DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

CSL Limited T/A CSL Behring
v
National Union of Workers
(C2017/6169)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT ANDERSON
COMMISSIONER SAUNDERS

PERTH, 14 DECEMBER 2017

Appeal against decision [[2017] FWC 5444] of Commissioner Ryan at Melbourne on 24 October 2017 in matter number C2017/4235 - appellable error as to characterisation of the dispute - decision quashed – dispute re-determined.

[1] CSL Limited (***CSL***) and the National Union of Workers (***NUW***) are in dispute about a decision by CSL to change the way in which shift penalties are paid to about 150 employees (***Employees***) from the payment of average shift penalties to the payment of actual shift penalties (***Dispute***). The Dispute could not be resolved at the workplace. As a result, the NUW filed an application in the Fair Work Commission (***Commission***) pursuant to s 739 of the *Fair Work Act* 2009 (Cth) (***Act***), seeking that a dispute resolution process be conducted in accordance with clause 6 of the CSL Limited CSL Agreement 2015 (***Enterprise Agreement***). Following an unsuccessful conciliation, Commissioner Ryan arbitrated the Dispute and published his decision on 24 October 2017 (***Decision***).[1] CSL appeals against the Decision.

Background

[2] There are about 1,000 employees who work at the same site as the Employees.[2]

[3] The Employees work a seven-day, twelve-hour rotating shift roster. As a consequence, their shift penalties can vary significantly from one week to the next. CSL wishes to pay actual shift penalties, rather than average shift penalties, to the Employees to align with the arrangements for employees of its business more generally.

[4] At present, CSL calculates the shift penalty entitlements for each Employee in accordance with clause 12.2 of the Enterprise Agreement over an eight week period. CSL then averages the shift penalties over the eight week period to an amount each fortnight and pays the average fortnightly shift penalty to the Employee. In the result, each fortnight, regardless of how many shift penalties were incurred, the Employee is paid the same shift

[1] [2017] FWC 5444

[2] Appeal Book at p 34 [18]

penalty amount. This avoids any fluctuations in actual fortnightly pay, but still involves CSL meeting all its obligations under the Enterprise Agreement to pay shift penalties to the Employees. That is, at the end of the eight week period the Employees have been paid an amount in shift penalties which matches their entitlement to shift penalties under clause 12.2 of the Enterprise Agreement.

[5] The practice of paying average shift penalties commenced some time ago, well before the Enterprise Agreement was made and before some of the Employees were employed by CSL. The shift penalties averaging provision found in clause 12.6 of Part 2 of the Enterprise Agreement has remained in CSL enterprise agreements since 2006. CSL accepts that it is "reasonable to assume that the averaging clause has been used by CSL and a certain cohort of its employees at some point in time to reach an agreement to average penalty rates in particular area[s]".[3]

[6] The following provisions of the Enterprise Agreement are relevant to the Dispute:

> **"3. No extra claims**
>
> The parties agree that they will not pursue any extra claims relating to conditions of employment or any other matters related to the employment of the employees, whether dealt with in the agreement or not, over the life of the agreement.
>
> **4. Relationship to other agreements**
>
> (a) This Agreement supersedes and replaces the:
>
> (1) CSL Ltd 2012 Enterprise Agreement; and
>
> (2) CSL Ltd 2012 Stores, Warehouse, Cleaning and Gardeners Enterprise Agreement.
>
> and any unregistered agreements or uncertified agreements between any of the parties.
>
> (b) This Agreement overrides and excludes all of the following:
>
> (1) Pharmaceutical General: CSL Award 1998;
>
> (2) CSL Senior Management Award 1999; and
>
> (3) CSL Limited Sales Force Award 1999.
>
> (c) This Agreement does not exclude or override the agreement entered into between the parties reflected in a letter dated 09 November 2015…

[3] Appeal Book at p 37 [5]

6 Dispute resolution

The following process applies to a dispute between parties covered by this Agreement in relation to a matter arising under this Agreement or in relation to the National Employment Standards.

6.1 Resolving disputes at the workplace

The parties to a dispute must genuinely attempt to resolve the dispute at the workplace level. In the first instance the parties will attempt to resolve the matter by discussions between the employee or employees concerned and the relevant supervisor.
If such discussions do not resolve the dispute, the employee or employees concerned will attempt to resolve the matter by discussions with more senior levels of management.

6.2 Where disputes cannot be resolved at the workplace

(a) If a dispute in relation to a matter arising under this Agreement or in relation to the National Employment Standards is unable to be resolved at the workplace, and all agreed steps for resolving it have been taken, the dispute may be referred to FWC for resolution by mediation and/or conciliation and, where the matter in dispute remains unresolved, arbitration.

6.3 Decision and appeals process

The decision of FWC will bind the parties, subject to either party exercising a right of appeal against the decision to a Full Bench of FWC pursuant to s.604 of the *Fair Work Act 2009* (or its successor). Any decision or direction FWC makes in relation to a dispute shall be in writing and will be accepted by all affected persons. The parties agree to comply with any decision or direction including procedural directions.

6.4 Representation

A party to a dispute may appoint any another person, organisation or association to accompany or represent them in relation to a dispute….

Part 2: Flexible work patterns

…

12 Shift work

An employee will be considered a shift worker if rostered to perform ordinary duty outside the period 6.30am to 6.30pm, Monday to Friday, and/or on Saturdays, Sundays or Public Holidays for an ongoing or fixed period. The ordinary hours of work shall not exceed twelve hours on any day or 36.75 hours per week on average over the nominated shift cycle.

12.1 Variation to rostered shift

Where practicable, employees shall be given the equivalent notice of a shift cycle in the event of a major roster alteration. Subject to consultation and agreement, an employee

may in the event of an emergency change from one roster to another at a minimum but not less than 24 hours' notice.

12.2 Shift work penalties

Penalty rates are payments made in addition to the employee's normal salary for the shift. A shift worker will be paid the relevant penalty rate for the time worked as set out in table 1 below:

Table 1

Rostered time of normal hours shift	**Penalty**
Morning shift: Normal hours worked commencing between 5.01-6.29am	**15%**
Afternoon shift: Normal hours worked that finish between 6.31pm and midnight	**15%**
Night shift: Normal hours worked that finish after midnight or commence before 5.00am Monday to Friday	**30%**
Saturday shift: Normal hours worked between midnight Friday and midnight Saturday	**50%**
Sunday shift: Normal hours worked between midnight Saturday and midnight Sunday	**100%**
Public Holiday shift: Normal hours worked on a public holiday	**150%**

12.3 Payments stand alone

Shift penalty payments will not be taken into account in the calculation of overtime or in the calculation of any payment or allowance based upon salary except employer superannuation contributions. Nor will they be paid with respect to any shift for which any other form of penalty payment is made under this Agreement.

12.4 Shift work penalty rates during approved annual leave

Additional penalty payment for normal rostered hours will be for any work that an employee would have done had they not been on approved paid annual leave. Penalty rates will be paid on annual leave accrued since the commencement of the 2006 agreement. Shift workers can access this accrued leave prior to using previous accruals. Penalties will not be paid on approved annual leave that 12-hour shift workers have accrued prior to the commencement of the 2006 agreement.

12.5 Shift work penalty rates during approved personal/carer's/ compassionate leave

Additional penalty payment for normal rostered hours will be for any work that an employee would have done had they not been on approved paid personal, carer's or

compassionate leave. Penalty rates will be paid on personal/carer's leave accrued since the commencement of the 2006 agreement. Shift workers can access this leave prior to using previous accruals. Penalties will not be paid on approved personal/carer's leave that shift workers have accrued prior to the commencement of this Agreement.

12.6 Averaged shift penalties

CSL and affected employees may consider a proposal that shift penalties be averaged over an agreed period."

Decision

[7] At first instance, the NUW contended that:

- because clause 12.6 of the Enterprise Agreement requires the mutual agreement of both CSL and affected employees to implement a system of paying average penalties, mutual agreement is required to end the system. There is no capacity for unilateral termination; and

- in the alternative, CSL's proposed unilateral change to the agreed system of paying average penalties constitutes an extra claim within the meaning of clause 3 of the Enterprise Agreement, with the result that the claim cannot be "pursued" by CSL.

[8] The Commissioner reached the following conclusions in relation to the Dispute:

(a) First, the Dispute is not a dispute about a matter arising under the Enterprise Agreement or in relation to the National Employment Standards;[4]

(b) Secondly, the Dispute, to the extent that it is about a matter arising under the terms of a predecessor enterprise agreement, is not able to be dealt with under the Enterprise Agreement because of clause 4, which provides that the Enterprise Agreement "supercedes and replaces" earlier enterprise agreements;[5]

(c) Thirdly, CSL cannot rely on clause 7.1 of the Enterprise Agreement to remove the payment of shift penalties on an averaging basis from those employees who are currently receiving them;[6]

(d) Fourthly, it is a term of the Enterprise Agreement that CSL is able to consider a proposal from affected employees that shift penalties be averaged over an agreed period. CSL cannot unilaterally withdraw its ability to consider a proposal from affected employees that shift penalties be averaged over an agreed period. Nor can CSL use its unilateral withdrawal of its ability to consider a clause 12.6 proposal as a reason to remove the payment of shift penalties on an averaging basis from those employees currently paid in that manner;[7]

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[4] Decision at [46]

[5] Decision at [47]

[6] Decision at [48]

[7] Decision at [49]

(e) Fifthly, the decision of CSL to cease paying affected employees shift penalties on an averaging basis and to pay those employees on an as earned basis does not constitute an extra claim for the purpose of clause 3 of the Enterprise Agreement;[8] and

(f) Sixthly, it is clear that whilst the matter in dispute is not able to be resolved by the Commission under the terms of the Enterprise Agreement it is also clear that CSL cannot unilaterally remove the payment of shift penalties on an averaging basis whilst clause 12.6 remains in the Enterprise Agreement.[9]

Appeal as of right

[9] Clause 6.3 of the Enterprise Agreement confers on CSL a "right of appeal against the [arbitrated] decision to a Full Bench" of the Commission. Accordingly, permission to appeal is not required.[10]

[10] The Commissioner's task at first instance was to consider the proper construction of the relevant clauses of the Enterprise Agreement and the rights and obligations they conferred and imposed on CSL and then to consider whether CSL's proposed conduct accorded with those rights and obligations.[11] It follows that, on appeal, the question before us is whether the Commissioner reached the correct conclusion, not whether the conclusion he reached was reasonably open to him. The Decision is not a discretionary one; the principles in *House v The King* do not apply.[12]

Grounds of appeal

[11] CSL relies on three grounds of appeal:

1. The Commissioner erred in concluding (at paragraphs [37] and [46]) that on a proper characterisation of the Dispute, it was not about a matter arising under the Enterprise Agreement, such that the Commission was not able to resolve it under clause 6 of Part 1 of the Enterprise Agreement. The Commissioner should have found that on a proper characterisation of the Dispute, it was about the proper construction and application of either clause 3 of Part 1 and/or clause 12.6 of Part 2 of the Enterprise Agreement and as such, about a matter arising under the Enterprise Agreement.

2. Further or alternatively to ground 1, the Commissioner erred in concluding (at paragraph [51]) that CSL "cannot unilaterally remove the payment of shift penalties on an averaging basis whilst clause 12.6 remains" in the Enterprise Agreement.

3. Further or alternatively to ground 2, the Commissioner erred in concluding (at paragraphs [24]-[26] and [49]) that CSL was unilaterally withdrawing/removing its ability to consider a proposal from affected employees under clause 12.6 of Part 2 of

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[8] Decision at [50]

[9] Decision at [51]

[10] *AMWU v Silcar Pty Ltd* [2011] FWAFB 2555; *DP World Brisbane Pty Ltd v Maritime Union of Australia* (2013) 237 IR 180; [2013] FWCFB 8557 at [39]-[43]

[11] *University of Western Sydney v Fletcher* (2009) 183 IR 256; [2009] AIRCFB 368 at [22]-[24]

[12] *Transport Workers' Union of Australia v Wymap Group Pty Ltd* [2014] FWCFB 3484 at [12]

the Enterprise Agreement (or that it was purporting to do so) and/or that this otherwise prevented CSL from ceasing to pay shift penalties on an averaging basis.

NUW submissions

[12] The NUW submits that the Decision is sufficiently vague in that it simultaneously dismissed the NUW's original application on the basis that the Dispute did not relate to a matter arising under the Enterprise Agreement whilst also stipulating that CSL is unable to unilaterally withdraw the averaging of penalties due to the operation of clause 12.6 of the Enterprise Agreement.

[13] The NUW seeks that the Decision be quashed and the Commission re-determine the Dispute by deciding that CSL is prevented from unilaterally altering the shift penalty averaging system without the agreement of the Employees. To that end, the NUW relies on its submissions before the Commissioner below, together with its written and oral submissions on appeal.

Consideration

[14] A dispute must be "in relation to a matter arising under this [Enterprise] Agreement or in relation to the National Employment Standards" to fall within the scope of disputes which may be dealt with under the dispute resolution procedure (clause 6) in the Enterprise Agreement. The Commissioner concluded that the Dispute is not a dispute "about a matter arising" under the Enterprise Agreement or in relation to the National Employment Standards.[13] By considering whether the Dispute is "about a matter arising..." rather than "in relation to a matter arising…" the Commissioner asked the wrong question and thereby erred.

[15] Further, the Dispute is plainly "in relation to a matter arising" under the Enterprise Agreement because it relates (a) to the proper construction of clauses 3 and 12.6 of the Enterprise Agreement and (b) whether either or both of those clauses, properly construed, prevents CSL from changing the payment to the Employees of average shift penalties to the payment of actual shift penalties. Accordingly, the Dispute falls within the character of disputes which may be dealt with in accordance with the dispute resolution procedure (clause 6) in the Enterprise Agreement and the Commissioner erred in concluding that "the matter in dispute is not able to be resolved by the Commission under the terms" of the Enterprise Agreement.[14] It is therefore appropriate that we accede to the parties' request to uphold the appeal, quash the Decision and re-determine the Dispute ourselves.

Re-determination of the Dispute

[16] Clause 12.2 of Part 2 of the Enterprise Agreement imposes an obligation on CSL to pay shift workers "the relevant penalty rate for the time worked as set out in table 1". However, clause 12.2 does not expressly deal with payment mechanisms or the timing of payment of shift penalties. Reference is made in clauses 12.10.2 and 12.10.5 of Part 2 of the Enterprise Agreement to "an employee's fortnightly income (salary and any associated shift payments)" being reduced in certain circumstances, on the basis of which it might be concluded that shift penalties must be paid each fortnight. However, use of the expression

[13] Decision at [46]

[14] Decision at [46] & [51]

"associated shift payments" in the Enterprise Agreement is, in our view, sufficiently broad to encompass payment of either actual shift penalties earned in the fortnight or average shift penalties, provided that the average shift penalties paid meet CSL's obligation to pay the shift penalties to which employees are entitled under clause 12.2 of Part 2 of the Enterprise Agreement. We therefore agree with the Commissioner's assessment that "the manner of payment of shift penalties, whether on an as earned basis or on an averaging basis, is primarily a matter of administration of the terms of the Agreement."[15]

[17] Clause 12.6 is a facultative provision; it facilitates consideration by CSL and affected employees of a "proposal that shift penalties be averaged over an agreed period." However, it does not impose any obligation on CSL or "affected employees" to reach an agreement on the averaging of shift penalties or to cease the operation of such an agreement.

[18] Clause 12.6 of Part 2 must, of course, be construed in context, including by reference to the other terms of the Enterprise Agreement. Clause 12.1 of Part 1 of the Enterprise Agreement permits CSL and an employee covered by it to agree to make an individual flexibility arrangement to vary the effect of certain terms of the Enterprise Agreement. Clause 12.4 of Part 1 of the Enterprise Agreement permits CSL or the employee to terminate the individual flexibility arrangement by giving no more than 28 days' written notice to the other party or at any time, if they agree. This provision indicates that where the makers of the Enterprise Agreement intended for there to be a particular requirement or mechanism for the termination of an agreed arrangement, such as a flexibility arrangement made under clause 12.4 of Part 1 of the Enterprise Agreement, it was set out in the Enterprise Agreement. By contrast, clause 12 of Part 2 of the Enterprise Agreement does not set out any mechanism or requirement for the termination of an agreed arrangement for the payment of average shift penalties made as a result of consideration of a proposal pursuant to clause 12.6 of Part 2.

[19] In our view, nothing in the Enterprise Agreement prevents, precludes or otherwise prohibits CSL from ceasing to pay shift penalties on an averaging basis. Further, that CSL may cease paying shift penalties on an averaging basis does not preclude or prevent CSL from considering any future proposal "that shift penalties be averaged over an agreed period."[16]

[20] We agree with the Commissioner's conclusion that CSL's decision to cease paying average shift penalties to the Employees is not an "extra claim" within the meaning of clause 3 of Part 1 of the Enterprise Agreement.[17] CSL's decision to no longer maintain a pre-existing arrangement to pay average shift penalties and instead to pay actual shift penalties is not an attempt to vary a right or obligation conferred or imposed by the Enterprise Agreement and there is no evidence before us of any other "conditions of employment" to which the decision to cease paying shift penalties may relate.[18] The manner of payment of shift penalties is primarily a matter of administration of the terms of the Enterprise Agreement.[19] Further, the very broad prohibition on parties to "not pursue any extra claims relating to … any other matters related to the employment of the employees" in clause 3 of Part 1 of the Enterprise

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[15] Decision at [44]

[16] Clause 12.6 of Part 2 of the Enterprise Agreement

[17] Decision at [44] & [50]

[18] Noting that we declined to permit the NUW to adduce new evidence on the appeal on grounds including that evidence of any relevant contractual terms between any one or more of the Employees and CSL was available and could have been admitted at first instance (*Brazilian Butterfly Pty Ltd v Charalambous* (2006) 155 IR 36 at 44)

[19] *National Union of Workers v Qantas Airways Limited* [2010] FWA 4991 at [18], [27]-[35] and the cases referred to therein

Agreement does not, on its proper construction, prevent CSL from changing matters of administration or policy which are not governed by the Enterprise Agreement or a contract; a clear provision in an enterprise agreement or contract would be required to prevent the alteration of such a practice or policy.[20]

[21] In addition, because clauses 12.2 and 12.6 of Part 2 of the Enterprise Agreement contemplate changes concerning the manner in which shift penalties may be paid, by necessary implication a proposal (or decision) to change the payment of shift penalties from average shift penalties to actual shift penalties is not an "extra claim" for the purpose of clause 3 of Part 1 of the Enterprise Agreement, because it is not "extra" in the sense of being additional to the matters already provided for by the Enterprise Agreement or a contract.[21]

Conclusion

[22] We uphold the appeal, quash the Decision and resolve the Dispute by determining that the Enterprise Agreement does not prevent, preclude or otherwise prohibit CSL from ceasing to pay shift penalties on an averaging basis to the Employees and reverting to a time worked method of payment as set out in clause 12.2 of Part 2 of the Enterprise Agreement, with or without their agreement.

DEPUTY PRESIDENT

Appearances:

Mr M Follett, counsel, and *Mr A Lambert,* solicitor, on behalf of the appellant.
Mr R Payne, Industrial Officer, on behalf of the respondent.

Hearing details:

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[20] *AMWU v Toyota Motor Corporation Australia* [2013] FWC 8237 at [52]-[54]

[21] *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [2013] FWCFB 2301 at [26]