



Summary of Decision

2 April 2014

Peabody Moorvale Pty Ltd

v

Construction, Forestry, Mining and Energy Union

AG2013/12223

1. This decision concerns two issues relevant to the approval of enterprise agreements pursuant to s.185 of the *Fair Work Act 2009* (the Act). The first was whether the notice of employee representational rights (the 'Notice'), provided by Peabody to each employee who would be covered by the Agreement, complied with s.174(1A) of the Act and, if the Notice did not comply, was it necessarily invalid and of no effect (the 'Notice' point). The second issue was whether Regulation 2.06A(b)(i) of the *Fair Work Regulations* (the Regulations) requires that an application for the approval of an enterprise agreement be accompanied by a signed copy of the agreement which includes the 'residential address' of each person who signs the agreement (the 'Regulation 2.06A point').

The Notice Point

2. Section 174(1A) of the Act provides that the notice of employee representational rights must be in the form and contain the content prescribed by the Regulations. The Full Bench considered the following questions:

- (i) What is the proper construction of s.174(1A) and does non-compliance with this provision go to invalidity?
- (ii) Does s.174(1A) preclude an employer from providing additional material to its employees at the same time as the Notice is given to them?
- (iii) What constitutes the Notice in this case and does it comply with s.174(1A)?

3. The consequence of failing to give a Notice which complies with the requirements of s.174(1A) is that the Commission cannot approve the enterprise agreement. This does not prevent the employer from recommencing the bargaining process, completing the pre-approval steps (including the giving of valid Notices) and making application to have the resultant enterprise agreement approved by the Commission.

4. The Full Bench held that the notice provided departed from both the form and content prescribed by s.174(1A) and the Regulations and was therefore invalid. The Full Bench dealt with the proper construction of s.174(1A) at paragraphs [46]-[47]:

“In our view s.174(1A) is clear and unambiguous. There is simply no capacity to depart from the form and content of the notice template provided in the Regulations. A failure to comply with these provisions goes to invalidity. We agree with the Minister’s submissions on this point, that is:

‘A mandatory template is provided in the Regulations. The provisions make it clear that there is not scope to modify either the content or the form of the Notice other than as set out in the template.’¹

Taking into account the considerations identified in *Project Blue Sky* we have concluded that the legislative purpose of s.174(1A) is to invalidate any Notice which modifies either the content or form of the Notice template provided in Schedule 2.1 of the Regulations. We now turn to the facts of this case to determine whether the Notice given by Peabody complies with Schedule 2.1.”

5. Peabody, Ai Group and the Minister submitted that a notice which otherwise complies with s.174(1A) in both content and form is not rendered invalid simply because other material is provided to the relevant employees at the same time. The Full Bench accepted these submissions and said, at paragraphs [66] to [70]:

“We agree with the submissions advanced on behalf of the Minister, in three respects.

First, s.174(1A) is not to be construed so as to preclude an employer from providing additional material to its employees at the same time as the Notice is given to them. Subsection 174(1A) is directed at the form and content of the Notice. It does not require the Notice to be provided in isolation and to construe the provision in that way would produce some absurd results, for example, it would prevent an employer from providing employees with a simple covering letter or an offer of interpreter services. Such a construction would also give rise to considerable uncertainty, for example, about whether an employer could merely provide the additional information in a separate envelope to the envelope containing the Notice, or whether the additional information could be provided at the same time or whether the employer would need to wait until a later time, and if so how long should the employer wait.

These problems are avoided if s.174(1A) is interpreted as a means of curing the mischief to which it was directed, namely, ensuring that the actual Notice is not amended in content or form from the template provided in Schedule 2.1 of the Regulations. To the extent that *Shape Shopfitters* may be said to be inconsistent with our conclusion it is wrong and should not be followed.

Secondly, where additional material accompanies a document which contains the content, and is in the form, prescribed in the Regulations, the issue to be determined is what purports to be the Notice. This is a question of fact.

Thirdly, where additional material is provided with the Notice and that material has the character of being, for example, misleading or intimidatory, then this will be relevant to the Commission’s assessment of whether the enterprise agreement had been ‘genuinely agreed’ by the employees. However, it is not a basis for finding that a Notice has not been given in accordance with the Act. Section 188 deals with when employees have ‘genuinely agreed’ to an enterprise agreement.... To rely on additional material which is misleading or intimidatory as a basis for finding that the Notice has not been given in accordance with the Act would be to conflate the issues that arise for consideration in paragraphs 188(a) and (c). These are two separate requirements and need to be considered as such. Paragraph 188(a) deals with whether a Notice was given in accordance with the Act (ie whether the timing, content and form requirements were met). Any concerns as to whether the employees may have misunderstood their right to be represented, despite being provided with a valid Notice, fall to be considered under paragraph 188(c)...”

6. The Full Bench held that s.174(1A) is not to be construed so as to preclude an employer from providing additional material to its employees at the same time as the Notice is given to them.

7. In particular circumstances of this case three documents were given to employees stapled together. The three pages were later attached to a statutory declaration as a PDF document. The Full Bench held that in this case the notice was made up of the three pages and as it contained ‘other content’ it did not comply with s.174(1A).

The Regulation 2.06A point

8. The issue in contention was the meaning of ‘*the.. address of each person who signs*

the agreement', in Regulation 2.06A(2)(b)(i). The particular issue was whether 'address' meant the persons' residential address or whether it was sufficient if a work address was supplied.

9. The Full Bench rejected the CFMEU's submission that 'address' in Regulation 2.06A(2)(b)(i) meant 'residential address'. At paragraphs [104] - [106] the Full Bench said:

"The context tells against the construction advanced by the CFMEU. In this regard we note that the Regulations make reference elsewhere to an individual's 'residential address'²; 'postal address'³; and 'email address'⁴. The only other provision in the Regulations that require an individual to provide their address is subregulation 2.09(A)(2)(b)(i) (which deals with requirements for signing variation of enterprise agreement). The use of these different expressions in the same legislative context suggests that a different meaning was intended... It is particularly relevant to note that in the regulations relating to Part 2-4 of the Act the legislature has chosen to use different expressions. In Regulation 2.04, dealing with how a notice of employee representational rights is given, subregulation 2.04(3) provides:

"The employer may send the notice by pre paid post to:

- (a) the employee's residential address; or
- (b) a postal address nominated by the employee." (emphasis added)

The legislature could have specified in Regulation 2.06A that bargaining representatives provide their residential address, given that this phrase is used elsewhere in regulations pertaining to Part 2-4 of the Act. However, the legislature has only required a bargaining representative to provide their address. In our view this indicates that the legislative intention was that a bargaining representative would not be required to provide their residential addresses."

Conclusion

10. Peabody failed to give a Notice which complied with the content and form requirements of s.174(1A) and for that reason the application to approve the Agreement was dismissed. Employers should ensure that Notices provided to employees are in the form, and have the content, prescribed in Schedule 2.1 of the Regulations (copy attached).

[2014] FWC FB 2042

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

- ENDS -

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¹ Written submissions on behalf of the Minister 18 February 2014 at [10].

² See subregulations 2.02(3)(a), 2.04(3)(a), 3.13(5)(b)(i), 3.24(3)(a)

³ See subregulations 2.02(3)(b), 2.04(3)(b), 3.13(5)(b)(ii), 3.24(3)(b)

⁴ See subregulations 2.02(4), 2.02(5), 2.04(4), 2.04(5), 3.13(5)(c)(d), 3.24(4)