[2017] FWCFB 1093

The attached document replaces the document previously issued with the above code on 20 April 2017.

Paragraph [67] which stated “The matter is referred to Commissioner Johns for rehearing” is now deleted.

Associate to Vice President Catanzariti

Dated 20 April 2017

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Bupa Care Services Pty Limited
v
New South Wales Nurses and Midwives' Association
(C2016/7380)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT DEAN
COMMISSIONER RIORDAN

SYDNEY, 20 APRIL 2017

Appeal against decision [2016] FWC 8508 of Commissioner Johns at Melbourne on 25 November 2016 in matter number C2016/4647 & C2016/4648.

[1] On 25 November 2016, Commissioner Johns issued a Decision[1] which held that Bupa Care Services Pty Limited ("the Appellant") was not entitled to give notice to Ms Puata of a change to her roster without reaching agreement in writing and that the letter sent to Ms West on 4 August 2016 did not comply with the *Bupa Care Services, NSWNMA, ANMF (NSW Branch) and HSU NSW Branch, New South Wales Enterprise Agreement 2013* ("the Agreement"). That is, in relation to the documents provided to Ms Puata and Ms West, the Commissioner found that those documents did not satisfy the requirements of clause 9.3(b) of the Agreement.

[2] On 15 December 2016, the Appellant lodged a Notice of Appeal, appealing the Decision made by the Commissioner. We heard the appeal on 3 February 2017 and reserved our Decision. At the hearing, Mr B. Lacy, of Counsel, sought permission to appear for the Appellant and Mr M. Gibian, of Counsel, sought permission to appear for the Respondent. Given the complexity of the matter, and having regard to section 596 of the *Fair Work Act 2009* (Cth) (hereafter "the Act"), permission was granted to both parties to be represented.

The Decision

[3] The Commissioner summarised the issues in terms of whether the Appellant had complied with the requirements of the Agreement as follows:

1. Is the Respondent entitled to give notice to Ms Puata of a change to her roster without reaching agreement in writing with her?

2. Do the terms of the letter to Ms West dated 4 August 2016 comply with the requirements of the Agreement?

[1] [2016] FWC 8508.

[4] The Commissioner answered each of these questions in the negative. In doing so, the Commissioner adopted the submissions of the Respondent, namely, that:

(a) If it were permissible for a part-time work agreement to do no more than record the guaranteed minimum hours of work of a part-time employee, the provision would not achieve its obvious objective of ensuring predictability and certainty in the working pattern of the employee. Such an agreement records no "rostering arrangements" at all. Neither would it be sufficient for an employer to enter an agreement which purports to permit it to change the hours of work of a part-time employee at any time.

(b) The documents proposed to Ms Puata and Ms West to record their hours of work do no more than set out the guaranteed minimum number of hours of work. The documents do not record any rostering arrangements, including days of work or starting and finishing times. The documents provided to Ms Puata and Ms West do not satisfy the requirements of clause 9.3(b) of the Agreement.

[5] Accordingly, in adopting the Respondent's submissions, the Commissioner rejected the Appellant's submission that "rostering arrangements" are confined to "arrangements surrounding the roster such as whether the roster is a weekly or fortnightly roster, where the roster will be displayed, that an employee may be required to work reasonable additional hours on top of their guaranteed hours and that the employee's roster may change from time to time."

[6] The Commissioner noted that to adopt the construction advanced by the Appellant would defeat the purpose of clause 9.3 which is to provide some predictability and certainty to part-time employees about their pattern of work.

[7] As such, the Commissioner was satisfied that the objective intention of the parties to the Agreement must have been to infuse part-time working arrangements with predictability and certainty.

The Appeal

[8] At the heart of the appeal was whether the Commissioner correctly applied and construed clauses 9 and 24 of the Agreement.

Appellant's Submissions

[9] The Appellant's primary submission was that the Commissioner erred in construing the meaning of clauses 9 and 24 in accordance with their terms and in the context of the Agreement as a whole.

[10] We herewith summarise the Appellant's submissions into three main grounds of appeal as follows.

[11] Firstly, the Appellant contended that the principles for interpreting enterprise agreements are well established and discussed in *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd*[2] (hereafter "*Golden Cockerel*"), in particular, at paragraphs

[2] [2014] FWCFB 7447.

[19]-[41] of that decision. The Appellant contended that the Commissioner was correct in finding that clause 9.3 of the Agreement contained no ambiguity, however, that he erred in his interpretation of the Agreement.

[12] Properly construed and reading the Agreement as a whole, the Appellant contended that the scheme of the Agreement in relation to hours of work and rostering for part-time employees is as follows:

(a) Employees work the hours they are rostered;

(b) Rosters are fixed by the Appellant and posted 14 days in advance;

(c) The Appellant retains an ability to vary rosters on 7 days' notice to the employee;

(d) The Appellant must notify an employee of a proposed change to an employee's regular roster or ordinary hours of work and consult with the employee in accordance with clause 7, but this does not require agreement or joint decision-making;[3]

(e) Upon commencement, the Appellant and a part-time employee must agree in writing on the employee's guaranteed minimum hours of work – any changes to that agreement must be recorded in writing; and

(f) Upon commencement, the Appellant and a part-time employee must also agree in writing on the employee's "rostering arrangements" – any changes to that agreement must be recorded in writing.

[13] The Appellant asserted that clause 9.3(c) merely requires agreement to a variation of the terms of the initial agreement that was made under clause 9.3(b). It does not require agreement as to each and every variation of the roster. The Appellant submitted that neither Ms Puata nor Ms West have agreements in place which restricted the Appellant to rostering them only on certain days, or only with fixed starting and finishing times. Rather, the Appellant posited that the rostering arrangements allow the Appellant to vary each employee's roster subject to the consultation and notice requirements of the Agreement.

[14] Further, or in the alternative, the Appellant submitted that in construing clause 9.3(c) of the Agreement, the Commissioner erroneously applied decisions of the Commission which has considered the application of a different phrase that does not appear in the Agreement. In this regard, the Appellant made reference to the decision of *Leading Age Services Australia NSW - ACT*[4] (hereafter "*Leading Age Services*") and the decisions referred therein, which concerned the construction of the *Aged Care Award 2010* and the meaning of the phrases "regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day" and "hours of work" in clause 10.3(c) of that Award. The Appellant contended that the Commissioner erroneously applied these phrases in construing the Agreement as neither of these phrases are evident in the Agreement.

[3] *CFMEU v BHP Coal Pty Ltd* [2016] FCA 1009 at [59]-[60]; *CEPU v QR Limited* [2010] FCA 591 at [44] and the decisions referred to therein.
[4] [2014] FWCFB 129.

[15] The Appellant noted that the *Nurses Award 2010*, which at clause 10.3(b) and (c) are identical to clause 9.3(b) and (c) of the Agreement, were made by the Commission at the same time as the *Aged Care Award 2010*. The Appellant asserted that the Commission deliberately chose to use one phrase, "rostering arrangements", in the *Nurses Award 2010* and a different phrase, "regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day", in the *Aged Care Award 2010*. The Appellant contended that it can be inferred that the Commission intended the two Awards to have different meanings.

[16] The Appellant posited that both clause 10.3(b) of the *Aged Care Award 2010*, on the one hand, and 9.3(b) of the Agreement (and clause 10.3(b) of the *Nurses Award 2010*), on the other hand, begin by prescribing that the employer and the employee will agree in writing, but diverge at that point as to the matters that are to be agreed. The Appellant contended that "the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day" is a subset of "regular pattern of work" in the *Aged Care Award 2010*. Further, the Appellant submitted that the Agreement and the *Nurses Award 2010* prescribe agreement between employer and employee before commencement of employment as to the minimum number of hours to be worked. It does not require agreement as to the pattern of work, but rather agreement as to "rostering arrangements".

[17] In construing the meaning of "rostering arrangements", the Appellant contended that the Commission ought to have regard to the ordinary meaning of the words. The Appellant posited that the agreed "rostering arrangements" may be matters such as "arrangements surrounding the roster such as whether the roster is a weekly or fortnightly roster, where the roster will be displayed, that an employee may be required to work reasonable additional hours on top of their guaranteed hours and that the employee's roster may change from time to time." In this regard, the Appellant contended that the Commissioner erred in disagreeing with the Appellant's construction of "rostering arrangements" on the grounds that it would defeat the purpose of clause 9.3(b) of the Agreement. The Appellant asserted that the Commissioner erred not only in finding that agreement on days of work and starting and finishing times was a mandatory feature of their employment under clause 9.3, but in the absence of this feature, to imply for each of them such an agreement.

[18] Further, the Appellant contended that the agreed guaranteed minimum number of hours to be worked and the rostering arrangements are intended to be a feature of reasonable predictability of hours of work for the purposes of the Agreement. However, the Appellant submitted that, contrary to the *Aged Care Award 2010* which was considered previously by the Commission, clause 9.3 of the Agreement does not disclose an intention that the "reasonably predictable" nature of part-time employees' hours of work must include agreement on the days of work, or starting and finishing times each day. The Appellant contended there is nothing in clause 9.3 of the Agreement that requires an employee's agreement to a change of roster, unless it involves a variation to the number of guaranteed minimum number of hours to be worked, or to other rostering arrangements which were agreed at the commencement of the employment. Subject to those two requirements, and to the notice requirements in clause 24 of the Agreement and the consultation requirements in clause 7 of the Agreement, the fixing of rosters is left to the employer. As such, the Appellant contended that the Commissioner failed to construe clause 9.3 in the context of the terms of the Agreement as a whole and, in particular, clause 24 which expressly applies to all employees and provides for the employer to initiate a change of roster upon giving the

requisite notice, and clause 7, which provides for consultation (but not agreement) in relation to changes in regular rosters.

[19] The Appellant also submitted that the Commissioner erred in deciding that the initial agreement between the Appellant and a part-time employee should set out the relevant roster, and that any variation should also be agreed in writing. Such a conclusion is inconsistent with clause 24 of the Agreement and, therefore, is inconsistent with section 739(5) of the Act. The Appellant contended that subsection 739(5) mandates that the outcome of the dispute should be consistent with the Appellant's power to set rosters in accordance with clause 24 of the Agreement, and the failure to determine the matter consistent with such an outcome was a jurisdictional error.[5]

[20] Secondly, the Appellant contended that the Commissioner failed to give adequate reasons for his Decision. The Appellant asserted that it is not at all apparent, on the face of the Decision, what weight if any the Commissioner has given to the express power of the employer to change employees' rosters on notice under clause 24 or to the requirement to consult (but not agree) in relation to roster changes under clause 7. Further, that it is not clear what account, if any, the Commissioner took of the differences in the language between the clause 10.3 of the *Aged Care Award 2010* and clause 9.3 of the Agreement.

[21] Thirdly, the Appellant contended that, even if the Commissioner's construction of clause 9.3 was correct, the Commissioner erred in his consideration of the circumstances of Ms West. In particular, the Appellant asserted that the Commissioner did not consider the following facts:

(a) At the time the proceeding was heard by the Commissioner, Ms West had accepted her rostered hours of work as set by the Appellant;[6] and

(b) Those rostered hours were recorded in writing, namely the roster posted by the Appellant (albeit that Ms West was concerned that the roster could be changed on a fortnight's notice by the Appellant).[7]

[22] In this regard, the Appellant submitted that the failure to address the Appellant's submissions about the circumstances of Ms West's case was significant, and it touched upon the core duty being discharged by the Commission in relation to Ms West. The Appellant asserted that the Commissioner's failure to address these submissions constituted jurisdictional error.[8] Further, or in the alternative, the Appellant posited that even if it did not constitute jurisdictional error, by failing to take into account the facts referred to in paragraph [24] of this Decision, the Commissioner made a *House v The King*[9] error.

[23] For the above reasons, the Appellant contended permission to appeal should be granted, the appeal should be upheld and the Decision of Commissioner Johns should be quashed.

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[5] *Ferrymen Pty Ltd v MUA* [2013] FWCFB 8025 at [19]; *UFU v Metropolitan Fire and Emergency Services Board* [2013] FWCFB 2301 at [38]; *AWU v BlueScope Steel (AIS) Port Kembla* [2015] FWCFB 1798 at [18]; *UFU v Country Fire Authority* [2014] FWCFB 410 at [36]; *Construction, Forestry, Mining and Energy Union-Mining and Energy Division Queensland District Branch v North Goonyella Coal Mines Pty Ltd* [2015] FWCFB 5619 at [34].
[6] Transcript at PN173-174 (Appeal Book p 33).
[7] Transcript at PN152-157 (Appeal Book pp 31-32) and PN180 (Appeal Book p 33).
[8] *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157, [47].
[9] [1936] 55 CLR 499.

Respondent's Submissions

[24] The Respondent contended that permission to appeal should be refused having regard to the nature of the disputes in fact determined by the Commissioner. With regard to the circumstances of Ms Puata and Ms West, the Respondent asserted that permission to appeal should be refused.

[25] We herewith summarise the Respondent's submissions into four main grounds of appeal as follows.

[26] Firstly, the Respondent contended that the Commissioner's interpretation of the Agreement was correct. The Respondent asserted that the Agreement applies, in accordance with clause 5.1, to the Appellant and "all nursing employees, aged care employees and health professional employees of the Appellant employed and the Appellant's facilities in Schedule B to this Agreement." By clause 5.3, the Respondent submitted that the terms of the Agreement are said to entirely replace and supersede the terms of the various instruments including the *Nurses Award 2010*, the *Aged Care Award 2010* and the *Health Professionals and Support Services Award 2010*. Further, the Respondent contended that clause 7 of the Agreement makes provision for consultation regarding major workplace change and changes to regular hours. In the event of major workplace change, the Respondent asserted that the Appellant must discuss the change with employees and their representatives in accordance with clause 7.5. In addition, the Respondent posited that clause 7.11 provides that the Appellant will consult with employees about changes to their regular roster or ordinary hours of work. The Respondent contended that the principles to be applied when interpreting an enterprise agreement do not appear to be in dispute and that the Appellant did not submit that the Commissioner erred in his interpretation. The Respondent posited that the Commissioner correctly observed that context and history may be of particular significance in the interpretation of industrial instruments.[10]

[27] Secondly, the Respondent contended that the Appellant failed to reconcile clause 24 with the remainder of the Agreement, particularly the protections afforded to part-time employees by clause 9.3. The Respondent asserted that if clause 24 permits the Appellant to alter the hours of work of employees without restriction, clause 9.3 is rendered meaningless and to no effect. The Respondent asserted that it is not open to the Appellant to alter the terms of an agreement reached under clause 9.3(b) by simply giving notice of a roster change in accordance with clause 24. Rather, clause 9.3(b) requires the Appellant to reach agreement with a part-time employee not only in relation to the total hours of work, but also the "rostering arrangements which apply to those hours". In this regard, the Appellant asserted that both the minimum number of hours of work and the "rostering arrangements" cannot be altered except with the written agreement of the employee in accordance with clause 9.3(c). Applying the *generalia specialibus non derogant* principle, the Respondent contended that the specific provisions of clause 9.3 must prevail over the other general provisions in the case of inconsistency.[11] The Respondent submitted that the Appellant's assertion that neither Ms Puata nor Ms West had agreements in place that "restricted Bupa to rostering them only on certain days, or only with fixed starting/finishing times"[12] misstates the issue. Moreover, it

[10] [2016] FWC 8508, [28].
[11] *Transport Workers' Union of Australia v Qantas Airways Limited* [2008] AIRC 1198 at [14]; *Leading Age Services Australia NSW – ACT* [2014] FWCFB 129 at [19]; *Australian Workers' Union v Bluescope Steel (AIS) Port Kembla* [2015] FWCFB 1798 at [13]-[15].
[12] Appellant's submissions, [26].

was contended that the notation purporting to assert that "these shifts and areas may change"[13] appears to be an attempt to contract out of the Agreement and cannot overcome the clear terms of clause 9.3(c) which require any variation to be by agreement and recorded in writing. The Respondent asserted that the Appellant's criticism of *Leading Age Services* is without foundation and that the decision assists in the present matter in three ways, which we briefly summarise as follows:

1. The decision provides an example of the interaction between protections afforded in an industrial instrument to part-time workers and general rostering provisions which appear to confer broad discretion upon the employer. The Full Bench determined that part-time work provisions must be held to prevail to avoid the protections afforded to part-time employees being rendered ineffective;

2. Clause 9.3 of the Agreement is identical in terms to clause 10.3 of the *Nurses Award 2010* and it must be inferred that clause 9.3 was intended to have the same operation as the equivalent clause of the Award; and

3. Although clause 10.3 of the *Aged Care Award 2010* considered in *Leading Age Services* uses somewhat different language to clause 9.3 of the Agreement and clause 10.3 of the *Nurses Award 2010*, the submissions of the Appellant which endeavour to discount the relevance of the Full Bench decision entirely ignore the uncontested evidence of award history which was before the Commissioner.[14]

[28] Accordingly, the Respondent contended it is clear that the Commission intended clause 10.3 of the *Nurses Award 2010* to constrain the capacity of an employer to change either total hours of work or the pattern of working hours without agreement by an individual employee. Further, Respondent asserted that, having regard to the award history, the phrase "rostering arrangements" in clause 9.3(b) can only be understood to refer to the pattern of hours of a part-time employee. Additionally, the Respondent noted that the Appellant relies upon a certified agreement, the *Calendula Pty Ltd and Staff Certified Agreement 2001* ("the Calendula Agreement"). However, the Respondent submitted that the Calendula Agreement was not before the Commissioner at first instance and that there was no explanation as to the failure to make contentions regarding the Calendula Agreement to the Commissioner. The Respondent noted that the Calendula Agreement does not assist the Appellant and is passed its nominal expiry date. In this regard, the Respondent asserted that reliance upon a former agreement which apparently covered one former employer of some of the Appellant's employees is a thoroughly inadequate basis to assert any "historical context" to the current Agreement.

[29] Thirdly, the Respondent contended that the Appellant's submission that the Commissioner failed to give adequate reasons for his decision is without merit. The Respondent asserted that it is not necessary for a decision-maker to expose every step of his or her chain or reasoning, nor is it necessary for reasons to be elaborate or lengthy.[15] In response to the Appellant's contention that it is not apparent what weight was given to the express power of the employer to change employees' rosters under clause 24 or the

[13] Appeal Book p 206.
[14] Appellant's submissions, [29]-[32].
[15] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 271-272; *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386.

requirement to consult under clause 7,[16] the Respondent contended that the Commissioner accepted the submission of the Respondent that, given the purpose of clause 9.3, it was not open to the Appellant to alter the hours of work of a part-time employee by simply giving notice of a roster change at any time.[17] Further, in response to the Appellant's submission that it was not clear what account the Commissioner took of the differences in language between clause 10.3 of the *Aged Care Award 2010* and clause 9.3 of the Agreement, the Respondent submitted that the Commissioner accepted that the objective intention of the equivalent provisions of the *Nurses Award 2010*, as well as the *Aged Care Award 2010* and *Health Professionals Award*, was to infuse part-time working arrangements with predictability and certainty.[18]

[30] Fourthly, in response to the Appellant's contention that the Commissioner failed to consider that Ms West had accepted her rostered hours; and that the rostered hours were recorded in the roster posted by the Appellant, the Respondent contended these submissions cannot be accepted for two reasons:

1. The Commissioner recorded in his decision that "Ms West has accepted a change in her hours but is not satisfied with how the change has been documented."[19]

2. To the extent it was suggested that the Commissioner failed to consider that Ms West's hours were recorded on the fortnightly roster,[20] such a submission was not advanced to the Commissioner. At first instance, the Appellant did not submit that the posting of a fortnightly roster was sufficient to satisfy the obligation in clause 9.3(b) and (c) of the Agreement to record in writing agreement with a part-time employee. The Appellant's submission was that the separate letters issues to Ms Puata and Ms West were sufficient notwithstanding that they did not record days or hours of work.[21] That submission was considered and rejected by the Commissioner.[22]

[31] For the above reasons, the Respondent contended that permission to appeal should be refused, or if permission is granted, the appeal should be dismissed.

Consideration – Permission to Appeal

[32] The Commission will grant permission to appeal only if it is in the public interest to do so.[23] The test of assessing whether a matter is in the public interest is discretionary and involves a broad value judgment.[24] In *GlaxoSmithKline Australia Pty Ltd v Colin Makin,*[25] the Full Bench summarised the test for determining the public interest as follows:

> "[26] Appeals have lain on the ground that it is in the public interest that leave should be granted in the predecessors to the Act for decades. It has not been considered useful or appropriate to define the concept in other than the most general terms and we do not intend to do so. The expression 'in the public interest', when used in a statute,

[16] Appellant's submissions, [46].
[17] [2016] FWC 8508, [30]-[31].
[18] Ibid [31].
[19] Ibid [8](b)(ii).
[20] Appellant's submissions, [49(b)].
[21] Appeal Book, Tab 3 p 97.
[22] [2016] FWC 8508, [31].
[23] *Fair Work Act 2009* (Cth) s 604(2).
[24] *Esso Australia Pty Ltd v AMWU; CEPU; AWU* [2015] FWCFB 210, [6].
[25] [2010] FWAFB 5343, [27].

> classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only by the objects of the legislation in question. [*Comalco v O'Connor* (1995) 131 AR 657 at p.681 per Wilcox CJ & Keely J, citing *O'Sullivan v Farrer* (1989) 168 CLR 210]
>
> [27] Although the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters, it seems to us that none of those elements is present in this case."

[33] Alternately, the second ground for granting permission to appeal is that the decision is attended with sufficient doubt to warrant its reconsideration or that substantial injustice may result if leave is refused.[26]

[34] In determining whether permission to appeal should be granted we have reviewed and considered all material filed by the parties including all submissions, correspondence and relevant authorities.

[35] We find that permission to appeal should be granted in this matter. We are of the view that the appeal raises important questions concerning clauses 9 and 24 of the Agreement in circumstances where the Commissioner's construction of those clauses is an issue in the dispute. We consider this to be an important matter regarding the Commissioner's approach in making such a determination and, therefore, the dispute arising in this case is a matter of public interest. It is on this basis that permission to appeal is granted.

Consideration – The Appeal

[36] We note that a decision under appeal is of a discretionary nature and such a decision can only be successfully challenged on appeal if it is shown that the discretion was not exercised correctly. We note that it is not open for us to substitute our view on the matters that fell for determination before the Commissioner in the absence of error of an appellable nature in the Commissioner's original Decision. As the High Court said in *House v The King*[27]:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

[26] *Esso Australia Pty Ltd v AMWU; CEPU; AWU* [2015] FWCFB 210, [7].
[27] [1936] 55 CLR 499.

In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[37] We begin our consideration of the Commissioner's Decision by noting that this is not a case about what is or is not part-time employment, which is fundamentally the argument put forward by the Appellant. This case is about the construction of this Agreement in relation to Ms Puata and Ms West only.

[38] Clause 9.3 of the Agreement states:

"**9.3 Part-time employment**

(a) A part-time employee is an employee who is engaged to work less than an average of 38 ordinary hours per week and whose hours of work are reasonably predictable.

(b) Before commencing part-time employment, Bupa and a part time employee will agree in writing the guaranteed minimum number of hours to be worked and the rostering arrangements which will apply to those hours. The minimum hours which a part time employee will be required to work on a rostered day or shift is 3 hours.

(c) The terms of the agreement may be varied by agreement and recorded in writing.

(d) The terms of this Agreement will apply on a pro rata basis to part-time employees on the basis that the ordinary fortnightly hours for full-time employees are 76.

(e) Where an employee is regularly working more than their specified contract hours continuously for more than 12 months, they may request that their contracted hours be reviewed and increased by their manager. If the manager does not agree to the request, the manager will formally respond to the request in writing outlining the reasons for declining the request. The manager shall increase the employee's hours in accordance with the employee's request, however, hours worked in the following circumstances will not be incorporated into any adjustment:

(i) if the increase in hours is as a direct result of another employee(s) being absent on leave, such as for example, annual leave, long service leave, maternity leave, or workers compensation or

(ii) if the increase in hours is due to a temporary increase in hours only due, for example, to the specific needs of a resident or facility.

(f) Any adjusted contracted hours resulting from a review identified in subclause (e) of this clause should, however, be such as to readily reflect roster cycles and shift configurations utilised at the workplace." (our emphasis)

[39] Clause 24 of the Agreement states:

"**24. Rostering**

24.1 This clause applies to all employees covered by this Agreement.

24.2 Employees will work in accordance with a weekly or fortnightly roster fixed by Bupa.

24.3 The roster will set out employees' daily ordinary working hours and starting and finishing times and will be displayed in a place conveniently accessible to employees at least 14 days before the commencement of the roster period.

24.4 Unless Bupa otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.

24.5 Seven days' notice of a change of roster will be given by Bupa to an employee. Except that, a roster may be altered at any time to enable the functions of the facility to be carried out where another employee is absent from work due to illness or in an emergency. Where any such alteration requires an employee working on a day which would otherwise have been the employee's day off, the day off instead will be as mutually arranged." (our emphasis)

[40] A Full Bench of the Commission in *Golden Cockerel,* has determined the principles to be followed when interpreting enterprise agreements at paragraph [41] of its Decision:

"From the foregoing, the following principles may be distilled:

1. The AI Act does not apply to the construction of an enterprise agreement made under the Act.

2. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.

3. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

4. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

5. If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstances will be admissible to aide the interpretation of the agreement.

6. Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include:

(a) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;

(b) notorious facts of which knowledge is to be presumed;

(c) evidence of matters in common contemplation and constituting a common assumption.

7. The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.

8. Context might appear from:

(a) the text of the agreement viewed as a whole;

(b) the disputed provision's place and arrangement in the agreement;

(c) the legislative context under which the agreement was made and in which it operates.

9. Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common intention is identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement.

10. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties."

[41] We now turn to consider the matter in relation to Ms Puata.

Ms Puata

[42] In determining whether the Appellant is able change Ms Puata's roster without reaching an agreement in writing with her, we refer to the written agreements between Ms Puata and the Appellant. In particular, the written agreement dated 25 August 2003 states as follows:

"Dear Catherine,

Thank you for your recent letter, applying for a permanent part time position.

I am pleased to confirm your appointment to the position of Assistant Nurse on a permanent part time basis at Amity at Banora Point. Your appointment is subject to the Calendula EBA and the conditions outlined in this letter and will be effective from 20 August 2003.

> **Your hours of employment are 32 per fortnight. You are required to work a roster as displayed. No shifts are guaranteed, with any and all shifts subject to change at the direction of management**."[28] (our emphasis)

[43] Thus, Ms Puata agreed she would work in accordance with the "roster as displayed" and that her shifts were "subject to change at the discretion of management".

[44] On 20 November 2003, Ms Puata's hours of work were increased and a further written agreement was entered into between the Appellant and Ms Puata, which stated:

> "Dear Catherine
>
> Following our recent discussion, I am pleased to confirm that your hours of employment will increase to 49 per fortnight, effective from 26 November 2003. You are required to work a roster as displayed. No shifts are guaranteed, with any and all shifts subject to change at the direction of management …"[29]

[45] On 19 June 2013, the Appellant notified Ms Puata of a change to her shifts in accordance with clause 33.2 of the Agreement in the following terms:

> "Dear Catherine,
>
> Starting in April 2013 Bupa will be introducing a new model of integrated care. General Practitioners will join our care home teams, working with our dedicated nurses to ensure residents benefit from personalised medical care. For this reason Bupa Banora has decided that in order to ensure the success of the new model of care your shift will change.
>
> This change will not affect your permanent part-time hours, however, this means your shift will be changed as indicated on the attached shift change form. The new roster will commence on Monday 1st July 2013 and in accordance with section 33.2 of the NSW Enterprise Agreement you are being provided with seven days notice (sic) of this change …"[30]

[46] Ms Puata confirmed she could work these new shifts by signing a new agreement on 24 June 2013 which provided as follows:

> "We are pleased to confirm your current allocated permanent shifts, listed below, as of
>
> **1/7/2013**

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Shift	1430-2230	1530-2130	1430-2230				1430-2230
Area	Kirra	Kirra	Kirra				Kirra

[28] Witness statement – Catherine Puata Annexure A; letter dated 25 August 2003 (Appeal Book p 195).
[29] Witness statement – Catherine Puata Annexure A; letter dated 20 November 2003 (Appeal Book p 197).
[30] Witness statement – Catherine Puata Annexure B; letter dated 19 June 2013 (Appeal Book p 200).

**Please note you are contracted to permanent hrs not shifts – these shifts and areas may change"[31]

[47] Ms Puata signed a similar document again on 24 March 2014, which stated:

"We are pleased to confirm your current allocated permanent shifts, listed below, as of

24/3/2014

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Shift	1430-2130	1430-2130	1430-2230				1430-2230
Area	Kirra	Kirra	Kirra				Kirra

** Please note you are contracted to permanent hrs not shifts – these shifts and areas may change."[32]

[48] It is clear that the written agreements between Ms Puata and the Appellant guaranteed the fortnightly hours of work, however, the shifts were subject to change by management. The aforementioned history indicates Ms Puata has worked in accordance with this understanding throughout her employment with the Appellant.

[49] The parties referred the Full Bench to the decisions in *Transport Workers' Union of Australia v Qantas Airways Limited*[33] (hereafter "*Qantas*") and *Leading Age Services*. In our view, these cases can be distinguished from the matter before us.

[50] In relation to *Qantas* and having regard to the agreements between the Appellant and Ms Puata, we are not satisfied the Appellant changed Ms Puata's roster in a manner which was inconsistent with the Agreement. In this regard, we note the Appellant agreed in writing with Ms Puata that her hours were guaranteed (originally 32 hours per fortnight). However, Ms Puata was required to undertake her shifts pursuant to the displayed roster which was subject to change by management. Thus, the Appellant does not need Ms Puata's agreement to change her roster. Rather, only Ms Puata's hours of work must be agreed to in writing.

[51] We are of the view that the decision in *Leading Age Services* can be distinguished. Clause 5.3 of the Agreement stipulates that:

> "The terms of this Agreement entirely replace and supersede the terms of any state or federal industrial instrument including any NAPSA, award or enterprise I workplace I certified agreement that may have applied to any employee now covered by this Agreement including but not limited to the:
>
> (a) Nurses Award 2010;
>
> (b) Aged Care Award 2010;

[31] Witness statement – Catherine Puata Annexure C; Confirmation of permanent part time shifts (Appeal Book p 204).
[32] Witness statement – Catherine Puata Annexure D; Confirmation of permanent part time shifts (Appeal Book p 206).
[33] [2008] AIRC 1198.

(c) Health Professionals and Support Services Award 2010;

(d) Bupa Care Services, NSWNA and HSU-East, New South Wales Enterprise Agreement 2010;

(e) Amity Grand at Willoughby Workplace Agreement 2007;

(f) Nursing Homes & Nurses' (State) Award NAPSA;

(g) Nurses, Other Than in Hospitals, (State) Award 2006 NAPSA;

(h) Aged Care General Services (State) Award 2006 NAPSA.

To avoid doubt, none of the industrial instruments above apply to employees covered by this Agreement, notwithstanding the fact that modern award rates will be applied if rates in this Agreement were to fall below the modern award rates."

[52] The decision in *Leading Age Services* was in relation to an interpretation of the *Aged Care Award 2010*, which as noted above, has been superseded by the current Agreement. The Part Time and Roster provisions of the *Aged Care Award 2010* state:

"10.3 Part-time employees

(a) A part-time employee is an employee who is engaged to work less than full-time hours of an average of 38 hours per week and has reasonably predictable hours of work.

(b) **Before commencing employment, the employer and employee will agree in writing on a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day.**

(c) Any agreed variation to the hours of work will be in writing.

(d) The terms of this award will apply on a pro rata basis to part-time employees on the basis that the ordinary weekly hours for full-time employees are 38.

(e) Payment in respect of personal/carer's leave (where an employee has accumulated an entitlement) for a part-time employee will be on a pro rata basis made according to the number of ordinary hours the employee would have worked on the day or days on which the leave was taken.

…

22.6 Rosters

(a) The ordinary hours of work for each employee will be displayed on a roster in a place conveniently accessible to employees. Such roster will be displayed at least two weeks prior to the commencing date of the first working period in any roster subject to clause 22.6(b) below.

(b) It is not obligatory for the employer to display any roster of the ordinary hours of work of casual or relieving staff.

(c) Seven days' notice will be given of a change in a roster. However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.

(d) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has two rostered days off in that week or four rostered days off in that fortnight, as the case may be.

(e) Where practicable, ADOs will be displayed on the roster.

(f) This clause will not apply to hostel supervisors." (our emphasis)

[53] In *Leading Age Services*, the Full Bench made the following observation:

> "Insofar as there is an interpretational contest as to how clauses 10.3(c) and 22.6(c) interrelate with each other, we consider it appropriate to express our views on the subject. Our conclusion is that the effect of clause 10.3(c) is to require any changes to the agreement entered into before the commencement of employment pursuant to clause 10.3(b), including any changes to the number of hours worked each week, the days of the week the employee will work and the starting and finishing times each day, to be by further written agreement, and that clause 22.6(c) does not permit the employer to make unilateral changes in respect of any of these matters for part-time employees by use of its right to change the roster on the provision of the requisite notice. The reasons for our conclusion are as follows."[34]

[54] The Agreement before us does not contain the specificity of the Award provisions in relation to written agreements between the employer and the employee regarding the days or starting and finishing times that a part-time employee will work. The written agreement between the Appellant and Ms Puata stated she would be required to work in accordance with the displayed roster, which was subject to change by management.

[55] We note, in reaching his Decision regarding Ms Puata, the Commissioner asked himself the following question:

> "Is the Respondent [Appellant in these proceedings] entitled to give notice to Ms Puata of a change to her roster without reaching agreement in writing with her?"

[56] Noting the above evidence, we are satisfied the agreement between the Appellant and Ms Puata provides that Ms Puata's hours are guaranteed. However, she is required to work in accordance with the displayed roster. As such, in answering the question asked by the Commissioner at first instance, we are satisfied the Appellant is able change Ms Puata's roster without reaching an agreement in writing with her. Nevertheless, we note any alterations to Ms Puata's hours of work must be agreed to in writing pursuant to clause 9.3(b).

[34] [2014] FWCFB 129, [18].

[57] Accordingly, the appeal in relation to Ms Puata is upheld.

[58] We now turn to consider the matter in relation to Ms West.

Ms West

[59] We note the dispute in relation to Ms West differs from that of Ms Puata in that Ms West accepted a change to her hours and days of work, but gave evidence that she wanted her days and shift times to be provided to her personally in writing.[35] In this regard, the changes to Ms West's roster were recorded in writing on the roster displayed at the Appellant's facilities. Thus, the issue before us is whether Ms West is to be personally informed in writing of the changes to her roster, as opposed to being informed by referring to the displayed roster.

[60] Ms West was issued with a letter from the Appellant on 4 August 2016, stating:

> "Dear Sukanya
>
> Further to recent discussions, from 4 August 2016, you will work the fortnightly roster discussed with you during the Fair Work Commission conciliation conference on 3 August 2016. This will be a temporary arrangement and further hours, as mentioned below, will be added to your shifts as they become available. This means your contracted fortnightly hours will reduce from 45 hours to 37 hours per fortnight during this temporary arrangement.
>
> When a further 2 hours becomes available to extend your shifts on a Saturday and / or Monday, you will be the 'first cab off the rank' to obtain those extra hours and increase your fortnightly hours accordingly.
>
> As always, any further changes to your roster will be made after consultation with you under clause 7.11 of the enterprise agreement (or the equivalent provision of any agreement which replaces this enterprise agreement)."[36]

[61] It is evident from the above letter that the Appellant reached an agreement in writing with Ms West that her hours of work would reduce from 45 hours to 37 hours per fortnight. Pursuant to clause 9.3(c) of the Agreement, Ms West's minimum number of hours and the rostering arrangements applying to those hours may be varied and recorded in writing. The Appellant's letter dated 4 August 2016 to Ms West specifically stated that her hours would reduce from 45 hours to 37 hours per fortnight. Further, the Respondent was notified in writing of the changes to her roster by way of a displayed roster at the Appellant's facilities.

[62] As such, we are satisfied the Appellant informed Ms West of her guaranteed minimum number of hours and her rostering arrangements in writing pursuant to the Agreement. There is nothing particularised in the Agreement that provides that Ms West is to be personally informed in writing of changes to her roster. The Agreement only provides that Ms West is to be informed in writing and this was adhered to by way of a displayed roster which stipulated her starting and finishing times and the letter dated 4 August 2016 which outlined the changes to Ms West's minimum hours of work.

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[35] Transcript at PN173-174 (Appeal Book p 33).
[36] Ibid 102.

[63] Thus, we are not satisfied that the manner in which the Appellant reached an agreement with Ms West in relation to her reduction in hours of work and her rostering arrangements contravened the Agreement.

[64] Accordingly, the appeal in relation to Ms West is upheld.

Conclusion

[65] Permission to appeal is granted.

[66] The appeal in relation to Ms Puata and Ms West is upheld.

VICE PRESIDENT

Appearances:

B. Lacey for the Appellant.
M. Gibian for the Respondent.

Hearing details:

2017
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