DECISION

Fair Work Act 2009
s.604—Appeal of decision

Australian Rail, Tram and Bus Industry Union
v
NSW Trains T/A NSW Trainlink
(C2020/6992)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

SYDNEY, 2 MARCH 2021

Appeal against decision [2020] FWC 4359 of Deputy President Sams at Sydney on 26 August 2020 in matter number C2020/441 – permission to appeal granted – appeal upheld.

Overview

[1] The Australian Rail, Tram and Bus Industry Union (the Appellant) has lodged an appeal under s 604 of the *Fair Work Act 2009* (Cth) (the Act), for which permission to appeal is required, against a Decision[1] of Deputy President Sams (Deputy President) issued on 26 August 2020. The Decision dealt with an application made by the Appellant under s.739 of the Act for the Fair Work Commission (the Commission) to deal with a dispute in accordance with the dispute settlement procedure in clause 8 of the *NSW Trains Enterprise Agreement 2018* (the Agreement).

[1] The matter on appeal was subject to a hearing on 20 November 2020. The Appellant and the Respondent sought permission to be legally represented. The Full Bench granted the parties' applications for permission to be represented pursuant to s 596(2)(a) of the Act in the hearing.

[2] The Full Bench has heard the parties on permission to appeal and the substantive appeal.

Decision under appeal

[3] The Deputy President outlined in the Decision that he would approach the dispute, which he had stated arose when NSW Trains T/A NSW Trainlink (the Respondent) commenced discussing with the Appellant the classification of Drivers for a new fleet of trains and a phasing in of changes affecting Guards in 2023, by answering the following questions:

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[1] *Australian Rail, Tram and Bus Industry Union v NSW Trains T/A NSW Trainlink* [2020] FWC 4359 (the Decision).

1. Does Clause 12 of the *NSW Trains Enterprise Agreement 2018* prevent NSW Trains from implementing its proposals in respect to the New InterCity Fleet, unless there is an in-principle agreement with the Union?

2. Is NSW Trains' proposal an extra claim not permitted by Clause 13?

3. Have the provisions of the Consultation Clause (Clause 7), requiring arbitration as to the merits of the proposal, been completed?[2]

[4] After outlining relevant provisions of the Agreement[3], the Deputy President considered the evidence and submissions of both parties[4] and the approach to construing agreements.[5]

[5] We note the following observations made by the Deputy President in respect of those questions. In respect of question 1, the Deputy President concluded that what the Respondent proposes does not require resort to Clause 12 of the Agreement because when the Agreement is read as a whole, and what relevantly informs how the new fleet proposal is to be introduced, and why no Union agreement is required, is entirely permitted and provided for in Schedule 4A of the Agreement.[6] The Deputy President reasoned, *inter alia*, that:

- The words in Clause 12 have a plain meaning and are not ambiguous, uncertain or susceptible to more than one meaning, including the purported requirement to reach an in-principle agreement with the Union and a ballot of affected employees, before NSW Trains can introduce changes to the fleet as envisaged in the proposal[7];

- Clause 12 is predicated on any proposal having the effect of changing or altering a clause/s in the Agreement, specifically in this case the rates of pay and certain conditions of employment and absent such an intention to alter or vary any clause in the Agreement to achieve a change proposal, Clause 12 cannot be relied on and has no work to do in this instance.[8]

- The Respondent has not proposed, has never proposed and has no intention to seek any change to the Agreement, specifically in Schedule 4A, or the instruments referred to in Clause 12.1(a)(iii)[9];

- Clause 12 abounds in references to a proposal only being introduced by effecting a change or alteration to other clauses in the Agreement by formal variation, and not otherwise[10];

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[2] Decision [52]-[55]

[3] Ibid [8].

[4] Ibid [9]-[51].

[5] Ibid [56]-[58].

[6] Ibid [68].

[7] Ibid [60].

[8] Ibid [63].

[9] Ibid.

[10] Ibid [64].

- the words 'agreement in principle with the relevant Union', must be read in their context, having regard to the purpose and intent of the clause when read as a whole[11];

- There is no distinction as to what 'train' the essential crew are required to move; be it electric, diesel, steam, drone, fuel cell/electric, other hybrid combinations, or any other type of locomotive (not yet developed) and the reference in the definition to InterCity Drivers and guards and Regional Drivers, is a reference to the train lines a train crew works on, as distinct to the type or kind of rolling stock (train) they are required to move (drive or guard)[12]; and

- The Driver will still be driving and be in charge of a train, albeit a modern, technologically advanced species. Nothing alters the Drivers' fundamental role as reflected in the definitions and classification title in Schedule 4A. The fact NSW Trains proposes to pay a higher rate of pay (4%) is irrelevant. It is entirely within managerial prerogative to do so;[13]

[6] In respect of question 2, the Deputy President concluded that when Cl 12 is read according to its plain meaning, as informed by Schedule 4A, and subject to consultation, there is no impediment to NSW Trains introducing the new role for Drivers and most likely the changed role for Guards (given the rates of pay for Guards on the new fleet are 'grandfathered' until 2023).[14] The Deputy President reasoned, *inter alia*, that:

- It is difficult to reconcile circumstances where the Driver will receive a 4% pay rise for driving the new train after obtaining the necessary competencies expected of a Driver's usual and regular training updates, with a notion of an extra claim resulting in a detriment;[15] and

- In the very unlikely event there is no new agreement negotiated in the next two and a half years, there would no detriment for the Guards notwithstanding their role will change and some existing duties will no longer be required. This is because their rate of pay remains the same and they are not being asked to do more, just differently[16].

[7] In respect of question 3, the Deputy President concluded that a rigorous and thorough consultative process had taken place, and was set to continue. The Deputy President also expressed the view that the consultation obligations could not go on indefinitely, or impede the orderly delivery and introduction of a new improved InterCity fleet to benefit the travelling public. [17]

Applicable appeal principles

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[11] Ibid 65].

[12] Ibid [70].

[13] Ibid [71].

[14] Ibid [73].

[15] Ibid [74]

[16] Ibid.

[17] Ibid [85].

[8] An appeal under s 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are exercisable only if there is error on the part of the primary decision maker.[18]

[9] The Decision under appeal did not involve the exercise of discretion. It was concerned with determining, *inter alia*, as to whether or not certain provisions of the Agreement permitted NSW Trains to implement the changes arising from the new fleet as they affected Train Drivers and Train Crews, who would be titled 'Intercity Specialist Drivers' and 'Customer Service Guards' respectively. There is no discretionary element involved in such a task. It follows that our task on appeal is to determine whether the interpretation adopted of the Agreement by the Deputy President was correct.[19] If the instrument was erroneously interpreted or the facts erroneously applied to its proper interpretation then it is open for an appellate bench to grant the appeal.

[10] Accordingly, the question on appeal, as concerns the Deputy President's interpretation of the Agreement, is whether his interpretation was correct.[20] Error might also be discussed in the reasoning process, where construction principles are misapplied or not understood. Other decisions made in the course of hearing and determining the dispute might involve the exercise of discretion. Such decisions are appealable on the bases identified in *House v The King*.[21]

Consideration

[11] The grounds for the appeal were expressed in six parts, asserting that the Deputy President erred in:

a) his interpretation of clauses 12, 13 and 7;
b) finding, as a matter of fact, that the Change was not contemplated by cl.12;
c) finding, as a matter of fact, that the Change was not an extra claim within the meaning of cl.13;
d) finding, as a matter of fact, that NSW Trains had met the consultation obligations under the Agreement;
e) finding that the Change could be introduced while matters remained in dispute which had not been resolved in accordance with the dispute resolution process; and
f) otherwise that NSW Trains could introduce the Change.

[12] The background to the dispute before the Deputy President is that the Respondent was pursuing a proposal for the operation of its New Intercity Fleet (NIF) to which the Appellant responded with objections on merit grounds and the assertion that it was caught by Clause 13 of the Agreement, the no extra claims clause. Therefore, it was argued, the proposal could only be pursued through the process outlined in Clause 12 of the Agreement. The starting point is therefore Clause 13, the text of which is:

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[18] *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[19] *Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd* [2014] FWCFB 7447 at [7].

[20] *Energy Australia Yallourn Pty Ltd T/A Energy Australia v Construction, Forestry, Mining and Energy Union* [2017] FWCFB 3574 applying *Pawel v AIRC* [1999] FCA 1660.

[21] [1936] 55 CLR 499.

"13. NO EXTRA CLAIMS OTHER THAN IN ACCORDANCE WITH THIS AGREEMENT

13.1. This clause is subject to the right to a variation of this Agreement in accordance with Part 2-4 Division 7 of the *Fair Work Act 2009* (Cth). This Agreement covers the field. During the life of this Agreement the parties:

(a) will continue to recognise the Employer's managerial prerogative to propose and implement change in compliance with this Agreement;

(b) except in accordance with the terms of Clause 12, shall make no extra claims for any changes in remuneration or conditions of employment;

(c) agree that where any change proposed in Clause 12 above, impacts upon Employees' existing rates of pay and/or conditions of employment under this Agreement, then it will only be implemented in accordance with the consultation and voting process included in Clause 12 of this Agreement;

(d) for Train Crew it is recognised that "conditions of employment" includes current:

(i) depot transfer and roster placement procedures; and

(ii) rostering codes and conditions."

[13] The approach of the Deputy President was to consider Clause 13 through the lens of Clause 12 and what he understood to be a submission advanced by the Respondent that Clause 12.5 of the Agreement was repugnant to the variation of Agreement provisions in Part 2-4- Division 7 of the Act.

[14] As to the issue of repugnancy, we observe that before us there was no dispute between the parties that because Clause 13.1 is subject to the right to a variation of the Agreement in accordance with Part 2-4, Division 7 of the Act, no issue of repugnancy arises. We agree and to the extent he found otherwise, the Deputy President erred.

[15] As to Clause 13, we note the Full Court of the Federal Court in *Toyota Motor Corporation Australia Ltd v Marmara & Ors*[22] (*Marmara*) accepted the proposition that a *no extra claims* clause is fundamental in the context of an Agreement, in that it delivers stability and predictability in the matter of the terms and conditions of employment.[23] The statement within Clause 13.1 of the Agreement that it covers the field indicates it is the intention of the parties that the terms of the Agreement comprehensively outline the terms and conditions of employment for its duration, with changes in remuneration or conditions of employment only permitted through the variation process in the Act or Clause 12. The language is broad and does not limit changes to those that might be made to the text or terms of the agreement.

[16] Section 4 of the Agreement applies to employees whose positions are covered under one of the classifications in Schedule 4A and Clause 124 in Section 4 states their rates of pay are also set out in Schedule 4A. Section 4 also contains the definition of "Train Crew", which is defined as being "essential crew that are required to move a train and includes InterCity Drivers and Guards and Regional (Former CountryLink) Drivers". Contained within Clause

[22] (2014) 222 FCR 152

[23] Ibid at 174.

12 is an acknowledgement that changes in technology, organisational structures and work practices will occur and the clause then provides:

> "The following provisions will facilitate such changes to the operation of the terms of this Agreement as specified in this clause following a ballot of affected Employees who will share the benefits of agreed changes."

[17] Clause 12.1(a) then provides for the Appellant and Respondent to agree in principle to implement changes for Train Crew to the operation of a range of terms and conditions, including Section 4 and Schedule 4A. As to what "the changes" may include is outlined in Clause 12.1(b), which outlines "changes to working arrangements, conditions and payments" and that the changes will be compensated for by the payment of additional remuneration.

[18] We are satisfied that the Respondent proposes to change its organisational structure and some work practices with the introduction of the new classifications of Intercity Specialist Driver and Customer Service Guard. Doing so would change the operation of parts of Section 4 and Schedule 4A of the Agreement because the Respondent's proposal would change the classification, working arrangements and payments of employees covered under Schedule 4A and their rate of pay. New Train Crew recruits into the role of Guard would be employed with changed pay and conditions. We are therefore satisfied that the changes proposed are extra claims and may only be implemented through the process outlined in Clause 12 or through a variation of the Agreement in accordance with Part 2-4, Division 7 of the Act. As such, we would uphold appeal grounds (a)-(c) insofar as they relate to clauses 12 and 13.

[19] The consequence of our finding in relation to appeal grounds (a)-(c) that the changes proposed are extra claims and may only be implemented through the process outlined in Clause 12 or through a variation of the Agreement in accordance with Part 2-4, Division 7 of the Act is that appeal grounds (e) and (f) must also be upheld.

[20] In terms of Clause 7 and appeal ground (d), the Appellant contends that the Deputy President erred in finding, as a matter of fact, that NSW Trains had met the consultation obligations under the Agreement. It is relevant to outline the following:

- At [84] of the Decision the Deputy President stated "While not strictly necessary to the determination of this discrete dispute, Mr *Meehan* invited the Commission to find that NSW Trains had acquitted its obligations under the Clause 7 – Consultation – in respect to its 'proposal for the working of the new InterCity fleet'."

- At [85] of the Decision the Deputy President stated "In my view, one would be hard pressed to find a more rigorous and thorough consultative process than that which has taken place, and which is set to continue. This does not mean, however, the parties must agree on all, and every aspect of the proposal. Consultation obligations, notwithstanding Cl 12.5 (repugnant as it is) cannot go on indefinitely, or impede the orderly delivery and introduction of a new improved InterCity fleet to benefit the travelling public."

[21] The Appellant submits it is common ground that the consultation process had, in respect of its merits, been exhausted in the Respondent's view and that significant matters were unable to be resolved through that process. The Appellant has also submitted that "notwithstanding the conclusion of consultation, those matters that were not able to be

resolved through the consultative process are required to be dealt with in accordance with the Dispute Settlement procedure.” The Respondent contends the Appellant has made no submission that the Deputy President erred, as a matter of fact, in concluding that NSW Trains had met the consultation obligations under the Agreement and as such, permission to appeal on appeal ground (d) should be refused.

[22] It appears to us that the Deputy President did not find that the Respondent had met the consultation obligations under the Agreement in the sense that they had been finalised. His finding, if any, was that the consultation was set to continue. Further, the Deputy President did not appear to make a ruling regarding Clause 7 and instead made reference to consultation obligations under Clause 12.5. For these reasons, we reject appeal ground (d).

Permission to appeal

[23] Having regard to the above, we are satisfied that the appeal enlivens the public interest. The Appellant has identified, appealable errors of law within the Decision. It is in the public interest to ensure that enterprise agreements are properly considered and applied in each matter. Appellate intervention is both warranted and necessary to examine the identified errors and quash the Decision.

Conclusion

[24] We have read the Decision fairly and as a whole and considered all of the materials filed by the parties. The errors of law warrant the quashing of the Deputy President’s Decision.

[25] We order as follows:

- Permission to appeal is granted.

- Appeal grounds (a)-(c), (e) and (f) are upheld.

- The Decision ([2020] FWC 4359) is quashed and the answer to the questions are as follows:

  1. Does Clause 12 of the *NSW Trains Enterprise Agreement 2018* prevent NSW Trains from implementing its proposals in respect to the New InterCity Fleet, unless there is an in-principle agreement with the Union?

  Answer: *Yes*

  2. Is NSW Trains’ proposal an extra claim not permitted by Clause 13?

  Answer: *Not if pursued through the process outlined in Clause 12 or through a variation of the Agreement in accordance with Part 2-4, Division 7 of the Act.*

  3. Have the provisions of the Consultation Clause (Clause 7), requiring arbitration as to the merits of the proposal, been completed?

  Answer: *Not necessary to answer.*

VICE PRESIDENT

Appearances:

Mr *M Gibian SC* and Ms *L Saunders* of Counsel on behalf of the Appellant
Mr *S Meehan* of Counsel on behalf of the Respondent

Hearing details:

2020.
Sydney, with video-link to Melbourne.
20 November.

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