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Précis Paper

Teekay Shipping (Australia) Pty Ltd v Auld [2020] FCAFC 206

A discussion about the application of consultation obligations in enterprise agreements in the recent decision of Teekay Shipping (Australia) Pty Ltd v Auld [2020] FCAFC 206.

Discussion Includes

- Significance of the case
- Background
- Relevance of the case
- Teekay's judicial review applications
- Key lessons for employers

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Teekay Shipping (Australia) Pty Ltd v Auld [2020] FCAFC 206

In this edition of BenchTV, Bilal Rauf (Barrister, State Chambers, Sydney) and Shelley Williams (Partner, Kingston Reid) discuss the application of consultation obligations in enterprise agreements in the recent decision of Teekay Shipping (Australia) Pty Ltd v Auld [2020] FCAFC 206.

Significance of the case

1. This case is important because it is concerned with the application of consultation obligations in enterprise agreements as well as their requirements contained in the Fair Work Act (the Act).
2. It travelled a long journey between the Fair Work Commission (FWC), the Full Bench of the Fair Work Commission (Full Bench) and the Full Court of the Federal Court (Full Court). At the end of the journey, clarity was reached on the consultation provisions in the Act, where they are contained in enterprise agreements, and how they should be understood, particularly when there is an issue about a model consultation term (model term) being picked up and how it interacts with the existing provisions in an enterprise agreement

Background

3. The proceedings originally commenced as 31 unfair dismissal applications were filed to the Fair Work Commission (FWC) on behalf of a group of employees who were being made redundant following BHPB Freight's decision to cease operations of its last two vessels, Mariloula and Lowlands Brilliance, in Australia.
4. Teekay Shipping (Australia) Pty Ltd (Teekay) provided crewing and management services to Mariloula and technical and crew management services to Lowlands Brilliance.
5. On 10 January 2019, Teekay notified its employees and the union of its customers' decision to terminate its shipping and crew management arrangements with Teekay.
6. Between 11 and 25 January 2019, Teekay conducted discussions and consultation with the union and affected employees, and communicated the loss of the crewing and management contracts.
7. On 7 February 2019, Teekay terminated over 60 vessel crew members by way of redundancy.
8. There were three different types of objections, with the first two being resolved at the initial stage of the case.

9. The most important one was the last one where there were 21 applications surrounding the issue of whether they had been made genuinely redundant under section 389 of the Act. If they had been, then they were precluded from making an unfair dismissal application.
10. It was this issue that went all the way in the case, which involved the notice to produce. The union wanted a whole category of documents but Teekay's lawyers raised an objection to that saying it was not relevant.
11. The determination of the issue turned on when the consultation obligations started. Teekay's lawyers said at the time the enterprise agreement was approved, the FWC had noted that the model term had been picked up. As such, the model term was the applicable term and that term started once the decision related to an employment had been made.
12. Meanwhile, the purported clause in the agreement was a more extensive clause which had been negotiated that it started at the time when the employer was considering making a decision. The union said that was the clause that applied. Therefore, it turned on which consultation clause applied as well as the timeframe for it, and that in turn determined how far back the union could go and get documents from Teekay.
13. Eventually, it was determined that it should be resolved as a preliminary point by the Full Bench.

Relevance of the case

14. The genesis of this question is derived from sections 205(1) and (1A) of the Act which set out the requirements of an enterprise agreement to contain a "consultation term". The Act states that a "consultation term" must be included in an enterprise agreement, with subsection (1) setting out the requirements of that consultation term. An employer cannot give an undertaking in relation to a consultation term. The consultation term has to comply with subsections (1) and (1A) of section 205. Or if it is deficient, then subsection (2) will become relevant.
15. Under section 205(1), the consultation term needs to allow for consultation in relation to a major workplace change, or a change to regular rosters or ordinary hours of work. The consultation term also needs to allow for the representation of those employees by their nominated representatives.
16. Section 205(1A) deals with the change of an employee's regular roster or ordinary hours of work. But this section was not of particular relevance in this case.
17. However, if the consultation term in an enterprise agreement does not meet those requirements, which Teekay submitted in this case, then if an enterprise agreement does not include a consultation term, or if the consultation term is an objectionable emergency management term, then the model term would be taken to be a term of the agreement by virtue of section 205(2).
18. Section 205(3) sets out that the regulations must prescribe the model term for enterprise agreement.

Teekay's judicial review applications

19. Teekay filed a judicial review application in the Federal Court seeking constitutional writs and declarations that the Full Bench had erred in its reasons by concluding that section 205(2) was not engaged and the model term was not a term of the Teekay enterprise agreement.
20. Teekay contended that the Full Bench misconstrued that statutory question posed by section 205 by finding that clause 8 of the Seagoing Industry Award 2010 (the Award clause) together with clause 9 of the enterprise agreement met the requirements of section 205 without resolving the extent to which there was an inconsistency of those terms which was required by clause 5.3(b) of the enterprise agreement.
21. As such, the Full Bench was required to ascertain the true extent of any putative consultation clause by reference to which section 205 was required to be assessed. The first question to be answered is: "What is the consultation term?". Once it has been identified, it should then be determined whether it was deficient, If the answer is "yes", then a model term is taken to be a term of the enterprise agreement.
22. Eventually, three clauses arose in the debate, namely: (i) the agreement clause; (ii) the Award clause; and (iii) the model term.
23. During the arguments, Full Bench which raised the proposition that at the time the agreement was approved, there was the existing agreement clause, and it was to be understood in combination with the Award clause which has been picked up and potentially plugging in any gaps. If that view was taken, then at the time that the agreement was approved, it met the requirements of section 205 and contained a valid consultation clause and therefore there was never any basis as a matter of law for the model term to be taken as a term.
24. Teekay's lawyers argued that the agreement clause and the Award clause were very different and inconsistent. The agreement clause started at an earlier time than that of the Award clause and hence they could not be joined together, and have some hybrid where the Award clause plugs in. The Full Bench did not like the argument, saying when the clauses were read together, they met the requirements of section 205, and as a matter of law, the model term was never taken to be a term of the agreement.
25. That was the primary position of the Full Bench that the existing clause in the agreement applied and that it was deficient, the Award clause plugged in the gap so it was not deficient anymore. And the model term could hence be disregarded.
26. Then it came back to the question of whether the model term apply to the exclusion of the agreement term.
27. The question remained if a model term was taken to be a term of the agreement, what impact or effect it has on the existing clause which the parties have negotiated and

included in the agreement. The FWC said the model term does not operate to the exclusion of the existing provisions.

28. The Full Court expressed the concern that there had been reasons but not any proper decision, and it issued a mandamus compelling the Full Bench to issue a proper order which reflected the reasons but responded to the particular question, including that second question that had not been actually submitted but was raised by the Full Bench during the hearing.
29. The matter was remitted back to the Full Bench to hand down its decision. Following a further hearing between the parties, the Full Bench's decision answered those two questions.
30. The first question was whether the effect of reading clauses 5.3 and 9 of the agreement properly construed and read together with clause 8 of the Award operated as an incorporated term which would mean the agreement contains the consultation term that complies with section 205 so that subsection 205(2) is not engaged.
31. The Full Bench answered "yes" to that question, and it found the model term was not taken to be a term of the enterprise agreement.
32. The second question that was required to be answered by the Full Bench was whether the model term, when taken to be a term of the agreement, apply in substitution of or in conjunction with clause 9 of the agreement. Teekay submitted it was "in substitution of", and that was the model term that should apply. The Full Bench disagreed with that saying in answering that question, if the answer to the first question was incorrect, that when read together the clauses do not form a valid consultation term, then the model term is taken to be a term of the agreement and applies in conjunction with clause 9 (which is said to be the deficient term) of the enterprise agreement.
33. The Full Bench said clause 8 of the Award operates as an incorporated term of the agreement and has effect, subject to an inconsistency with the express provisions of the agreement.
34. Teekay then filed a second judicial review application in the Federal Court that the Full Bench had erred in answering and deciding on those two questions.
35. On 27 November 2020, the Full Court handed down its decision in favour of Teekay's interpretation of section 205 as well as its enterprise agreement.
36. There were two key issues at the subject of debate. First, was there an inconsistency between the existing agreement clause and the Award clause. If there was an inconsistency, it went to the question of whether it has been complied with section 205, such that it is a valid consultation clause.
37. The important aspect was understanding how to construe those clauses and whether they could be read together or whether they are in fact inconsistent. There is no dispute that if they are, then it would be deficient and the model term comes in. Ultimately, the Full Court agreed with Teekay's lawyers that they are inconsistent, and one cannot just use the Award clause to plug in the gaps to the existing clause. And the issue was left to the existing

agreement clause, which there was no dispute that it was deficient. So, that meant what the FWC did years ago when it approved the agreement it picked up the model term and the model term was taken to be a term.

38. With the model term being there and the existing clause still in the agreement, the question comes to how they should be read, whether the model term replaces and substitutes the existing agreement clause or are they to be read together. Ultimately, the Full Court agreed with Teekay's lawyers that they are to be read as replacing the deficient provisions when taking into account the structure of the Act, the way the mandatory terms work, and the force that they take.
39. The Full Court's decision was important in the sense that it provided clarity to Teekay on the consultation obligations that it was required to comply with in the context of implementing workplace change. It also provided clarity in relation to the interaction of the model term more broadly within the regulations and deficient terms within an enterprise agreement. If there is a deficient consultation term, the decision has provided clarity that it is by virtue of section 205(2) that the model term is taken to be a term of the enterprise agreement.

Key lessons for employers

40. When considering which consultation obligations apply, the first thing that an employer needs to do is to identify whether the consultation term in the enterprise agreement is compliant with sections 205(1) and 205(1A) of the Act, i.e., identifying whether there is a deficiency within the consultation term. Guidance can be taken from the approval decision of the FWC in approving the enterprise agreement and the FWC is required to note in its decision if the model term is taken to be a term of the agreement.
41. If the consultation term is deficient, then on the proper construction of section 205(2) of the Act, the model term is taken to be the term of the agreement for the purposes of consultation to the exclusion of that deficient consultation term that might otherwise exist within that enterprise agreement.

BIOGRAPHY

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Mr Rauf was called to the bar in 2014 and specialises in employment and industrial relations law and workplace health and safety law. His expertise has been recognised in the 2017 Doyle's Guide where he has been included in the list of leading employment and workplace safety junior counsel. Prior to coming to the Bar, Bilal was a Special Counsel at Ashurst in its Sydney and Brisbane offices.

Shelley Williams

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Ms Williams is an experienced employment and industrial lawyer, and providing advice on all aspects of employment, industrial relations and discrimination law including advice and litigation. She represents clients in the federal and state courts and tribunals and regularly appears in the Fair Work Commission on the full range of collective and individual matters.

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Legislation

Section 205 of the Fair Work Act 2009

Section 389 of the Fair Work Act 2009

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