PiperAlderman

Article Information

Author: Erin McCarthy
Service: Employment & Labour

Beware of errant signposting

The Fair Work Commission Full Bench's decision Construction, Forestry, Mining and Energy Union v Sparta Mining Services Pty Ltd

*The Fair Work Commission Full Bench's decision Construction, Forestry, Mining and Energy Union v Sparta Mining Services Pty Ltd [2016] FWCFB 7057 (**CFMEU v Sparta**) has cast doubt over whether a reference to external documents (e.g. workplace policies) within an enterprise agreement is merely a 'signpost' or actually incorporates those documents. **Erin McCarthy, Partner,** discusses the implications of CFMEU v Sparta for employers generally and consider how the decision may make the road to enterprise agreement approval even rockier.*

Background

The Fair Work Commission approved Sparta Mining Service Pty Ltd.'s (**Sparta**) enterprise agreement in July 2016. However, the CFMEU lodged an appeal against the approval decision, alleging that the Commissioner had erred in concluding that Sparta had complied with the requirements of section 180(2) of the *Fair Work Act 2009* (Cth) (**FWA**).

Section 180(2)(a)(ii) requires that an employer must take all reasonable steps to ensure that during the access period for the agreement, the employees who will be covered by the enterprise agreement are given a copy of any other material incorporated by reference in the agreement.

The CFMEU's argument relied on the proposition that clauses 2.5, 6.1, 6.2 and 14.4.2 incorporated, by reference, certain documents that were external to the enterprise agreement. While cl 2.5 used the wording: *"This Agreement is supported by policies and procedures determined by the Employer from time to time…"* clauses 6.1, 6.2 and 14.4.2 used the following wording:

6.1: *"The Employer agrees to comply with State and Commonwealth Occupational Health & Safety laws and any relevant industry codes of practice."*

6.2: *"The Employee agrees to carry out any instructions, polices and decisions made to promote and maintain a safe workplace required by relevant occupational Health and Safety legislation…"*
…
14.4.2*: "You will not be required to work more than 5 hours… in accordance with the site 'Fitness for Work' and 'Fatigue Management Policy'."*

Incorporation

Sparta argued that the reference in section 180(2) to "any other material incorporated by reference in the agreement" was a reference to documents or materials that are specifically named or identified, which clauses 6.1, 6.2 and 14.4.2 allegedly did not do. Sparta also argued that the reference within clause 6.1 to the industry codes of practice were akin to publicly available 'laws of the land' and no further step was required to make them available.

The Full Bench rejected Sparta's argument. The Full Bench found that clauses 6.2 and 14.4.2 both "establish entitlements or obligations which operate by reference to documents external to the Agreement". The Full Bench also pointed out that while legally effective incorporation of entitlements or obligations from an external document requires that the document is described in a way which permits it to be identified, there is no rule against incorporation where the external document has been generally described. In this case, it was held that clauses 6.2 and 14.4.2 refer to policies and were described with sufficient particularity to be incorporated into the enterprise agreement.

Furthermore, as the Full Bench decided it did not have any particular knowledge as to how readily accessible the industry codes or practices that were referred to in clause 6.1 were to employees, it found that Sparta's failure to provide these codes should have been considered in the context of its compliance with section 180(2).

Implications

The implications of the Full Bench's findings are potentially problematic for the overall approval process of enterprise agreements. The wording used within clauses 6.1 and 6.2 ("*The Employee agrees to comply/carry out…*") is not uncommon, especially as both clauses generally reflect an employee's duty to follow actions or policies promoted by their employer to comply with workplace health and safety obligations. Employers with similarly-worded clauses may face some difficulty if all possible policies and codes of practices are not made available to employees during the access period.

However, the implications do not just end with employers in the midst of the enterprise agreement approval process. The Full Bench failed to disavow the wording in clause 2.5 as being incorporated by reference. Employers with enterprise agreements containing general wording similar to Sparta's enterprise agreement are now exposed to the risk that workplace policies, which were not intended to be incorporated into an enterprise agreement, could be held to be incorporated by reference into the terms of the agreement.

The problem for employers in this situation is where a parallel is drawn with *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177 (**Romero**). In *Romero*, the question was whether there was a breach of contract, as the employee alleged that the workplace policies were included in the employee's contract of employment. The employment contract referred to specific workplace policies and the Full Court rejected the employer's argument that the wording was merely "directive" in the sense that it consisted of directions to the employees as to how workplace matters would be handled. Rather, the language used in that instance imposed the expectation of mutual legal obligations, and hence the policy was found to be incorporated as a term of the employment contract, which the employer had breached. While later judgements in the Court have questioned that approach, it remains relevant.

An application of *Romero* to an employer whose situation is similar to that of Sparta's in *CFMEU v Sparta* may lead to increased scope for arguments that an employer's failure to follow its own workplace policies amounts to a breach of the enterprise agreement.

Employers should also remember that *Sparta v CFMEU*, and previous authorities on the subject of incorporation by reference, show that whether a particular clause or term incorporates extrinsic material into the terms of an agreement will be fact-dependent. A court will analyse the construction of the clause and determine whether the extrinsic material should indeed be incorporated in the particular circumstances of the case. An example of this approach is seen in *McKeith v Royal Bank of Scotland Group PLC* -2016] NSWCA 36 where the NSW Court of Appeal distinguished Romero and other similar cases on the individual facts of the case.

So what can employers do?

1. Be very aware of when enterprise agreement terms might be seen to incorporate a policy or management direction.
2. Ensure that where it does, this is deliberate and the written policy direction is distributed with the enterprise agreement, so employees know what they are voting on.
3. Only agree to terms that "incorporate" another document where this is the explicit intention, and recognise when this may inhibit the ability to change a policy at a later point.