

United Firefighters Union, Victorian Branch

Legal Update Newsletter

Keeping members informed about litigation issues



Issue: 3 Vol: 8 August 2014

To ALL UFU MEMBERS

Litigation Update

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.

The MFB applications to terminate the Agreement has been part-heard in the Fair Work Commission, the "Recruits" case appeal is before a Full Bench in the Federal Court mid August and there are two other Federal Court matters on foot and numerous other matters before the Commission.

In addition it has been necessary to have legal support and assistance with bargaining matters.

It is unlikely that this current environment will change without a change in Government.

The UFU has sound financial management processes in place. In the face of ongoing litigation including the establishment of a dedicated committee for the purpose of monitoring the cost of litigation and to report the status of such costs and any recommendations to the Branch Committee of Management. This sub-committee is representatives of the membership and includes professional expertise.

This is the third issue of the UFU Legal Update Newsletter which 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 APPLICATION TO TERMINATE OPERATIONAL STAFF AGREEMENTS

The MFB Application to terminate the MFB UFU Operational Staff Agreement 2010 and the MFB UFU ACFO Agreement 2010 was heard in the Fair Work Commission in July 2014.

The case has been adjourned to be reconvened on the 21st and 22nd August 2014 when the legal submissions will be presented orally by Counsel

The MFB 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 "non permitted matters". The MFB filed 15 witness statements and the UFU filed 74 witness statements in the Commission and the evidence was heard from the 7th to the 25th July before Commissioner Wilson.

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The MFB did not contest the evidence of 34 of the UFU witnesses and as a result the statements were handed up and incorporated into the evidence as separate exhibits.

Due to the extensive and unprecedented interest in the case, the Fair Work Commission had set up a video link in a second court room so that 60-70 people could attend at any time to hear the evidence first hand.

Consistently about 60-100 firefighters attended each day filling both court rooms.

This was a powerful message to the Commissioner who must take into account the views of the employees that are covered by the Agreements in his determination of the MFB applications.

A party can apply under section 225 of the Fair Work Act 2009 to terminate an enterprise agreement where it is past the date of the nominal expiry date. However, this provision of the Act is general used for vastly different situations and the MFB attempt to use it in these circumstances is unusual.

Under section 226 FWC *must* terminate an enterprise agreement if:

- FWC is satisfied that it is not contrary to the public interest to do so; and
- FWC considers it appropriate to terminate the agreement taking into account all the circumstances including:
 - The views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

- The circumstances of those employees, employers and organisations including the likely effect will have on each them.

As the above tests include the views of the employees and the union, a wealth of evidence from firefighters of all ranks was put before the Commissioner including the UFU survey which showed that more than 96% of those that participated strongly disagreed with the termination of their agreement. The UFU evidence included statements from six Assistant Chief Fire Officers, 13 Commanders, 10 Senior Station Officers, 16 Station Officers, 21 Leading Firefighters, three senior Firefighters, Firefighters.

The UFU also provide expert evidence through Dr Ian Gordon, the University of Melbourne Director of Statistics who found the the UFU survey of members on their views of termination was valid, and Dr Francesco Litow, an American Physician who is an expert in the necessity of trust in systems, equipment, training and colleagues in defence and firefighting.

Throughout the hearing the MFB attempted to portray firefighters as thugs by having body guards with the MFB witnesses continually.

On the first day of the hearing there was a police presence and additional security measures at the Commission. Upon inquiries the UFU was informed that the police had been told that the UFU members intended to storm the Commission and occupy it. It was not disclosed who had made such allegations to the Police and the Commission.

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The continued mass presence of firefighters who sat and listened intently to the witnesses throughout the 15 days of evidence was testament to the integrity and professionalism of firefighters. It was clear from the first day that the MFB's perceived need for bodyguards was a stunt. The Commissioner got to see for himself not only the great interest in the case but the professionalism of firefighters in the manner they conducted themselves, even when hearing evidence that was not consistent with their own experiences.

During the hearing the MFB produced a document now known as MFB Exhibit 9 dated June 2014 which sets out the Chief Officer's intention to assess the fire risk of the MFD each week and determine staffing and trucks accordingly. The proposal provides for the Chief Officer to reduce minimum crewing to 246 and take 8 water tankers out of the system on the lowest risk days.

The MFB have said it will give an undertaking "*to maintain the core entitlements*" of operational staff if the Agreements are terminated. This is extremely misleading as the undertaking provided is questionable as to whether it can be enforced. The terms of the undertaking involve a significant reduction in conditions that MFB firefighters currently enjoy under the 2010 enterprise agreement. The MFB's undertaking expires in 12 months and what happens to your terms and conditions then is unknown, is a matter for the MFB subject to the award, if any award applies.

During the hearing when asked what would happen after 12 months the Chief Officer Peter Rau said he did not know.

The legal submissions will be made before Commission on the 21st and 22nd August and then it is expected Commissioner Wilson will again adjourn to consider the matter with a written decision to be provided at a later date.

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 will be heard before a Full Bench of the Federal Court on the 13th and 14th August 2014.

The Full Bench will consist of Justices Perram, Robertson and Griffiths.

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 firefighter resourcing problems across the State and the cancelling of recruit courses impacting on the recruitment of 342 additional staff as agreed ("the Recruits case").

The Victorian Attorney-General has intervened in the Appeal. The Attorney-General has to be notified of any Constitutional matter that may affect Victoria. The Attorney-General did not seek to intervene when the matter was first heard before Justice Murphy last year but has filed submissions and is intervening in the Appeal. 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,

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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 employing 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 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 dispute resolution clause was not prevented 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.

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

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

This Federal Court matter has been adjourned pending the Appeal of the "Recruits" case in the Federal Court as the issue of the application of the Re AEU case and referral laws is relevant.

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.

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

The UFU amended its statement of claim this year 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 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. The inclusion of the Deeds in this case means that the UFU is arguing that if the maintenance of classifications clause in the enterprise agreement is found to be invalid that the provision in the Deed should be enforced and the classifications and work of firefighters are to be protected through the Deed.

HAZELWOOD MINE FIRE OHS MATTERS

The Hazewood Mine Board of Inquiry hearings were held in Hazelwood over four weeks in May and June 2014.

The UFU filed an extensive submission that included personal experiences of a series of firefighters and focused on OH & S issues

and the lack of consistent and appropriate incident management systems.

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 requested the Coroner and WorkSafe to 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's Office will not investigate as it views such an inquiry would be a duplication of the government's inquiry into the Hazelwood fire. Worksafe has referred the UFU claim to its Enforcement Group for a comprehensive investigation regarding breaches of OH&S legislation.

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The UFU is currently pursuing an investigation and prosecution through WorkSafe regarding this matter. WorkSafe have commenced this process including meeting with the UFU to discuss the issues the UFU had included in its complaint.

CFA OPERATIONAL BARGAINING UPDATE-

CFA are taking a lengthy bureaucratic and legalistic approach to bargaining.

It appears that both Government and lawyers are providing direction and advice to their bargaining strategy.

Bargaining commenced in June 2013.

There have been numerous meetings and matters before the Fair Work Commission, brought by both the UFU and CFA.

As members will be aware, in February 2014 the FWC issued interim orders against both the CFA and UFU in order to progress bargaining. These orders were complied with, however CFA in line with their previous legal behaviour, have simply found new matters to complain about.

The CFA is asserting that the UFU should also amend its claims in regard to the CFA view regarding re AEU and other legal issues regarding permitted matters.

In the interests of furthering the bargaining the UFU has redrafted clauses in such a way as to address the alleged concerns and these were provided to the CFA on 9 May 2014.

The UFU has a strong view that such clauses which the CFA complain of are permitted, and as discussed above the UFU is challenging the CFA "Recruits" case which the CFA is

relying upon in making its complaints about the validity of the clauses.

Despite the significantly redrafted claims, the CFA have continued to refuse to discuss any claims at all. The CFA have claimed that the redrafted UFU claims are also not legal.

Again the CFA went to the Commission seeking good faith bargaining orders.

The UFU defended these claims and Deputy President Smith is currently considering the matter. Further, the UFU also has recently met with the CFA twice, once in the presence of legal counsel, to explain why the CFA's position is incorrect.

MFB OPERATIONAL BARGAINING UPDATE

The MFB filed for a breach of good faith bargaining late last year and then withdrew their application in February this year. On the same day, the MFB then notified under the Fair Work Act an intention to seek bargaining orders on different grounds regarding the UFU allegedly seeking unpermitted content, including re AEU related clauses.

It became apparent that the MFB would not agree to the UFU proposed clauses, and would not continue to bargain. The UFU on a totally without prejudice basis committed to recast the UFU claims in such a way as that they should not offend any party.

Recasting was a work intensive process and involved assistance of the UFU legal team.

However the MFB have now claimed that the re-casted claims are not lawful. The MFB have simply refused to continue to bargain.

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The MFB have put forward an ultimatum that they will only bargain if the UFU withdraws the claims that the MFB assert are illegal. The MFB won't even meet to discuss the claims they complain about.

At the time of writing, the UFU is proposing a further meeting and topics to progress the negotiations.

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 over three years ago. The UFU have sought a further conference with the Fair Work Commission which has been listed for September.

CFA PAD FLEXIBLE HOURS OF WORK

The UFU and CFA have again met but have been unable to resolve this dispute where the CFA want 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 CFA have provided another amended proposal to the UFU. The UFU have sought clarification on this amended proposal from the CFA and will then seek to meet with affected members.

CFA RESERVED MATTERS AND HEAVY HAZMAT ALLOWANCE

The UFU is appealing the Fair Work Commission jurisdictional decision to adjourn these matters until the "Recruits" Appeal is determined and until the bargaining for the CFA Operational Staff Agreement is completed. The Appeal will be heard by a Full Bench of the Fair Work Commission on the 28th of August 2014.

At the time the 2010 CFA Operational Staff Agreement was negotiated and agreed, CEO Mick Bourke wrote a letter setting out a list of

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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.

The CFA changed its objections to 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.

NON-PAYMENT AND PAYROLL DEDUCTIONS

The UFU lodged an application in the Federal circuit court on behalf of the hundreds of MFB fire fighters who were not provided with payments for overtime performed at the Hazelwood incident until months following the performance of their shifts.

In their defence, the MFB deny that they did not pay the overtime in a timely fashion. They also deny that overtime payments were not made within a month of the work being performed.

The UFU finds it difficult to believe that the MFB are able to deny these charges.

The matter could not be resolved through mediation which occurred yesterday and has been set down for a hearing in May of next year.

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 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

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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. At a recent Fair Work conference the MFB undertook to make the Deloitte employees who prepared the report available to UFU representatives discuss its contents. This meeting is scheduled to take place on 16 August. Following this meeting it is expected the matter may proceed to a hearing or conference.

TRANSFIELD NON-PAYMENT OF ALLOWANCE

The UFU have lodged a dispute in the Commission regarding non-payment of an allowance at Transfield, the 'Range' allowance. The matter could not be resolved at a recent conference and will now be listed for arbitration.

AWARD MODERNISATION

As part of the award modernisation process, enterprise awards and other awards are being modernised or terminated. The UFU made applications to modernise the Victorian Firefighting Industry Employees Award and various other CFA and MFB awards.

CFA applications are currently adjourned pending the outcome of the recruits case appeal.

We are currently awaiting judgement on 'threshold issues' which will determine whether or not our application to modernise

the Victorian Firefighting Industry Employees Award is allowed to proceed.

The MFB have opposed the application as part of their overall strategy to reduce fire fighter conditions.

The Award that the MFB have referred to in correspondence regarding their application to terminate the operational staff agreements is the Firefighting Industry Award. Which is a generic award that provides for inferior conditions to the VFFIEA Award that was created specifically for CFA and MFB firefighters..

COMPASS BARGAINING

Firefighters engaged by Compass at defence bases in Northern Victoria and Southern New South Wales have been advised that they will not be provided with a redundancy payment at the conclusion of their contract later this year. The UFU initiated bargaining and lodged a protected action ballot application to try to ensure that members

A conciliation conference is scheduled to be held on Monday the 11th of August.

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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.

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STRENGTH IN UNITY

Do you have a question?

Please email any questions to

reception@ufuvic.asn.au.