

United Firefighters Union, Victorian Branch

Legal Update Newsletter

Keeping members informed about litigation issues



Issue: 2 Vol: 1 May 2014

To ALL UFU MEMBERS

Litigation Update

This is the second issue of the UFU Legal Update Newsletter.

The CFA and MFB are continuing their regressive and litigious approach towards your terms and conditions of employment which both employers agreed to in 2010.

This monthly UFU newsletter is to keep members informed of the current significant legal and industrial matters facing the Union. Due to space constraints, this is just an outline of some of the key issues that are currently being litigated.

MFB APPLY TO TERMINATE OPERATIONAL STAFF AGREEMENTS

On two occasions the MFB have unsuccessfully attempted to change the decision-maker hearing this case.

The MFB have applied to the Fair Work Commission to have the MFB UFU Operational Staff Agreement 2010 and the MFB UFU ACFO Agreement 2010 terminated. These agreements were negotiated, agreed, signed by the MFB and UFU and then certified by the Fair Work Commission in 2010. The MFB wants to wipe out the operational staff terms and conditions of employment claiming the agreements they negotiated are now unworkable and contain "not permitted matters".

In April the MFB failed in their bid to have the case heard by a Full Bench of the Full Court as the President Justice Ross said it would be heard by one Commissioner and therefore remained with Commissioner Wilson.

The MFB then wrote to Commissioner Wilson asking him to excuse himself on the basis of "apprehended bias".

Apprehended bias is a claim that if a lay fair-minded reasonable person was at the back of the room listening to the case they would think that the Commissioner was not able to make an impartial decision.

The MFB said there was nothing Commissioner Wilson had said or done that would indicate bias but that they wanted to avoid any "embarrassment" resulting from him having to determine matters that may include issues or conduct he had witnessed in the usual course of his duties as Commissioner in matters involving the MFB and the UFU.

The Fair Work Commission is set up on a panel system which has a panel of Commissioners assigned to industry areas and as a result the same Commissioner is often hearing the disputes and issues between the same parties.

Commissioner Wilson determined there were not any grounds for him to "excuse" himself as the MFB had not given any detail or evidence" of apprehended bias.

Continued attacks on your conditions despite agreement in 2010

Therefore the case continues with Commissioner Wilson presiding over the 20-day hearing in July 2014.

The MFB's intention is to have the working conditions of the firefighters covered by the MFB UFU Operational staff agreement reduced to the Modern Award which is the Firefighting Industrial Award 2010. There is no Award for ACFOs and therefore the only protection if the Agreement is terminated is the National Minimum Wage and the 10 National Employment Standards.

The MFB have said it will give an undertaking "to maintain the core entitlements" of operational staff if the Agreements are terminated. The terms, scope or effect of any such undertaking, if eventually given, are unknown.

COMMON LAW DEEDS TO BE CONSIDERED BY THE FEDERAL COURT OF AUSTRALIA IN THE UFU v CFA VOLUNTEER SUPPORT OFFICES CASE

There has been a change of Federal Court Judge to hear the UFU claim that the CFA Volunteer Support Officers jobs include duties performed by fire fighters

In 2013 CFA sought to introduce a Volunteer Support program and officers in early 2013 with no consultation and significant concerns raised by the Union about work currently performed by current Operational Staff.

The UFU filed in the Federal Court regarding breach of the agreement and this matter has been set down to be heard in October 2014.

Initially this case was before Justice Marshall but due to his unavailability it has recently been transferred to Justice Tracey.

The UFU is putting the Common Law Deed between the UFU and the CFA before the Federal Court in this matter.

The Deed was agreed and signed by the CFA and UFU in 2010 to protect terms of conditions of employment should any term of the CFA UFU Operational Staff Agreement be deemed to be unlawful and/or unenforceable.

The Deeds have been put before the Federal Court in this matter as a result of the Recruits case (referred to above) where Justice Murphy found four clauses including the no contracting out/maintenance of classifications clause were unlawful on the basis it interfered with the State's right to determine the number and identity of state employees.

UFU APPEAL AND CFA CROSS-APPEAL OF THE "RECRUITS" CASE IN THE FEDERAL COURT OF AUSTRALIA

The Appeal of the UFU's claim that the CFA is required to recruit firefighters in accordance with the CFA UFU Operational Staff Agreement 2010 is likely to be heard in August 2014 before a Full Bench of the Federal Court.

Specific dates are yet to be confirmed but the Federal Court has indicated the case will be heard in the August sitting.

Continued attacks on your conditions despite agreement in 2010

This is the Appeal of the Federal Court case that was brought because the CFA reneged on the implementation of the independent board of reference findings on severe fire-fighter resourcing problems across the State and cancelling the recruitment of 342 additional staff as agreed ("the Recruits case").

There were a number of issues in the Federal Court case before Justice Murphy. Many of these involved the CFA asserting that the Agreement it had made, and freely entered, and had certified by the Fair Work Commission, was invalid for a variety of technical reasons. The UFU won all but one of these arguments.

In the decision that is being appealed [**United Firefighters Union v Country Fire Authority 2014 FCA 17 (31/1/14)**] the

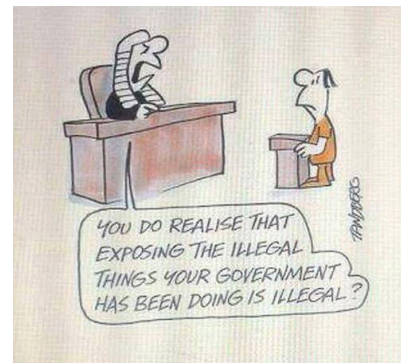
Federal Court ruled enterprise agreement clauses regarding staffing, contracting out/maintenance of classifications; secondment and lateral entry (clauses 26, 27, 28 and 122) were invalid as they impaired the capacity of a state government to determine the number and identity of its employees or the number and identity of employees to be made redundant.

This is known as the Re: AEU legal principle as Re: AEU was a High Court case where the distinction between the powers of the State and the Commonwealth in terms of employment staff was determined.

While Justice Murphy found four of the clauses of the Agreement were not enforceable because of the Re: AEU principle, he went on to say:

*"I have some difficulty in treating the implied constitutional limitation as applicable to **industrial agreements** that are bona fide voluntarily entered into by a state party and which may therefore have no practical impact on a State's capacity to govern."*

The CFA have notified of cross-appeals of Justice Murphy's decision again attempting to challenge the validity of consultation and dispute resolution clauses.



The CFA were not successful in claiming argued that clauses 13, 14 and 16 of the Agreement were "objectionable" and /or "unlawful terms".

The **UFU also successfully defended the dispute clause with** Justice Murphy finding that this clause was valid and that the clause did not prevent a dispute resolution clause from extending to matters beyond the Agreement.

Importantly, the UFU also successfully argued that the CFA is a constitutional corporation. If the CFA had been found not to be a trading corporation then the Referral Act 2009 would prevent prescribed minimum staffing.

Continued attacks on your conditions despite agreement in 2010

The CFA has filed a notice of contention claiming Justice Murphy erred in finding the CFA was a constitutional corporation.

HAZELWOOD MINE FIRE OHS MATTERS

The Victorian Government has established a Board of Inquiry into the Hazelwood Coal Mine Fire to be headed by the Honourable Bernard Teague.

The UFU has filed a submission to the government Inquiry focussing on serious OH&S issues Fire Fighters faced.

Acting on firefighter concerns, the UFU repeatedly sought action from the Fire Services Commission, CFA and MFB Chief Officers and the Government to address the serious health and safety concerns at the time of the Hazelwood Mine fire operation.

These concerns included exposure to health-threatening levels of carbon monoxide, contaminated water and the failure to appropriately test and monitor exposure levels and take appropriate action.

In addition there were inadequate amenities including no or poorly organised transition areas resulting in contaminated PPE having to be worn out of the mine and in rest and respite areas including canteens.

Some six weeks into the protracted serious operation, a report into the level and monitoring of carbon monoxide levels and work systems was leaked to the UFU.

In addition to the UFU submission to the Board of Inquiry, the UFU has also sought inquiries the Coroner and WorkSafe

undertake the appropriate investigation into the conduct of the operation of the mine fire and resulting health issues suffered by firefighters and the community with a view to possible prosecution.

The Coroner has said that Office will not investigate as it views it as a duplication of the government's inquiry into the Hazelwood fire. Worksafe has referred the UFU claim to the Enforcement Group for a comprehensive investigation regarding breaches of OH&S legislation. Worksafe stated as six months has not elapsed since alleged event has occurred the matter is not treated as a request for prosecution.

EPA have issued clean up notices regarding the site soil and water

The UFU is currently pursuing an investigation and prosecution through WorkSafe regarding this matter.

MFB OPERATIONAL BARGAINING/ GOOD FAITH BARGAINING ORDERS

MFB filed for a breach of good faith bargaining and then withdrew their application.

They have since threatened another application and parties are continuing discussions, including through conciliation at the Fair Work Commission.

Justice Murphy's decision in the Federal 'recruits' case has had implications for the negotiations for the CFA and MFB operational staff agreements and has resulted in the UFU re-framing draft staffing clauses that may be affected by the Re AEU principle.

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The UFU has presented a number of recast claims and are seeking to progress bargaining.

It is worthy of note that the MFB cancelled a bargaining meeting in early May claiming their staff were too busy preparing statements and evidence for the MFB termination of operational staff agreements case.

CFA OPERATIONAL BARGAINING - GOOD FAITH BARGAINING ORDERS

CFA filed for a breach of good faith bargaining.

The matter was heard in late February and the Fair Work Commission issued interim orders against the CFA and the UFU. CFA attempted to seek new orders at a hearing on 26/3/14 however this attempt was not accepted by the Commission.

The UFU has presented a number of recast claims and are seeking to progress bargaining.

Parties are currently complying with the interim order and the parties are due to meet in June discuss the claims.

CFA FISKVILLE BARGAINING - FAIR WORK COMMISSION BARGAINING DISPUTE

This matter has been in front of the Fair Work Commission since 2012, where CFA stated that it was their final offer despite not having any wage figures in the agreement at the time. The parties have been in numerous conferences before the Commission since and most recently on Tuesday 25/3 several matters were progressed however significant outstanding matters remain with no adequate movement from CFA. Fiskville hospitality staff are also seeking to become incorporated into the larger PTA agreement. The CFA is yet to

put an offer to vote for employees, despite the previous agreement passing its nominal expiry date almost three years ago.

CFA DMO FAIR WORK COMMISSION BARGAINING DISPUTE

Approximately 25 bargaining meetings and seven Fair Work conferences have been held in order to negotiate an agreement to cover CFA District Mechanical Officers and Tower Overseers

A bargaining meeting was held two weeks ago with CFA providing what they have called a 'final offer' which they will put to vote. Bargaining has now been suspended.

Members have indicated strongly that they intend to reject the CFA's offer, which seeks to limit consultation and redeployment rights and provides for an average pay increase of less than 2.5 percent from expiry of the current agreement.

The current agreement expired at the end of 2012. It's now been more than two years since DMO's and TO's have received a pay rise. Work bans have been in force for two months. The UFU expect to escalate industrial action in coming days.

Continued attacks on your conditions despite agreement in 2010



CFA PAD FLEXIBLE HOURS OF WORK

The UFU and CFA have again met but have been unable to resolve this dispute where the CFA wan to implement flexible hours for PAD Operators pursuant to clause 150 of the 2010 Agreement.

This matter is still in conferences before the Fair Work Commission.

The CFA has sought to implement a flexible hour's arrangement. The CFA has filed in Fair Work Australia in a bid to put PAD supervisors and operators on a roster.

The PAD section of the enterprise agreement clearly sets out the hours of work. The CFA is claiming that a clause headed "flexible working hours" is sufficient to change those hours of work. The UFU has claimed FWA has no jurisdiction to hear the matter as the hours of work clause details the hours to be worked and it would be an extra claim.

FWC decided that parties should attempt to reach agreement on the implementation of flexible hours. The UFU appealed this matter however because the FWC didn't finally decide the dispute, meaning the appeal could not be heard at that time.

The Commission has recently raised a technical issue as to the status of the initial dispute and partially determined by Commissioner Roe.

There is a FWC conference report back to Commissioner Wilson this month where the issue of flexible working hours and the status of the initial dispute as partially determined by Commissioner Roe will be discussed.

PTA BARGAINING

Preparations for CFA PTA bargaining has been ongoing with formal bargaining to commence shortly.

Delegate elections have been held recently with four new delegates elected as PTA representatives.

Interest in bargaining has been strong due to cutbacks which have been focussed on CFA admin and support staff.

The UFU intend to initiate bargaining in within 1-2 weeks

CFA RESERVED MATTERS AND HEAVY HAZMAT ALLOWANCE

The Fair Work Commission recently determined it has jurisdiction to hear the UFU's reserved matters claims but has adjourned the hearing of these matters pending the "Recruits" Appeal to be heard by a Full Bench of the Federal Court and the bargaining of the CFA Operational Staff

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Agreement.

Commissioner Wilson is still considering jurisdictional arguments regarding the UFU's Heavy Hazmat claims.

At the time the 2010 CFA Operational Staff Agreement was negotiated and agreed, CEO Mick Bourke wrote a letter setting out a list of reserved matters that could go to arbitration if the CFA and UFU could not reach Agreement.

When the UFU first applied to have several "reserved matters" arbitrated, the CFA attempted to avoid arbitration by claiming the UFU first had to show the claims had merit, would be cost-neutral and had a health and safety aspect.

Recently the CFA changed its objections and now claim the FWC does not have jurisdiction or they should not be arbitrated because they are matters included in the current bargaining, are matters being appealed in the Full Federal Court in the 'recruits' case and other jurisdictional grounds.

The CFA also objected to the Commission hearing the UFU claim for a Heavy Hazmat allowance on the same basis.

LATE NOTIFICATION PAYMENTS

For some time members have been raising with the UFU multiple disputes relating to the MFB refusing to pay members payments regarding late notification of a move. The UFU has always maintained that the clause requires a member to be notified of a move within the specified timeframes and, at a time

when they are *on shift*. The MFB have sought to deny this interpretation and deny members payment.

The UFU is now running a test case arbitration before the Fair Work Commission seeking a decision on the interpretation of the clause. The matter will be head in early May.

NON-PAYMENT AND PAYROLL DEDUCTIONS

The UFU has filed applications in the Federal Court to have MFB firefighters paid the monies they are owed for deployments to Stawell and Hazelwood.

The MFB has continued to seem incapable of simply paying members in time for their work. The UFU has filed for payment through Federal Circuit Court within the small claims jurisdiction.

TERMS OF REFERENCE DISPUTE

Recently the MFB did not succeed in an application to re-open the term of reference dispute.

In 2011 the UFU filed a dispute surrounding the terms of reference for the Consultative Committee and Sub-Committees. As members would be aware the consultative process is crucial to ensuring your voice, through your representatives, is heard, and is part of decisions within the MFB.

The process since the operation of the agreed terms of reference has come into force has generally been smooth between the parties with consultative committee meetings and subcommittee meetings being held

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regularly.

The MFB however, who we know are continually trying to collapse the consultative process and avoid firefighter input, have sought to recently re-open the terms of reference dispute before FWC which was concluded in 2011.

The Fair Work Commission denied the MFB request to reopen the dispute.

MFB LEAVE BALANCES

This matter has been ongoing at the Fair Work Commission regarding the accuracy of Firefighter's leave balances within the MFB. This has been a persistent and ongoing issue. To date the MFB has been unable to explain why numerous employees have identified significant discrepancies within their leave balances.

Last year before the Commission the MFB made commitments to provide the Deloitte audit report to the UFU. However after numerous requests, a report has not been forthcoming and the UFU has recently sought the matter be relisted.

TRANSFIELD NON-PAYMENT OF ALLOWANCE

The UFU have lodged a dispute in the Commission regarding a non-payment of an allowance at Transfield, the 'Range' allowance. A conference regarding this matter is scheduled for 1/4/14 at the Fair Work Commission.

AWARD MODERNISATION

As part of the award modernisation process, enterprise awards and other awards are being modernised or terminated. The UFU has made applications to modernise the

Victorian Firefighting Industry Employees Award and the CFA Administrative and Support Services Award.

The Award that the MFB have referred to in correspondence regarding their application to terminate the operational staff agreements is an Award that has already been modernised – the Firefighting Industry Award.

In most cases these Awards are the safety net of conditions which have been significantly superseded by enterprise agreements. However it is important to protect these instruments of which are utilised by the Commission when considering the approval of enterprise agreements

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The United Firefighters Union holds one of the highest membership densities of any contemporary unions, whereby almost all CFA and MFB firefighters are members.

This means we have a collective voice which is both unique and loud.

It means as a collective, we can cause change where wrongs need to be righted.

STRENGTH IN UNITY

Do you have a question?

Please email any questions to reception@ufuvic.asn.au.

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