DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Construction, Forestry, Maritime, Mining and Energy Union - The Maritime Union of Australia Division

v

Qube Ports Pty Ltd T/A Qube Ports
(C2017/7134)

DEPUTY PRESIDENT BOOTH SYDNEY, 4 SEPTEMBER 2018

Application to deal with a dispute in accordance with the dispute settlement procedure in an enterprise agreement – interpretation of agreement – shift extension provisions.

[1] This is a decision about whether Qube Ports Pty Ltd (Qube) is entitled to lengthen the duration of a shift to be worked on a Sunday, once notified, other than by way of an extension.

[2] The Construction, Forestry, Maritime, Mining and Energy Union (the Union) made an application to the Fair Work Commission (the Commission) to deal with the dispute in accordance with the dispute settlement procedure of the "Qube Ports Pty Ltd Port of Port Kembla Enterprise Agreement 2016" (the Agreement) and s. 739 of the Fair Work Act (the Act). The dispute was not resolved by conciliation,[1] and is now before me for arbitration.

[3] The parties agree that the Commission has the power to arbitrate to resolve the dispute and I agree.

[4] I exercised my discretion under s.596 of the Act to allow the Union and Qube permission to be legally represented. Mr Howell represented the Union and Mr Follett represented Qube. Evidence was given by Mr Keane for the Union and by Mr Wingate, Mr Chatterton and Mr Stewart for Qube. Mr Keane was not required for cross-examination.

[5] The Union and Qube put forward an agreed question for me to answer:

> Does clause 1.6.6 of Part B of the [Agreement] permit Qube to vary the length of a Sunday Day Shift, Evening Shift or Night Shift notified under clause 1.6 of Part B of [the Agreement]?[2]

[6] In submissions Qube said that the question would be better expressed as:

> Does clause 1.6.6. of Part B permit Qube to vary a Sunday shift length so as to extend the length of the indicative shift?[3]

[7] The Union agreed that this formulation of the question was acceptable.[4]

[8] The fundamental difference between the parties is that the Union says that once a shift is notified on a Friday for a Sunday, the duration of the shift cannot be lengthened other than by use of the shift extension provisions of the Agreement. The shift extension provisions of the Agreement contain the right for an employee to decline an extension. Qube says that the duration of the shift can be lengthened by the shift being varied by 2pm on Saturday. Qube says that this is not a shift extension but a variation, and therefore an employee does not have the right to decline.

[9] My task is to interpret the Agreement in accordance with the accepted principles of construction of enterprise agreements. The circumstances giving rise to the dispute are uncontroversial. They are not relevant to the task of interpretation but they are relevant to the resolution of the dispute.

[10] On Friday 10 November 2017 before 4pm Qube notified employees of an indicative shift of 10 hours starting at 4pm on Sunday 12 November and finishing at 2am on Monday 13 November 2017. On Saturday 11 November 2017 before 2pm Qube notified the employees that this shift was varied to start at 7pm on Sunday 12 November and finish at 7am on Monday 13 November 2017. That is, the shift start time was varied from 4pm to 7pm and the duration of the shift was lengthened from 10 hours to 12 hours. At the commencement of the shift there was a toolbox meeting. During the toolbox meeting dialogue occurred between the Shift Manager and employees about the duration of the shift. The Shift Manager wrote a note that was attached to the statement of Mr Stewart to the effect that he affirmed that it was a 12 hour shift. [5] Neither the Shift Manager nor any of the employees gave evidence. Although there is some difference between the Union and Qube about who said what to whom I will not address this further as it is not relevant to the construction of the Agreement.

[11] Seven employees ticked a box on a sign-on sheet indicating that they were unavailable to extend the shift. Those employees unilaterally left the workplace at 5am having worked 10 of the 12 hours. Subsequently these employees were each issued with a "Formal Warning: First and Final" for leaving the site without authorisation and refusing a lawful and reasonable direction to complete the shift. The CFMMEU on behalf of these employees disputes these warnings.[6]

[12] The interaction between the answer to the question I have been asked to answer, in order to interpret the agreement, and the dispute itself is revealed by Qube's submission that:

> ...if the Commission answers the question as "no" it need not trouble itself with paragraphs 44-65 of the MUA Outline and the question of what to do regarding the warnings. In such a circumstance, there was no foundation for the warnings in the first place. Subject to any appeal, Qube undertakes that it will (itself) wholly withdraw all of the relevant warnings issued to the seven employees, if the Agreed Question is answered "No".[7]

[13] For the reasons outlined below I consider that the answer to the question in either of the formulations is "No". It follows from Qube's submission above that the relevant warnings will be withdrawn.

Interpretation of the Agreement

[14] I have applied the principles recently summarised in *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Ltd* (Berri).[8] The summary conveniently provided in Berri distils decades of jurisprudence derived from decisions of the High Court of Australia, the Federal Court, State courts and decisions of the Fair Work Commission itself.[9]

[15] The Agreement is in two parts; Part A containing nationally applicable terms and Part B containing terms applicable only to the Port of Port Kembla. The terms in Part B override the terms in Part A to the extent of any inconsistency.[10]

Does the Agreement have a plain meaning or is it ambiguous or susceptible to more than one meaning?

[16] To answer this question I must consider the language of the Agreement having regard to its context and purpose.[11] Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.[12]

[17] I will set out the terms of the Agreement that I consider are relevant to my consideration of the dispute:

> Part A, Clause 29
>
> 29. Rostering and notification procedures
>
> 29.1 The parties agree that regulated time off provided by the 7/1 roster will continue to apply in ports where that roster form exists as a minimum standard, subject to the arrangements in this Agreement where the actual configuration of the regulated time off will be finalised on a port by port basis.
>
> 29.2 Final notification of allocation for Employees will be made on the job or by telephone ring-in at the following times:
>
> a. from 1600 hours on the day prior to any requirement to work Day Shift/ Evening Shift/ Night Shift Monday to Friday.
>
> b. from 1600 hours on Friday for any requirement to work Day Shift/ Evening Shift/ Night Shift on a standard public holiday that falls on a Monday.
>
> c. from 1600 hours on Friday for any requirement to work Day Shift/ Evening Shift/ night Shift on a standard public holiday that falls on a Monday.
>
> 29.3 As far as practicable, where orders can be confirmed earlier than 1600 hours, Employees will be notified by text message that their orders are released.
>
> 29.4 Once allocation is provided, Employees start times and shift lengths will not be altered other than in accordance with the shift extension provisions. The Employee will be paid and have AAH credited accordingly.

Part A, Clause 31

31. Shift extensions

31.1 Other than as provided for in Part B of this Agreement, the following will apply:

a. The parties intend that vessels are worked and that the Company has certainty of labour and skills to maintain vessel operations.

b. Shift extensions for all Employees will be worked in accordance with operational, maintenance and skills requirements.

31.2 Shift extensions are not considered normal practice and are subject to the following conditions:

a. The hours of a shift extension notified will count towards the AAH for all FSEs and PFSEs and will be paid for all other Employees.

b. Any allocated shift will not be extended for more than four hours.

c. Shift extensions may be extend for one, two, three or four hours and once notified the duration of the extension may not be altered. It is intended that a confirmed shift extension will only be altered in extenuating circumstances by agreement. For avoidance of doubt, the full shift length, including any extension, will not exceed 12 hours.

d. Shift extensions will be notified at the commencement of the last break, or earlier and may be cancelled by notification up to one hour before the shift extension is to occur.

e. In the case of a four hour shift, notification will be provided no later than one hour prior to the end of the shift and any shift extension will result in a seven hour minimum engagement.

f. If an Employee is not available to extend, they will notify the shift manager and where there is no shift manager, the Team Leader at the tool box meeting. If the Employee does not notify the Company in accordance with this subclause of his or her inability to extend, the Employee will be required to extend.

g. Where an Employee requests an exemption from a shift extension as a result of a pressing personal necessity and alternative arrangements cannot be made, the Employee will not be required to work the shift extension.

31.3 Shift extensions can be called in unforeseen circumstances. Unforeseen circumstances include vessel late arrival, equipment breakdown, weather delay, apparent stowage problems and genuine circumstances that are identified in consultation with employee representative and foremen.

Part B, Clause 1.3.4

1.3.4 Two meal breaks will apply to seven and eight hour shifts under the following circumstances:

a. At the commencement of a Day Shift or Evening Shift where the forecast temperature is 36 degrees or greater.

b. At the commencement of any shift where the actual temperature is greater than 36 degrees.

c. Where Employees are required to work in uneven stows that are not accessible to forklifts to transport cargo to the shifts hook, for work periods that total greater than 50% of any shift.

d. Where Employees are required to work at heights or lash motor vehicles of work period that total greater than 50% of any shift.

e. When an extension is notified via the allocation system the day prior or at the toolbox meeting on that day, it is understood that any extension notified via the allocation system the day prior then cancelled or reduced to eight hours or less at the toolbox meeting at clause 1.6.2 will not attract the extra meal break(s).

Part B, Clause 1.6

1.6 Notification

1.6.1 Employees will be notified of their work requirements on the job on the previous day or by telephone service 1600 hours on that day, other than where specified in this clause.

1.6.2 Notification will contain details of the work location, commencement time and indicative duration of the work period.

1.6.3 The indicative shift length is to be worked/paid unless a reduced time is notified at the commencement of the shift toolbox meeting.

1.6.4 A shift can be extended beyond the indicative shift length to a maximum of 12 hours as per clause 31 of Part A of this Agreement.

1.6.5 Should the indicative shift length be reduced at the toolbox meeting, it cannot be extended except in extenuating circumstances, as agreed.

1.6.6 Notification to work on weekend will be notified Friday at the normal notification time. Sunday Day Shift, Evening Shift and Nights Shifts (first shift Monday) may be confirmed, varied or cancelled (i.e. change to shift start time or cancelled) by 1400 hours. Saturday.

1.6.7 Notification to work on Monday public holidays will be notified on Friday at the normal notification time. Monday public holidays Day Shift, Evening Shift

and Night Shift (first shift Tuesday) may be confirmed, varied (i.e. change to shift start time) or cancelled by 1500 hours Sunday.

1.6.8 Where a shift is cancelled in accordance with clauses 1.6.6 and 1.6.7, no payment will apply.

1.6.9 Whilst on shift, an Employee may be "ordered back" to a subsequent shift.

1.6.10 Employees are responsible for ascertaining when they are required to work.

1.6.11 The Company may contact Employees after the usual notification time and procedures above, except between 0100 hours and 0430 hours, to provide additional resources due to late changes in operational requirements. In these circumstances, no Employee is compelled to work at short notice. It is essential that the Employee has had adequate rest and is able to meet all Company requirements in relation to working safely, prior to accepting any such engagements at short notice.

i.e. or e.g.?

[18] The Union says the terms in the brackets in clause 1.6.6 and 1.6.7 *(i.e. change to shift start time or cancelled)* qualify the word "varied" by confining the permitted variation to a change to the shift start time or cancellation of the shift because, among other reasons, "i.e." means "that is". Qube says that this is an ultra-literal interpretation and submit *"the words i.e. are intended to be e.g. That is, a variation to the shift start time is one type of variation contemplated but it's not the only type of variation contemplated"*,[13] and *"we would say the ordinary meaning of i.e. or e.g. could be either."*[14]

[19] Notwithstanding the quote provided by Qube from the Editor-at-Large for Merriam Webster: *"The most looked up abbreviations in our online dictionary are i.e. and e.g., probably for the simple reason that they are so often confused for one another"*,[15] the Webster Online Dictionary itself defines i.e. as "that is" and e.g. as "for example". I see no ambiguity in these phrases. I do not think that this is an ultra-literal interpretation. It is simply the plain meaning of i.e. and e.g. I reject Qube's submission that a variation to the shift start time is one type of variation contemplated but is not the only type of variation contemplated.

[20] Qube says that if the clause was to be read literally then it would mean that the finish time of a shift could not be changed. If this was the case varying the start time could shorten or lengthen the shift and the Union *"cannot have it both ways"*.[16] The Union rejects this literal interpretation. Referring to clause 1.6.2,[17] the Union says the requirement is to notify commencement time and indicative duration of the work period. The Union says "*the end time follows as a natural consequence of a shift length being fixed and a start time being varied…"*.[18] I accept that reasoning.

Interaction between clause 1.6.6 and the whole of clause 1.6

[21] The Union says that it would be inconsistent with the existence of clauses 1.6.3 and 1.6.4 in clause 1.6 to infer that clauses 1.6.6 and 1.6.7 allow for the duration of a shift to be lengthened.[19] Clause 1.6.3 (and clause 1.6.5) concern reduction of the shift length and clause 1.6.4 concerns the extension of the shift length. The Union says that a general power to vary the shift length arising from Qube's interpretation of clause 1.6.6 is inconsistent with the existence of clause 1.6.3 and 1.6.4 which specifically address reduction and extension of shifts.[20] I consider that there is force in this reasoning.

[22] Qube says that clause 1.6.4 does not apply to weekend, Sunday or Monday public holiday shift notifications.[21] Qube says:

> "1.6.1 and 1.6.2 deal with M-F notifications. 1.6.3 and 1.6.4 and 1.6.5 expand upon and give additional content to M-F notifications. 1.6.6 and 1.6.7 then address a different scenario unencumbered by 1.6.3 to 1.6.5".[22]

[23] I do not accept this proposition. I have considered Qube's reasoning, including the reference to "notification" found in clauses 1.6.1, 1.6.2, 1.6.6 and 1.6.7 and the insertion of clauses 1.6.3, 1.6.4 and 1.6.5 below clauses 1.6.1 and 1.6.2 after the 2008 negotiations, but I am not persuaded. I think clause 1.6 needs to be read as a whole to understand each of its elements. I agree that the effect of "other than where specified in this clause"[23] means that clause 1.6.1 refers to shifts on Monday to Friday (because of the existence of clauses 1.6.6 and 1.6.7 that deal with Sundays and Monday public holidays). However, clause 1.6.2 is not so qualified and I consider that it applies equally to Sunday and Monday public holiday shifts as it does to shifts on Monday to Friday. There is nothing in clauses 1.6.3 and 1.6.5 to warrant the conclusion that they are not as relevant to shifts on Sunday and Monday public holidays as they are to shifts on Monday to Friday. I consider that they address specific aspects of the work arrangements pertaining to shifts on any day of the week at Port Kembla, as do clauses 1.6.8 to 1.6.11.

[24] The word "indicative" appears many times in relation to "indicative duration" (clause 1.6.2) and "indicative shift length" (clause 1.6.3, 1.6.4 and 1.6.5). Mr Howell informed me that the term "indicative" had been in predecessor documents as far back at 2005 and possibly before then.[24] Mr Follett said "*It's indicative at all times until it becomes either reality or something different and that occurs in the morning toolbox.*"[25] I don't think this has any bearing on the disputed interpretation.

[25] I consider that the construction of clause 1.6.6 when read in the context of the whole of clause 1.6 supports the Union's construction of the Agreement.

Interaction between clause 1.6 and the Agreement as a whole

[26] In support of its interpretation of clause 1.6.6 Qube says that notification on a Saturday regarding a Sunday shift is not a shift extension.[26] Qube says that a shift extension is something that happens "*on the day*"[27] (meaning during the shift).

[27] To explore this concept let us look firstly at clause 29.4 that provides that once allocation is provided start times and shift lengths cannot be altered other than in accordance with the shift extension provisions. Clause 1.6.6 overrides the restraint on changing the start

time of a Sunday shift. I note that clause 1.6.6 does not explicitly override the restraint on changing a shift length or this dispute would not have occurred. As mentioned the shift length is addressed by clause 1.6.3 and 1.6.4 so arguably clause 29.4 does not apply to Port Kembla.

[28] Shift extensions are dealt with by clause 31 in Part A. Clause 31 does apply to Port Kembla because clause 1.6.4 in Part B says so. Clause 31.1 d. includes the provision that shift extensions are to be notified at the commencement of the last break, or *earlier*. Qube contends that this means *earlier* in the shift. The Union says that this cannot be the case as clause 1.3.4, that deals with meal breaks, includes 1.3.4 e. that says *"When an extension is notified via the allocation system the day prior or at the toolbox meeting that day ...."*. I agree that this suggests that a shift extension being notified before the shift commences is contemplated by the Agreement.

History of the provisions in the Agreement

[29] Mr Howell took me through the history of a number of the provisions of the Agreement from 2005 onwards. He examined the 2005, 2008, 2011 versions of the Agreement to identify when the wording now contained in the Agreement was inserted. The first appearance of a national shift extension provision, that is, a shift extension provision in Part A of the enterprise agreement, occurred in 2008.[28]

[30] All three witnesses for the Respondent formed part of the bargaining team for Qube during negotiations for Part B of the 2008 agreement.[29] David Wingate and Greg Stewart both gave evidence that the only significant material change (except for changes to shift notification times) to the shift extension provisions across the 2005, 2008, 2011 and 2016 agreements occurred during the 2008 negotiations.[30]

[31] The change was to subclause 1.8.2 of Part C of the 2005 Agreement, which read:

> 1.8.2 Notification to work on weekends shall be notified Friday at the normal notification time. Sunday Day shift, Evening shift and Night shift (1st shift Monday) may be confirmed, varied or cancelled (i.e. reallocated shift, or change to shift start time or cancelled) by 1700 hours Saturday.

[32] Following the 2008 negotiations, 1.7.5 of Part B of the 2008 Agreement (the equivalent subclause in that Agreement) now had the words:

> 1.7.5 Notification to work on weekend shall be notified Friday at the normal notification time. Sunday Day shift, Evening Shift and Night Shift (1st Shift Monday) may be confirmed, varied or cancelled (i.e. change to shift start time or cancelled) by 1500 hours Saturday.

[33] There are two material changes to the subclause, one being the adjustment of the notification time from 1700 hours on Saturday to 1500 hours on Saturday, and the second and most pertinent to this dispute being the removal of the words 'reallocated shift' from the words in brackets following 'i.e.'.

[34] David Wingate and Kevin Chatterton gave evidence that the words "reallocated shift" were removed from the 2008 Agreement in response to a demand from the MUA that re-

allocation by Qube from day shift to evening shift or from evening shift to night shift could no longer occur.[31]

[35] In his witness statement, David Wingate detailed his specific recollection of the 2008 negotiations regarding the removal of the words "reallocated shift" from the new subclause 1.7.5 of Part B of the 2008 Agreement as follows:

> "One particular claim I recall being made by the MUA (and ultimately agreed to by Qube) was the removal of the phrase "reallocated shift" from clauses 1.8.2 and 1.8.3 of the 2005 Agreement, which had to that point in time enabled Qube to change employees from one type of shift (day, evening, night) to another between initial notification and actual shift confirmation. The MUA complained about significant dislocation for employees in having the nature of their shift varied in this manner."[32]

[36] Mr Wingate then went on to say that despite such an agreement, which resulted in the removal of the words "reallocated shift" from the new subclause 1.7.5 of Part B of the 2008 Agreement:

> "…Qube's concession on this amendment came with the rider, consistent with current operations at that point in time, that Qube needed to retain the ability to vary shift lengths, along with commencement and end times. I specifically recall stating that Qube needed to be able to vary the shift commencement and end times when dealing with the MUA's claim."[33]

[37] Evidence of the removal of the words "reallocated shift" suggests attention was paid to the words in brackets, and I note that although the words "shift lengths" are in clause 29.4 they were not inserted into clause 1.6.6. Mr Stewart's evidence that he stated that Qube needed to be able to vary the shift commencement and end times, however, is merely evidence of what one person intended or requested and does not satisfy me that a common understanding existed. In any event, as stated, I consider the variation of the start time as having the natural consequence of varying the end time.

[38] In his reply statement, Mr Keane sets out:

> "… there were significant discussions at the 2008 Part B negotiations for Port Kembla about indicative shift lengths notification … the result of those discussion was the inclusion of the following clauses in Part B of the 2008 enterprise agreement which did not exist in the 2005 enterprise agreement:
>
> - Clause 1.7.2: the indicative shift length to be worked/paid unless a reduced time is notified at the commencement of the shift toolbox meeting; and
>
> - Clause 1.7.3: a shift can be extended beyond the indicative shift length to a maximum of 12 hours as per Part A, clause 13.
>
> These paragraphs are still in the current agreement at Part B, clause 1.6.3 and clause 1.6.4."[34]

[39] All three witnesses for the respondent acknowledged that they did not recall any specific discussions about the substance of the weekend allocation provisions in the

negotiations for the 2011 and 2016 EAs and that they were unchanged in their application (save for some small changes to specific times of notification).[35]

[40] In closing, Mr Howell mentioned the Berri principle that the fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the Act is itself an important contextual consideration,[36] in particular, that an enterprise agreement is "made" when a majority of employees approve the agreement.[37] Whilst an examination of the predecessor documents to the Agreement have assisted me to understand the timing of the insertion of some of the clauses in the Agreement, consistent with the Berri principle, in interpreting the Agreement I have focussed my attention on the Agreement and not its predecessors.

[41] There was no evidence relating to the negotiation of the Agreement that could be said to be 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.[38]

Practice at Port Kembla

[42] The evidence of Mr Wingate, Mr Chatterton and Mr Stewart addressed their understanding of how the clause operated at Port Kembla. Each of them conveyed their understanding that varying the length of a Sunday shift on Saturday before 2pm was not a shift extension but a variation, and they did not apply the provisions of clause 31.[39]

[43] David Wingate said in cross examination that he considers that extensions are "*confirmed on shift*",[40] Greg Stewart gave evidence that "*shift extensions can only occur on the day of the shift*"[41] and Kevin Chatterton maintained that "*shift extensions can only be notified on the day the extension is required*".[42]

[44] In cross-examination Greg Stewart clarified his witness statement to confirm that any change that happened the day before a Sunday shift he would refer to as a "variation"[43] and that he considered a variation to lengthen a shift that occurred at the toolbox meeting on the day of the shift would be a "shift extension".[44] When asked by Mr Howell whether the term "variation" is something that's in the lexicon at the Port Kembla site, Greg Stewart replied "*Whenever we talk about variations or changes to Sunday allocations or Monday public holidays it is exactly that. It is a variation or a cancellation, so we either cancel the shift or we vary it*."[45] He went on to say that the lengthening of an indicative shift that is notified on Friday to be worked on Sunday would not be an extension, but would rather be "extending the shift's length".[46]

[45] However when Mr Howell took the witnesses to clause 1.3.4 5. of Part B of the 2008 Agreement, the witnesses accepted that a broader definition of "shift extension" was contemplated by that clause. Specifically, Greg Stewart accepted that a shift extension can be notified via the allocation system the day prior or at the toolbox,[47] Kevin Chatterton acknowledged that an extension could be notified the day prior to the shift,[48] and David Wingate accepted that a shift extension could be notified via the allocation system the day prior to the day on which it's worked.[49]

[46] All witnesses agreed that by clause 1.3.4 5. shift extensions can be notified by the allocation system the day prior to the shift that is being extended. Their opinion that shift extensions necessarily occur on the day of the shift, and where something resembling a shift

extension occurs at any time other than on the day of the shift, that this is not a shift extension, is contradictory to words in the Agreement which specifically contemplate that.

[47] Mr Follett said that accepting the Union's interpretation would be "a complete surprise" to Mr Wingate, Mr Chatterton and Mr Stewart.[50] I note that the Berri principle, that subsequent conduct may be relevant to the interpretation of an industrial instrument, is qualified by the cautionary note that post-agreement conduct must be such as to show that there has been a meeting of the minds; a consensus.[51] Absence of complaint or common inadvertence is insufficient to establish a common understanding. The mere fact that successive agreements may have contained the same provision and no claim was made under an earlier instrument will not sustain the assertion that the parties had a common understanding as to the meaning of a provision.[52]

Impact on the operation at Port Kembla

[48] Qube contend that the Union's interpretation could be disruptive of the Port Kembla operation.[53]

[49] I note that it is not open to me to rewrite the Agreement to achieve what might be regarded as a fair or just outcome.[54]

[50] As Tracey J said in a recent decision of the Federal Court dealing with interpretation of the Security Services Award 2010:[55]

> 24. Both sides sought to support their construction argument by reference to extraneous matters. United Voice and Mr Davis argued that a finding by the Court that the revised rostering arrangements were permissible under the Award would give rise to what was said to be "an industrially repugnant result". This was because employees were entitled to be compensated both for the disutility of weekend work and for being required to work overtime.
>
> 25. Wilson Security, for its part, emphasised the competitive nature of the security industry and the low profit margins available to participants.
>
> 26. The Court's decision must, however, depend on the text and the context of the Award. In the event that the proper construction of the Award is unacceptable to one or both of the parties there is always scope for an application for amendment.

[51] Should Qube consider that their commercial interests are compromised by my interpretation of the Agreement it is open to them to seek to renegotiate this provision in enterprise bargaining.

Conclusion

[52] After considering the text of clause 1.6.6 and reading it in the context of clause 1.6 and the Agreement as a whole I conclude that the Agreement has a plain meaning and is not ambiguous or susceptible to more than one meaning.

[53] In so far as a shift on a Sunday is concerned I conclude that the Agreement means:

1. An employee is to be notified of the start time, place and length of their indicative shift by 4pm on the preceding Friday by application of clause 1.6.2; and
2. The shift can be worked in accordance with the notification; or
3. The employee can be notified of a cancellation of this shift by 2pm on Saturday by application of clause 1.6.6; or
4. The employee can be notified of a change to the shift start time by 2pm on Saturday by application of clause 1.6.6; or
5. The employee can be notified at the commencement of the shift toolbox meeting that the shift length is to be reduced by application of clause 1.6.3; or
6. The employee can be notified that the shift length is to be extended by application of clause 1.6.4.

[54] Consequently my answer to the question in either of the formulations is "No".

DEPUTY PRESIDENT

Appearances:

Mr A. Howell on behalf of the Applicant.

Mr M. Follett on behalf of the Respondent.

Hearing details:

2018.

Sydney:

August 7.

Final written submissions:

Outline of Submissions on behalf of the Applicant of 8 May 2018.

Witness statement of Garry Keane of 7 May 2018.

Reply statement of Garry Keane (undated).

Outline of Submissions on behalf of the Respondent of 25 June 2018.

Witness statement of David Wingate of 25 June 2018.

Witness statement of Greg Stewart of 25 June 2018.

Witness statement of Kevin Chatterton of 28 June 2018.

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[1] Conference of 9 February 2018.

[2] Email from Mr A. Jacka on behalf of the Applicant of 17 April 2018.

[3] Outline of Submissions on behalf of the Respondent of 25 June 2018.

[4] Transcript of 7 August, PN102-105.

[5] Witness statement of Greg Stewart of 25 June 2018, Annexure GS-1.

[6] Witness statement of Garry Keane of 7 May 2018 at [44].

[7] Outline of Submissions on behalf of the Respondent of 25 June 2018.

[8] "Automotive, Food, Metals, Engineering, Printed and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Ltd (2017) 268 IR 285.

[9] Ibid at [114].

[10] Qube Ports Pty Ltd Port of Port Kembla Enterprise Agreement 2016 Part A clause 5.6.

[11] Above n 8 at [114], Principle 7.

[12] Ibid at [114], Principle 8.

[13] Transcript of 7 August 2018, PN801-802.

[14] Transcript of 7 August 2018, PN819.

[15] Outline of Submissions on behalf of the Respondent of 25 June 2018, p.5, footnote 5.

[16] Transcript of 7 August 2018, PN798.

[17] Qube Ports Pty Ltd Port of Port Kembla Enterprise Agreement 2016, Part B.

[18] Transcript of 7 August 2018, PN832.

[19] Transcript of 7 August 2018, PN251.

[20] Ibid.

[21] Transcript of 7 August 2018, PN757.

[22] Transcript of 7 August 2018, PN762.

[23] Qube Ports Pty Ltd Port of Port Kembla Enterprise Agreement 2016, Part B, clause 1.6.1.

[24] Transcript of 7 August 2018, PN228.

[25] Transcript of 7 August 2018, PN790.

[26] Transcript of 7 August 2018, PN759.

[27] Ibid.

[28] Qube Ports Pty Ltd Port of Port Kembla Enterprise Agreement 2016, Part A, clause 13.

[29] Witness statement of David Wingate of 25 June 2018 at [18]; Witness statement of Kevin Chatterton of 28 June 2018 at [5]; Witness statement of Greg Stewart of 25 June 2018 at [9]; Transcript of 7 August 2018, PN394.

[30] Witness statement of David Wingate of 25 June 2018 at [19]; Transcript of 7 August, PN393, 398 and 631.

[31] Transcript of 7 August 2018, PN410, PN403, PN408, PN540 and PN552.

[32] Witness statement of David Wingate of 25 June 2018 at [19].

[33] Ibid at [20].

[34] Reply statement of Garry Keane (undated) at [4-5].

[35] Witness statement of Kevin Chatterton of 28 June 2018 at [7]; Witness statement of David Wingate of 25 June 2018 at [29]; Transcript of 7 August 2018, PN392 and PN630.

[36] Above n 8 at [114], Principle 5.

[37] Transcript of 7 August 2018, PN710-718.

[38] Above n 8 at [114], Principle 12 (i).

[39] Transcript of 7 August 2018 PN435-443, PN451-452,PN577-578 and PN632; Witness statement of Kevin Chatterton of 28 June 2018 at [28]; Witness statement of David Wingate of 25 June 2018 at [26]; Witness statement of Greg Stewart at [12].

[40] Transcript of 7 August 2018, PN441.

[41] Transcript of 7 August 2018, PN663.

[42] Transcript of 7 August 2018, PN579.

[43] Transcript of 7 August 2018, PN619.

[44] Transcript of 7 August 2018, PN620.

[45] Transcript of 7 August 2018, PN651.

[46] Transcript of 7 August 2018, PN659.

[47] Transcript of 7 August 2018, PN640 and 644.

[48] Transcript of 7 August 2018, PN594.

[49] Transcript of 7 August 2018, PN469.

[50] Transcript of 7 August 2018, PN760.

[51] Above n 8 at [114], Principle 15.

[52] *Glen Cameron Nominees Pty Ltd (t/a Glen Cameron trucking) v Transport Workers Union of Australia* [2018] FWCFB 3744 at [46].

[53] Transcript of 7 August 2018, PN806-811.

[54] *Knucks v CSR Limited* (1996) 66 IR 182 at 184; Above n 52 at [33].

[55] *United Voice v Wilson Security Pty Ltd* [2018] FCA 1215 at [24]-[26].