

Potentially unlawful employer surveillance not enough to invalidate enterprise agreement

A recent decision of the Fair Work Commission has approved an enterprise agreement despite containing a clause that potentially breached state legislation because it allowed GPS tracking of employees and equipment. Senior Associate, Benjamin Motro and Lawyer, Ryan Ainscough discuss.

Facts

An application was made by the City of Joondalup, the employer, to the Fair Work Commission for approval of a single-enterprise agreement known as the *City of Joondalup Inside Workforce Workplace Agreement 2013* (“**the Agreement**”).

The Agreement was opposed by the Australian Municipal, Administrative, Clerical and Services Union (“**the ASU**”) on the basis that clause 37 of the Agreement was not enforceable and could be in breach of the *Surveillance Devices Act 1998* (WA) (“**the Surveillance Act**”).

Clause 37 of the Agreement (“**the Clause**”) stated that employees covered by the Agreement acknowledge and consent to a Global Positioning System (“**GPS**”) being installed in equipment or vehicles to be used in the course of their work as supplied by the employer to the employees. The clause expressly stated that the GPS functionality would be used for things such as an alarm in case of an emergency; to collect data for performance analysis and providing location information for vehicles to ensure safety and efficiency.

The Clause acknowledged that it could not override the Surveillance Act and that the employer would advise employees of the use of any information obtained from the GPS which was considered beyond what was detailed in the Clause, prior to using any such information.

Subject to some exclusions, section 7 of the Surveillance Act generally prohibited a person from installing or using a tracking device to determine the geographical location of a person or object without the express or implied consent of that person. Comparable legislation regulating the use of tracking devices also exist in New South Wales (*Surveillance Devices Act 2007* (NSW) s 9); Victoria (*Surveillance Devices Act 1999* (VIC) s 8); South Australia (*Listening and Surveillance Devices Act 1972* (SA)); and the Northern Territory (*Surveillance Devices Act 2007* (NT) s 13).

The ASU submitted that 50 employees of the employer had expressly advised the employer in writing that they did not grant their consent required under the Surveillance Act for the employer to lawfully install or use tracking devices in the employer’s vehicles that those employees might use.

Consequently, the ASU submitted that should the employer install or use tracking devices in vehicles that these employees may use it would be doing so in breach of the Surveillance Act. Other than for this objection, the ASU agreed that the Agreement met all requirements that the Commission was required to consider under the *Fair Work Act 2009* (Cth) (“**the Act**”).

Decision

Section 192 of the Act provides that the Commission may refuse to approve an enterprise agreement if, amongst other things, compliance with such an agreement may result in a person committing an offence against a law of the Commonwealth.

Whilst the ASU acknowledged that the Surveillance Act is a law of Western Australia and not the Commonwealth, they argued that the Commissioner should apply section 192 of the Act to refuse to approve the Agreement by virtue of section 118 of the Constitution which concerns the recognition of State laws.

Commissioner Williams rejected this argument and relied on the authority of previous decisions of the Commission in deciding that there are provisions of the Act indicating a clear distinction between the Commonwealth, a State and a Territory. Therefore, inconsistency with State legislation, rather than Commonwealth legislation was not a matter required to be considered when deciding whether the specified conditions set out in the Act are met in order to approve an agreement.

Therefore the Commission made no finding as to whether the Clause was inconsistent with the Surveillance Act and as he considered that the requirements under the Act had been satisfied, the Agreement was approved.

Discussion

Whilst this decision demonstrates that an enterprise agreement can include terms that are inconsistent with State laws, employers need to ensure that their practices are consistent with state laws, as it will be no defence to a breach of those laws to say that the action was taken consistent with the clause of an enterprise agreement.

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