



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.437 - Application for a protected action ballot order

Australian Maritime Officers' Union, The

v

Geraldton Port Authority

(B2009/45)

DEPUTY PRESIDENT MCCARTHY

PERTH, 14 DECEMBER 2009

Proposed protected action ballot by employees of Geraldton Port Authority.

[1] On 9 December 2009 the Australian Maritime Officers Union (“the AMOU”) lodged an Application for a Protected Action ballot order (“the application”). The application seeks an Order that a Ballot be conducted (“the Ballot Order”) of employees of Geraldton Port Authority (“GPA”) employed as Marine Pilots. I listed and conducted a brief hearing on 10 December 2009 and a more fulsome proceeding on 11 December 2009. At the end of the proceedings on 11 December 2009 I decided that it was not practicable for me to determine the application on that day.

[2] The AMOU provided a detailed history of its version of the negotiations that had occurred over most of 2009. That outline included correspondence between the AMOU and GPA which amongst other things included efforts to arrange meetings, arrangements for meetings, outcomes from meetings, the status of claims made and responses to those claims and the position in relation to claims. The AMOU also provided copies of the draft agreements that had been provided for meetings and discussed at those meetings. The draft agreements were varied to reflect the status of each item in the proposed agreement as the negotiations progressed.

[3] The negotiations got to the stage in November where the differences between the AMOU and the GPA were reduced to a small number of items and agreement had not been reached on those items. The AMOU foreshadowed in its correspondence that if agreement could not be reached on those items then they would pursue any applications they were entitled to lodge under the Fair Work Act 2009 (“the FW Act”). It has to be inferred that the AMOU was referring to its right to lodge an application for a Ballot Order. In foreshadowing an application for a Ballot Order the AMOU also indicated a preparedness to meet and continue negotiations.

[4] Whilst the AMOU did not produce any witnesses to give evidence I am satisfied that the documentation and submissions they made are sufficient for me to be able to form a view about the meeting of the requirements for a Ballot Order.

[5] The GPA contested the meeting of those requirements of the FW Act. More specifically the GPA asserted that the AMOU had not bargained in good faith and that as a consequence the AMOU had not been and was not genuinely trying to reach agreement.

[6] The GPA asserted that requests had been made for the AMOU to provide materials and information to the GPA and that material had not been provided. They asserted and it was conceded by the AMOU that several requests had been made in writing and the material had not been provided.

[7] The material requested by the GPA included a decision of the Australian Conciliation and Arbitration Commission in 1969 which was described as a benchmark decision. The GPA stated that after it had been requested to be provided the AMOU dropped any reliance on that decision as basis to justify their claim. There are two issues I do not accept from the position of the GPA on this issue. Firstly what the AMOU actually did was discontinue relying on the decision because the AMOU could not provide a copy of it but rather because the GPA could not access that decision. Secondly the GPA provided no explanation as to what efforts it had made to access the decision apart from demanding that the AMOU provide it. Indeed in my view there was little if any obligation on the AMOU to provide a copy of the decision.

[8] The other material requested by the GPA included material relating to any information the AMOU had regarding why the AMOU considered the value of pilotage services in Geraldton to be greater than in other locations and why ports selected by the AMOU for wage comparisons should influence the wages paid to Marine Pilots in Geraldton. The AMOU did not seriously contest that it had not provided the material requested by the GPA although documents tendered included a marine Pilot Market Rates Benchmarking spreadsheet for rates as at September 2009. Notably a column for West Australian Ports was blank.

[9] The GPA relies mainly on what it regards as a failure to provide relevant information outlined in the previous paragraph that indicates that the AMOU did not comply with good faith bargaining obligations which in turn should be able to be relied upon in ascertaining whether the AMOU had been and is genuinely trying to reach an agreement. Mr Kemp for the GPA seemed to be indicating that the AMOU had failed to provide information inferring that the AMOU had failed to disclose relevant information (other than confidential or commercially sensitive information) in a timely manner.¹

[10] Mr Kemp seemed to be inferring that a failure to provide information was the same or similar to a failure to disclose information. I do not necessarily accept that view. It seems to me that a failure to disclose is a more significant connotation than a failure to provide. However the inference that Mr Kemp made was not fully argued and in any event it is not essential for the purposes of these proceedings to conclude a view on that issue.

[11] I agree with Mr Kemp's general proposition that good faith bargaining failures can be relied upon as an indicator as to whether a bargaining representative has been and is genuinely trying to reach an agreement. However in my view by relying on a premise that a bargaining representative has not bargained in good faith brings with it an obligation to establish that premise. In this matter Mr Kemp produced no evidence in support of his contentions. Nor was there any evidence as to the capacity of the GPA to formulate a response to the AMOU's claims in the absence of its provision. In short I was not provided with any evidence other

¹ s.228(1)(b)

than documents and correspondence showing that the information had been requested and that the GPA thought it was important that it be provided for it to be able to respond to the claims.

[12] Whichever approach I adopted in this matter I am not satisfied and there is insufficient material or evidence provided for me to be satisfied that the AMOU was doing anything other than trying and is genuinely trying to reach agreement. I am satisfied and I find that the submissions and material provided by the AMOU of the history and content of the negotiations and claims illustrates that the AMOU was and is genuinely trying to reach agreement.

[13] I will therefore issue a Ballot Order in the terms sought.

DEPUTY PRESIDENT

Appearances:

M. Flemming for the The Australian Maritime Officers' Union

S. Kemp on behalf of Geraldton Port Authority

Hearing details:

2009.

Perth:

10, 11 December.

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