CONSTRUCTION FORESTRY MINING & ENERGY UNION v. MAMMOET AUSTRALIA PTY LTD (P26/2013)

Court appealed from: Federal Court of Australia
[2012] FCA 850

Date of judgment: 14 August 2012

Date of grant of special leave: 12 April 2013

The respondent was awarded a contract from Woodside to perform the heavy lift and transportation of pre-assembled Liquefied Natural Gas train modules for the Woodside Pluto Liquefied Natural Gas Project. It commenced work in September 2008 and employed 34 employees including 12 crane operators and forklift drivers four of whom were specifically the subject of the proceedings in the Federal Court ("the Relevant Employees"). These operators/drivers were eligible to be members of the appellant, and had their terms and conditions of employment regulated by a workplace agreement made under the provisions of the *Workplace Relations Act 1996* (Cth), called the Mammoet Australia Pty Ltd Pluto Project Greenfields Agreement 2008 ("the Agreement").

The employees under the Agreement were known as "Distant Workers", and were on "fly in/fly out" arrangements in relation to the performance of their work. The respondent, at its expense, provided travel to the employees between their work and their normal place of residence on each "rostered swing" and when working a rostered swing, the respondent, under the Agreement provided the employees with either board and lodging ("Accommodation"), or a specified living away from home allowance ("LAHA"). Four of the Relevant Employees were provided with Accommodation which was owned by Woodside. The respondent paid Woodside to the extent that its employees resided there.

On 28 April 2010, a group of the respondent's employees, including the Relevant Employees, commenced a 28 day period of protected industrial action within the meaning of s 408 of the *Fair Work Act 2009* (Cth) ("the FW Act"). The protected industrial action involved a complete cessation of work. The respondent told the Relevant Employees that if they engaged in the industrial action, the respondent would not provide them with Accommodation or pay LAHA during the period.

Once the industrial action was finished, the respondent re-commenced providing Accommodation or LAHA to the Relevant Employees.

The appellant filed an application in the Federal Magistrates Court alleging a breach of the Agreement and a contravention of the FW Act. Lucev FM found that provision of Accommodation to certain of the respondent's employees constituted "payment" to them within s 470(1) of the FW Act and that accordingly the withholding of that Accommodation was authorised under s 342(3) of the FW Act and therefore not adverse action for the purposes of s 342(1) of the FW Act.

The appellant appealed to the Federal Court. Gilmour J dismissed the appeal noting that the Accommodation was provided to enable the employees to be in a position to perform their employment and earn their pay, not for their use while on strike.

The grounds of appeal include:

- The Court erred in law by failing properly to construe section 470 of the FW Act, such as not to apply to the provision of accommodation by the respondent to the employees the subject of the proceedings.

The respondent has filed a notice of contention. The respondent contends that the decision of the Court below should be affirmed on the ground that: "[t]he Agreement did not require the respondent to provide a distant worker with accommodation or LAHA when that distant worker was not 'ready, willing and available for work', such that the respondent's non-provision of accommodation or LAHA to the employees the subject of this claim during the period of protected industrial action did not:

(a) Contravene section 340(1)(a) of the FW Act; or
(b) Contravene clause 6 of Appendix 7 of the Agreement pursuant to item 2(2) in Schedule 16 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).