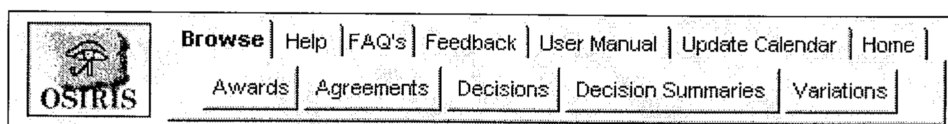

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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.127(2) application to stop or prevent industrial action

The Australasian Meat Industry Employees Union

and

Peerless Holdings Pty Ltd

(C No. 36152 of 2000)

Various employees Meat industry

COMMISSIONER SMITH MELBOURNE, 6 SEPTEMBER 2000

Cessation of industrial action.

EXTEMPORE DECISION

[1] The following decision (now edited and with some additions) was issued at the conclusion of proceedings conducted on 4 September 2000.

INTRODUCTION

[2] This is an application made by the Australasian Meat Industry Employees Union (AMIEU) for an order, pursuant to section 127 of the *Workplace Relations Act 1996* (the Act), to be made against Peerless Holdings Pty Ltd (Peerless).

[3] The order seeks that:

* Peerless be stopped from locking out full-time employees;

* any ban, limitation, or a restriction on the performance of work be prohibited;

* the adoption of a practice or requirement in relation to work the result of which is or would be that work be performed in a manner different from that in which it was customarily performed immediately prior to the commencement of industrial action on 7 August 2000, be prohibited.

[4] Peerless has decided to lock out full-time employees, all are members of the AMIEU. The lockout is designed to induce those employees to accept the terms of an Australian Workplace Agreement (AWA).

[5] It needs to be stated clearly at this stage, that the Commission has no preference over the form of any agreement that might be reached. The Act provides for a range of ways parties may reach agreement either collectively or individually.

[6] Peerless seeks to reduce labour costs and increase productivity by offering AWAs. It is submitted that the company is suffering severe financial hardship.

[7] The reduction in labour costs involves reducing the minimum wage of employees for all purposes, including accrued entitlements for annual leave and long service leave. Peerless seeks to reduce the existing value of both existing and contingent liabilities in respect of accrued benefits.

[8] In relation to increasing productivity, Peerless seeks to base earnings upon a bonus system and will abolish rostered days off.

[9] Peerless has not sought to set aside the existing certified agreement [1] which would test its assertions about the serious financial circumstances facing the company. Rather, it seeks to make an AWA which it believes will override the existing agreement. The effect of the AWA is a matter of some argument between the parties.

[10] In addition, and to contrast the situation, Peerless has sought to negotiate a collective agreement with members of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AFMEPKIU) employed as maintenance employees.

[11] It appears that Peerless seeks to distinguish between categories and classes of employment in pursuit of AWAs.

[12] The matter has been argued before the Commission now for three days. Last night I declined to issue an order which might be described as interlocutory[2] in character and permitted the lock-out to begin this morning. This was done so that I could consider all the evidence.

[13] Today, the employer has locked out all full-time employees and has maintained a full production schedule through the use of casual employees. Casual employees were engaged following an earlier lockout and those persons have been trained to perform duties by the full-time staff. The casual employees have not been offered AWAs and are currently covered by terms and conditions of the existing certified agreement.

[14] It is argued by the union that the use of casual employees constitutes an unfair labour practice and is evidence of a failure to bargain in good faith. It is submitted that the employer has deliberately created a pool of casual employment so that it may maintain full production at a time when it locks out employees through AWA industrial action.

[15] The issue of replacement employees being used during strikes or lockout is indeed a vexed question in collective bargaining economies [3]. Whilst it is always a matter of fact and degree, I take the view that the use of replacement employees may well give rise to a conclusion that an employer is not bargaining in good faith.

JURISDICTION.

[16] Given the order I am about to make, I do not doubt that the Commission has jurisdiction. Authority of that proposition is the decision of the Full Bench in *The Australasian Meat Industry Employees Union v G & K O'Connor Pty Ltd*[4]. That case is also authority for the proposition that the Commission should be reluctant to issue such orders in AWA industrial action.

[17] I have considered this aspect very carefully.

RELIEF.

[18] I propose to make an order bringing to an end the industrial action.

[19] I do this for a number of reason which, in combination and in the circumstances of this case, lead me to that conclusion.

[20] Those reason include:

* The history of the controversy between the parties. This matter has been on foot for some considerable time and has been the subject on numerous decisions, directions and orders of the Commission.

* The use of casual employees as replacement employees and the fact that these casual employees have not been offered AWAs leads to the apprehension, in my mind, that the employer is not bargaining in good faith.

* The different treatment of employees in relation to the industrial regulation preferred by Peerless.

* The timing of the notice to employees of the lock-out and its relationship to the Directions issued by the Commission on 16 August. [5]

* The fact that the employer has now resisted all attempts to resolve the conflict through ADR by the use of conciliation/mediation, even in circumstances where the lock-out may continue. I recognise that that the employer earlier took part in conciliation before Commissioners Simmonds and Gay and progressed that to the extent it could.

* The terms of the proposed AWA which would require employees to forgo, in some instances, the current value of accrued benefits [6].

* The fact that AWA industrial action is treated in an entirely different way under the Act when contrasted with industrial action associated with the pursuit of a certified agreement [7]. In this connection there is, in my view, no scheme to provide protected action including the circumstances which would give rise to that action. There is a definition of AWA industrial action and a limited immunity if such action is taken. Bargaining periods are unknown to Part VID of the Act, only a regime

of statutory requirements. There is no requirement to bargain, but where an employer purports to bargain it cannot be the case that bargaining in bad faith is permissible.

* The other action I am going to take in relation to case number 36922 of 2000.

[21] The order I will make will be confined to stopping the lock-out and will not deal the other matters raised by the AMIEU. The order will only operate for a period of four weeks while the Commission exercises its other responsibilities under the Act.

[22] Finally, and as an integral part of the decision I now reach, I find pursuant to section 101 of the Act, having regard to section 493, that there exists an industrial dispute within the meaning of the Act between Peerless Holdings Pty Ltd and D B Ciotti and others. The subject matter of the dispute is a series of demands by the employer attached to a letter of 17 August 2000.

[23] Whilst unusual, is also clear that given the history of this matter, conciliation is at an end and therefore I propose to do two things.

[24] Firstly, I propose to consider whether or not an exceptional matters order should be made to deal with the rate of pay which should be paid to persons who take any form of paid leave.

[25] Secondly, I propose to consider whether or not an order should be made on hours of work having regard to section 93A of the Act. Given that my order issued, pursuant to section 127 does not deal with this matter, should the employer decide to introduce rotating shifts then any person who believes that family responsibilities inhibit them from altering their current working hours should notify Peerless. The employee should give reasons why their family responsibilities inhibit them from altering their shifts.

[26] In making this statement, I do not at this stage make any judgment as to the unions contention that the alteration to shift patterns is contrary to the existing certified agreement. The union is at liberty to make an application, separately lodged, for the Commission to determine the proper application of the agreement. If such an application is made, along with the other proceedings foreshadowed, all matters may be covered at the one-time to save further transaction costs.

[27] Matter case number 36922 of 2000 will be listed for hearing of any preliminary arguments on 12 September 2000 at 9.30 am.

BY THE COMMISSION:

COMMISSIONER

Appearances:

E White of Counsel with *A Lester* and *G Bird* for the Australasian Meat Industry Employees' Union.

S Wood of Counsel with *C Jones* on behalf of Peerless Holdings Pty Ltd.

Hearing details:

2000.

Melbourne:

August: 11, 15 and 16; and

September; 1, 3 and 4.

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[1] *Peerless Holdings Pty Ltd and the Australasian Meat Industry Employees Union (Merino Street) Enterprise Agreement 1996* [Print N8159]

[2] Matters involving s.127 require the Commission to deal with an application as quickly as practicable because of the potential harm, but does not permit the Commission to make a decision based only upon the concept of a serious issue to be considered and the balance of convenience. In this context the decision at first instance is appeallable and the same time afforded for reflection to the appeal bench does not exist for the member at first instance

[3] Approaches range from legislative prohibition, judicial precedent and codes of practice. In addition, the reasons may invoke different responses ie whether the use of replacement employees is designed to attack a union bargaining unit

[4] [Print S2371] See also the decision of Simmonds C [Print S6546] and Giudice J [S6876]

[5] [Print S9245]

[6] It is argued that in such circumstances employees would forfeit a considerable amount of money to agree to the terms of the AWA

[7] This may reflect a recognition of the significantly different balance in bargaining power of persons involved in collective, as opposed to individual, bargaining.

Decision Summary

		Industrial dispute - industrial action - s127(2) Workplace Relations Act 1996 - various employees, meat industry - AMIEU applied for an order seeking employer be stopped from locking out full-time employees - employer decided to lockout full-time employees to induce employees to accept terms of an AWA - employer sought to negotiate a collective agreement with members of AFMEPKIU employed as maintenance employees - employer locked out full-time employees and maintained full production schedule through use of casual employees - casual employees not offered AWAs and are currently covered by existing certified agreement - Commission concluded use of casual employees as replacement employees and fact that casual employees not been offered AWAs leads to apprehension that employer not bargaining in good faith - fact that AWA industrial action treated in entirely different way under Act when contrasted with industrial action associated with pursuit of certified agreement - Commission's view no scheme to provide protected action including circumstances which would give rise to that action - Commission to make order stopping lock-out - order to operate for 4 weeks - Commission found pursuant to s101, having regard to s493, that industrial dispute exists between Peerless Holdings Pty Ltd and D B Ciotti and others - Commission to consider whether or not an exceptional matters order should be made to deal with rate of pay which should be paid to persons who take any form of paid leave - Commission to consider whether or not an order should be made on hours of work having regard to s93A - C No 36922 of 2000 listed for hearing of any preliminary arguments on 12 September 2000.
The Australasian Meat Industry Employees Union and Peerless Holdings P/L		
C No 36152 of 2000	Print <<T0409>>	
Smith C	Melbourne	6 September 2000

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