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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CFMEU)

and

PROLAC PTY LTD T/AS PROLAC PAINTING MANAGEMENT PTY LTD

RE: ALLEGED SHAM CONTRACTING

22 OCTOBER 2018

024-2018

STATEMENT

[1] The CFMEU notified a dispute on 11 October 2018 concerning allegations of non compliance with Clause 15 - Sham Contracting of the Enterprise Agreement by Prolac Pty Ltd, specifically in relation to engaging employees on ABNs and not under the terms of the applicable Enterprise Agreement.

[2] The Panel convened a Conference of the parties on 22 October 2018.

[3] There is no dispute that the applicable Enterprise Agreement is *Prolac Pty Ltd T/As Prolac Painting Management Pty Ltd and the CFMEU (Victorian Construction and General Division Enterprise Agreement 2016-2018)*.

[4] The Employer is engaged as a sub-contractor to various major principal contractors, including Multiplex on the Australia 108 Project, Southbank.

[5] There is no dispute that the Enterprise Agreement applies to this matter and that the Panel has certain powers in relation to sham contracting as defined and provided for by sub clause 15.4. The Enterprise Agreement provides at sub clause 15.4 (d) that “*Any use of sham contracting is a breach of this agreement*”. Sub clause 15.4 (h) makes specific provisions for calculation of back pay in the event a sham contract is found to have been in place.

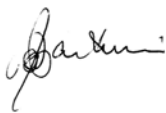
[6] The Employer acknowledges and agrees that it has engaged a number of workers on “contracts” who were employees under the Enterprise Agreement and for whom the terms of the Enterprise Agreement were not provided by the Employer. The Employer understands these “contracts” were sham contracts. The Employer confirmed that it no longer did so and that all its workers were now correctly engaged under the terms of the Enterprise Agreement. This was acknowledged by the CFMEU.

[7] The Employer was unable to present any specific reason as to why it had acted in this way other than for economic reasons, particularly given it says it had employed other employees under the terms of the Enterprise Agreement. The Panel notes that 15.4(c) provides that for the purposes of the Enterprise Agreement (and consistent with the *Fair Work Act 2009*), it is not “sham contracting” where an employer proves that when an Employer “*did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services*”. Based on the material before the Panel, it would appear unlikely that the Employer would have been able to rely on clause 15.4(c) had the matter proceeded to Determination. On the material before the Panel the Employer has breached the Enterprise Agreement, and on its own admission it has.

[8] The Enterprise Agreement provides at sub clause 15.4 (h) the terms of settlement for such a breach. The parties have agreed to resolve the matter in a manner consistent with the provisions of sub clause 15.4(h) having application to each of the employees affected by this matter for the relevant periods. The Employer has committed to pay the back pay calculated in accordance with this sub clause not later than 5.00pm on Monday 12 November 2018. Before that date the Employer has agreed to meet with the CFMEU to finalise the calculations in accordance with sub clause 15.4(h).

[9] In this instance the CFMEU has not pressed the Chair to exercise the provisions of sub clause 15.4. (g). The Chair is satisfied having regard to the specific circumstances of this matter, the undertakings given by the employer that it will now fully comply with the terms of the Enterprise Agreement and given its preparedness to be frank and open before the Panel.

[10] The Panel directs that both parties advise the Panel not later than 5.00pm on Monday 12 November 2018 as to the status of the matter and whether or not further assistance of the Panel is required.



Peter Parkinson
Chairman



Tony Cordier
Panel Member



Daniel Hodges
Panel Member