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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)

AND

BOOM LOGISTICS (VIC) PTY LTD (BOOM LOGISTICS)

RE: ALLEGED NON COMPLIANCE WITH ENTERPRISE AGREEMENT- REDUNDANCY- MORWELL DEPOT

19 JULY 2021 ***003-2021***

DECISION

By Majority, Member Gruszka dissenting.

[1] The CFMEU notified a dispute on 25 May 2021 alleging that Boom Logistics had failed to comply with its obligations under the Enterprise Agreement concerning its decision to make an employee, Mr M. Down, redundant.

[2] The Panel convened Conferences of the parties on 1 and 9 June 2021, and issued Statements which are to be read in conjunction with this Decision.

[3] The parties have been unable to resolve the dispute. The parties have acknowledged that the Panel has the jurisdiction to decide the matter pursuant to the applicable Enterprise Agreement.

[4] The applicable Enterprise Agreement is *Boom Logistics (Vic) Pty Ltd and the CFMEU Mobile Crane Hiring Industry Enterprise Agreement 2016-2019* (the Agreement).

[5] The parties have observed the Dispute Resolution Procedure Clause 11 of the Agreement. Mr. Down's proposed redundancy was withheld by Boom and he has remained an employee of Boom, in accordance with the Procedure, although he has been on unpaid sick leave since 17 May 2021 consequent upon being selected for redundancy. The circumstances attaching to Mr. Down's employment and condition are properly acknowledged by all parties.

[6] The CFMEU allege that Boom contravened the Agreement in the following respects:

> 1. Failing to properly apply Clause 22.3 of the Agreement by taking into account matters not contemplated by the clause when selecting CFMEU member, Mr M. Down, for retrenchment; and
>
> 2. Failing to comply with its obligations under Clause 8.1(c) concerning the provision of information to Mr. Down, including the criteria relied upon to select employees for retrenchment.

[7] On 17 June 2021, the Panel issued a Statement which listed the matter for Hearing and required that the parties file any further written submissions upon which they intended to rely.

[8] The parties filed written submissions together with witness statements on 6 July 2021.

[9] The Panel conducted a Hearing on 15 July 2021 by way of Zoom teleconference and received further oral submissions from the parties and heard from their witnesses.

[10] The relevant clauses of the Agreement are as follows:

- Clause 22.3 provides the following with regard to the selection of employees for redundancy:

The seniority of employees – within classifications, experience or skills held – will be observed by the Employer in selecting employees for retrenchment. It is agreed that that management reserves the right to maintain a mix of employees, qualified and experienced to operate the cranes and equipment operated by the company to ensure the ongoing viability of the employer.

In such instances if disagreement arises, the matter will be dealt with in accordance with the Dispute Settlement Procedure at clause 11. The employer shall offer the choice of voluntary redundancy in the first instance.

- Clause 8.1(c) and (d) provides the following concerning requisite discussions regarding major workplace change, which includes termination of employment:

(c) For the purposes of the discussion the employer will provide the relevant employees and/or their nominated representative/s in writing:

(i) *All relevant information about the change including the nature of the change proposed;*

(ii) *Information about the expected effects of the change on the employees; and*

(iii) *Any other matters likely to effect the employees.*

However, the Employer is not required to disclose confidential or commercially sensitive information.

(d) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.

[11] The first controversy in relation to selection of employees concerns whether Clause 22.3 permits Boom to consider matters beyond *experience or skills held*. To be clear there is no dispute as to the application of *seniority of employees* or *classifications*. Without

traversing all of the detail, Boom in the first instance when selecting employees for redundancy, utilised a selection process by way of application of a "skills matrix" employee assessment which the Panel finds went beyond what is permitted by the Agreement. The Panel considers that the intention of the Agreement is clear in that only matters relevant to *experience or skills held* can be considered, in the context of the relevant *seniority of the employees* and their *classifications*.

[12] Once the CFMEU had enlivened the Dispute Resolution Procedure, Boom reviewed its initial selection process and removed from its consideration a number of the factors that the Panel considers did go beyond what was permitted, as was seemingly acknowledged by Boom by its review. The factors that then remained in Boom's second review of the selection via the "skills matrix" are matters that the Panel considers do go to the question of *experience* and *skills*, particularly when selecting employees from amongst others similarly classified. For example, there was some debate about safety considerations, but we consider, provided the assessment is relevant and reasonably undertaken, this is a factor that bears upon one's skills and is therefore permitted to be taken into account by Boom. As to whether the elapsing of time following an incident assessed for the purposes of safety is reasonable is another matter to be weighed and we think Boom's assessment given the times lines may be considered harsh.

[13] Nevertheless we do not find that Boon, in its second "skills matrix" selection review, took into account factors that are not permitted by the Agreement. In assessing these matters however the Panel considers these are matters that properly need to be brought to the attention of an employee in order to allow the employee the opportunity to respond should there be any disagreement. We deal with this aspect later.

[14] The second controversy arising from Clause 22.3 is the implication by Boom in its written submissions and correspondence that irrespective of the obligations under the Agreement, it has an overarching unfettered right to select whom it wishes for redundancy. The relevant provision of the clause is repeated here:

It is agreed that that management reserves the right to maintain a mix of employees, qualified and experienced to operate the cranes and equipment operated by the company to ensure the ongoing viability of the employer.

[15] From the oral submissions, contrary to what was previously implied by Boom, it is clear to the Panel that Boom does not hold the view that it has an unfettered right, rather it is in agreement with the CFMEU's submission as to the application of this provision. To be clear, the Panel agrees with the CFMEU's submission on this point. Accordingly the Panel does not need to take this aspect any further.

[16] Accordingly, the Panel finds that whilst in the first instance Boom had not acted in compliance with Clause 22.3, its second attempt was sufficiently in compliance that the Panel does not consider an adverse finding in relation to that clause alone is appropriate in the circumstances.

[17] However, when taken together with Clause 8.1 we find there was a major flaw in Boom's process.

[18] Whilst undertaking a detailed, comprehensive and seemingly thorough assessment, Boom in its second attempt at selection, did not provide to Mr. Down the assessment in such a way to enable an adequate opportunity for him to either challenge or amend the assessment such that it could have resulted in Boom reconsidering its selection of Mr Down for redundancy. The Panel considers that it is possible had there been both knowledge of the detailed assessment and findings of him made by Boom and an opportunity for Boom to give prompt and genuine consideration to such matters, a different outcome might have been possible.

[19] However, it is not to the point for present purposes as whether or not there may have been a different outcome, it is enough that the employee was denied being appraised by Boom of the matters that affected him in so far as the selection process was concerned. This is required by Clause 8.1(c)(iii). These were matters that clearly affected the employee in a significant way, and Boom did not provide it, in writing or in any form,

either to Mr. Down or his representative. The onus is on the employer to provide it, not for the employee to ask for it.

[20] The results of the "skills matrix" assessment that led Boom to confirm Mr Down's selection for redundancy was not provided to Mr Down or the CFMEU. It was subsequently provided to the Panel as part of the witness evidence material in the Hearing, in a redacted version.

[21] There is some controversy over whether or not a request was made for a copy of the "skills matrix" assessment. It is clear from the correspondence between the parties in May 2021 that the "skills matrix" was a key determinant for Boom, as confirmed by the witness evidence in the Hearing. The Panel finds that it was incumbent upon Boom to provide this assessment to Mr. Down.

[22] Boom sought to argue that had it provided the "skills matrix" to Mr. Down or the CFMEU, it would have breached confidentiality in relation to other employees who had been assessed. The Panel considers it was not necessary to provide details of any other employee, and that it could have and should have provided the assessment of Mr. Down, no different to what has been provided to the Panel in the witness evidence. The claim of confidentiality carries no weight in this context.

[23] The Panel regards the detail included in the assessment made about Mr. Down is so significant that it properly should have been provided to him to understand the basis upon which Boom had selected him, given its affect on him, that is, he would as a result have his employment terminated. The Panel considers the Agreement at 8.1(d) is designed to provide an opportunity to an employee to be heard and potentially change the selection. Absent the reasons for selection, the employee can have no chance of review and importantly no knowledge as to whether the assessment made by the employer is accurate, relevant or fair.

[24] In this case the "skills matrix" utilised by Boom is a corporately prepared document designed to enable an assessment of multiple employees, to allocate scores according to the assessor's knowledge, from which the resulting scores identify those who will be

selected for redundancy. A range of criteria is assessed against which an employee is scored. There has been no engagement with the CFMEU about its content. The Panel believes it would be constructive for Boom to consult with the CFMEU to improve its content and scoring methodology such that a fairer assessment might be possible in the future and disputes like this one might be avoided.

[25] It is clear to the Panel, having considered the "skills matrix" and its content, together with the witness evidence before us, that there was scope for Mr. Down to genuinely question the assessment in a number of respects, or for that matter the CFMEU on his behalf, had the opportunity been provided. The fact is this opportunity was clearly denied. Mr. Down was deprived of any reasonable opportunity to respond given he had not been provided with Boom's assessment of him.

[26] Accordingly we find that Boom has failed to comply with the provisions of the Agreement and its obligations that arise pursuant thereto under the Fair Work Act.

[27] The parties were asked to outline, in their view, what remedies might be appropriate if the Panel was to find as it has.

[28] Boom indicated it was prepared to retain Mr Down in its employ, notwithstanding it continued to press for his redundancy. In the event, it is clear to the Panel, having heard from Mr. Down, that the circumstances attaching to Mr. Down including his own health difficulties and the process of redundancy as it has played out, have the result that it would not be practicable or in his best health interests for the Panel to find that continuing employment ought occur. It is also noted that the consequence of his continuing employment with Boom would also cause Boom to make an alternative selection of an employee for forced redundancy. Under all the circumstances this would only exacerbate the impact on Mr. Down and we consider, having regard to all those circumstances, that it really is impracticable for his employment to continue.

[29] If this were a termination of employment, the test would be whether it is practicable to reinstate the employment relationship. In this case for the reasons set out earlier in relation to the employee's particular circumstances and characteristics it would not be

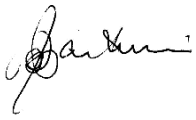
practicable. This is the approach utilised by the Panel in considering whether compensation is appropriate and if so what that the quantum might be.

[30] The CFMEU indicated that as an alternative to continued employment, which it also acknowledged was impracticable given what has transpired, an appropriate payment or paid leave for a period in a form of compensation, having regard to the circumstances, would be warranted.

[31] The Panel has decided, given our finding, that in the present circumstances an appropriate conclusion will be for Boom to proceed immediately with the effecting of Mr Down's redundancy and in consideration of its failure to apply the terms of the Agreement, that it make a compensation payment to him, in addition to any other monetary entitlements due to him upon redundancy.

[32] Whilst we consider that a payment for the period relevant to his employment to the conclusion of this matter has some merit, it also needs to be acknowledged that Boom is prepared to provide continuing employment, and for this reason we think some appropriate discount is appropriate. Doing the best we can, taking into account the time involved in dealing with the dispute, in those circumstances Mr. Down is likely to have otherwise continued to have earned an income for some of this time and in all the circumstances we find that the following is an appropriate basis to determine this matter. We have therefore determined that an amount equivalent to his usual wages that would have been paid had he continued to attend for work for his usual hours, for the period 17 May 2021 to 18 June 2021 inclusive be made to him in compensation. Such payment to be made no later than 7 days after his date of termination of employment. We so decide.

[33] The parties are directed to immediately confer and agree the quantum of the payment decided in paragraph [32.] Should agreement not be reached promptly, the Panel will be available to settle the amount upon reference by either party.



Peter Parkinson
Chair

Tony Cordier
Panel Member