

Summary of Decision

3 November 2014

Metropolitan Fire and Emergency Services Board v United Firefighters' Union of Australia

AG2014/5121

1. The Fair Work Commission has refused an application by the Melbourne's Metropolitan Fire and Emergency Services Board (MFB) to terminate two enterprise agreements that were beyond their nominal expiry date.
2. The application was made by the MFB on 28 March 2014 and relates to two enterprise agreements, the *Metropolitan Fire and Emergency Services Board, United Firefighters' Union of Australia, Operational Staff Agreement 2010* and the *Metropolitan Fire and Emergency Services Board, United Firefighters' Union of Australia, Assistant Chief Fire Officers Agreement 2010*. Each agreement was approved by the Commission on 23 September 2010, with the nominal expiry date of 30 September 2013.
3. An application can be made to the Commission under s.225 of the *Fair Work Act 2009* for the termination of an agreement once it has passed its nominal expiry date. Section 226 of the Act requires termination if two tests are met. The first is satisfaction that termination *it is not contrary to the public interest*; and the second is if the Commission *considers that it is appropriate* to terminate the agreement, taking into account all the circumstances of the matter. In turn, this requires consideration of the *views of those covered*, including the employer, employees and any employee organisation (or union) party to the agreement. It also requires consideration of the *circumstances* of those covered including the *likely effect* that termination of the agreement will have on those covered by the agreement.
4. The MFB employs more than 2,100 people comprising around 1,800 operational firefighters and 300 corporate staff. Its "baseline" operational staffing consists of 270 personnel on shift at any one time, located at 47 fire stations throughout the Metropolitan District. The Metropolitan District covers more than 1,000 square kilometres, and the MFB estimates it protects almost 4 million Melbourne residents, workers and visitors.
5. The MFB contended that the content of the two agreements interfered with its process of change and improvement and impeded its capacity to carry out its statutory functions. The MFB argued the provisions relating to consultation and dispute resolution were onerous and unworkable when combined with the need for decision-making and consultation to be by consensus, which is a feature of the Operational Staff Agreement. The MFB undertook that should the Commission terminate the two agreements, it would maintain employee's wages and certain conditions for a period of 18 months from the date of termination.
6. The Commission has established in earlier decisions that the "public interest" involves something distinct from the interest of the parties covered by an agreement, although they may be similarly affected.

7. This decision finds that termination of the two agreements is not contrary to the public interest. The Commission's decision on this aspect of the decision took into account that the MFB contended there was uncertainty in implementation of the two agreements because of decisions of the Courts, including the High Court in *Re AEU*, which prohibit Federal laws (including an enterprise agreement) impairing a State's capacity to function as a Government. The decision took into account that termination of the two agreements is unlikely to work against the objects of the *Fair Work Act* (in the s.3 and s.171). The decision also found that while termination of the two agreements would impact substantially on the relative bargaining position of the parties, this was more about the private interests of the parties, as between each other, than it was about the public interest.
8. The Commission took into account the views of those covered, which showed that, while the MFB was in favour of termination, employees and their union, the United Firefighters' Union, were against it. The Commission did not find there were extreme circumstances faced by any party, and so the circumstances of the parties was a neutral factor.
9. The Commission considered the effects of termination on those covered by the agreements. It did so by considering the evidence of the 37 witnesses who provided oral evidence and the witness statements of a further 51 operational firefighters. Many of the witnesses provided evidence about the process of consultation and disputes arising in the workplace. The decision reached by the Commission reviewed more than 28 such matters and considered four of those in detail. This consideration showed that while there are mixed motives for, and benefits from, consultation and using the dispute resolution procedure, some matters have been appropriate to progress through those forms. As a result, the Commission's decision about the likely effects of termination include that there will be a significantly greater negative effect on the employees and the union than the positive effect on the MFB. This is for the reasons that;
 - disputes that have a genuine connection with occupational health and safety would not be required to be the subject of consultation and a requirement to reach agreement and would not progress through the dispute resolution procedure; and
 - that termination of the 2010 Agreements will result in an appreciable and unmatched shift of the parties' bargaining position in the favour of the MFB.
10. The Commission found that because of these two factors taken together, it is not appropriate to terminate the 2010 Agreements.
11. Despite finding that termination of the 2010 Agreements is not contrary to the public interest, which is the first of the two pre-conditions for the Commission to be required to terminate the two agreements, because of the finding that it is not appropriate to terminate the two agreements, the Commission is not required by s.226 to terminate them.
12. The Commission also found there were no other grounds that would give the Commission a discretion to terminate the 2010 Agreements. As a result, the MFB's application has been dismissed.

- *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.*

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