FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v CUB Pty Ltd [2015] FCA 692

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| Citation: | Construction, Forestry, Mining and Energy Union v CUB Pty Ltd [2015] FCA 692 |
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| Parties: | **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v CUB PTY LTD and AUSTRALIAN ELECTORAL COMMISSION**  |
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| File number: | VID 350 of 2015 |
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| Judge: | **BROMBERG J** |
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| Date of judgment: | 2 July 2015 |
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| Catchwords: | **INDUSTRIAL LAW** — application for injunction under s 545 *Fair Work Act 2009* (Cth) — where allegation that respondent breached s 345 FW Act by making false or misleading representation in connection with ballot of employees seeking approval of a proposed enterprise agreement — where applicant sought injunction preventing continuation of ballot, or alternatively communication of result of ballot — serious issue established — identification of balance of convenience — balance of convenience favoured limited injunctive order — interim order made prohibiting communication of result of ballot.  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 181, 341, 341(2)(e), 345, 345(1)  |
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| Date of hearing: | 2 July 2015 |
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| Place: | Melbourne |
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| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 14 |
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| Counsel for the Applicant: | Ms S Kelly  |
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| Solicitor for the Applicant: | CFMEU, Legal Branch |
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| Counsel for the Respondents: | Mr R Dalton  |
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| Solicitor for the Respondents: | Corrs Chambers Westgarth |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 350 of 2015 |

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| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION Applicant |
| AND: | CUB PTY LTD First RespondentAUSTRALIAN ELECTORAL COMMISSION Second Respondent |

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| JUDGE: | BROMBERG J |
| DATE OF ORDER: | 2 JULY 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The first respondent direct the Australian Electoral Commission that only officials of the Australian Electoral Commission be present when the votes cast in the ballot of employees at the first respondent’s Abbotsford Brewery on 2 July 2015 for the approval of a proposed enterprise agreement under s 181 of the Fair Work Act 2009 (Cth) (the Ballot) are counted.
2. The first respondent direct the Australian Electoral Commission to refrain from declaring or otherwise communicating the result of the Ballot.
3. The first respondent direct the Australian Electoral Commission to place the result of the Ballot in a sealed envelope marked “Confidential” and deliver the envelope to the first respondent.
4. On or before 10:00 am on 3 July 2015 the first respondent deliver the envelope to the registry of the Court marked to the attention of the Associate of Justice Bromberg, but not otherwise deal with the envelope.
5. The applicant’s interlocutory application be adjourned to 9:30 am on Tuesday, 7 July 2015.
6. On or before 10:00 am on 6 July 2015 the parties file and exchange any further affidavits either party seeks to rely upon.
7. Costs are reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 350 of 2015 |

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| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION Applicant |
| AND: | CUB PTY LTD First RespondentAUSTRALIAN ELECTORAL COMMISSION Second Respondent |

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| JUDGE: | BROMBERG J |
| DATE: | 2 JULY 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

1. The applicant seeks an injunction, the effect of which would be to enjoin the further conduct of a ballot of employees (**ballot**) being conducted to ascertain whether an enterprise agreement proposed by the first respondent (**CUB**) is approved: see s 181 of the *Fair Work Act 2009* (Cth) (**FW Act**). That ballot has in part already been conducted. It commenced today and is programmed to run in two voting periods, the first between 5 am and 8 am this morning, and the second between 1.30 pm and 4.15 pm this afternoon. CUB has appointed the Australian Electoral Commission as its agent to conduct the ballot.
2. The applicant (**CFMEU)** seeks to enjoin the further conduct of the ballot and the counting and declaration of the votes cast. It does so because it contends that CUB has misrepresented to its employees, or at least some of its employees who are eligible to vote in the ballot, the outcome and effect of a s 240 bargaining dispute heard by Commissioner Blair of the Fair Work Commission (**Commission**). It is contended that the misrepresentation has the potential to have a material effect on the outcome of the ballot.
3. The CFMEU relies on s 345 of the FW Act which provides as follows:

(1) A person must not knowingly or recklessly make a false or misleading representation about:

 (a) the workplace rights of another person; or

 (b) the exercise, or the effect of the exercise, of a workplace right by another person.

Note: This subsection is a civil remedy provision (see Part 4-1).

 (2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

1. In support of its application, the CFMEU relied on an affidavit of Joseph John Myles. CUB relied on an affidavit of Felix Blackler. The relevant facts relied upon by the CFMEU have been usefully set out in an outline provided by the CFMEU this morning. The factual matters set out at [4] to [23] of that outline are, for the purposes of this morning’s hearing, accepted by CUB save for some relatively minor alterations recorded on transcript by Mr Dalton, Counsel for CUB. It is not necessary that I set out that factual background in full, but I rely upon it. It is sufficient to say in summary that, in the context of bargaining for enterprise agreements to cover employees working at the CUB brewery in Abbotsford, there has been an industrial contest between the CFMEU and CUB as to whether some 40 forklift drivers for whom the CFMEU has industrial coverage and historical representation should be:

(i) covered by an enterprise agreement which would cover operational employees for whom another union, United Voice, has industrial coverage and historical representation; or

(ii) be covered by an enterprise agreement with boiler attendants for whom the CFMEU has industrial coverage and historical representation.

1. Various applications have been made by the CFMEU to the Commission in which that contest has been addressed including an application dealt with by Commissioner Blair. Two meetings were conducted on 25 June 2015 involving some 20 to 25 employees in total. On the evidence before me, at those meetings a Logistics Manager of CUB, Ed Lee, made statements to the effect that Commissioner Blair had decided that there would be only one agreement for all operations employees and that that decision was not CUB’s decision.
2. The CFMEU contends that the statements made by Mr Lee would have had the effect of suggesting to employees that there would only be one enterprise agreement that could be made and that an enterprise agreement which would cover the 40 forklift drivers together with the boiler attendants would no longer be possible.
3. The CFMEU contends that within the meaning of s 345(1), the representations made by Mr Lee were misleading and were “about” the “workplace rights” of the employees to whom they were made. Section 341 of the FW Act sets out the meaning of the term “workplace right”. It relevantly includes a right to initiate or participate in a process or proceeding under a workplace law. Section 341(2)(e) identifies a process or proceeding under a workplace law as including the making of an enterprise agreement. The CFMEU contended that various provisions of the FW Act dealing with the making of an enterprise agreement provide to employees workplace rights and that the representations made by Mr Lee were made “about” those workplace rights.
4. I accept, and it was not really contended to the contrary, that there is a serious issue to be tried as to whether the representations made by Mr Lee were representations about the workplace rights of another person and made knowingly, recklessly, falsely or misleadingly in contravention of s 345(1) of the FW Act.
5. An important issue for the question of what, if any, relief the Court should grant, is the extent to which any misrepresentation has had a material effect on the voting intentions of employees to whom the misrepresentation was made to directly or to whom it was further communicated. On the material before me, it is clear that CUB has taken some action designed to dispel any misapprehension that may have been created by any statements made by Mr Lee. Notices have been posted in the area in which voting is being conducted which include a statement that the Commission has not said or decided that only one enterprise agreement can be made.
6. Despite that effort, it seems to me that on the material currently before me it is nevertheless possible that employees to whom Mr Lee’s representation was communicated, may have not seen the notices posted by CUB when attending to cast their vote or not attended to vote at all having determined not to participate in the ballot because of Mr Lee’s representation.
7. This matter has come on urgently. CUB has only had a short opportunity in which to provide a response to the material upon which the CFMEU relies. It is appropriate that CUB have a proper opportunity to put material before me including material as to the last issue with which I have just dealt. I have come to the view that, at this juncture, only an interim order ought be made if I am satisfied that, on the balance of convenience, any order should be made at all. Accordingly, I will consider the question of the balance of convenience on the basis that, if an order is made, it will only have effect until early next week or the further order of the Court.
8. On the question of balance of convenience, there is prejudice to CUB if the Court were to make the primary order sought by the CFMEU which would restrain the further conduct of the ballot. Such an order would preclude further voting this afternoon and would involve the wastage of resources.
9. As an alternative order, the CFMEU seeks that only the declaration of the result of the ballot be restrained. In relation to that order, CUB does not point to any prejudice to it at all and none is apparent. Such an order would be more than sufficient to address, at least in the interim, the legitimate concerns of the CFMEU. I have taken into account as well, although I recognise that it may not ultimately be of great significance, the fact that the CFMEU has offered the usual undertaking as to damages.
10. In my view, the balance of convenience favours the grant of a limited order restraining the declaration of the result. There is merit in the vote being counted and being made available for use before the Court on the date to which I intend to adjourn this application. I say that because it seems to me that the extent to which the impugned statement of Mr Lee was capable of having a material effect on the ballot will be better understood if the Court has an understanding of the result of that ballot. For those reasons, the Court will make the following orders:

(i) The first respondent direct the Australian Electoral Commission that only officials of the Australian Electoral Commission be present when the votes cast in the ballot of employees at the first respondent’s Abbotsford Brewery on 2 July 2015 for the approval of a proposed enterprise agreement under s 181 of the *Fair Work Act 2009* (Cth) (the Ballot) are counted.

(ii) The first respondent direct the Australian Electoral Commission to refrain from declaring or otherwise communicating the result of the Ballot.

(iii) The first respondent direct the Australian Electoral Commission to place the result of the Ballot in a sealed envelope marked “Confidential” and deliver the envelope to the first respondent.

(iv) On or before 10:00 am on 3 July 2015 the first respondent deliver the envelope to the registry of the Court marked to the attention of the Associate of Justice Bromberg, but not otherwise deal with the envelope.

(v) The applicant’s interlocutory application be adjourned to 9:30 am on Tuesday, 7 July 2015.

(vi) On or before 10:00 am on 6 July 2015 the parties file and exchange any further affidavits either party seeks to rely upon.

(vii) Costs are reserved.

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| I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg. |

Associate:

Dated: 8 July 2015