



Chairman: Peter Parkinson
UNIT 1, 233 CARDIGAN STREET
CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9348 2613 FAX: 03 9348 2714
dboard@vbidb.org.au
www.vbidb.org.au

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)

And

SERGI (AUST) PTY LTD

**RE: ALLEGED INCORRECT PAYMENT RE. SHIFT WORK FOR CASUAL
EMPLOYEES**

6 September 2018

013-2018

STATEMENT No.2

[1] The CFMEU notified a dispute on 27 June 2018 concerning various matters pursuant to the Enterprise Agreement [*Sergi (Aust) Pty Ltd and the CFMEU Mobile Crane Hiring Industry Enterprise Agreement 2016-2019*].

[2] The Panel convened a Conference and issued a Statement on 4 July 2018.

[3] Various alleged matters concerning Superannuation and Travel were resolved.

[4] The remaining matter concerns the application of sub clause 35.2 of the Agreement in so far as it applies to casual employees:

“Shift workers who work on any shift roster which does not continue for at least five (5) successive afternoon or nights, shall be paid for each shift 50% for the first two hours, thereafter 100% for the remaining hours thereof, in addition to the ordinary rate for the day prior and day after shift.”

[5] In accordance with the directions set out in the earlier Statement, the parties filed written submissions including submissions in reply. The Panel conducted a Hearing on 6 September 2018.

[6] During the Hearing it became apparent that there were two Enterprise Agreements applicable to Sergi that had been approved by the Fair Work Commission within 3 months of each other in 2016, which are not in identical terms, at least in relation to sub clause 35.1. The Panel determined that it was appropriate to receive further submissions, should it become necessary, as to the effect, if any, on the issue before the Panel, and as to which of the agreements should be applicable. It was noted that a third agreement may also be pending.

[7] The Panel heard from the parties further as to the substantive matters and indicated to the parties that its initial view was that the construction of the clause was so unclear as to potentially render it incapable of proper Determination by it, without further adequate and satisfactory evidence as to the intention of the parties in particular.

[8] The Panel noted that in Matter No. 016-2017, *Membreys Transport & Crane Hire*, a somewhat similar controversy was raised with respect to full time employees. In that matter the CFMEU had filed written submissions which seemed to throw some light on what the parties may have intended, arising from which that matter was adjourned to allow the parties to settle the matter. The Panel understands the matter was settled.

[9] Importantly, it was apparent from that earlier submission by the CFMEU, that other employers, including Sergi, had been involved in earlier dialogue which lead to an understanding about the application of sub clause 35.2 for full time employees, terms which Sergi confirms it still applies today, the terms of which are quite different to the words that appear in the agreement itself.

[10] This being the case, it raises the question as to whether or not there had been any dialogue at the same time that dealt with casual employees, such that the intention of the parties might be understood. In absence of any submissions presently before the Panel about this, it seems unwise to proceed in absence of the parties being provided with a further opportunity to review their position on the matter. Moreover, with the approach taken in practice, it seems by the industry generally, to sub clause 35.2 in relation to full time employees at least, it would be inappropriate in the Panel's view to proceed to determine the matter in absence of further genuine dialogue between the parties.

[11] The Panel makes the observation that a literal reading of the words of sub clause 35.2, particularly as it applies to casuals, makes no relevant sense in the context of the approach generally understood to have been taken on the subject matter across industries. A literal reading would therefore not be likely to assist in this matter, as it is neither logical nor consistent with any reasonable interpretation of the objective intent of the parties. It is further apparent that differing approaches to the matter of

casual remuneration pursuant to sub clause 35.2 are being taken in this industry, none of which are in accordance with a literal reading of the clause. It is clear that at the earliest opportunity a variation of the appropriately applicable agreements is needed, should agreement as to intent be reached.

[12] Having regard to the matters raised by the Panel, the parties have agreed to this matter being adjourned to enable further dialogue with each other, including other relevant participants in the industry, with a view to resolving the matter.

[13] The parties are directed to advise the Panel not later than 5.00pm on Friday 28 September 2018 as to the status of the matter. In absence of a settlement, either party can request the Panel's assistance in the matter by further Conference and/or proceeding to Determination.



Peter Parkinson
Chairman



Daniel Hodges
Panel Member



Tony Cordier
Panel Member



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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

And

SERGI (AUST) PTY LTD

RE: ALLEGED INCORRECT PAYMENT OF SUPERANNUATION, TRAVEL ALLOWANCE AND NON PAYMENT OF REST PERIODS IN CONNECTION WITH SHIFT WORK

4 JULY 2018

013-2018

STATEMENT

[1] The CFMEU notified a dispute on 27 June 2018 concerning the alleged incorrect payment of Superannuation, Travel Allowance and non payment of Rest Periods after Overtime pursuant to the applicable Enterprise Agreement [*Sergi (Aust) Pty Ltd and the CFMEU Mobile Crane Hiring Industry Enterprise Agreement 2016-2019*].

[2] The Panel convened a Conference of the parties on 4 July 2018.

[3] In relation to the matter concerning Superannuation the Employer acknowledged that there had been a shortfall with respect to some payments due to a payroll oversight which it said had now been corrected and adjustments made to ensure

compliance with the Enterprise Agreement. The Employer agreed to provide relevant material to the CFMEU as confirmation. Subject to this occurring, this matter will be settled.

[4] In relation to the Travel Allowance allegation, the Employer stated that it was in compliance with the provisions of the Enterprise Agreement for this purpose and undertook to provide relevant material to the CFMEU as confirmation. Subject to this occurring, this matter will be settled.

[5] In relation to the matter of shift work, this concerns the connection between the terms of the Enterprise Agreement regarding casual employment and shift work. On this matter the parties were not in agreement. Indeed it is apparent that the more general issue of the correct application of the shift work provision is a question that has been the subject of debate in the mobile crane hiring industry for sometime. The Panel acknowledged it may therefore not necessarily be as simple or straightforward a matter as it would otherwise appear.

[6] Accordingly, in order to progress the issue, the parties agreed to make written submissions to the Panel as to how the matter could be resolved no later than 5.00pm on Wednesday 15th August 2018. These submissions should address the central issue of how a casual employee is required to be paid under the Agreement when engaged to perform shift work which does not continue for at least five successive afternoons or nights, as well as any other relevant matter. Following receipt of submissions, the Panel will advise the parties further.



Peter Parkinson
Chairman



Daniel Hodges
Panel Member



Tony Cordier
Panel Member