

Menu

Take another look at safety net, court tells tribunal

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Concerns that employees could be left without award coverage if an FWC full bench refused a modern enterprise award bid should have given a "sharper edge" to its consideration of safety net obligations, a full Federal Court has ruled.

Federal Court Justices Chris Jessup, Mordy Bromberg and Anna Katzmann upheld CSR Limited's argument that the full Fair Work Commission's decision was "devoid" of the wider safety net considerations listed in the Fair Work Act's [s134\(1\)](#).

The Commission viewed the "need to encourage collective bargaining" to be a "circumstance of considerable discretionary importance" in rejecting the application, the full court said.

But this was just one of the considerations necessary to ensure compliance with the safety net, it said.

The full court continued that the Commission had assumed that a significant number of CSR staff would be without award coverage (in the absence of a modern enterprise award).

"That circumstance, of itself, should have given a sharper edge to the obligation on the Commission under s 134 of the FW Act to ensure that modern awards, together with the standards referred to, provided a fair and relevant safety net of terms and conditions," the bench said.

CSR (with the support of the Holcim staff association) had filed a writ of certiorari, calling on the Federal Court to terminate the Commission's decision and issue a writ of mandamus to direct it to hear and determine the case according to law.

It sought to overturn the ruling by Senior Deputy President Lea Drake, Deputy President Reg Hamilton and Commissioner Tim Lee, who [rejected](#) in December last year the CSR & Holcim staff association's application to make a modern enterprise award to replace the CSR Staff (Consolidated) Award 2000.

CSR Limited and its staff association argued that without an enterprise award 835 staff members would only be covered by the Miscellaneous Award, while 641 salaried employees would be covered by five different modern awards.

It further complained of facing "upfront compliance projects costs" of between \$300,000 and \$400,000 and an ongoing increased annual overhead of \$550,000 if the Commission rejected its application.

The FWC bench considered the origins of the CSR Award 2000 as an enterprise instrument with the company refining sugar as early as 1855, and then diversifying into other industries including building materials and construction on the eve of World War II, natural gas in the 1970s and early 1980s and glass in 2007.

The award dates back to the settlement of a 1944 industrial dispute.

The FWC bench reasoned that declining to make a modern enterprise award would overcome what it described as "the historical inertia with respect to such collective bargaining".

It said the "likely impact" of its decision would "quickly" be collective bargaining between the parties for an enterprise agreement/s.

But the full court rejected CSR's argument that it was "illogical" for the Commission to have assumed that the parties would quickly resort to collective bargaining, when in reality the parties could have taken months or years to reach an agreement.

"The Commission was entitled to regard the parties' quick resort to collective bargaining as a relevant factor in itself," the full court said.

"It was not relevant only by reason of being logically connected to the emergence of an enterprise agreement. Indeed, the state of affairs which the Commission was presumptively obliged to regard as consistent with the policy of the FW Act in relevant respects was one in which there was a modern award safety net in place, but in which the absence of an enterprise agreement would encourage collective bargaining to the end of making one," the full court said.

Ordering the Commission to re-determine the application, the full court conceded that the Commission's decision may not have "led to a different result" even if it had properly applied the modern award objectives.

CSR welcomes decision

CSR executive general manager HR Luke Murphy welcomed the full court decision, telling *Workplace Express* today that the company supports its staff association's application and looks forward to returning to the Commission to "resolve the issue".

Murphy highlighted the uniqueness of the 70-year old award, saying it is a key component of the company's value proposition, and supports its varied business portfolio from manufacturing and property to retail.

[CSR Limited v CSR & Holcim Staff Association \[2015\] FCAFC 95 \(1 July 2015\)](#)

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