

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/1

And

AM2015/2

FURTHER SUBMISSIONS OF THE AUSTRALIAN COUNCIL OF TRADE UNIONS

DATE: 12 April 2017

D No: 45/2017

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Introduction

- 1) These submissions are filed in accordance with a direction made by Ross J at the hearing held on Tuesday 4 April 2017 regarding the constitution of the bench in *AM2015/1 Family and Domestic Violence Leave Clause*. At that hearing, Ross J asked the parties to file further submissions addressing the following specific matters:
 - (a) The relevance (if any) of the decision of the New South Wales Supreme Court in *Morton v The Transport Appeal Board & Anor No 1* [2007] NSWSC 1454 (**Morton**), in particular paragraphs [41] – [48];
 - (b) The constitution of the bench in *AM2015/2 Family Friendly Work Arrangements*.
- 2) These matters are addressed below.
- 3) The ACTU repeats and relies on its written submissions dated 4 April 2017 regarding the application of s 622 of the *Fair Work Act 2009* (**FW Act**) to this matter.
- 4) The ACTU’s position on the constitution of the bench in *AM2015/1 Family and Domestic Violence Leave Clause* is summarised as follows:
 - i) Deputy President Gooley and Commissioner Spencer are permitted to publish their decisions (but not take any other step) in this matter.
 - ii) The decision of Vice President Watson (published 27 February 2017), together with the decisions of Deputy President Gooley and Commissioner Spencer, form the decision of the Full Bench.
 - iii) As soon as Deputy President Gooley and Commissioner Spencer have issued their decision, Vice President Watson “becomes unavailable to continue dealing with the matter” within the meaning of s 622 of the FW Act, and the President must appoint a new Member before any additional step in the matter can be taken.
 - iv) Any new Member appointed by the President would not be required to make or issue a decision in the matter, as the decision of the majority of Deputy President Gooley and Commissioner Spencer and former Vice President Watson will be determinative of the matter [section 618(3)].

AM2015/1 Family and Domestic Violence Leave Clause

Morton v The Transport Appeal Board

- 5) In summary, there is nothing in this decision which alters the position of the ACTU set out in its submissions filed on 4 April 2017. The decision is considered in detail below.

- 6) The plaintiff, Mr Morton, was dismissed from his employment by the Sydney Ferries Corporation. He appealed the decision to the Transport Appeal Board (**TAB**), a merits review tribunal constituted under the [*Transport Appeal Boards Act 1980 \(NSW\)*](#) (**TAB Act**). The TAB dismissed the plaintiff's appeal after a hearing. The plaintiff then brought an action in the Supreme Court alleging that the TAB had not acted within the authority conferred by the TAB Act, including because the TAB was not properly constituted at the time the decision was made.
- 7) Berman J upheld the plaintiff's complaint that the tribunal was not properly constituted at the time of the purported decision (as well as a number of his other complaints) and quashed the TAB's decision, remitting the matter back for rehearing by a differently constituted TAB.
- 8) Berman J's examination of the way in which the TAB members reached their decision is set out at paragraphs [23] – [56] of the decision. The constitution of the TAB was prescribed by the TAB Act and there was no issue in this case about the constitution of the board. The issue in question was the validity of the board's decision-making process.
- 9) Berman J held that the word *meeting* in section 6 of the TAB Act encompasses the situation where the three TAB members "come together" to determine an appeal.
- 10) Berman J found that the plaintiff's appeal was heard over a number of days by a three member TAB, consisting of a Vice-Chair and two other members, Ms Ambler and Mr Ferrarelli. These three members met on one occasion after the final day of hearing to discuss the appeal. At that meeting, Ms Ambler and the Vice-Chair agreed that the plaintiff's appeal should be dismissed, while Mr Ferrarelli thought it should be upheld. There was no further meeting of all three members after that time, and Ms Ambler and Mr Ferrarelli had no further communications. Subsequently, the Vice-Chair sent his draft decision to Ms Ambler for her views. The Vice-Chair then issued a final written decision.
- 11) Berman J found that while Ms Ambler saw the Vice-Chair's draft decision, she did not know Mr Ferrarelli's view on it; either because the Vice-Chair never gave Mr Ferrarelli a copy of the draft decision, or because any comment was not passed on by the Vice-Chair to Ms Ambler [36] and [37]. Further, Ms Ambler did not see the Vice-Chair's final decision before it was issued [50].
- 12) At [41], Berman J concludes that it was "essential" to the proper exercise of the TAB's functions that the three tribunal members "exchanged their views", not only about the outcome, but the reasons for it and the content of the written decision handed down. At [44]-[50], Berman J considers the role of the minority decision-maker and considers that they are "entitled, and probably even obliged" to provide their views to the majority, and vice versa.

- 13) At [50], Berman J reiterates his finding that it is “essential” for a valid decision of the TAB that the decision be “the decision of the majority of the members”, and held that as the final decision handed down by the Vice-Chair was not shown to either of the other two members before it was published, the Vice-Chair’s decision was the decision of one member only.
- 14) Berman J concludes at [54] that “*the TAB did not function in the manner required by the Act creating it, and the decision cannot stand*”.

Relevance of Morton to the current matter

- 15) The TAB is established under a statute different in terms to the relevant provisions of the FW Act. In particular, sections 6 and 9 of the TAB Act make it clear that the decision-making power of the TAB is exercised through a “meeting” of the TAB members, and that the decision of the majority constitutes the decision of the TAB. As Berman J points out at [47], no dissenting judgement is delivered by a member of the TAB. ‘Decision’ under the TAB Act means the decision of the majority of the members taken at a meeting of the TAB.
- 16) This is quite different to the requirements for a decision of the Fair Work Commission (FWC). Sections 618(3) and (4) of the FW Act make it clear that differing and separate decisions by individual FWC members are authorised. Under section 618(3), the decision of the majority merely “prevails”; it is not the case that the decision of the majority “constitutes” the FWC’s decision. There is also no express requirement in the TAB Act that the TAB issue either a written decision or reasons for decision.
- 17) It is not yet known whether or not there will be a minority decision handed down in AM2015/1. It is clear that both Deputy President Gooley and Commissioner Spencer will have the opportunity to consider Vice President Watson’s decision and reasons before making their decisions. However, it seems clear from the published reasons of Watson VP that he was not able to consider the decisions of either Deputy President Gooley or Commissioner Spencer before handing down his decision because those decisions were not available to him.¹ In contrast to the TAB Act, there is no requirement under the FW Act for members to ‘meet’, ‘come together’ or ‘exchange views’ after a hearing has concluded in order to deliver a valid decision.
- 18) The facts can also be distinguished from the present case, in that the Vice-Chair in *Morton* purported to issue a decision on behalf of all three members of the board. By contrast, when Watson VP issued his reasons for decision, he expressly foreshadowed that the decisions of the remaining members of the Full Bench were necessary to finally determine the matter.

¹ *4 yearly review of modern awards—Family & Domestic Violence Leave Clause* [2017] FWCFB 1133 at 146.

- 19) In addition to the provisions of the TAB Act, Berman J relied on the decision in *Hamblin v Duffy (No.2)* (1981) 37 ALR 297 (*Hamblin*) (at [39], [40] and [53]). The plaintiff in that case was employed by the ABC. After missing out on a promotion, she appealed to the Promotions Appeal Board (PAB) under section 49(2) of the [Broadcasting and Television Act 1942 \(Cth\)](#) (**the Act**).
- 20) During the appeal process, a PAB board member left the boardroom and refused to take any further part in proceedings before the board had made any decision as to the outcome of the appeal. The applicant subsequently received a letter from the PAB Chair advising that her appeal had been dismissed. She successfully applied for an order of review to the Federal Court pursuant to the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.
- 21) Section 50(2) of the Act provided that the PAB would consist of a Chair appointed by the Governor-General and, for each appeal, an officer appointed by the ABC and an officer nominated by the union entitled to represent the industrial interests of the relevant employee.
- 22) In concluding that the PAB's decision was not valid in this instance, Lockhart J considered the words of section 50(4) of the Act, which stated: "*Where, at any meeting of the Promotions Appeal Board, the members are divided in opinion on any question, that question shall be decided according to the decision of the majority.*"
- 23) Lockhart J found that as neither the Act nor the applicable Regulations provided for a quorum, or for the effect of death, retirement or resignation of members of the PAB, all three members needed to be present for the PAB to validly determine the outcome of an appeal under the provisions of the Act.
- 24) By contrast, the FW Act provides for the effect of unavailability of members of the FWC (sections 622 and 623), as well as setting out detailed requirements for the issuing of written decisions, including a requirement to provide reasons for decision (section 598). The facts of *Hamblin* can be distinguished from the current circumstances, in that the member in *Hamblin* effectively resigned from the board without having made any decision whatsoever, written or otherwise, about the appeal.
- 25) Berman J noted that *Hamblin* was not directly relevant to *Morton* as it concerned a different tribunal established under a different statute, and the participation of the member in that case concluded at an earlier stage than did Mr Ferrarelli's involvement with the TAB. Berman J nevertheless relied on *Hamblin* as authority for the proposition that if Mr Ferrarelli had deliberately made himself unavailable for the tribunal's deliberations or decision (which could not be established one way or the other on the evidence), then the TAB decision was certainly a nullity, as it was in *Hamblin* for the same reason.

- 26) Both *Morton* and *Hamblin* involve statutory tribunals required by their governing legislation to ‘meet’ to determine appeals through a majority decision. These cases do not contain broad statements of principle about the requirements for valid decision-making by all statutory tribunals. Rather, they are specific findings in the context of the legislation governing the tribunals in question. Neither decision is binding on the FWC.
- 27) The FWC is authorised to act only as provided by the FW Act. While decisions interpreting the provisions of other statutes may be indirectly relevant, it is the ordinary meaning of the words of the relevant provisions in the FW Act which are relevant to the President’s decision in this matter.

AM2015/2 - Family Friendly Work Arrangements

- 28) On 28 October 2014, in response to the Statement and Directions issued by the President on 1 October 2014, the ACTU filed an outline of claim in relation to family friendly work arrangements.
- 29) On 13 February 2015, the ACTU filed a submission attaching a draft clause and on 2 March 2015, the ACTU filed a draft determination. On 15 June 2015, the ACTU filed a revised draft clause in response to Directions made by the Commission on 23 February 2015 regarding preliminary/jurisdictional matters raised by the employer parties.
- 30) On 30 November 2015, VP Watson made directions for the conduct of the matter by consent. On 22 December 2016, VP Watson issued revised directions for the conduct of the matter, which reserve the weeks of 10 and 17 October 2017 for a hearing of the evidence. The ACTU’s witness statements and submissions are due on 24 April 2017.
- 31) On 22 March 2017, the ACTU wrote to the President seeking leave to file a further revised draft clause. No objections have been raised by the employer parties to this course and no response has yet been received from the FWC.
- 32) While neither party has to date indicated an intention to seek amendments to the current directions, requests for amendments are foreseeable as deadlines approach. The ACTU is finalising its evidence on the basis of witnesses’ availability for the hearing dates currently listed. Confirmation that a newly constituted Bench would be available for the listed dates is now urgent in light of the rapidly approaching deadline for the filing of the ACTU’s material.
- 33) In order to provide certainty to all parties regarding the conduct of AM2015/2, the ACTU encourages the President to direct another FWC Member to form part of the Full Bench as soon as practicable.

The Australian Council of Trade Unions

12 April 2017