[2018] FWC 1500
FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Australian Mines and Metals Association; Master Builders Australia Limited
v
Construction, Forestry, Mining and Energy Union; Maritime Union of Australia; Textile, Clothing and Footwear Union of Australia;
(C2018/1245)

VICE PRESIDENT HATCHER SYDNEY, 16 MARCH 2018

Appeal against decision [2018] FWC 1017 *of Deputy President Gostencnik at Melbourne on 6 March 2018 in matter number D2017/5.*

Introduction and background

[1] In a decision issued on 6 March 2018 1 (Decision), Deputy President Gostencnik, pursuant to s 73 of the *Fair Work (Registered Organisations) Act 2009* (RO Act), fixed 27 March 2018 as the day upon which the amalgamation between three registered organisations - the Construction, Forestry, Mining and Energy Union (CFMEU), the Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia (TCFUA) - was to take effect. This amalgamation had previously been approved in ballots of the members of the MUA and the TCFUA which were declared by the Australian Electoral Commission on 28 November 2017.2 On 8 March 2018 the Australian Mines and Metals Association (AMMA) and the Masters Builders Association Limited (MBA) jointly lodged an appeal (for which permission to appeal is required) against the Decision pursuant to s 604 of the *Fair Work Act 2009* (FW Act). The notice of appeal lodged by the AMMA and the MBA includes interlocutory applications for an expedited hearing of the appeal and a stay of the Decision pending the hearing and determination of the appeal.

[2] The appeal has been listed for hearing on 9 April 2018, and thus the application for expedition can be taken as having, in substance, been granted. This decision concerns the application for a stay of the Decision. The terms of the stay order sought by the AMMA and the MBA were as follows:

> "It is ordered that, until 4.30pm on 9 April 2018 or further order, the operation and execution of the decision of Deputy President Gostencnik on 6 March 2018, in D2017/5, to fix an amalgamation date pursuant to s 73(2) of the *Fair Work (Registered Organisations) Act 2009* be stayed forthwith."

[3] The principles applying to the determination of stay applications are well established. The practice of the Commission is to adopt the two-part test enunciated in a decision of the Australian Industrial Relations Commission in *Edghill v Kellow-Falkiner Motors Pty Ltd.* 3 This decision has been followed in a number of cases decided under the FW Act. Paragraph [5] of that decision states:

> "[5] In determining whether to grant a stay application the Commission must be satisfied that there is an arguable case with some reasonable prospects of success, in respect of both the question of leave to appeal and the substantive merits of the appeal. In addition, the balance of convenience must weigh in favour of the order subject to appeal being stayed. Each of the two elements referred to must be established before a stay order will be granted."

[4] In assessing whether the purpose of a stay application in an appeal has the requisite prospects of success, the Commission necessarily engages in an assessment of the merits of a preliminary nature, since the Commission will not have had the benefit of hearing the appellant's full argument and usually will not have had the opportunity to properly peruse the case materials. 4

[5] It is not necessary for present purposes to traverse all the issues dealt with in the Decision. The critical issue which forms the basis of the appeal concerns s 73(2)(c) of the RO Act, which provides:

> **73 Action to be taken after ballot**
>
> . . .
>
> (2) If the FWC is satisfied that:
>
> . . .
>
> (c) there are no proceedings (other than civil proceedings) pending against any of the existing organisations concerned in the amalgamation in relation to:
>
> (i) contraventions of this Act, the Fair Work Act or other Commonwealth laws; or
>
> (ii) breaches of modern awards or enterprise agreements; or
>
> (iii) breaches of orders made under this act, the Fair Work Act or other Commonwealth laws; ...
>
> . . .
>
> the FWC must, after consultation with the existing organisations, by notice published as prescribed, fix a day (in this division called the ***amalgamation day***) as the day on which the amalgamation is to take effect.

[6] It is not in dispute that the Commission's satisfaction as to the matters specified in s 73(2)(c) is a jurisdictional prerequisite for the fixation of the amalgamation day.

[7] Section 73(3) describes the necessary consequences of the occurrence of the amalgamation day as follows:

> (3) On the amalgamation day:
>
> (a) if the proposed amalgamated organisation is not already registered--
> the General Manager must enter, in the register kept under subsection 13(1), such particulars in relation to the organisation as are prescribed, and the date of the entry; and
>
> (b) any proposed alteration of the rules of an existing organisation concerned in the amalgamation takes effect; and
>
> (c) the FWC must de-register the proposed de-registering organisations; and
>
> (d) the persons who, immediately before that day, were members of a proposed de-registering organisation become, by force of this section and without payment of entrance fee, members of the proposed amalgamated organisation.

[8] Under the scheme of amalgamation, the CFMEU will be the "host" organisation which continues its legal existence and becomes the amalgamated organisation, while the MUA and the TCFUA will be de-registered on amalgamation day.

[9] In the proceedings before the Deputy President, the AMMA and the MBA submitted that a number of pending proceedings against the CFMEU and the MUA for contravention of various civil remedy provisions of the FW Act meant that the Commission could not be satisfied in relation to s 73(2)(c). This was rejected by the Deputy President, who relevantly determined that the pending proceedings relied upon by the AMMA and the MBA fell within the exclusion in respect of "*civil proceedings*". The Deputy

President was satisfied that there were no proceedings, other than civil proceedings, of the type specified in s 73(2)(c)(i)-(iii) pending against the CFMEU, the MUA or the TCFUA, and thus concluded (having been also satisfied as to the matters in s 73(2)(a), (b) and (d)) that he was required by s 73(2) to fix the amalgamation day. As earlier stated, the date so fixed was 27 March 2018.

[10] The grounds of appeal contained in the AMMA's and the MBA's notice of appeal were as follows:

> 1. The Fair Work Commission erred in its construction of s 73 of the *Fair Work Registered Organisations Act* 2009 (Cth) **(RO Act)** by construing the phrase "civil proceedings" as including proceedings for the imposition of a pecuniary penalty and therefore committed an error of law and/or asked itself the wrong question and/or committed jurisdictional error.
>
> 2. The Fair Work Commission erred by fixing an amalgamation day pursuant to s 73 of the RO Act in circumstances where there are pending proceedings against one or more of the existing organisations concerned in the amalgamation for the imposition of a pecuniary penalty.
>
> 3. The Fair Work Commission erred by fixing an amalgamation day pursuant to s 73 of the RO Act, in circumstances where it misconstrued s 73, and therefore committed an error of law and/or did not have jurisdiction to fix an amalgamation day.

[11] The notice of appeal also contended that permission to appeal should be granted in the public interest because:

> 1. There is a public interest in the proposed amalgamation, which is of national significance, and in ensuring that it is lawful.
>
> 2. The proper construction of s 73(2) has not yet been tested by a Full Bench of the FWC or a Court. There is a public interest in the Full Bench considering the proper construction of this provision and providing guidance on this important issue.
>
> 3. The decision is attended with sufficient doubt to warrant its reconsideration, the FWC at first instance has exceeded its jurisdiction, and substantial injustice may result if leave is refused.
>
> 4. The grounds of appeal concern a jurisdictional error, which would be amenable to judicial review and so there is a public interest in having the alleged error properly ventilated before the Full Bench rather than going directly to Court.

Evidence

[12] In support of their stay application, the AMMA and the MBA read two affidavits sworn by Michael Coonan, a partner in the law firm representing them in the appeal, on 13 and 14 March 2018. In these affidavits Mr Coonan deposed to the following matters:

- the grant of a stay would avoid the significant legal and financial complications that might arise if the amalgamation process proceeded but then had to be unwound if the appeal was successful;
- the Commission's records showed that in 2016 the MUA had filed four protected action ballot order (PABO) applications and the TCFUA two, and in 2017 the MUA had filed eleven PABO applications;
- this bargaining activity showed that the MUA and the TCFUA actively pursued their rights under the bargaining regime of the FW Act;
- the annexures to the original amalgamation application dated 20 June 2017 contained a number of statements concerning the strength, assets, resources, co-ordination, and campaigning and industrial strategies of the proposed amalgamated union;
- the ultimate subject matter of the appeal was the lawfulness of the proposed amalgamation, and whether the fixing of the amalgamation day was attended by legal or jurisdictional error;

- if the Decision was set aside as legally erroneous, then the amalgamation would be legally invalid, and all steps taken to give effect to the amalgamation and the exercise of rights under the FW Act arising as a consequence of the purported amalgamation would need to be unwound;

- this would involve serious and complex questions about the status, validity and consequence of steps taken by the amalgamated organisation, including: how transactions between the amalgamated organisation and third parties be enforced during the interregnum between the amalgamation day and the appeal; the extent to which the de-registered organisations, if subsequently re-registered, would be bound by such transactions; the status and coverage of enterprise agreements made in the interim involving the amalgamated organisation; the status of steps in the bargaining process undertaken in the interim by the amalgamated organisation acting as a bargaining representative; how the assets and liabilities of the previously de-registered organisations would be returned; what would happen to transactions in existing or new land, shares, charges and other assets and liabilities and instruments covered by ss 76-85 of the RO Act; the status of protected industrial action taken by the amalgamated organisation; and the situation if positions required to be elected by a direct vote of members under the rules of an existing union are elected under a different voting system in the amalgamated union; and

- if the status quo was not preserved, the consequences might include: that the Full Bench might conclude that it was unable to unwind all of the consequences that automatically occurred on the amalgamation day, and therefore the amalgamation itself, in which case the subject matter of the litigation might be lost; the Full Bench might conclude that it ought refuse relief notwithstanding legal or jurisdictional error, because it would be so difficult to unwind all of the consequences of amalgamation day; and there might be a question of whether s 88 of the RO Act prevents some or all of the events that occur on amalgamation day from being unwound; and the existing organisations, at the expense of their members, would be put to the potentially significant costs of giving effect to the matters required by amalgamation on amalgamation day and then unwinding them.

[13] The AMMA and the MBA also relied on evidence given in affidavits read in the proceedings before the Deputy President sworn by Peter Cooke, the Principal Workplace Relations Consultant of the AMMA and Shaun Schmitke, Deputy Chief Executive Officer and National Director - Safety, Contracts, Workplace Relations of the MBA. Mr Cooke's affidavit relevantly referred to public statements discussing the envisaged militancy of the amalgamated organisation, the assets which would be held by the amalgamated organisation and the history of unlawful conduct on the part of the CFMEU and the MUA, and expressed concern that the amalgamated organisation through the use of "*targeted enterprise bargaining, or illegal industrial action*" would cause economic loss to the mining industry and damage its international reputation. Mr Schmitke expressed concern that the amalgamation would expand the capacity of the CFMEU, MUA and TCFUA to disrupt the building and construction industry through widespread and coordinated unlawful industrial action.

[14] In opposition to the stay application, the CFMEU, the MUA and the TCFUA relied upon a witness statement made on 14 March 2018 by Michael O'Connor, the National Secretary of the CFMEU and the prospective National Secretary of the amalgamated organisation. In his witness statement he expressed concern that that if the stay order was granted, the CFMEU, the MUA, the TCFUA and the proposed amalgamated organisation would suffer loss, prejudice and inconvenience for the following reasons:

- the proposed amalgamated organisation had arranged to conduct its first National Conference from 11-15 June 2018 at the Gold Coast Convention centre, and a deposit of $150,000 was required to be paid by 16 March 2018 with a further payment of $300,000 due by mid-April;

- if it became necessary to cancel the conference any deposit moneys would not be refunded, and it would be difficult to secure an alternative venue before the end of the year;

- the Amalgamation Scheme required the creation of an additional officer position to serve increased MUA membership in Queensland, and a stay would delay this with the result that MUA members in Queensland, where there are currently no organisers or officials, would suffer from a lack of service;

- without the amalgamation being effective, nominations for elections in three state branches of the TCFUA are due to open on 24 April 2018, and the grant of a stay might require these elections to proceed in circumstances where they would not be required under the Scheme of Amalgamation.

Consideration

[15] I am prepared to accept, based on a very preliminary assessment of the grounds of appeal and the reasons advanced for the grant of permission to appeal, that the AMMA's and MBA's appeal is arguable with some reasonable prospects of success. The CFMEU, MUA and TCFUA have challenged the standing of the AMMA and MBA to bring the appeal, on the basis that the appellants had no greater interest in the amalgamation than that of an ordinary member of the public and thus were not "persons aggrieved" for the purpose of s 604 of the FW Act. In this respect the unions relied upon the decisions in *Tweed Valley Fruit Processors Pty Ltd v Ross & Ors* 5 and *Schinkel and Cannon v Thiess Degremont Joint Venture.*6 However in this case the AMMA and MBA were permitted by the Deputy President to adduce evidence and make submissions concerning the issue of the fixation of the amalgamation day, and their submissions were considered in detail in the Decision and rejected. I consider it to be arguable that this degree of participation in the first instance proceedings entitles the AMMA and the MBA to be characterised as persons aggrieved by the Decision and thus entitled to appeal subject to the grant of permission pursuant to s 604.

[16] In relation to permission to appeal, s 604(2) requires permission to appeal to be granted if the Commission is satisfied that it is in the public interest to do so. The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgement. 7 The public interest may be attracted where the appeal raises an issue of importance and general application.8 Permission to appeal may otherwise be granted on unspecified discretionary grounds. I consider that the AMMA and MBA have an arguable case for the grant of permission to appeal in the public interest or on discretionary grounds on the basis that their appeal raises a novel issue of statutory construction and challenges the validity of the fixation of the amalgamation day for an amalgamated organisation which would represent employees and affect workplace relations in major sectors of the Australian economy.

[17] As to the merits of the appeal, it is sufficient for present purposes to say, on the basis of a sketch of the appellants' arguments provided in written and oral submissions advanced in support of the stay application, that the appeal raises issues not unworthy of consideration. Consideration of those issues in the Decision necessitated extensive and detailed analysis, and there are some case authorities which appear to provide some support for some of the propositions advanced in connection with the appeal. That enables me to conclude that the appeal surmounts the fairly low bar of being arguable with some prospects of success.

[18] However I am not persuaded that the balance of convenience favours the grant of a stay, for five reasons. First, as earlier stated, an expedited hearing has been granted. The period for which the stay is sought, at least at this stage, would only be for the period from the amalgamation day, 27 March 2018, to the date of the appeal hearing, 9 April 2018. That is a period of only 14 days inclusive, and encompasses the Easter holidays. It is inherently unlikely that the amalgamated organisation would in that short period be capable of engaging in the damaging activity about which Mr Cooke and Mr Schmitke expressed concern, and there is no evidence before me that this is likely or even anything more that theoretically possible.

[19] Second, the matters raised by the AMMA and MBA as justifying the grant of a stay, as specified in the affidavits sworn by Mr Coonan, largely involve matters internal to the CFMEU, MUA and TCFUA and the prospective amalgamated organisation. Issues concerning the organisations' assets and liabilities, commercial transactions with third parties, elections of officers and the legal costs associated with the amalgamation are of primary interest to the organisations themselves and their members. There is no evidence that any of these types of issues will actually engage the interests of the AMMA, the MBA or their members. I do not accept that the appellants have any *bona fide* interest in these issues which would operate to weigh the balance of convenience in their favour.

[20] Third, insofar as Mr Coonan's affidavits raise issues that are capable of affecting the interests of the AMMA, the MBA or their members, they are raised at an entirely theoretical level. It may be accepted,

in particular, that employers engaged in bargaining with the MUA or the TCFUA and consequently having to deal with issues such as good faith bargaining obligations and protected industrial action may face legal questions of some complexity if the amalgamated organisation comes into existence on 27 March 2018 and the MUA and the TCFUA are de-registered on the same day, but the fixing of the amalgamation day and the consequent de-registrations are later found in the appeal to have been invalid. However there was no evidence before me that any employer who is a member of the AMMA or the MBA is actually engaged in bargaining with the MUA or the TCFUA currently or is likely to be prior to the hearing of the appeal. Therefore there is no basis to conclude that there is any real prospect that the appellants or their members will face any of the legal difficulties postulated in Mr Coonan's affidavits. Such mere hypotheticalities bear no weight in the scales of the balance of convenience.

[21] Fourth, I do not accept that the grant of a stay is necessary to preserve the subject matter of the appeal. As earlier stated, it is not in dispute that the Commission's satisfaction as to the matters in s 73(2)(c) is a jurisdictional prerequisite to the fixation of the amalgamation day. It is also not in dispute (as was made clear from concessions properly made by counsel for the unions at the hearing of the stay application) that if, as a result of a misconstruction of s 73(2)(c), the Full Bench hearing the appeal determined that the Deputy President erred in concluding that the matters specified in that provision were satisfied, the necessary consequence would be that the fixation of the amalgamation day would be invalid as would be the consequential steps taken in accordance with s 73(3). Although counsel for the unions reserved their position as to what remedies might be ordered by the Full Bench in that situation, I consider (consistent with the position of the AMMA and the MBA) that if the Full Bench identified jurisdictional error of this nature and upheld the appeal, there would be no reasonable alternative to issuing an order to quash the Decision (although it is possible that some consequential orders might be necessary). Once this occurred, the amalgamation would legally be undone. Legal difficulties might arise as a consequence of such an outcome, but the RO Act provides the means for the resolution of such difficulties. In particular s 87 of the RO Act empowers the Federal Court to make such order as it considers proper to resolve a difficulty arising from the application of Part 2 Div 6, *Amalgamation taking effect*. Section 88 of the RO Act also provides for the validation of acts done in good faith for the purpose of a proposed or completed amalgamation.

[22] The conclusion I have reached in this respect is consistent with that reached by the High Court (Dawson J) in *Ex Moore; Ex parte Pillar*. 9 In that matter the Court removed a stay order, earlier granted *ex parte*, upon the fixation of an amalgamation day under the *Industrial Relations Act 1988* in circumstances where there was a challenge as to whether the prerequisite in s 253Q(2) (the statutory predecessor of s 73(2) of the RO Act) was properly satisfied. The Court said:

> In the end, however, I am not persuaded after argument that, if the stay which I granted were to be lifted, the prosecutor would effectively be denied the relief which he seeks in the event that he is successful in this court. What he seeks by means of one or other of the prerogative writs is to stop the consequences which the Act prescribes upon the fixing of an amalgamation day. He bases his claim to relief upon the invalidity of the amalgamation day fixed by the Deputy President. But if he establishes the invalidity of the amalgamation day, and his argument is sound, the consequences prescribed by the Act will not have taken place. The subject matter of these proceedings - the validity of the amalgamation day fixed by the Deputy President - is a question which remains alive whether or not there is a stay. No doubt it is the prosecutor's contention that if the two organisations proceed upon the basis that the amalgamation day has been validly fixed and has passed and it is ultimately established that the day was not validly fixed, there may be consequences which are irreversible. However, that does not mean that the proceedings would prove to be futile. In particular, whether or not amalgamation had occurred would not be an empty issue. Furthermore, I am not satisfied that the consequences which the Act prescribes as flowing from amalgamation, or any steps which the parties might take upon the basis that amalgamation has occurred, would prove irreversible. It does not appear to me that the two organisations could not be restored, or substantially restored, to their former position, even with regard to those matters likely to be most affected, namely, membership and assets, if the court were eventually minded to grant relief."

[23] Finally, as was properly conceded by counsel for the AMMA and the MBA, if the stay is granted but the appeal is ultimately unsuccessful, the date of 27 March 2018 fixed as the amalgamation day will be lost, since the actions required to be taken under s 73(3) on the amalgamation day could not proceed, nor

could the prior notice required by s 73(2) and reg 78 of the *Fair Work (Registered Organisations) Regulations 2009* be issued. In that scenario it would therefore be necessary, upon the dismissal of the appeal, for the Full Bench to issue a further order pursuant to s 607(3)(a) of the FW Act to vary the Decision to fix a new prospective amalgamation day. This delay, which would be contrary to the interest of the CFMEU, the MUA and the TCFUA in having their amalgamation proceed expeditiously, weighs the balance of convenience against the grant of a stay.

Conclusion

[24] In conclusion, I consider that although the appeal is arguable with some prospects of success, the balance of convenience does not weigh in favour of the grant of a stay order. The application by the AMMA and the MBA for a stay order is therefore dismissed.

VICE PRESIDENT

Appearances:

S Wood QC with *A Bell* of Counsel for the Australian Mines and Metals Association

and Master Builders Australia

H Borenstein QC with *Y Bakri* of Counsel for the Construction, Forestry, Mining and

Energy Union, The Maritime Union of Australia and the Textile, Clothing and Footwear

Union of Australia

Hearing details:

Melbourne.

14 March:

2018.

<PR601134>

1 [2018] FWC 1017

2 The CFMEU had earlier been exempted from the requirement to conduct a ballot pursuant to s 63 of the RO Act: [2017] FWC 4353 at [62]

3 [2000] AIRC 785, Print S2639

4 *Supreme Caravans Pty Ltd v Hung Pham* [2013] FWC 4766 at [9]

5 (1996) 137 ALR 70

6 (2010) 194 IR 256

7 *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ: applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46]

8 *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [27]

9 (1991) 103 ALR 11

Printed by authority of the Commonwealth Government Printer