VBIDP

VICTORIAN BUILDING INDUSTRY DISPUTES PANEL
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ABIGROUP CONTRACTORS PTY LTD
MONASH UPGRADE SECTION – AUBURN ROAD HAWTHORN

-and-

CFMEU

RE: OCCUPATIONAL HEALTH & SAFETY MATTERS

013-2009

THURSDAY, 26 FEBRUARY 2009

DECISION

This matter relates to a notification by the Union following the deduction of 4 hours pay for the afternoon of January 23, 2009.

Prior to the hearing of the matter, correspondence was received from the respondent contractor with a copy to the Union, which raised a number of concerns as to the failure of the Union to adhere to EBA processes. Because of this reason the Contractor informed the Panel that they would not be attending the hearing scheduled for February 19, 2009.

Subsequently the Union corresponded with the Chairman with a copy to the contractor in which the Union disagreed as to the process to be followed and requested that the matter should be determined as required by the EBA Dispute Resolution Procedure.

Given the gravity of the claims and counter claims contained in the correspondence, a Panel member communicated with a senior management representative for the purpose of discussing the merits of attending the formal hearing to specifically address threshold issues as required by the Contractors certified EBA.

Despite this communication and its action in deducting 4 hours pay, the Contractor did not attend the hearing on February 19, 2009.

On opening the hearing the Chairman determined to proceed with the matter notwithstanding the Contractor's absence, noting the Panel's obligations outlined in the EBA Disputes Resolution Procedure and the Charter of the Building Industry Dispute Panel which includes reference to the Panel's fundamental responsibility to determine disputes in a timely manner.

On that basis, the Union was requested to outline its position and also address assertions made in the Contractors correspondence dated February 17, 2009.

The Union submitted that following a request from a site representative, a Union official attended the project in the early morning of January 23, 2009. The purpose was to address electrical tagging safety issues in accordance with his ARREO Authorisation entitling him to enter the site, but he was not permitted to do so by management, due to an alleged lack of detail on the certificate. This was amended, however, entry was still not approved.

The Union official then contacted Worksafe and was advised that a response for assistance would not be available for uncertain period of time.

As a consequence, a meeting of all employees was conducted offsite at lunchtime to address concerns relating to electrical tagging throughout the site.

During the course of the meeting major concerns were expressed that the required tagging had not occurred. Management did not assist in resolving these concerns. As a consequence a decision was taken for employees to vacate the project as site safety could not be guaranteed and hence there was a genuine concern as to imminent risk.

The Union further submitted that following this lunchtime meeting and before employees left the site the two site superintendants were fully advised of the safety concerns and the flow on affect of this very serious issue. Superintendants did not direct employees to other productive work however they did request that a skeleton crew be designated to remain on site to make safe and secure the project due to the forthcoming extended weekend. This was agreed to.

The Union then tabled a Memorandum from Management to all employees which indicated that a four hour deduction of pay had been made due to "unlawful industrial action" (on the afternoon of January 23, 2009) as defined within the Workplace Relations Act 1996.

In conclusion, the Union stated that there was no doubt in their minds (employees and representatives) that serious irregularities had occurred relating to tagging processes which manifested in genuine concerns for health and well being, particularly having regard to the recent industry Christmas shutdown and subsequent events. Clear evidence was then detailed which concluded that the tagging and registration had been falsified with all such work and had allegedly concluded on Sunday 25 January.

Having regard to safety concerns expressed particularly the imminent risks arising from the proven irregularities and the overall sequence of events, the Union submitted that the normal payment for the hours worked should be restored and that the Panel should find in no uncertain terms that the relevant Workplace Relations Act provisions (i.e. 4 hour deduction) should not apply in the circumstances presented for the Panel's consideration.

In considering the material before it and its obligation under the Charter, the Panel has reached the following conclusions:-

- On the morning of January 23, 2009 management were well aware that there were safety issues of concern as a consequence of the attendance of a Union official seeking entry to the project by way of presenting a notice for entry in accordance with Section 88 of Part 8 - Authorised Representatives of Registered Employee Organisations of the Occupational Health and Safety Act 2004.

- Following a request to include further information on the notice, the official attempted to re-submit the notice however was told that management was "too busy" and that it would be a period of time before a response was given.

- The official then sought the assistance of Worksafe however, they were unavailable (in the short term) to attend the project.

- As a consequence an off-site lunchtime meeting was conducted at which time employees expressed serious concerns relating to the overall electrical safety of the project, given the uncertainty of the testing and tagging process relating to approximately 280 electrical items.

- The Panel concludes that there is clear evidence that testing and tagging processes were not in order on January 23, 2009 and indeed that the tagging and testing was registered as having been undertaken on January 25, 2009.

- In these circumstances, given the site wide and known risks associated with electrical safety and the demonstrated departure from correct procedure, the Panel concludes that employees did in fact have "reasonable concern" for their health and safety and on the day and were confronted by the presence of an "imminent risk" as specified in clause 36(1)(g) of the B.C.I.I. Act 2005.

- To activate Section 507 of the Workplace Relations Act which involves a minimum deduction of 4 hours pay, Section 42 of B.C.I.I. Act requires under paragraph 1(a) that the building industrial action must be industrially motivated and constitutionally connected.

In all of the circumstances of this matter, the Panel finds that the employees' actions were not industrially motivated but were related to serious safety issues and imminent risk and therefore the 4 hour deduction by the Company was not in accordance with the Act and consequently should not have been deducted.

BOB MERRIMAN
CHAIRMAN

PETER KNIGHT
PANEL MEMBER

BILL DAVIS
PANEL MEMBER

DATED THIS 26 DAY OF February 2009