VBIDP

VICTORIAN BUILDING INDUSTRY DISPUTES PANEL
CHAIRPERSON: SIMON WILLIAMS
1/233 CARDIGAN STREET,
CARLTON SOUTH VIC 3053
A.C.N. 110 263 182
TEL: 03 9639 1322 FAX: 03 9639 2490
dboard@vbidb.org.au

CFMEU

AND

DIRECT SKILLS PTY LTD

VARIOUS PROJECTS

RE: ALLEGED STAND DOWN OF DAILY HIRE EMPLOYEES AND NON-PAYMENT OF EMPLOYEES

14 September 2012

023-2012

DECISION

DECISION OF THE PANEL

[1] The decision of the Panel is:

- that the employer has not had, since the reemployment of the employees in question, and does not have the right to stand down without pay any of those employees, and
- that, if the employer has not provided the employees in question with paid work or with payment of wages for the days upon which it failed to provide them with paid work, it has failed to comply with its obligations under the Agreement, and
- that, if it continues to fail to provide the employees with paid work or with payment of wages for the days upon which it fails to provide paid work, unless and until it reaches an agreement to the contrary or it terminates the employment of a relevant

employee, the employer will continue to fail to comply with its obligations under the Agreement.

[2] It follows that the employer is required to -

- provide each of the relevant employees in question with paid work, or
- pay each of the relevant employees for the days on which it has failed to provide that employee with paid work, or
- reach, if it has not already done so, an agreement with a relevant employee as to the terms upon which that employee may be stood down without pay (although any such agreement would only apply to the date on which it is made), or
- terminate the employment of a relevant employee.

Simon Williams
Chairperson

14 September 2012

INTRODUCTION

[3] The Construction Forestry Mining and Energy Union ("the CFMEU") and Direct Skills Pty Ltd ("the employer") are parties to and bound by the *Direct Skills Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* ("the Agreement") [Agreement ID: AE890866; Print No: PR518975].

[4] Clause 11 of the Agreement prescribes the procedure for resolving disputes arising between the employer on the one hand and an employee or employees on the other. That procedure is a staged process. At a specified point in that process, an unresolved dispute may be referred to the Panel and that is how this dispute came before the Panel. The Agreement requires that the Panel deal with the dispute "*in accordance with the Panel Charter*".

[5] Under the Panel Charter, the Panel consists of three members (including the Chairperson). Each member of the Panel has one vote. Decisions of the Panel are by majority.

[6] In this case, the members of the Panel have not been able to reach agreement in respect to all issues before it. The decision of the Panel in this case is a majority decision. The reasons for decision now published set out the reasons of the majority and minority respectively.

Simon Williams
Chairperson

14 September 2012

REASONS OF THE CHAIRPERSON AND PANEL MEMBER DOYLE

[7] We have had the opportunity of reading the reasons for decision of Panel Member Cross. It appears to us that the conclusions reached by the Panel Member and the reasons advanced by him in support of his conclusions differ more in form than substance from the conclusions reached by us and the reasons advanced in support of those conclusions.

[8] On 13 August March 2012, the CFMEU notified a dispute between it and the employer regarding the alleged stand down of daily hire employees and the alleged non-payment of those employees in breach of the Agreement.

[9] The matter came on for hearing before the Panel on 29 August 2012.

[10] The Panel had previously had before it a dispute between the same parties regarding the termination of six daily hire employees in circumstances where it was alleged that casual employees were being employed to perform work that could have been performed by the employees whose employment had been terminated [Matter 018-2012]. Following a hearing before the Panel and subsequent discussions between the parties, the Panel was advised that the dispute had been settled and no further action was required by the Panel. The Panel was

informed that the settlement of that matter involved the reemployment as daily hire employees of several of the employees whose employment had been terminated.

[11] At the hearing of this matter on 29 August 2012, it was common ground that the employees who had been reemployed as daily hire employees had been provided with only a limited amount of work and had, in effect, been stood down without pay for varying periods since their reemployment.

[12] It is well established that, at common law, an employer does not have the right to stand down an employee during periods in which the employee cannot usefully be employed [*Hanley v Pease & Partners Ltd* [1915] 1 KB 698; *Re Building Workers Industrial Union of Australia* (1979) 41 FLR 192 at 194]. Indeed, it has been said that "*where an employer does not provide work, for instance when no work is available, a failure to pay wages in such circumstances constitutes a wrongful suspension of the contract which gives rise to an action for damages for breach of contract*". [*Howe v Qantas Airways Ltd* [2004] FMCA 242 (15 October 2004)]

[13] In such circumstances, an employer must either dismiss the employee by giving appropriate notice of termination or retain the employee in employment without reduction of contractual rights. This "all or nothing" rule may be modified by statute, award or agreement.

[14] Section 524(1) of the *Fair Work Act 2009* ("the FW Act") prescribes circumstances in which an employer may stand down an employee. It provides as follows:

> *(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*
>
> *(a) industrial action (other than industrial action organised or engaged in by the employer);*
>
> *(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
>
> *(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*

[15] Section 524(2) of the FW Act recognises that an enterprise agreement or contract of employment may prescribe the circumstances in which an employer may stand down an employee. Clause 6 of the Agreement provides that the "*provisions of the National Building and Construction Industry Award 2000 [AW790741] ("Award") which are set out in Appendix G of this Agreement are incorporated into and form part of this Agreement ("Incorporated Terms").*

One such clause which is incorporated into and forms part of the Agreement is clause 14 of the Award which insofar as is relevant, provides at clause 14.2 as follows:

> *The employer may deduct payment for any day upon which an employee cannot be usefully employed because of any strike by or participation in any strike by members of the union; or because of any strike by any members of the union employed by the employer; or because of any strike by or participation in any strike by another union, organisation or association or by any branch thereof, or by any members thereof who are employed by the employer; or because of any stoppage of work (other than for inclement weather within the allowance prescribed in clause 21 of this award) for any cause, including breakdown of machinery or failure or lack of power, for which cause the employer is not responsible.*

[16] The purpose of a stand down provision is clear. In *Re Distilleries Award, 1976* [(1976) 180 CAR 786, at 787; Print D2366], Justice Sharp was hearing an application for the insertion into an award of a stand down clause. In relation to the purpose of a stand down clause, His Honour stated:

> *This comes to what seems to me to be the essence of the argument, namely, the purpose of a stand down clause. I do not accept the contention which, in fairness, was not advanced by Mr Park, that standing down employees without pay should be an employer's right if that were the most convenient way of avoiding economic loss. The concept that it was managements' prerogative to use labour at will has no place in western society for many decades. It has been replaced by the concept that the use of labour of human beings is a privilege accorded to management on defined terms. One of those terms is that reasonable security of earnings be assured to the labourer. This is the purpose of the notice clause in awards and very substantial grounds must exist for this Commission to include any provision which would enable it to be abrogated, even temporarily, by unilateral action.*
>
> *There may, however, be circumstances when both employer and those employed would want to avoid the extreme measure of terminating employment. It is for this situation that stand down provisions should exist and should contain adequate safeguards. If that consensus is not present then, as I have already indicated, this Commission must be persuaded that there are exceptional and substantial reasons.*

[17] A stand down clause mitigates the effect of the common law and is intended to provide for circumstances when an employer and employee "*would want to avoid the extreme measure of terminating employment*". An employer is not entitled to stand down an employee without pay merely because it is in the employer's financial interest to do so. [*Re Technical Staff (TAA) Award 1974* [1978] AILR 106 per Keely J]. Stand down provisions appearing in statute, awards and agreements, therefore, prescribe the specific circumstances which need to exist before an employer is allowed to stand down an employee without pay.

[18] In our view, none of the circumstances prescribed by the FW Act, the Award or the Agreement as being circumstances in which an employer may stand down an employee appears to the Panel to exist in this case.

[19] What is forbidden by the common law is the unilateral suspension by an employer of the employment relationship. What is conferred on an employer by the FW Act, the Award and the Agreement is a power to suspend the employment relationship in specified circumstances. However, it does not necessarily follow that an employer and an employee may not come to some arrangement so as to "*avoid the extreme measure of terminating employment*". Neither the common law, nor the FW Act nor the Award nor the Agreement appears to prevent an employer and an employee from entering into such an arrangement. Such an arrangement may involve the taking of leave, either paid or unpaid. Such an agreement would need to be entered into *freely* by both parties and, in the interests of both parties, it would be at least wise for such an arrangement to be clearly documented, setting out the rights of each party to the arrangement. For example, one can readily envisage circumstances where an employee agrees to be stood down without pay and obtains other employment the termination of which requires the employee to give notice. An agreement concerning stand down should deal with the employee's entitlement to seek and/or obtain other employment and the employee's not being required to abandon that other employment summarily should the original employer wish to terminate the stand down period.

[20] In our view, the Panel has not been provided with any specific material which would allow us to conclude that there has been any such arrangement agreed to by the employer and any of its employees, i.e. that any employee has agreed to being stood down from employment without pay. On the other hand, the Panel has not been provided with any specific material that supports a contention that any employee has refused to enter into such an agreement. As stated earlier, it was common ground that the employees who had been reemployed as daily hire employees had been provided with only a limited amount of work and had, in effect, been stood down without pay for varying periods since their reemployment. In those circumstances, therefore, i.e. in the absence of material upon which it could base a determination one way or the other in respect to any agreement between the employer and any employee as to stand down without pay, we are compelled to reach the following conclusions:

- that the employer in this case has not had, since the reemployment of the employees in question, and does not have the right to stand down without pay any of those employees, and

- that, if the employer has not provided the employees in question with paid work or with payment of wages for the days upon which it failed to provide them with paid work, it has failed to comply with its obligations under the Agreement, and
- that, if it continues to fail to provide the employees with paid work or with payment of wages for the days upon which it fails to provide paid work, unless and until it reaches an agreement to the contrary or it terminates the employment of a relevant employee, the employer will continue to fail to comply with its obligations under the Agreement.

[21] In our view, it follows from the above that the employer in this case is required to -

- provide each of the relevant employees in question with paid work, or
- pay each of the relevant employees for the days on which it has failed to provide that employee with paid work, or
- reach, if it has not already done so, an agreement with a relevant employee as to the terms upon which that employee may be stood down without pay (although any such agreement would only apply to the date on which it is made), or
- terminate the employment of a relevant employee.

Simon Williams
Chairperson

Fergal Doyle
Panel Member

14 September 2012

REASONS OF PANEL MEMBER CROSS

[22] On 13 August March 2012, the Construction Forestry Mining and Energy Union ("the CFMEU") notified a dispute between it and Direct Skills Pty Ltd ("the employer") regarding the alleged stand down of daily hire employees and the alleged non-payment of those employees in breach of the *Direct Skills Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* ("the Agreement") [Agreement ID: AE890866; Print No: PR518975].

[23] The matter came on for hearing before the Panel on 29 August 2012.

[24] The Panel had previously had before it a dispute between the same parties the termination of six daily hire employees in circumstances where it was alleged that casual employees were being employed to perform work that could have been performed by the employees whose employment had been terminated [Matter 018-2012]. Following a hearing before the Panel and subsequent discussions between the parties, the Panel was advised that the dispute had been settled and no further action was required by the Panel. The Panel was informed that the settlement of that matter involved the reemployment as daily hire employees of several of the employees whose employment had been terminated.

[25] At the hearing of this matter on 29 August 2012, it was common ground that the employees who had been reemployed as daily hire employees had been provided with only a limited amount of work and had, in effect, been stood down without pay for varying periods since their reemployment.

[26] It is well established that, at common law, an employer does not have the right to unilaterally stand down an employee during periods in which the employee cannot usefully be employed [*Hanley v Pease & Partners Ltd* [1915] 1 KB 698; *Re Building Workers Industrial Union of Australia* (1979) 41 FLR 192 at 194]. Indeed, it has been said that "*where an employer does not provide work, for instance when no work is available, a failure to pay wages in such circumstances constitutes a wrongful suspension of the contract which gives rise to an action for damages for breach of contract"*. [*Howe v Qantas Airways Ltd* [2004] FMCA 242 (15 October 2004)]

In such circumstances, an employer must either dismiss the employee by giving appropriate notice of termination or retain the employee in employment without reduction of contractual rights. This "all or nothing" rule may be modified by statute, award or agreement.

[27] It is well established by industrial law in Distilleries Award, 1976, Justice Sharp stated: "There may, however, be circumstances when both the employer and those employed would want to avoid the extreme measure of terminating employment." (Print D2366, (1976) 180 CAR 786 at p 787).

However, it was argued by the CFMEU that under the terms of the agreement, that the "all or nothing" rule prevents employees from asking for and or taking either paid or unpaid leave. The Panel Member recognises that the practice of allowing employees to elect to take leave on the days where there is no work, rather than be stood down, is a legitimate form of custom and practice within the bounds of the employment relationship. Further there was no evidence before the Panel that the employer had unreasonably refused a request to terminate the employment of any of its employees in lieu of consent arrangements. Further, the Panel Member heard that it was not unusual for some employees to refuse work when offered by the employer, and this was not refuted by the union.

[28] Section 524(1) of the *Fair Work Act 2009* ("the FW Act") prescribes circumstances in which an employer may unilaterally stand down an employee. It provides as follows:

> *(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*
> *(a) industrial action (other than industrial action organised or engaged in by the employer);*
> *(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
> *(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*

[29] Section 524(2) of the FW Act recognises that an enterprise agreement or contract of employment may prescribe the circumstances in which an employer may unilaterally stand down an employee. Clause 6 of the Agreement provides that the "*provisions of the National Building and Construction Industry Award 2000 [AW790741] ("Award") which are set out in Appendix G of this Agreement are incorporated into and form part of this Agreement ("Incorporated Terms").* One such clause which is incorporated into and forms part of the Agreement is clause 14 of the Award which insofar as is relevant, provides at clause 14.2 as follows:

> *The employer may deduct payment for any day upon which an employee cannot be usefully employed because of any strike by or participation in any strike by members of the union; or because of any strike by any members of the union employed by the employer; or because of any strike by or participation in any strike by another union, organisation or association or by any branch thereof, or by any members thereof who are employed by the employer; or because of any stoppage of work (other than for inclement weather within the allowance prescribed in clause 21 of this award) for any cause, including breakdown of machinery or failure or lack of power, for which cause the employer is not responsible.*

[30] Arguably none of the circumstances prescribed by the FW Act, the Award or the Agreement as being circumstances in which an employer may unilaterally stand down an employee appears to the Panel Member to be present in this case. However, it is noted that there is nothing in the Agreement that prevents the parties from coming to a consent arrangement concerning a request from an employee to take leave in lieu of termination. The Panel Member considers, therefore, that the employer in this case does not have a unilateral right to stand down the employees in question and that, if the employer does not provide the employees with paid work, the employer must either terminate their employment or not unreasonably withhold agreement to allow an employee to take either paid or unpaid leave. It goes without saying however, that in order to be eligible for payment the employee must hold themselves available to work.

Lawrie Cross
Panel Member

14 September 2012