

SUPREME COURT OF QUEENSLAND

CITATION: *CFMEU v BM Alliance Coal Operations Pty Ltd* [2016] QSC 69

PARTIES: **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**
(Applicant)
v
BM ALLIANCE COAL OPERATIONS PTY LTD
ACN 096 412 752
(Respondent)

FILE NO/S: No 12068 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 4 April 2016

DELIVERED AT: Brisbane

HEARING DATE: 18 December 2015

JUDGE: Martin J

ORDER: **1. Application dismissed**
2. I will hear the parties on costs.

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – CONDUCT OF MINING OPERATIONS – MINE SAFETY – PARTICULAR CASES – where the Site Senior Executive (SSE) at a mine initiated a process to change the criteria for assessment for drug testing of workers – where a vote was put to the workers on the new criteria – where 45.66% of those eligible to vote voted in favour of the new criteria while 37.49% voted against – where s 42(7) of the *Coal Mining Safety and Health Regulation 2001* (the Regulation) required the SSE to make “a reasonable attempt to establish the criteria for the assessment in agreement with a majority of workers at the mine” – where s 42(7A) of the Regulation provided that “[i]f the majority of workers at the mine disagree with the criteria for the assessment under subsection (7), the criteria for assessment stated in a recognised standard apply until an agreement is reached” – where the applicant sought a declaration that the new criteria for assessment were not lawfully established and that those contained in a recognised

standard continued to apply – whether a majority of workers at the mine “disagreed” with the new criteria

Coal Mining Safety and Health Act 1999

Coal Mining Safety and Health Regulation 2001, s 42

CFMEU v Anglo Coal (Dawson Management) Pty Ltd [2007] QSC 382, referred to

COUNSEL: M Hinson QC for the applicant
P Davis QC and A Scott for the respondent

SOLICITORS: Slater & Gordon for the applicant
Minter Ellison for the respondent

- [1] The respondent (“BM”) operates the Goonyella Riverside Coal Mine in central Queensland. In early 2015 the Site Senior Executive (“SSE”) for the mine started a process whereby he sought to change the criteria for assessment for drug testing in the fitness for work procedure.
- [2] The applicant (“CFMEU”) seeks a declaration that the criteria for assessment of workers at the mine were not lawfully established and that the proper criteria are those in Recognised Standard 07.
- [3] The statutory framework regulating safety at coalmines is contained in the *Coal Mining Safety and Health Act 1999* (“the Act”) and the *Coal Mining Safety and Health Regulation 2001* (“the Regulation”).
- [4] Section 42 of the Regulation relevantly provides:

“42 Safety and health management system for personal fatigue and other physical and psychological impairment, and drugs

- (1) A coal mine’s safety and health management system must provide for controlling risks at the mine associated with the following—

...

- (c) **the improper use of drugs.**

...

- (4) The system must provide for the following about drug consumption or ingestion for persons at the mine—

- (a) an education program;

- (b) an employee assistance program;
 - (c) an obligation of a person to notify the site senior executive for the mine of the person's current use of medication that could impair the person's ability to carry out the person's duties at the mine;
 - (d) an obligation of the site senior executive to keep a record of a notification given to the site senior executive under paragraph (c);
 - (e) the following **assessments** to decide a person's fitness for work—
 - (i) voluntary self-testing;
 - (ii) random testing before starting, or during, work;
 - (iii) testing the person if someone else reasonably suspects the person's ability to carry out the person's duties at the mine is impaired because the person is under the influence of drugs.
- (5) The site senior executive must consult with a cross-section of workers at the mine in developing the fitness provisions.
- (6) In developing the fitness provisions, the site senior executive must comply with section 10, other than section 10(1)(a) and (d)(ii)(C), as if a reference in the section to a standard operating procedure were a reference to the fitness provisions.
- (6A) If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1)(a) or (b), the site senior executive must establish the criteria for the assessment in agreement with a majority of workers at the mine.
- (7) **If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1)(c), the site senior executive must make a reasonable attempt to establish the criteria for the assessment in agreement with a majority of workers at the mine.**
- (7A) **If the majority of workers at the mine disagree with the criteria for the assessment under subsection (7), the criteria for assessment stated in a recognised standard apply until an agreement is reached.**
- (8) In this section—

fitness provisions means the part of the safety and health management system that provides for the things mentioned in subsections (2) to (4).” (emphasis added)

- [5] It has been conceded by the CFMEU that the Site Senior Executive has made a “reasonable attempt to establish... agreement with the majority of workers” in accordance with s 42(7) of the Regulation.
- [6] As part of the process undertaken by the Site Senior Executive to change the criteria for assessment of drug testing in the fitness for work procedures that were already in place, a ballot of the mine workers was conducted to ascertain their approval, or otherwise, for the change. The ballot paper set out the proposed criteria for assessment and then provided for a worker to signify either:
- (a) “YES – I Agree with the above Criteria for Assessment.” or
 - (b) “NO – I Disagree with the above Criteria for Assessment.”
- [7] There were 1579 workers eligible to participate in the ballot. Of those:
- (a) 721 voted “YES”,
 - (b) 592 voted “NO”,
 - (c) 4 lodged informal votes, and
 - (d) 257 did not vote.
- [8] In other words, 45.66% of those eligible to vote voted in favour of the proposed criteria while 37.49% voted against the proposed criteria.
- [9] The CFMEU contends that a majority of workers at the mine disagreed with the proposed criteria. It follows, it says, that the criteria in Recognised Standard 07 must apply until an agreement is reached.
- [10] In *CFMEU v Anglo Coal (Dawson Management) Pty Ltd*¹ I considered an earlier version of s 42 of the Regulation. In that version, the relevant provision provided:
- “(7) If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1), the site senior executive must establish the criteria for the assessment in agreement with a majority of workers at the mine.”
- [11] In that case a ballot of workers at the mine had been conducted and while a majority of those who voted was achieved, it fell short of a majority of “workers at the mine”. I held that what was required was positive agreement by a number of workers equivalent to, at least, half plus one of those who fell within the description “workers at the mine”.

¹ [2007] QSC 382.

- [12] Section 42 of the Regulation has been amended since that decision and a slightly different regime applies where the improper use of drugs is concerned.
- [13] Mr Hinson QC submitted that a majority of workers at the mine disagreed with the criteria on the basis that workers who did not vote should be regarded as having failed to agree to the proposed criteria. In other words, a failure to agree is the same as a positive act signalling disagreement. I do not accept that.
- [14] A failure or omission to vote can indicate one of a number of things. A person may not be interested in the process. A person may forget to vote. There might be an event which prevented the person from voting. Section 42(7A) establishes a test which requires a majority of workers at the mine to disagree, not fail to agree.
- [15] No authority was provided to me which suggested that it was appropriate to regard a failure to vote as being equivalent to a vote against a proposal contained in a ballot paper. It was not suggested at any stage during the proceedings before the vote was taken that a person who did not vote would be regarded as having voted "No".
- [16] In order for it to be established that a majority of workers disagree with proposed criteria at least half of the workers at a mine plus one must be shown to have disagreed. If the principle advanced on behalf of the CFMEU were to be applied in other circumstances then, for example, a director of a company who did not vote on a proposal because of a conflict would be regarded as having voted against the proposal.
- [17] It has not been established that a majority of workers at the mine disagreed with the proposed criteria. It is unnecessary to consider what type of an "agreement" is contemplated in s 42(7A) when a majority of workers do disagree with proposed criteria.

Order

- [18] The application is dismissed. I will hear the parties on costs.