



DECISION

Fair Work Act 2009

s.437 - Applications for a protected action ballot order

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

v

Australian Postal Corporation

(B2009/10457 and B2009/10458)

SENIOR DEPUTY PRESIDENT DRAKE

SYDNEY, 25 AUGUST 2009

Proposed protected action ballot of the employees of the Australian Postal Corporation by the CEPU.

[1] The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) lodged these 2 applications pursuant to s437 of the *Fair Work Act 2009* (the Act) on 12 August 2009. The applications were both listed before me for hearing on 13 August 2009 and 17 August 2009.

[2] Application B2009/10457 relates to the employees (including regular casuals) employed by the Australian Postal Corporation (Australia Post) and who are members of the CEPU, excluding those employees who are engaged in Post Logistics (third and fourth party warehousing/fulfilment operations)(Post Logistics).

[3] Application B2009/10458 relates to the employees (including regular casuals) employed by Australia Post and who are members of the CEPU, engaged in Post Logistics (third and fourth party warehousing/fulfilment operations)(Post Logistics).

[4] Australia Post sought permission to appear and make submissions. The CEPU opposed Australia Post's application. Much of the hearing was devoted to the issue of whether or not Australia Post had a right to appear. Mr Parry of Senior Counsel, appeared for Australia Post and provided written submissions in relation to Australia Post's right to be heard. Mr Reitano of Counsel, appeared for the CEPU and provided an outline of submissions and spoke to his submissions.

[5] An employer does not have an open ended right to appear before Fair Work Australia (FWA) in applications pursuant to s437. Permission for an employer to appear, and on what issues, is a matter for the exercise of a discretion by FWA in each application.

[6] In these applications Australia Post indicated that it disputed the matters of fact relied on by the CEPU to establish its entitlement to orders ie whether the CEPU had been, and was still, genuinely trying to reach an agreement with Australia Post concerning both groups of

employees who were proposed to be balloted. In this circumstance I considered it appropriate that Australia Post should be heard. I granted Mr Parry permission to appear for Australia Post limited to these issues.

[7] In application B2009/10457 the CEPU relied on the Affidavit of Mr Ed Husic of 13 August 2009. Australia Post relied on the Statutory Declaration of Ms Catherine Walsh of 17 August 2009.

[8] In application B2009/10458 the CEPU relied on the Affidavit of Mr Ian Bryant of 13 August 2009. Australia Post relied on the Statutory Declaration of Ms Toni Scott-Brown of 14 August 2009.

[9] Section 443 of the Act sets out the circumstances in which FWA must make a protected action ballot order. It is set out below in so far as is relevant to these applications:

“443 When FWA must make a protected action ballot order

(1) FWA 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) FWA 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) FWA 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.

.....”

[10] Mr Husic and Mr Bryant’s affidavits stated that the organisation had been and was still genuinely trying to reach an agreement with Australia Post.

[11] In relation to the employees of Post Logistics Ms Scott-Brown’s Statutory Declaration set out her contact with the CEPU in relation to a proposed new agreement. There have been no separate meetings between the CEPU and the particular business unit since the meeting on 21 December 2007. On 11 June 2008 Ms Scott-Brown advised Mr Bryant that, as there had

been no progress, she intended to establish discussions directly with his members in New South Wales.

[12] Ms Walsh provided copies of much of the correspondence between the CEPU and Australia Post, documenting as far as possible the negotiations that have taken place for a proposed new enterprise agreement, which I will call “EBA7”. This agreement is intended to replace the last agreement which all parties refer to as “EBA6”.

[13] For some time after the expiry of EBA6 the negotiating position of the CEPU in relation to the proposed EBA7 had been predicated upon the acceptance by Australia Post of a common law agreement governing the relationship of Australia Post and its contractors. This would have amounted to prohibitive content in any agreement and the CEPU could not be said to be genuinely trying to reach an agreement with Australia Post if these claims are being pursued as part of a separate agreement tied to a collective agreement.

[14] Negotiations towards EBA7 have taken place over an extensive period. Ms Walsh gave evidence regarding an agreed position which she says was reached between the CEPU and Australia Post in 2007, but which she says was subsequently reneged upon by the CEPU. Mr Reitano submitted that no position reached between the bargaining parties, including the position in 2007 referred to by Ms Walsh, has ever been accepted by a vote of members.

[15] This material does not assist in this application. Whatever the position was between the parties in 2007 there was no agreement voted upon and accepted by employees. EBA7 was not achieved in either 2007 or 2008. An agreement is not an agreement unless the employer puts an offer which is accepted by the employees. Whatever position was put to the CEPU, and whatever discussions took place between the CEPU and Australia Post in 2007, there has been no acceptance of an Australia Post offer by the employees of Australia Post.

[16] Bargaining between parties is not a static process. It can commence, be suspended, cease altogether for a period, recommence or fade away. The matters for negotiation are variable. In this case bargaining commenced after the expiry of EBA6 and for some considerable time involved a proposal concerning prohibited content. That bargaining ceased. On the facts before me to that time the CEPU could not be found to be genuinely bargaining for an agreement with Australia Post.

[17] On 10 November 2008 bargaining recommenced. I have to determine whether the bargaining which took place after 10 November 2008 was bargaining through which the CEPU was genuinely trying to reach an agreement.

[18] By November 2008 the CEPU had become unhappy with Australia Post’s position, in particular in relation to its position regarding claims which amounted to prohibited content. This is set out in a somewhat rambling fashion in the initial paragraphs of Mr Husic’s correspondence of 10 November 2008. Mr Husic then articulated in the following numbered paragraphs its projected position in relation to further negotiations.

“Re: FORMAL ADVICE OF THE CEPU’S INTENTION TO NEGOTIATE A NEW ENTERPRISE AGREEMENT

We refer to our attempts to conclude a new enterprise agreement with Australia Post.

In the EBA7 negotiations, considerable progress was achieved but Post took a particularly hard line on certain matters that are very important to our members. No agreement was possible as your negotiators frustrated the process by taking very unrealistically broad and ‘technical’ objections to certain topics.

Following the EBA7 negotiations, we also sought a common law agreement which attempted to protect other conditions of service. Australia Post rejected this approach outright.

During recent talks we suggested another approach: to vary and extend EBA6 under new provisions contained in the *Forward with Fairness* amendments. If an agreement is extended and varied, prohibited content, for example, can remain and even be added. This completely removed the broad and ‘technical’ problems relied on by your negotiators to frustrate agreement on EBA7.

This last offer by us was also rejected by Post.

It is apparent that your Corporation’s broad ‘technical’ objections in the EBA7 negotiations are nothing more than a device to prevent agreement.

Given the above, it is clear Post never genuinely intended to reach agreement with us on these matters, at any stage. The obvious conclusion is that Post does not wish [sic] negotiate further or meaningfully consider the claims submitted to you on behalf of our members.

Unless Post is prepared to reconsider its approach to negotiations, we can see no alternative but to follow the *Workplace Relations Act*.

As a result, the CEPU wishes to advise:

1. It is the view of the CEPU that the current draft EBA7 document no longer represents a valid, legal offer to employees of Australia Post;
2. Any move to submit this version of draft EBA7 to the workforce for a ballot would – on the advice provided to this union – represent a *prima facie* breach [sic] the *Workplace Relations Act 1996* and would be resisted by this union;
3. We believe that the current draft EBA7 document is an incomplete offer and must be amended to allow for various clauses within EBA6 to be incorporated into EBA7;
4. As indicated to Post previously, we note that since last year management has failed to genuinely consult on a range of workplace change initiatives. This lack of faith and commitment to follow established dispute resolution and consultation provisions within EBA6 has demonstrated to the CEPU and its members the inadequacy of the proposed consultation and dispute resolution clauses within the proposed draft EBA7. These must be subject to re-negotiation;

5. Recent cases before the Australian Industrial Relations Commission have demonstrated that the proposed draft EBA7 does not deal with the issue of Work Level Standards and fails to comprehensively address the incorporation of staffing agreements – this must also be negotiated within the new agreement;
6. Additionally, we identify the following issues that need to be addressed in any future enterprise bargaining agreement;
 - The type of agreement, that is, extend and vary EBA6 or amend EBA7;
 - Management of FDD issues
 - ‘Prohibited’ content issues and restrictions
 - Contracting out (to the extent permitted)
 - Injured Worker Policy
 - Disciplinary Abuse
7. We note that since last year, cost of living pressures have increased on our members and this must be addressed as part of a new EBA wage offer;
8. We note that Australia Post has refused to re-commence talks on the need for an amended EBA to cover the Corporation;
9. Our previous correspondence and meetings with the Corporation’s senior representatives have outlined the breadth of our claims on behalf of members; and,
10. As Post has, on numerous occasions, rejected the claims made by our organisation we wish to advise that our Divisional Executive has authorised the commencement of consultation and all actions designed to progress our claims for an enterprise bargaining agreement with Australia Post.

Notwithstanding your previous advice that you will not negotiate any changes to the draft EBA7 document, we invite Post to enter into meaningful negotiations.

We would appreciate a response to this letter by close of business, Wednesday 12 November 2008.”

[19] Ms Walsh suggests that prohibited content remained and still is an essential element of the CEPU’s position. I disagree. I am persuaded that the CEPU’s correspondence expresses disappointment with Australia Post’s refusal to negotiate regarding these issues but nevertheless demonstrates a perhaps begrudging intention to negotiate from that date onwards within the confines of what is “permissible”. The parties may not have found common ground but I am persuaded that, from 10 November 2008, the CEPU’s position was that they intended to negotiate concerning the issues listed within Mr Husic’s letter to the limit of what was permissible regarding “prohibited” content issues and restrictions.

[20] Ms Walsh suggests that the issue of contractors has remained a constant item on the agenda of the CEPU in an impermissible fashion. Ms Walsh’s Statutory Declaration makes reference to a number of occasions when the issue of contractors has arisen and suggests that the CEPU is still seeking an agreement on that issue in an impermissible fashion. I have examined Ms Walsh’s Statutory Declaration and considered the material she refers to. In

relation to the meeting on 18 December 2008 Ms Walsh refers to a remark of Mr Husic. I believe that this remark confirms that the issue was off the agenda for the current negotiations although the CEPU refused to guarantee that it would never emerge again if the present negotiations were unsuccessful. Also, the inclusion of “contractors” in a list of outstanding issues on 18 June 2009 does not mean that the CEPU is seeking an agreement about that issue in an impermissible fashion. Read in conjunction with the correspondence of 10 November 2008 the contrary is more likely.

[21] Mr Parry submitted that there was no evidence that the claims for prohibited content or a separate common law agreement on the same issue had been withdrawn. Whilst it is true that there has been no explicit statement that such claims have been abandoned there is positive evidence that the CEPU’s expectations and agenda on this issue were downgraded from 10 November 2008 to what was possible within the legislation.

[22] Australia Post responded to the correspondence from Mr Husic. They met on 18 December 2008 and 21 January 2009 and thereafter on a number of occasions. It is clear from Ms Walsh’s Statutory Declaration that the parties engaged in a very extensive negotiation until June 2009. Following the unsuccessful conclusion of those negotiations in June 2009 Ms Walsh says that the CEPU have refused to negotiate further and have walked away from Australia Post.

[23] In the *National Union of Workers and Blue Circle Transport Pty Ltd*ⁱ Vice President Watson dealt with an analogous situation and cited with approval a previous decision of Senior Deputy President Acton concerning applications of this kind. He said:

“[20] Counsel for Blue Circle contends that if a union makes a claim during a bargaining period that include matters which would be prohibited content in a collective agreement under the Act, the union is not genuinely trying to reach an agreement within the meaning of that term in s.461. Reliance is placed on the decision of Senior Deputy President Acton in *AFMEPKIU v Kempe Engineering Services Pty Ltd*¹ where her honour said at [24]:

‘In the circumstances, I am not satisfied that during the bargaining period, the AMWU genuinely tried to reach agreement with Kempe on the union collective agreement for Moon Street. I do not think a union can be regarded as having genuinely tried to reach agreement with the employer of relevant employees during a bargaining period if, during that period, the union has made what is clearly prohibited content part of its claims in respect of its proposed union collective agreement with the employer. The inclusion of what is clearly prohibited content in a union collective agreement is something an employer is unlikely to agree to because of the potential consequences for the employer of doing so. Similarly, **I do not think a union can be regarded as genuinely trying to reach agreement with the employer of relevant employees, if it makes what is clearly prohibited content part of its claims in respect of its proposed union collective agreement with the employer.**’

[21] **I agree, with respect, with Her Honour’s analysis. I am also of the view that the same conclusion arises if claims for prohibited content to be included in a**

¹ PR973592

separate document are being pursued in conjunction with claims for a collective agreement. It is clear in my view that the claims made by the union on 20 April 2006 included claims for prohibited content. However the critical question in this case is whether the applicant genuinely tried to reach agreement with the employer during the bargaining period notwithstanding that, as at 20 April 2006 at least, it advanced claims which included prohibited content.

[22] It cannot be doubted that a union which pursues claims which include prohibited content during a bargaining period and persists in those claims throughout the bargaining period cannot be regarded as genuinely trying to reach agreement in the relevant sense under the Act. In this case, the NUW contends that it has abandoned those claims and has not pursued them subsequent to their rejection by the company.

[23] As a matter of statutory construction, s.461(1)(b) involves a consideration of the state of affairs at the time the application is made and determined. Section 461(1)(a) involves a consideration of the same test but over a different time period. A similar formulation of the tests are contained in s430(2) of the Act and s170MW (2) prior to the 2005 amendments. The intent of the legislature appears to be to preclude a union from access to secret ballot and protected action provisions if it has not genuinely tried to reach an agreement before seeking to access those rights. **I do not believe that the intention is to forever disbar a union from access to the provision if it transgresses at some point of time in the past and thereafter falls into line with the statutory requirements. In my view, it is possible to be satisfied that an applicant genuinely tried to reach agreement during the bargaining period even though, at some point in time, claims of prohibited content are made. It must be necessary, however, to be satisfied that for an important period of the bargaining period, the applicant genuinely tried to reach agreement by pursuing claims which did not include prohibited content. That will be a question of fact and possibly a matter of degree in any given case.** A conclusion on that question is then considered in conjunction with a similar analysis of circumstances at the time the application is made in accordance with s461(1)(b).”

(my emphasis)

[24] I am satisfied that from 10 November 2008 the CEPU ceased to press its claim for Australia Post to negotiate a common law agreement or otherwise include a clause in EBA7, in relation to contractors, in a manner that was not permissible. I am satisfied that from 10 November 2008 to date the CEPU have been genuinely trying to reach an agreement with Australia Post.

[25] It is common ground that the CEPU has not met with Australia Post since June. Australia Post submits that the CEPU has not recently attended meetings with them and is not making any arrangements to have any future meetings, and that therefore the CEPU is not presently genuinely seeking an agreement with them.

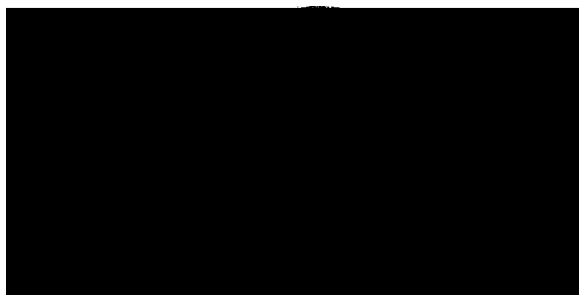
[26] The CEPU have decided to engage in industrial action and are not making any plans to meet and conduct further negotiations unless Australia Post materially alters its position on a number of issues. There are issues over which agreement is not presently possible because the

parties will not adjust their position. Parties do not have to continue to meet when agreement is no longer possible. The CEPU have reached a stage in negotiations where it believes that its position on core issues is unable to be further adjusted. That is a decision for the CEPU and it is not a conclusion which I have to further examine.

[27] Although there has been no bargaining since 1 July 2009 I am still satisfied that the CEPU is genuinely attempting to reach an agreement with Australia Post pursuant to the Act. FWA can properly take into account all conduct before 1 July 2009 when considering an application pursuant to s437. I am satisfied that the CEPU is still genuinely trying to reach an agreement with Australia Post.

[28] In relation to employees of Post Logistics there have been no separate meetings. The meetings between the CEPU and Australia Post have all been centralised. I am satisfied that bargaining in relation to these employees has been subsumed into the centralised bargaining between the CEPU and Australia Post. I am aware that this is the usual process and that agreement on issues with the bulk of employees would usually result in an agreement in relation to these employees thereafter.

[29] I am satisfied that the requirements of ss443(1) have been met and that both applications comply with the requirements of ss443(2). I am satisfied that the question proposed to be put to the employees in relation to the proposed protected action is clear and appropriate in relation to both applications.



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ⁱ Print PR973654