1)(f).

[29] More generally, in with particular reference to s 228(1)(e), the union contended that this was not a case where it was legitimate for the employer to submit a proposed agreement to a vote of the workforce over the objection of its union bargaining representative, which, consistent with the decision of the Full Bench in *Tahmoor*, could only occur in limited circumstances without offending the good faith bargaining requirements. The union said that the facts of the present case did not fall within those circumstances, particularly given that there was in fact no impasse or deadlock in bargaining, and that the union had not been afforded a reasonable opportunity to discuss its compromise offer with the company.

[30] The CFMMEU contended that it was reasonable in all the circumstances for the Commission to make a bargaining order. It said that the effect of the company's conduct had been to unfairly deprive the union and its members of the opportunity to attempt to resolve the five remaining issues. Negotiations had not reached a stage where the company was entitled to put its revised agreement to a vote. The union contended that the company had acted precipitously and unilaterally, and if an order was not issued, the consequence would be unjust, because MSS would enjoy the fruits of its failure to observe the good faith bargaining requirements, whereas the CFMMEU might be denied the opportunity to bargain further. The CFMMEU's proposed order would require MSS to refrain from putting the proposed agreement to a vote, and compel it to convene at least three bargaining meetings over a period of 21 days.

[31] MSS submitted that it had met and was meeting the good faith bargaining requirements, and that the requirement in s 230(3)(a)(i) for the making of an order was therefore not made out. MSS contended that the alleged *'vices'* of which it had been accused were based on false factual and legal premises. The company had not refused to bargain with the union from 16 December 2022, as the evidence of Mr Lamont had made clear. The company had given genuine consideration to the CFMMEU compromise offer and had responded to it by rejecting it. Throughout bargaining it had recognised the CFMMEU, as it was plainly required to do.

[32] MSS submitted that bargaining was indeed at an impasse, because although the CFMMEU had dropped a large number of its claims, it pressed five outstanding claims that the company would not agree to. MSS was not required to make further concessions, nor was it required to continue to attend meetings when this would be futile. The company had believed that making two final modifications in respect of annual and personal leave would result in the union supporting the proposed agreement. Mr Smith's email of 15 February 2023 had effectively said as much. Then, when the company did agree to those matters, it discovered that in fact there were more claims that the union continued to press. The company contended that although there was only a small number of issues separating the parties, they were important ones. Bargaining had been underway for some nine months and it could not be said that MSS had acted prematurely or precipitously. The company simply had nothing left to give. MSS contended that in any event, there was no principle to be implied from s 228(1) or the case law to the effect that an employer could only put an agreement to a vote if bargaining had reached an impasse. While there had been several decisions of the Commission preventing a vote from proceeding on the basis that the good faith bargaining requirements had not been met, the circumstances of those cases were a *'galaxy away'* from what had occurred in this case.

Consideration

[33] Section 230(3) of the Act requires that in all cases, the Commission must be satisfied either that a bargaining representative has not met or is not meeting the good faith bargaining

requirements, or that the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement. The second of these matters is not relevant in this case. Power to make an order is therefore contingent on the Commission reaching a state of satisfaction that MSS has not met, or is not meeting, at least one of the good faith bargaining requirements.

[34] Section 228(1)(a) requires that a bargaining representative attend and participate in meetings at reasonable times. The section establishes a general obligation. It does not necessitate that a bargaining representative attend every meeting that is proposed by another representative. Equally, the fact that a person has attended a meeting in the past will not mean that the person is free to refuse to attend another meeting. Whether a person's refusal to attend or participate in a meeting is inconsistent with s 228(1)(a) will involve considerations of context and degree.

[35] I do not accept the CFMMEU's contention that MSS has refused to attend a bargaining meeting with the union since 16 December 2023. It is clear from Mr Lamont's evidence, and I find, that the company has been willing to attend meetings at various times since this date. It is true that MSS is not presently willing to meet with the CFMMEU to discuss the union's outstanding claims. But this is because MSS considers bargaining to have reached an impasse. Of course, the fact that one party subjectively believes that there is an impasse does not mean that this is objectively so. However, I find that in this case, there is an impasse. Although the CFMMEU compromise offer entailed a substantial movement, the union still presses five claims. Mr Lamont was very clear that the company will not agree to the claims. He said that the company has given all that it is willing to give. Section 228(2) clearly states that the good faith bargaining requirements do not require a bargaining representative to make concessions or to reach agreement. Of course, an early or unreasoned declaration of impasse by one party might suggest that the party was not engaged in genuine bargaining. But that is certainly not the case here. Bargaining has been in train since May last year. Both the company and the union have made concessions. The differences between the parties are not numerous, but they are significant. After a lengthy period of genuine bargaining, the company has concluded that it cannot give any further ground. In my view it was right that the company was candid with the union that it would not make further concessions. Section 228(1)(a) did not require the company to convey that information to the union at a meeting. I do not consider that there has been a failure by the company to observe the requirement of *'attending, and participating in, meetings at reasonable times'*.

[36] In relation to ss 228(1)(c) and (d), I consider that MSS has responded to proposals made by the CFMMEU in a timely manner, and has given genuine consideration to such proposals, as well as reasons for its responses. The CFMMEU submitted that MSS had failed to respond to its compromise offer, but I find that this is not the case. The company rejected that offer. It told the union that it had nothing more to give. This was its reason for rejecting the offer. It made clear that if the union did not support the agreement, the company will nevertheless ask employees to vote on it. I further find that the company gave genuine consideration to the CFMMEU compromise offer. I accept Mr Lamont's evidence that he did so, and that he had discussions with colleagues internally about the offer and even had certain further costings done which confirmed his view that the company could not agree to the offer. I do not accept that there was any relevant failing on the company's part by not providing these further costings to the union. The company was not required to conduct further costings; Mr Lamont said that the claims had already been costed and workshopped. I am not satisfied that MSS has not met, or is not meeting, its obligations under ss 228(1)(c) or (d).

[37] The contention in relation to s 228(1)(f) may be dealt with briefly. I find that the company has not failed, and is not failing, to recognise or bargain with the CFMMEU. It is clear that it has done these things. It has been negotiating with the union since May last year. It recognises the union as a bargaining representative for the agreement and its dealings with the union over this period reflect this recognition.

[38] This brings me to s 228(1)(e). In my assessment, the facts of this case do not disclose any unfairness, caprice or arbitrariness on the part of the employer, nor do I consider that MSS's conduct, however else it might be characterised, has *'undermined'* either freedom of association or collective bargaining. In my view, the company and the union have negotiated with one another since May 2022 in a manner that is consistent with the good faith bargaining requirements. There have been many different points of view and numerous disagreements. The parties have attended meetings and had discussions with one another outside of meetings. They have exchanged draft agreements, and corresponded about particular conditions. Some conditions have been the subject of more attention than others. All of this is perfectly normal. After many months of bargaining, the company has reached a point where it will not make any further concessions. In my view, it was appropriate that the company candidly told the union that this was the case. Not to have done so would have been disingenuous.

[39] There was much debate at the hearing as to whether bargaining had really reached an impasse. I understood the union's contentions on this matter to engage with several, and perhaps all of the good faith bargaining requirements, including s 228(1)(e). I have found above that negotiations have reached an impasse. But in any event, as I have said on other occasions, I do not consider that a situation of impasse is a precondition for an employer to put an agreement to the vote without the assent of all relevant bargaining representatives. The Act does not say or imply this. The Full Bench in *Tahmoor* did not subscribe to such rule. It noted that the Commissioner below and the parties had used this concept as a *'touchstone'*. Even if the Full Bench is to be understood as having approved of the use of a such a touchstone, it is clear that it did not say that there are only limited circumstances where it is permissible to put an agreement to a ballot without the approval of the other bargaining representatives. Rather, it said that there may be circumstances in which the conduct of a ballot without the agreement of other bargaining representatives constitutes a breach of the good faith bargaining requirements. In other words, there are limits to when an employer may put an agreement to the vote without infringing the good faith bargaining requirements. The cases referred to by the union illustrate these limits. In my view, the circumstances of this case are well within those limits.

[40] In my opinion, the company has not been negotiating directly with employees without their bargaining representative, as suggested by the union. Rather, MSS sought feedback from employees after a majority of them voted to reject the proposed agreement. It only stands to reason that the employer would seek to understand why a majority of its workers had rejected its agreement. Depending on the circumstances, an employer might find itself in contravention of the requirements in ss 228(1)(e) or (f) if it circumvented a bargaining representative. But simply seeking feedback from employees is not inconsistent with good faith bargaining.

[41] Much attention was also devoted at the hearing to the question of whether the scope of the agreement had been the subject of discussions. Mr Lamont said that he believed the union had initially wanted an agreement to apply beyond the Loy Yang A site. Mr Smith denied that this had ever been the union's position. Mr Lamont said that he had had discussions about the scope of the agreement with another official of the union, who had favoured a broader scope. I

accept Mr Lamont's evidence that he had a discussion along these lines. But whatever may have been the case here, I do not regard this to be a significant matter. It does not affect the question of whether there is an impasse, because in any event it is clear from Mr Lamont's evidence that the company will *'never'* agree to the two-year nominal life of the agreement sought by the union, and that the other union claims come at a cost that the company will not accept. The union said that the question of scope could be significant because an agreement with a broader scope might displace the application of other more generous agreements that could have applied to other work that the company might undertake in the future in the Latrobe Valley. However, there is no sense in which a bargaining order is needed to protect employees from some form of harm in this connection. The company will be required to take all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, are explained to the employees (s 180(5)). Further, I note that the scope of the proposed agreement is the same as that which was contained in the earlier agreement that was rejected by employees at the vote in February 2023, to which the CFMMEU took no objection.

[42] The fact that the scope of the agreement may not have been discussed in any detail or at all, or that other conditions may not have been discussed in depth, does not lead me to conclude that a vote on the agreement is contrary to any of the requirements in s 228(1). Nor is the fact that the revised agreement has not been subject to separate discussions with the union a reason to conclude that requirements in s 228(1) have not been met. The agreement includes the enhanced conditions relating to leave. It is not clear what there is to discuss about these changes. There is no rule that each version of an agreement warrants a separate meeting. The company has made its best offer, one that is improved from the agreement that was submitted to a vote last month. The union maintains additional claims which the company rejects. Employees can decide for themselves whether to accept the company's revised agreement or continue to press for the additional claims sought by the union. There is no vice in any of this. The CFMMEU contended that, if employees vote to approve the agreement, it will not have the opportunity to bargain further with the company about the outstanding claims. But that will be a consequence of the employees' choice.

[43] The CFMMEU did not elaborate upon the concerns expressed by Mr Smith that casual employees may be artificially engaged to work during the voting period in order to inflate the *'yes'* vote. However, concerns about such matters may be ventilated at the hearing of any application under s 185 for approval of an agreement by the Commission.

[44] MSS contended that this case was not really about the union's concern that the company was not meeting the good faith bargaining requirements, but rather its concern that employees might approve the company's revised agreement. I have no difficulty in accepting that the union is concerned about the matters it raises in its application. However, I am not satisfied that those concerns are substantiated. Further, I am not persuaded that it would have been reasonable (s 230(1)(c)) to make an order preventing employees from voting on the agreement. I do not see any vice in the company's conduct. MSS has improved the offer that it put to employees in February 2023. I see no good reason why employees should not be allowed to decide whether to accept or reject it.

Conclusion

[45] I am not satisfied that MSS has not met, or is not meeting, the good faith bargaining requirements. The condition in s 230(3)(a) for the making of an order has not been met. I have no power to make a bargaining order.

[46] The application is dismissed.

DEPUTY PRESIDENT

Appearances:

Y. Bakri of counsel for the Construction, Forestry, Mining and Energy Union
M. Follett of counsel for MSS Strategic Medical and Rescue Pty Ltd

Hearing details:

2023
Melbourne
16 March

Printed by authority of the Commonwealth Government Printer
<PR760412>