# VBIDP

**VICTORIAN BUILDING INDUSTRY DISPUTES PANEL**
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# SALTA CONSTRUCTIONS

# MERCY HOSPITAL – EAST MELBOURNE

**-and-**

# CFMEU (C&G)

## **RE**: ALLEGED NON PAYMENT OF WAGES

**FRIDAY 17 JULY 2009**

**039-2009**

**DECISION**

This matter was first notified on the 15 June, 2009 and related to an alleged non payment of wages in breach of the Salta Construction's (Employer) 2008-2011 Enterprise Bargaining Agreement (EBA).

The matter was listed for hearing on 19 June, 2009, however, following a request from the employer's legal representative stating that a better understanding of the issues would be achieved by way of site visit, the Chairman agreed, and this matter was then set down to proceed by way of a site visit on 19 June, 2009 immediately followed by a hearing.

Due to the unavailability of key personnel, the matter was rescheduled to Tuesday 30 June 2009.

It should be noted that an additional dispute notification (wages matter) relating to an alleged breach of the EBA was notified on 25 June, 2009 and the parties were advised that this additional matter would also be dealt with at the time of the site visit/hearing set down for 30 June, 2009.

However, on 26 June 2009 the employer through their legal representative advised that there was no longer a need for a site visit, retracted the offer for a site visit and advised that the employer would not take part in any proceedings before the Panel in relation to the matter.

Notwithstanding this position, extensive documentation was couriered to the Panel by the employer's legal representative which in fact consisted of a very full and comprehensive written submission, outlining the employer's position and rebutting the Union's claims.

Earlier on 30 June, 2009, the Union independently requested that the matter should proceed by way of a hearing at the Panel's premises on 30 June, 2009, followed by a site visit if necessary.

Having regard for the various requests, the Chairman determined that a hearing would proceed on 30 June 2009 at the Panel's premises and the parties were notified accordingly.

At the hearing of the 30 June, 2009, in the absence of the employer, the Chairman provided the Union with a copy of the relevant correspondence from the employer's legal representative which amongst other things questioned the Panel's jurisdiction to deal with the matter and reserved their right for the matter to be referred to the Australian Industrial Relations Commission (AIRC).

At the hearing, the Union requested that the question of the Panel's jurisdiction should be dealt with by way of a further hearing and as a threshold matter.

The Panel accepted this submission and the hearing was then adjourned to 7 July 2009. All parties were advised as to this hearing date and its purpose.

At the hearing on 7 July 2009 the Chairman advised that the employer through his legal representative had again written confirming that they would not be attending. The Panel decided that it had a fundamental obligation to proceed under the terms of its Charter and the EBA.

This conclusion was arrived at given that the employer's legal representative had submitted additional extensive documentation which constituted submissions which went to the merits of the matter, however they would not be attending the hearing. On one view they were participating given the written submissions but not attending.

In support of the contention that the matter was properly before the Panel, the Union referred to Clause 16 of the EBA -

"16 - Procedure for Dealing with Safety Issues or Incidents states -

"16. **PROCEDURE FOR DEALING WITH SAFETY ISSUES OR INCIDENTS**

This procedure shall be followed in good faith and without unreasonable delay. **If an issue is not settled by observance of this procedure, or if the procedure is disregarded by either party, the matter may be submitted to the Victorian Building Industry Disputes Panel** or AIRC for resolution. Provided that any outcome so determined will not be inconsistent with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, the Workplace Relations Act 1996 or the Building and Construction Industry Improvement Act 2005.

Nothing in this Agreement shall take precedence over the Occupational Health & Safety Act 2004 (as amended).
(our emphasis).

The Union acted in accordance with the provisions of clause 16 by notifying the Panel and therefore bringing into action the jurisdiction of the Panel.

The Union then referred to clause 10 which states -

"10 - Dispute Resolution Procedure at -

"10.1 A major objective of this Agreement is to eliminate lost time and/or production arising out of disputes or grievances. Disputes over any work related or industrial matter or any matters arising out of the operation of the

Agreement or incidental to the operation of the Agreement should be dealt with as close to its source as possible .... "

and further -

"10.2.f in part which states -

"Should the matter remain unresolved either of the parties or their representative shall refer the dispute at first instance to the Victorian Building Industry Disputes Panel which shall deal with the dispute in accordance with the Panel Charter."

The Union also referred to the Panel's Charter and particularly 2.1 - **Functions of Dispute Panel** which states in part -

"(i) The Disputes Panel shall determine matters arising from the application of the provisions of the Enterprise Bargaining Agreement and **such other matters as agreed between the parties.**

and further at -

(iv) Nothing in this Agreement empowers the Disputes Panel to determine the payment of wages for periods during which an employee is engaged in industrial action except when it is proven that the lost time was due to genuine occupational health and safety grounds."

At this point the Union advocate requested that the Panel hear from other attendees present at the hearing namely -

Bill Oliver - State Secretary CFMEU

Matt Hudson - Organiser CFMEU

Gerry Ayers - OHS Manager CFMEU

Kris Ford - OHS Site Representative

Mr Oliver referred to a discussion with Sam Tarascio, a Senior Employer Representative on 22 May, 2009 on which the question of the dispute going to the Panel was understood. On 26 May 2009 Mr Oliver, Ms Walters and Mr Hudson of the CFMEU attended a meeting involving Sam Tarascio, George Wasin and Graham Gosling representing the employer. At this meeting the Union submitted it was agreed that the matter would be dealt with by the Disputes Panel. Mr Hudson in fact stated that the Senior Manager, Sam Tarascio had said that he was "happy to embrace the process".

For all the above reasons the Union strongly contended that it was evident that the Panel clearly had the power and jurisdiction to proceed with the matter.

The Panel has considered the written submissions of the employer's legal representative going to jurisdiction and finds that their argument cannot be sustained, given the provisions of the EBA and the Charter and collaborated evidence of the Union going to the Agreement between the parties.

The Panel therefore finds that it has jurisdiction to deal with this matter.

The Panel having so found then proceeded to hear the merits of the matter even though the employer by its own action was absent from the hearing. The Panel

relied upon the employer's legal representative's written submissions which were also addressed by the Union.

It is important for the Panel to record its concern as to the employer's absence because the early documentation from the Company indicated a complete willingness to participate in the requirements of its EBA going to Safety and Dispute Resolution clauses. Their position abruptly changed to one of non attendance and we would be concerned if an employer deliberately put itself in potential breach of its EBA because of some outside influence or acting upon such legal advice.

Having determined the matter of jurisdiction, the Panel being conscious of its responsibility to expedite hearings and given the delays in this matter decided to immediately hear and determine the issues.

The first matter for consideration related to an incident resulting from the discovery of a potential health risk which was asbestos containing material disturbed during a concrete cutting operation. This discovery led to a cessation of work with the approval of the employer by those directly involved. The employer then introduced processes to deal with the problem which were put in place by 7.00 am on Tuesday 19 May, 2009. A meeting of all workers then took place by agreement with the employer's representative Cameron Jackson to advise as to what had occurred.

Subsequent to the site meeting it was established that the disturbed material did contain asbestos. A rectification process was initiated following a report by Noel Arnold - Industrial Hygienist.

Employer representative Ryan McMahon was also involved in site discussions and the agreed activities during this period. A further agreed meeting took place at 2.30 pm on 19 May, 2009

At the 2.30 pm meeting numerous concerns were raised by the workforce as to the activities of the day before, when due to a power failure all workers were sharing the same mess shed, toilets and lifts etc and material disposal was conducted through the main thoroughfare to bins in Clarendon Street. Apparently workers were not offered or directed to any alternative work areas at any stage during the process.

Also at 2.15 pm on 19 May, 2009 a Worksafe Inspector attended the project and subsequently provided an Entry Report to Dario Bolzonello, an employer representative and Kris Ford, employee Health and Safety Representative. It would appear that the Entry Report is limited to the inspector being made aware of processes underway and his inspection of documentation, but he was not involved in a direct inspection of the areas of concern nor discussions with the employees.

The Union stated that following the 2.30 pm meeting, cleaning of amenities, toilets and other areas commenced around 4.00 pm.

The Union confirmed that Mr Gerry Ayers, CFMEU Occupational Health and Safety Unit Manager met with the OHS Committee on Wednesday 20 May 2009, including employer representatives, where it was agreed that there were serious discrepancies in the Part 6 - Asbestos Audit and associated Register.

It was alleged that the Audit had not been up-graded since 2006 which is not in accordance with the fundamental requirement of the Occupational Health and Safety Act. The employer acknowledged these discrepancies.

The Union sought to have these matters addressed without delay and Noel Arnold and Associates were engaged to this end.

It was agreed by David Russell, Employer Representative that no work would occur on the site until documentation and the Register were upgraded.

The Arnold Report became available on Thursday 18 May, 2009 however, the Register was not completed until Friday 19 May, 2009. It was of serious concern that the upgrade revealed three other areas on the project contained asbestos material. This discovery was then incorporated into the Register.

Following receipt of the written reports, work commenced progressively during the course of Friday by those employees who were available and had not been offered alternative off-site work.

It is noted that a significant number of sub-contractors employees had been relocated off site during the course of events.

As earlier stated the Panel has a fundamental responsibility to determine disputed matters.

There is no doubt that the employer did not assist the hearing processes by his absence, but as earlier stated the Panel has a fundamental responsibility to determine disputed matters relying upon the material before it.

Further, the Panel is concerned that such non-participation severely impacts on the effective operation of the EBA, the industrial instrument and potentially the stability of the industry as a whole.

Based on all of the evidence presented to the Panel, the events that unfolded from the 19 May 2009 to the 22 May 2009 does not constitute industrial action within the meaning of Section 38 as defined in Section 36 of the Building Construction Industry Improvement Act 2005 or the provisions of Section 420 of the Workplace Relations Act, and in addition Section 507 would likewise not have application with regard to any 4 hour deduction of pay.

The Panel relies on a number of decisions of the ABCC going to the question of industrial motivation and constitutionally connected action. To arrive at this conclusion, namely -

- McFee - Bendigo Goldfields Redevelopment
- Hooker Cockram - Defence Science & Technology Organisation
- Multiplex - Melbourne Showgrounds Redevelopment

There is no evidence that the employees stopped work other than their concern for their safety and the imminent risk as to their well being. The fact that on each occasion a member of responsible management either agreed to the meetings, or

agreed to a process whereby activities were undertaken to ensure the safety of the workers and importantly that the employer met their obligations under the Occupational Health and Safety Act.

All of the lost time was associated with a genuine concern as to employee safety and workplace practices consistent with the Act or the relocation of certain employees of the sub-contractors.

We now turn to clause 16.4.1 which states -

"**16.4 Direction to cease work**

**16.4.1** If -

(a) An issue concerning health or safety arises at a workplace or from the conduct of the undertaking of an Company; and

(b) The issue concerns work which involves an immediate threat to the health or safety of any person; and

(c) Given the nature of the threat and degree of risk, it is not appropriate to adopt the processes set out in clause 16.3 -

the Company or the health and safety representative for the designated workgroup in relation to which the issue has arisen may, after consultation between them direct that the work is to cease."

Clearly the material before us confirms that the finding of asbestos did involve an immediate threat to the worker's health, not only the discovery that occurred on Monday 18 May, 2009 but also the additional findings resulting from the audit on Wednesday 19 May and Thursday 20 May, 2009. Consistent with the EBA the Company and the health and safety representative consulted and agreed to direct that the work should cease. This occurred on a number of occasions between Monday and Thursday. Some employees were relocated, however the EBA at 16.5.2(b) requires payment if not relocated.

It is of some concern that the Worksafe Inspector did not personally examine the affected areas and did not consult with other than the employer.

Clause 16.5.2 says:-

If -

"(a) The inspector issues a prohibition notice; or

(b) otherwise determines that there was reasonable cause for employees to be concerned for their health or safety -

An employee who was not assigned suitable alternative work pursuant to 16.4.2, and who has a result of the issue arising, does not work for any

period pending its resolution but would otherwise be entitled to be paid for that period continues to be entitled to be paid for that period."

The inspector notes in his report that the employer engaged Noel Arnold and Associates P/L who subsequently verified that the substance did contain asbestos and made certain recommendations for full rectification which Worksafe expects will be followed. He also goes on to describe some of the actions that should be taken and refers to the Audit of 29 February, 2006.

He makes no references that the Asbestos Audit and associated Register had not been updated since that date and given his comments and his agreement to the process there must have been some concern and reasonable cause for concern for the health and safety of the workers.

Importantly, all of the issues that occurred throughout this period related to the safety of the workforce and were not industrially motivated or constitutionally connected. A position obviously endorsed by the employer's representative on site at the time, who agreed to a process which included employees not performing their normal work because of the safety issues.

For all these reasons, we find that the workers who have not been paid should be paid for the period they were deducted when they were on site.

An additional matter to be dealt with by the Panel (as advised to the parties) relates to an incident involving a crane which occurred on Saturday 20 June, 2009

(notified as Sunday 21 June, 2009 by the employer) which led to a site meeting on Monday 22 June, 2009.

The Union stated that the meeting had been agreed to by Cameron Jackson, Site Safety Supervisor.

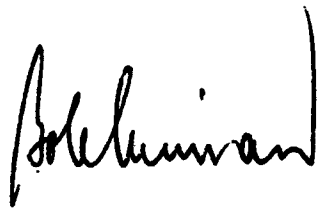
The employer was apparently invited but declined to attend the meeting. A range of concerns were raised during the course of the meeting including the fact that the nature of the site required specific work methods as opposed to the generic, i.e. stringent visual observation etc.

As craneage operations were regarded as high risk on this project, site inductions were regarded as essential to the Occupational Health and Safety Policy and operations on the project consistent with the standards set out in the Occupational Health and Safety Act 2004 (Clause 20) - "The Concept of Ensuring Health and Safety".

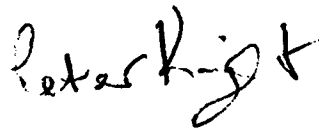
Apparently, following the meeting, the employee Health and Safety Representative was advised that the meeting, which took approximately 45 minutes, was not authorised and therefore a 4 hour deduction of pay would occur.

It would appear from the evidence presented at the hearing the Panel could only come to the conclusion that the employer safety representative on site, Safety

representative Cameron Jackson authorised the site meeting of Monday 22 June, 2009 and the associated events following a change of work procedures, site re-inductions etc could not constitute industrial action set down in the relevant Acts or Regulations and therefore 4 hours payment should not be deducted.



BOB MERRIMAN
CHAIRMAN



PETER KNIGHT
PANEL MEMBER

BILL DAVIS
PANEL MEMBER

DATED THIS 16 DAY OF JULY 2009