



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.437 - Application for a protected action ballot order

Australian Rail, Tram and Bus Industry Union

v

Pacific National NSW Pty Ltd

(B2012/2067)

COMMISSIONER CAMBRIDGE

SYDNEY, 3 DECEMBER 2012

Proposed protected action ballot by employees of Pacific National NSW Pty Ltd.

[1] On 30 November 2012, the Australian Rail, Tram and Bus Industry Union (RTBU), made an application for a protected action ballot order. The application was made pursuant to section 437 of the *Fair Work Act 2009* (the Act). The application was made in respect of members of the RTBU who are employees of Pacific National NSW Pty Ltd (the employer), and who are employed in the Coal Division.

[2] The application seeks a ballot of employees of the employer who are members of the RTBU and who would be covered by a proposed enterprise agreement. The application included a Statement of *Stephen David Wright*, undated (the Statement). In summary, the Statement provided information about events involving attempts made by the RTBU to reach agreement with the employer on the terms of a proposed enterprise agreement.

[3] The application was listed for Hearing before Fair Work Australia (FWA) on 3 December 2012, at which time the following appearances were recorded:

Ms K Presdee, solicitor from Slater and Gordon, on behalf of the RTBU;
Mr D Perry, solicitor from Herbert Smith Freehills, on behalf of the employer.

[4] The application was opposed by the employer. The employer opposed the application both in substantive terms and in respect to the detailed terms of the Order sought by the RTBU. In addition the employer sought to have any Order include a requirement that the written notice period referred to in paragraph 414(2)(a) of the Act be extended for a period of 7 working days. I have considered the materials filed and the submissions made by both the RTBU and the solicitors representing the employer.

[5] The determination of this matter is primarily governed by the provisions of section 443 of the Act. Section 443 is in the following terms:

“443 When FWA must make a protected action ballot order

(1) FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:

(a) an application has been made under section 437; and

(b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

(2) FWA must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).

(3) A protected action ballot order must specify the following:

(a) the name of each applicant for the order;

(b) the group or groups of employees who are to be balloted;

(c) the date by which voting in the protected action ballot closes;

(d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

(4) If FWA decides that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the protected action ballot, the protected action ballot order must also specify:

(a) the person that FWA decides, under subsection 444(1), is to be the protected action ballot agent; and

(b) the person (if any) that FWA decides, under subsection 444(3), is to be the independent advisor for the ballot.

(5) If FWA is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days, the protected action ballot order may specify a longer period of up to 7 working days.

Note: Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.”

[6] My determination of the competing issues raised in this matter has been made having particular regard for the object of Division 8 of Part 3-3 of the Act as set out in section 436.

[7] Firstly in respect to the substantive objection raised on behalf of the employer, the draft clause proposed by the RTBU regarding the establishment of the Consultation Group

includes a requirement that all decisions of that Group be made by consensus. Somewhat regrettably the draft clause appears to seek to embody such decisions as terms of the proposed Agreement and plainly this would not be permissible. However because the draft clause is underpinned by a proposed consensus being achieved I do not believe that the RTBU claim could ultimately be construed as the pursuit of a non-permissible matter.

[8] Consequently I am satisfied that the application has been made in accordance with section 437 of the Act. In particular, I am satisfied that the applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted. In addition, I am satisfied that the requirements of sections 438 and 440 of the Act have also been met.

[9] Further having regard for the object as set out in section 436 of the Act, I believe that that object would be advanced if the application was granted in terms of an amended Order making some changes to specific terms of the Order sought by the RTBU. In particular I believe that one such alteration will provide an appropriate and realistic time frame to meet the objective stipulated by section 436. Other alterations to the Order are made to clarify the detail of questions to be put to voters in the ballot.

[10] In respect to the extension of the written notice period as contemplated by subsection 443(5) of the Act, I have not been persuaded that a case has been made out to establish exceptional circumstances justifying any extension of the written notice period required by 414(2)(a) of the Act.

[11] Therefore, pursuant to subsection 443(1) of the Act, FWA must make the protected action ballot order sought by the RTBU with consequential amendments. Accordingly an Order [PR531947] is issued separately.



Appearances:

Ms K Presdee, solicitor from Slater and Gordon, on behalf of the RTBU;

Mr D Perry, solicitor from Herbert Smith Freehills, on behalf of the employer.

Hearing details:

2012.

Sydney:

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