FEDERAL COURT OF AUSTRALIA

John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FCA 286

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| Citation: | John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FCA 286 |
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| Parties: | **JOHN HOLLAND PTY LTD v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and FAIR WORK COMMISSION** |
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| File number(s): | WAD 411 of 2012 |
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| Judge(s): | **SIOPIS J** |
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| Date of judgment: | 27 March 2014 |
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| Catchwords: | **INDUSTRIAL** **LAW** – employer and employees entered into an agreement under Pt 2-4 of the *Fair Work Act 2009* (Cth) – the coverage clause of the agreement specified the classification of employees covered – whether the group of employees covered by the agreement was fairly chosen for the purposes of s 186(3) of the *Fair Work Act*.  |
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| Legislation: | *Fair Work Act 2009* (Cth) Pt 2-4, ss 171, 172(2), 180, 181(1), 182(1), 185, 186, 186(2)(d), 186(3), 186(3A), 187, 187(2), 578(a), 604, 607(3)  |
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| Date of hearing: | 24 October 2013  |
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| Place: |  |
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| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 43 |
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| Counsel for the Applicant: | Mr Stuart Wood SC and Mr Richard Dalton |
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| Solicitor for the Applicant: | Kelly Hazell Quill Lawyers |
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| Counsel for the First Respondent: | Mr Robert Reitano |
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| Solicitor for the First Respondent: | Construction, Forestry, Mining and Energy Union |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | WAD 411 of 2012 |

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| BETWEEN: | JOHN HOLLAND PTY LTDApplicant |
| AND: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONFirst RespondentFAIR WORK COMMISSIONSecond Respondent |

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| JUDGE: | SIOPIS J |
| DATE OF ORDER: | 27 march 2014 |
| WHERE MADE: | PERTH |

THE COURT ORDERS THAT:

1. A writ in the nature of certiorari is issued to quash the decision of the Full Bench of Fair Work Australia dated 13 September 2012 setting aside the decision of a Deputy President of Fair Work Australia dated 22 May 2012.
2. Within 7 days each of the parties is to file written submissions as to the granting of any further relief.

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

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| BETWEEN: | JOHN HOLLAND PTY LTDApplicant |
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| JUDGE: | SIOPIS J |
| DATE: | 27 march 2014 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

1. The applicant, John Holland Pty Ltd (John Holland), carries on business as a construction and engineering company.
2. At an unspecified date, John Holland was awarded the head construction contract to build the new children’s hospital in Perth. During December 2011, the applicant employed three employees to perform building and construction work at that site. The employees commenced work on the site in January 2012. John Holland as head contractor, planned to perform the vast majority of work through subcontractors and to employ only a relatively small number of employees directly for the purposes of carrying out the children’s hospital contract. John Holland expected that the total number of its direct employees at the children’s hospital site would be around 25, in the positions of labourers and form workers and also the possibility of employees in the key roles as tow crane operators, riggers and doggers.
3. On 12 January 2012, John Holland had a meeting with the three employees at the site office in relation to the making of an agreement under the *Australian Fair Work Act 2009* (Cth) (the *Fair Work Act*). The agreement making process was explained at that meeting. At the meeting, each of the three employees appointed themselves as bargaining agents for the purpose of negotiating the entry into an agreement with John Holland.
4. On 13 February 2012, the three employees voted in favour of entering into the agreement. At the time that the agreement was entered into John Holland was also tendering as head contractor for other government projects in Western Australia, such as the Perth waterfront project and the Kalgoorlie gaol project, and some private projects. Also, at that time, John Holland employed a broad range of employees in work classifications nationally from clerical to construction work.
5. Clause 1 of the agreement provides as follows:
	1. This agreement is made under the *Fair Work Act 2009* (Cth) and subject to Clause 1.2 those bound by this agreement are:
		* 1. John Holland Pty Ltd ABN: 11 004 282 268 (the Company); and
			2. All employees of John Holland Pty Ltd performing building or civil construction work in Western Australia in accordance with a classification specified in this Agreement (Employees).
	2. Any project or site specific agreement entered into by the Company or by any Joint Venture or similar business arrangement of which the Company is part, will cover and apply to the Company and any employees at that particular project or site to the exclusion of this Agreement.
6. The three employees who voted in favour of the agreement were the only employees covered by the agreement who were employed by John Holland at the time that it was made. The job classifications referred to in cl 1.1(b) of the agreement were set out in an appendix to the agreement and included job classifications in addition to those in which each of the three employees were employed.
7. It was also common ground that the wage rates for the employees covered by the agreement were significantly higher than the wages prescribed under the applicable award and that no agreements had been entered into of the kind described in cl 1.2 of the agreement.
8. On 13 February 2012, John Holland lodged an application under s 185 of the *Fair Work Act* with Fair Work Australia to approve the agreement.
9. On 22 March 2012, a Deputy President of Fair Work Australia heard the application. The application was opposed by the first respondent, the Construction, Forestry, Mining and Energy Union (CFMEU).
10. On 22 May 2012, the Deputy President approved the agreement. One of the issues which the Deputy President addressed in approving the agreement is particularly relevant to this application. That issue was whether the group of employees covered by the agreement was fairly chosen within the meaning of s 186(3) and s 186(3A). Section 186(3) and s 186(3A) of the *Fair Work Act* are relevant in this respect.
11. Section 186(3) of the *Fair Work Act* provides as follows:

FWA must be satisfied that the group of employees covered by the agreement was fairly chosen.

1. Section 186(3A) provides as follows:

If the agreement does not cover all of the employees of the employer or employers covered by the agreement, FWA must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

1. The Deputy President, having addressed that question, came to the view that the group of employees covered by the agreement was fairly chosen. The Deputy President had regard to the mandatory considerations referred to in s 186(3A) and found that the group of employees covered by the agreement was geographically and operationally distinct, but not organisationally distinct.

# the proceeding before the full bench OF FAIR WORK AUSTRALIA

1. The CFMEU appealed against the decision of the Deputy President under s 604 of the *Fair Work Act*. On 13 September 2012, a Full Bench of Fair Work Australia handed down a decision upholding the CFMEU’s appeal. Further, the Full Bench, exercising its powers under s 607(3), quashed the decision made by the Deputy President to approve the agreement.
2. The Full Bench came to the view that the Deputy President had committed an error “of the kind described in *House v The King*” in relation to the manner in which the Deputy President applied s 186(3) and s 186(3A).
3. In its reasons for decision, the Full Bench referred to cl 1 of the agreement, and in particular, to cl 1.2 (which it referred to as “the exclusion provision”), then stated:

[25] Given the nature of the exclusion provision, we doubt that it would be possible to make any definitive finding as to the group of employees covered by the Agreement as required for the purposes of s 186(3). *This would depend upon how many building and civil construction employees are now covered or may in the future be covered by site-specific arrangements.* At most the group to be covered by the Agreement may be described as comprising some of John Holland’s employees working on some building and civil construction sites at some locations in Western Australia. *As it is not possible to identify with any certainty the group of employees to be covered by the Agreement, it is not possible to be satisfied that the group of employees was fairly chosen as required by s 186(3) or to apply the requirements of s 186(3A).*

[26] The agreement reached between John Holland and the three employees would, if approved, apply to all employees of John Holland performing building or civil construction work in Western Australia, unless clause 1.2 applies. It would seem that the Agreement is not intended to cover currently employed building and civil construction employees at sites where there are project or site agreements in place. However the effect of clause 1.2 is not certain, particularly in regard to future employees. In theory the Agreement could cover three, many, or all of John Holland’s employees in Western Australia doing certain work and covered by classifications referred to in clause 1.1(b). *How many employees the Agreement covers will depend on how many employees are covered by site-specific agreements as referred to in clause 1.2. This cannot be predicted now.* (Emphasis added.)

1. The Full Bench then went on to state a number of conclusions. In short, the first conclusion was that the presence of cl 1.2 in the agreement meant that the Full Bench was not in a position to know how many employees would be covered by the agreement in the future and, therefore, the Full Bench was not in a position to find that the group of employees chosen was distinct by reference to the categories referred to in s 186(3A).
2. Secondly, the Full Bench observed that, on the authority of another decision of the Full Bench, in applying s 186(3), regard should be had to whether the selection of the group of employees was based on criteria that would have the effect of undermining collective bargaining. In this regard, the Full Bench went on to say at [30]:

In this case three employees on one site have bargained and agreed on an agreement with potentially very wide application to other employees who have not engaged in bargaining under Part 2-4 of the Act and will not be given the opportunity to bargain.

1. Thirdly, the Full Bench observed that the effect of cl 1.2 was that employees who might otherwise be covered under the agreement might become parties to agreements which do not need to satisfy requirements for approval under the *Fair Work Act* (particularly, the application of the better offer overall test).
2. The Full Bench went on to find at [34]:

[W]e consider that the group of the employees covered by the Agreement is not geographically, operationally or organisationally distinct. We also consider that the operation of the Agreement, as made with the three employees, would undermine collective bargaining by other employees in a manner not compatible with the objects of Part 2-4, and that the exclusion provision in the clause is contrary to the purpose and policy of the Act.

# john holland’s application for judicial review

1. On 20 December 2012, John Holland commenced this application for judicial review of the decision of the Full Bench of Fair Work Australia. John Holland sought the following relief:
2. A writ of certiorari quashing the decision of Fair Work Australia made on 13 September 2012 in proceedings C No 4133 of 2012 (decision [2012] FWAFB 7866);
3. A writ of mandamus directing Fair Work Australia to hear and determine according to law the appeal brought by the First Respondent in C No 4133 of 2012.
4. John Holland initially relied upon four grounds of review. However, by the time of the hearing, the applicant relied upon in essence two broad grounds of review.
5. The first broad ground of review, which contained two aspects, impugned the manner in which the Full Bench approached the task of applying s 186(3) on the basis that it misconstrued s 186(3) and s 186(3A) of the *Fair Work Act*. More specifically, John Holland contended that the Full Bench misunderstood the task required under s 186(3) of the *Fair Work Act* in that it asked itself the wrong question about the possible future size and composition of the membership of the group of employees rather than identifying the chosen group from a proper construction of the agreement. Further, it was said that the Full Bench imported an extraneous test into s 186(3A) in that it considered that the chosen group could not be geographically distinct because a project or site agreement could be ad hoc or random in nature.
6. The second broad ground of review contended that John Holland had not been accorded natural justice because it had been denied the opportunity to provide undertakings to address any concerns as to the view expressed by the Full Bench that the scope of cl 1.2 of the agreement was unclear, and was not in its terms limited to enterprise agreements approved under the *Fair Work Act*.

# the alleged misconstruction of s 186(3) and s 186(3A) of the *fair work act*

1. At the heart of the applicant’s complaint in relation to its first broad ground of review, was the contention that the Full Bench fell into jurisdictional error by reason of a misconstruction of s 186(3) and s 186(3A) of the *Fair Work Act*.
2. In my view, for the reasons which follow, the Full Bench fell into jurisdictional error because it misconstrued s 186(3) and s 186(3A) and so misconceived its task in applying those two subsections.
3. The statutory scheme proceeds on the basis that the power to make an agreement to which s 186(3) applies, resides in the parties to the agreement, namely, in this case, the employer and the employees covered by the agreement who were employed at the same time that the agreement is made (s 172(2) of the *Fair Work Act*). Sections 180, 181(1) and 182(1) specifically recognise that an agreement is “made” when the majority of the employees covered by the agreement who are employed at that time, vote in favour of the agreement.
4. The *Fair Work Act* goes on to provide that Fair Work Australia must, nevertheless, approve the agreement made by those persons. Section 186 and s 187 of the *Fair Work Act* set out the matters in respect of which Fair Work Australia must be satisfied. One of these matters is that the agreement has been genuinely agreed to by the employees covered by the agreement. This, of course, refers back to the employees who are covered by the agreement and were employed at the time that the agreement was made. Also, importantly, Fair Work Australia must be satisfied that the agreement met the better off overall test.
5. It is in this context that the requirement under s 186(3) that Fair Work Australia be satisfied that the group of employees covered by the agreement was fairly chosen, arises. The content of the matters in respect of which Fair Work Australia is to be satisfied under s 186(3) is, of course, informed by a proper construction of the *Fair Work Act*.
6. First, it is appropriate to observe that s 186(3) calls upon Fair Work Australia to be satisfied that the group of employees covered by the agreement “was” fairly chosen. It is of significance that the past tense “was” is used. This directs Fair Work Australia to have regard to the conduct of those persons who made the agreement and the content of that agreement. In other words, the question is whether the parties that made the agreement acted fairly in choosing those employees to be covered by the agreement. The question of fairness of choice arises because those employees who are “chosen” to be covered by the agreement will, ex  hypothesi, be the better off overall than those employees who were not “chosen” to be covered by the agreement. Thus, for example, if only some of a group of employees doing the same work and in the same location were chosen to be covered by an agreement on the basis of their place of birth or their support of a particular political party, the group of employees chosen to be covered by the agreement would not have been fairly chosen. In this regard, it is also of some interest to observe that s 186(3) follows immediately after s 186(2)(d), which is the provision in the *Fair Work Act* which requires that the agreement satisfy the better off overall test.
7. In my view, it is also necessary in determining the task to be undertaken by Fair Work Australia in applying s 186(3) to have regard to the terms of s 186(3A). Of particular significance is the characterisation of the specific criteria prescribed in s 186(3A) as mandatory considerations to which regard is to be had in assessing whether the group of employees covered by an agreement has been fairly chosen, when not all the employees of a single employer are covered by the agreement.
8. Each of the three criteria mentioned as mandatory considerations describes a legitimate business related characteristic. The reason for this, in my view, is to preclude approval of an agreement which excludes an employee or number of employees from the benefit of being covered by an agreement for an extraneous characteristic of the kind referred to at [30] above.
9. The *Fair Work Act* contemplates, therefore, that in applying s 186(3) and s 186(3A), Fair Work Australia will, by reference to the coverage clause, undertake an examination of the criteria by which the group of employees was chosen. In determining whether the group was fairly chosen, Fair Work Australia will have regard to whether the criteria reflect the criteria identified in s 186(3A) or some other like legitimate business related characteristic, rather than an extraneous characteristic of the kind referred to at [30] above.
10. In my view, there is nothing in the language of s 186(3) and s 186(3A) of the *Fair Work Act* which conditions the exercise by Fair Work Australia of the power under s 186(3) to approve an agreement, upon Fair Work Australia being satisfied as to the number of employees who will, or may, during the term of the agreement, be covered by the agreement.
11. Accordingly, in my respectful view, in finding that it was unable to make the assessment of whether the group of employees was fairly chosen because it could not say with any certainty how many employees would, or may, be covered by the agreement throughout its term, the Full Bench misapprehended its statutory task and fell into jurisdictional error.
12. It was common cause that there were no agreements of the kind referred to in cl 1.2 in existence at the time that the agreement was made. There was nothing unfair in including a clause which contemplated that circumstances may arise when employees who would otherwise have been covered by this agreement may be covered by a different agreement. However, in my view, the inclusion of a clause which contemplated a potential change in circumstances did not affect the fairness of the criteria chosen as identifying a group of employees who were, in the absence of such circumstances, to be covered by the agreement. In other words, the inclusion of cl 1.2 did not preclude Fair Work Australia from embarking upon an assessment of the fairness of the fundamental criteria specified by the makers of the agreement.
13. Further, in my view, the words “was fairly chosen” in s 186(3) are not to be construed as “was chosen in a manner which would not undermine collective bargaining”. Notwithstanding the patient argument of Mr Reitano at the hearing, I am of the view that s 578(a) of the *Fair Work Act* does not support giving that construction to the words of s 186(3).
14. Section 578(a) relevantly provides that Fair Work Australia must, in exercising its powers, take into account any objects of the *Fair Work Act* and the objects of any part of the Act. However, I am of the view that the general words in s 578(a) do not permit Fair Work Australia to imbue the words of the statute with concepts which are not to be found in those words when properly construed. In my view, the proper construction of s 186(3) is informed by s 186(3A). That section prescribes the nature of the considerations to which Fair Work Australia is to have regard in exercising its power under s 186(3). Therefore, in my view, Fair Work Australia is not at liberty to exercise its s 186(3) powers on some other basis in reliance upon the general provisions in s 578(a) of the *Fair Work Act*. In other words, the general words in s 578(a) must yield to the specificity embodied in s 186(3A) in relation to the proper construction of the words “was fairly chosen” in s 186(3).
15. Further, there are specific provisions in Pt 2-4 of the *Fair Work Act* which give Fair Work Australia powers to withhold approval on grounds which reflect conduct inconsistent with the objects of Pt 2-4 identified in s 171. Thus, for example, s 187(2) permits Fair Work Australia to withhold approval for an agreement if approval would not be consistent with, or would undermine, good faith bargaining. It is significant, therefore, that there is no similar provision permitting Fair Work Australia to withhold approval on the grounds that it is of the view that the approval of the agreement would undermine collective bargaining. In the absence of that power having been conferred expressly on Fair Work Australia, it is, in my view, not open to Fair Work Australia to exercise such a power under the rubric of s 186(3) of the *Fair Work Act*.
16. Plainly, the Full Bench was of the view that there was something wrong with three employees being able to make an agreement which covered work classifications other than their own. However, if there is a lacuna in the *Fair Work Act*, on which I express no view, then the remedy would appear to lie in legislative amendment.
17. In light of the conclusion to which I have come, it is unnecessary for me to deal with John Holland’s second argument under the first broad ground of review, nor its second ground of review based on procedural fairness.
18. I, accordingly, will make orders for the issue of a writ in the nature of certiorari quashing the decision of the Full Bench.
19. I will hear from the parties whether, in the circumstances, a writ in the nature of mandamus is necessary, and any further orders.

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| I certify that the preceding forty‑three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis. |

Associate:

Dated: 27 March 2014