DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Uniline Australia Limited
(AG2016/634)

COMMISSIONER ROE MELBOURNE, 13 MAY 2016

Application for approval of the Uniline Australia Limited Enterprise Agreement. Notice of employee representational rights issued more than 14 days after the notification time. Section 188(a)(ii) requires a valid notice of representational rights. A notice issued more than 14 days after the notification time is invalid. Lack of genuine agreement.

[1] An application has been made for approval of an enterprise agreement known as the *Uniline Australia Limited Enterprise Agreement 2016* (the Agreement). The application was made pursuant to Section 185 of the *Fair Work Act 2009* (the Act). It has been made by Uniline Australia Limited. The Agreement is a single enterprise agreement.

[2] I raised a number of concerns with the employer. There was considerable correspondence between the parties which resolved some but not all of those concerns. The matter was finalised at a hearing on 11 May 2016.

[3] It is agreed that the notification time for the Agreement occurred in April 2014.[1] I provided the employer with the opportunity to clarify whether or not this response was in fact accurate and they provided such confirmation. The last notice of representation rights was issued on 11 February 2016. The notice met the content requirements of Section 174(1A) of the Act.

[4] I am satisfied that the Agreement cannot be approved because I am not satisfied that Section 186(2)(a) "genuine agreement" has been met. The Agreement cannot be approved unless Section 186(2)(a) is met.

[5] The requirement for genuine agreement in Section 186(2)(a) is defined in Section 188:

> **"188 When employees have genuinely agreed to an enterprise agreement**
>
> An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:

[1] See Uniline response to Question 2.8 on the F17 Form dated 21 March 2016.

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees."

[6] The issue in contention in this case is whether or not Section 188(a)(ii) has been complied with or in other words whether Section 181(2) has been complied with.

"**181 Employers may request employees to approve a proposed enterprise agreement**

(1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

(2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

[7] The decision in Peabody Moorvale[2] established that the notice specified in Section 173(1) is not a valid notice unless the content requirements in Section 174 have been complied with. Section 173 includes other requirements for the notice including when the notices must be given which is specified in Section 173(3). This is governed by the notification time which is also referred to in Section 173(1).

"**173 Notice of employee representational rights**

Employer to notify each employee of representational rights

(1) An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:

(a) will be covered by the agreement; and
(b) is employed at the notification time for the agreement.

Note: For the content of the notice, see section 174.

[2] *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2014] FWCFB 2042.

Notification time

(2) The ***notification time*** for a proposed enterprise agreement is the time when:

(a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
(b) a majority support determination in relation to the agreement comes into operation; or
(c) a scope order in relation to the agreement comes into operation; or
(d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

Note: The employer cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).

When notice must be given

(3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

Notice need not be given in certain circumstances

(4) An employer is not required to give a notice to an employee under subsection (1) in relation to a proposed enterprise agreement if the employer has already given the employee a notice under that subsection within a reasonable period before the notification time for the agreement.

How notices are given

(5) The regulations may prescribe how notices under subsection (1) may be given."

[8] Vice President Hatcher in *Transport Workers Union of Australia v Hunter Operations Pty Ltd*[3] concluded that in order for a Notice to be valid, it must be issued in conformity with Section 173(3). As a consequence Section 188(a)(ii) cannot be complied with unless the notice has been issued in conformity with Section 173(3). The notice was not issued in conformity with Section 173(3) in this case and therefore based upon Vice President Hatcher's reasoning the Agreement has not been genuinely agreed and cannot be approved.

[9] The reasoning of Vice President Hatcher was as follows:

"[73] *Peabody Moorvale* was concerned with whether non-compliance with the form and content requirement for Notices prescribed by s.174(1A) meant that the Notice was invalid. Section 174(1A) provides:

Notice requirements

(1A) The notice must:

(a) contain the content prescribed by the regulations; and

[3] [2014] FWC 7469.

(b) not contain any other content; and
(c) be in the form prescribed by the regulations."

[74] The Full Bench held that non-compliance resulted in invalidity. Its reasoning included the following (footnotes omitted):

"[14] What then are the consequences of providing a Notice which is different, either in content or form, from the Notice prescribed in the Regulations? As the High Court said in *Project Blue Sky v Australian Broadcasting Authority* (Project Blue Sky), an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect:

> "Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition."

[15] While there is no decisive rule that can be applied to determine legislative purpose the decided cases provide some guidance in analogous circumstances. A textual indicator which is always of significance is the mode of expression in the provision in question. As Spigelman CJ observed in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*: 'Substantial indeed often, but not always, determinative, weight must be given to language which is in mandatory form'.

[16] The word 'must' in s.174(1A) is language in mandatory form. A similar conclusion, albeit in a different context, was reached by the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*. In that case the court was construing s.424A of the *Migration act* 1958 (Cth) which provides:

> "**Applicant must be given certain information.**
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> (1) Subject to subsection (3), *the Tribunal must*:
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> > (a) *give to the applicant*, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
> > (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and
> > (c) invite the applicant to comment on it.
>
> (2) The information and invitation *must be given* to the applicant:
>
> > (a) except where paragraph (b) applies - by one of the methods specified in s.441A; or
> > (b) if the applicant is in immigration detention - by a method prescribed for the purposes of given documents to such a person ..." (emphasis added)

> [17] The use of the words 'must give' was described by various members of the Court as 'imperative'. As McHugh J put it:
>
> > "... the assumption that no breach of s.424A occurs if the applicant has otherwise been given procedural fairness overlooks the imperative nature of the section. Nothing in the section suggests that fairness in the way in which the Tribunal observes its statutory obligation is an implied limitation on its operation. The section describes a procedural step that, if enlivened by the circumstances of the case, the Tribunal is required to take in every case. Further, the mandatory nature of the obligation in s.424A(2)(b) points to the conclusion that the failure to provide in writing to the applicant particulars of the adverse material and the invitation to comment upon it amounts to a breach of s.424A ...
> >
> > Because the language of s.424A is imperative, failure to comply with the obligation to provide the applicant with particulars of adverse information in writing constitutes a breach of that section ... There was some debate before this Court as to whether the term 'must' in s.424A(1) necessarily imposed a mandatory requirement to provide the information in writing in all circumstances. However, in the absence of any qualifying terms, the natural meaning of the section is that the Tribunal is compelled in all circumstances to provide the information in writing. This is so, even if the Tribunal puts the information to the applicant at an interview or when the applicant appears before the Tribunal to give evidence and present arguments. Such a construction is consistent with the purpose of the section to accord the applicant procedural fairness in the conduct of the review."
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> [18] Subsection 174(1A) uses language in mandatory form and goes to some length to make it clear that there can be no departure from the content or form of the Notice prescribed in the Regulations. As mentioned earlier, s.174(1A) provides that a Notice must contain the prescribed content, must not contain any other content and must be in the form prescribed.
>
> [19] The clear and unambiguous meaning of the words of s.174(1A) is entirely consistent with the context and mischief to which the provision is addressed."

[75] In identifying the "context and mischief" referred to, the Full Bench discussed the significance of the Notice as earlier quoted, and after considering the circumstances in which s.174(1A) was enacted concluded that: "The language of s.174(1A), the context and legislative purpose all support the proposition that a failure to comply with the provision goes to invalidity".

[76] Like s.174(1A), s.173(3) is expressed in mandatory language. Not only is the word "*must*" used to convey the requirement that the Notice must be given as soon as practicable after the notification time, but also the expression "*no later than*" is used to introduce the 14-day requirement. That expression, read in the context of the subsection as a whole, must be read as meaning something equivalent to "in no circumstances after". No other provision of the Act allows or accommodates any extension to the time allowed by s.173(3). It is not an irregularity capable of being

waived under s.586(b). The language of s.173(3) therefore strongly points to invalidity being the consequence of a failure to comply.

[77] One important contextual consideration supports this conclusion, and that is that there is no separate sanction for contravention of s.173(3). It is not a civil remedy provision. No other remedy for contravention is identifiable. Therefore unless non-compliance with s.173(3) resulted in the invalidity of the Notice and any subsequent enterprise agreement being rendered incapable of approval, it would become in substance voluntary and without practical utility. That cannot have been intended by the legislature.

[78] An interpretation of s.173(3) which requires strict compliance is consistent with the statutory purpose of the Notice as identified in *Peabody Moorvale*. It would ensure that employees are informed at the earliest practicable time of the fact that bargaining is occurring and their entitlement to representation in that process. An alternate construction, whereby the Notice could be given at any time without adverse consequences provided that this occurred 21 days before a vote to approve the enterprise agreement occurred, would have potential consequences which would be destructive of the Notice's statutory purpose. It might mean that bargaining for an enterprise agreement is well advanced or even completed before all employees are advised of the fact that bargaining is occurring and are made aware of the means by which they may participate and be represented in that bargaining process. If, for example, an employer agrees to negotiate in response to a claim for an enterprise agreement made by a relevant union, the late provision of the Notice may mean that any employees who are not members of that union may not be aware that bargaining is occurring or that they may be individually represented in such bargaining before the negotiations have substantially progressed or have finished. Similarly if an employer initiates bargaining with employees directly, and any employees who are union members are not advised from the outset through the Notice that they are entitled to have their union represent them in the bargaining, the result may be that bargaining proceeds without that union being involved contrary to the representational entitlement of the union members.

[79] I conclude therefore that in order for a Notice to be valid, it must be issued in conformity with s.173(3). In respect of the bargaining which has occurred between Hunter Operations and the TWU, no valid Notice can now be issued, and no enterprise agreement which might ultimately emerge from that bargaining would be capable of approval. In those circumstances, the making of a bargaining order could serve no possible purpose. That would be so even if a bargaining order could require that a Notice be issued."

[10] The Australian Industry Group (AiGroup) on behalf of Uniline argues that I should not follow the Vice President's reasoning. I noted that a recent Full Bench in *MUA v Maersk*[4] quoted with approval the reasoning of Vice President Hatcher. I accept the submission of the AiGroup that they did not specifically refer to or rely upon the Vice President's conclusion that the notice was invalid if not issued within 14 days of the notification time.

[4] *Maritime Union of Australia, The v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894.

[11] The AiGroup made comprehensive written submissions which I have considered. They also referred to the following passage from Peabody Moorvale:

> **"[44]** The 21 day requirement in s.181(2) is met if there was a period of at least 21 days after the last Notice was given before employees were asked to approve the proposed agreement. This requirement is not met unless the Notice is validly issued under s.173 and a Notice will be valid provided that it complies with the content and form requirements of s.174(1A).
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> …
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> **[47]** Taking into account the considerations identified in *Project Blue Sky* we have concluded that the legislative purpose of s.174(1A) is to invalidate any Notice which modifies either the content or form of the Notice template provided in Schedule 2.1 of the Regulations. We now turn to the facts of this case to determine whether the Notice given by Peabody complies with Schedule 2.1.
>
> **[48]** There is no dispute that Peabody gave the Notice to the relevant employees within 14 days after the notification time for the Agreement (as required by s.173) and that it was given in a manner consistent with Regulation 2.04. …."[5]

[12] The AiGroup submit that this passage suggests that the failure to comply with Section 173(3) does not invalidate the notice. However, I consider that paragraph 44 of Peabody Moorvale quoted above is purely concerned with the issue of the content and form of the notice and that paragraph 48 makes it clear that the issue of a notice which has not been issued within 14 days after the notification time was not considered.

[13] I adopt the reasoning of Vice President Hatcher. I particularly agree with his comments about the statutory purpose of the notice as set out in paragraph 78 of his decision quoted earlier. I agree that the statutory purpose of the notice is not met unless the notice is given shortly after the notification time.

[14] For this reason I cannot be satisfied that there is genuine agreement and therefore the conditions in Section 186 are not met and I cannot approve the Agreement. The application is dismissed.

COMMISSIONER

[5] [2014] FWCFB 2042 at [44] to [48].

Appearances:

Mr M Swan represented the Applicant.

Hearing details:

2016
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May 11

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