HIGH COURT OF AUSTRALIA

14 August 2013

CONSTRUCTION FORESTRY MINING & ENERGY UNION v MAMMOET AUSTRALIA PTY LTD
[2013] HCA 36

Today the High Court unanimously allowed an appeal from a decision of the Federal Court of Australia, which held that the provision of accommodation to employees during a period of "protected industrial action" would have constituted a "payment" by their employer that was prohibited by s 470(1) of the *Fair Work Act* 2009 (Cth) ("the Act").

The appellant represents the industrial interests of a number of the respondent's employees, who worked on construction at the Woodside Pluto Liquefied Natural Gas Project on the Burrup Peninsula in Western Australia. The employees worked on a "fly in/fly out" basis. Under the terms of an enterprise agreement ("the Agreement"), the respondent was required to provide its employees with suitable accommodation or to pay them a living away from home allowance, while they were on location. The respondent elected to provide the former.

On 21 April 2010, the respondent was notified that some of its employees intended to take "protected industrial action" for a period of 28 days as part of the process of negotiating a new enterprise agreement. The respondent informed the employees that for the duration of that period it would cease to pay for their accommodation.

The appellant applied to the Federal Magistrates Court, seeking relief on the basis that the respondent's refusal to provide accommodation breached the terms of the Agreement and constituted "adverse action" contrary to s 340(1) of the Act. The respondent argued that it was obliged to cease providing accommodation pursuant to s 470(1) of the Act, which provides that if an employee engages in "protected industrial action ... the employer must not make a *payment* to an employee in relation to the total duration of the industrial action on that day." The respondent's contention was accepted in the Federal Magistrates Court and on appeal to the Federal Court.

The High Court unanimously held that the provision of accommodation would not have constituted a "payment ... in relation to the total duration of the industrial action." It held that when s 470(1) speaks of "payment" it means a payment in money and not simply the transfer of any economic benefit by an employer to an employee. The Court held that the section was principally concerned to prohibit the payment of "strike pay". The Court also dismissed the respondent's argument that because the employees were not ready, willing and available to work, they were not entitled to accommodation under the terms of the Agreement. In the absence of an express or implied term to the contrary, the Court held that the employees' entitlement to accommodation was dependent only upon the continuation of the employer-employee relationship and the presence of the employees on location at the respondent's direction. The Court ordered that the application should be remitted to

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893
Email: bwickham@hcourt.gov.au Website: www.hcourt.gov.au

the Federal Circuit Court to be heard and determined according to law.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*