DECISION

Fair Work Act 2009
s.604—Appeal of decision

Victoria Police
v
The Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria
(C2018/5566)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT HAMILTON
COMMISSIONER BISSETT

SYDNEY, 04 JANUARY 2019

Appeal against decision [2018] FWC 5695 of Commissioner Wilson at Melbourne on 14 September 2018 in matter number C2017/3833.

[1] The Police Federation of Australia (Victoria Police Branch) trading as The Police Association of Victoria **(Respondent)** filed an application pursuant to s.739 of the *Fair Work Act 2009* (Cth) (**Act**) for the Fair Work Commission (**Commission**) to deal with a dispute with Victoria Police (**Appellant)** in accordance with the *Victoria Police (Police Officers (excluding Commanders), Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2015* (**the 2015 Agreement**). The dispute followed a request by Detective Senior Constable Gary Emery (**DSC Emery**) for a flexible working arrangement. DSC Emery's request, if approved, would allow him to work 10 hour shifts over 4 days per week rather than working 8 hour shifts over 5 days per week (**the Request**).

[2] The Request was made under the Right to Flexible Working Arrangements clause of the 2015 Agreement (**clause 14)**, more specifically clause 14.1(d) as the Appellant is over the age of 55 years. Clause 14.3 provides that requests for flexible working arrangements must be made by the employer, and assessed in accordance with s.65 of the Act. Clause 14 and s.65 of the Act are set out as follows:

> **"14. Right to Request Flexible Working Arrangements**
>
> 14.1 An employee who:
>
> (a) is the parent of, or has responsibility for, the care of a child who is of school age or under; or
> (b) is a carer within the meaning of the *Carer Recognition Act 2010*; or
> (c) has a disability; or
> (d) is 55 years of age or older; or
> (e) is personally experiencing family or domestic violence; or

(f) is providing personal care, support and assistance to a member of their immediate family or member of their household because they are experiencing family or domestic violence;

may request a change in working arrangements relating to those circumstances.

14.2 The employee is not entitled to make such request, unless the employee has completed at least 12 months of continuous service with the employer, immediately before making the request.

14.3 Such request must be made by the employee, and assessed by the employer, in accordance with the provisions of Section 65 of the FW Act."

"65 Requests for flexible working arrangements

…

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

[3] DSC Emery's Request was ultimately denied by the Appellant by way of a letter dated 21 June 2017. The issue at first instance was therefore whether the reasons for denying DSC Emery's Request amounted to "reasonable business grounds" in accordance with clause 14.3 of the 2015 Agreement and s.65 of the Act.

[4] On 14 September 2018, Commissioner Wilson determined that the basis on which the Appellant refused DSC Emery's Request did not amount to reasonable business grounds and that the request be approved instead (**Decision**).[1] The Appellant now seeks to appeal that Decision.

[1] [2018] FWC 5695.

[5] On 28 November 2018 Mr M Harding, of Counsel, appeared for the Respondent and Mr R Dalton, of Counsel, appeared for the Appellant. Having regard to s.596(2)(a) of the Act, permission to appear was granted to both representatives.

Background

[6] DSC Emery has worked for nearly 31 years as a police officer and is presently 58 years of age. Since early 2008 his work has been substantially associated with units in the Mornington Peninsula. Since 24 March 2018 he has returned to a permanent assignment at the Mornington Peninsula Crime Investigation Unit (**CIU**). On 2 May 2017 when he was working in what is now the Mornington Peninsula Divisional Response Unit (**DRU**),[2] DSC Emery submitted his Request as follows:

> "…
>
> I am 57 years old reaching the age of 55 on 11th of December, 2014. I have been a member of [the Appellant] since the 16th of September, 1987. I am currently a full time employee stationed at the Mornington Peninsula CIU and own position number 20022494. I have held this position since our transfer from Hastings CIU in November 2015. Prior to this date, I was seconded to the Mornington Peninsula Tasking Unit (now Divisional Response Unit) since the 25th of August, 2013 and post the CIU transfer to Somerville I have continued to be seconded to this team 5 position 20023662.
>
> As per the Enterprise Agreement 2015 section 14, I request that I be authorised to undertake flexible working arrangements to assist in my transition to retirement. I request that my working arrangements change from the current ten 8 hour shifts per fortnight to eight 10 hour shifts. The change would equate to two additional rest days per fortnight.
>
> I am not requesting a set roster or specific working patterns (nominated day or shifts), flexible rosters are required with DRU duties. This arrangement would be reviewed in 12 months.
>
> …"[3]

[7] Having received DSC Emery's Request, the then Acting Inspector Miro Mastorovic, sought advice from the Appellant's Employee Relations team:

> "I spoke to Nicole and was asked to send this email with basic details pending your legal advice. A Detective at Mornington Peninsula CIU has submitted a report asking that his hours of work are changed to 4 x 10's rather than 5 x 8's, in accordance with the EB…

[2] For the purposes of context, whereas the CIU predominantly responds to reported crime, the DRU predominantly deals with drug related crime, and includes sourcing work from intelligence activities; see also Transcript of Proceedings dated 23 July 2018 before Commissioner Wilson at PN 526.

[3] Decision at [7].

> The member has cited 'transitioning into retirement' as a reason for requesting the change.
>
> As the normal OIC of that unit, I can confirm that although the request could technically be accommodated, this would cause discontent from other members for obvious reasons (not earning the COT, which is essentially based and accounted for around 8 hours shifts).
>
> Can you advise once you have your legal advice on the matter. I will not provide a response to the member other than that it is being considered by Employee Relations."[4]

[8] By mid-June 2017 Inspector Cornford had become the decision-maker and a dialogue ensued between the two about the request. On 18 June 2017 Inspector Cornford acknowledged that DSC Emery was due a response within 21 days of his initial Request and apologised for the time taken to respond and undertook to progress the matter.[5] Inspector Cornford ultimately refused DSC Emery's request on 21 June 2017 on the following basis:

> "• As a Detective, the regular performance of overtime and recall to duty is an inherent requirement of your position. In the event a 4 x 10 roster was granted, [the Appellant] may require that you be recalled to duty on the fifth day. It is my view that granting you a compressed roster of longer days where this is not strictly required, in addition to the possibility of recall on the fifth day, raises occupational health and safety risks associated with fatigue.
>
> • Granting your request imposes an unreasonable financial burden on [the Appellant] because it would be obliged to pay both your full salary and the COT in respect of working the same hours. You would, in effect, be paid twice for the same work."

[9] The issues that were in dispute at first instance were as follows:

1. Whether granting the request will reduce DSC Emery's working hours;
2. Whether, for the above for other reasons, the flexible working arrangement, if granted will increase the workload of other staff members;
3. Whether there is, or may be, extra cost to the Appellant in the event the request is granted; and
4. What the Appellant's reasons are for refusing the request and which ones may be relied upon for the purposes of these proceedings.

[10] It is also relevant to mention how the ('**COT**') or Commuted Overtime hours operate. As the Commissioner notes at paragraph [53] of the Decision:

> "The Allowance is intended to be a "swings and roundabouts" allowance in the form a prepayment which pays officers for regular incidences of overtime. It saves everybody

[4] Decision at [11].

[5] Decision at [13].

> the bother of having to complete overtime forms, calculate overtime and pay precise payments, presumably varying week by week. It follows that the allowance will over compensate some people, and potentially under-compensate others."

Permission to appeal

[11] In relation to the question of permission to appeal, the Appellant submitted:

- The appeal raises important questions about the scope and application of the "reasonable business grounds" requirement for a refusal of a flexible working hours arrangement request.

- That on discretionary grounds, the appeal grounds raise arguable errors which demonstrate that the Decision is attended with sufficient doubt to warrant its review on appeal and there would be substantial injustice if permission were not granted, given the broader consequences for managing flexible work arrangement requests of this kind within the Appellant's extensive operations.

[12] The Respondent submits that it was necessary for the Commissioner to evaluate the reasons offered by the Appellant and make a judgment as to whether they constituted reasonable business grounds for refusal. That is what he did. The Decision is not affected by appealable error. Further, whilst one of the grounds for permission referred to in the notice of appeal is said to be the "broader consequences for managing flexible work arrangements", these consequences are not identified. Whatever they are, the consequences stem from the Agreement itself and the Act.

[13] An appeal under s.604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[6] There is no right to appeal and an appeal may only be made with the permission of the Commission. Subsection 604(2) *requires* the Commission to grant permission to appeal if satisfied that it is *in the public interest to do so*. Permission to appeal may otherwise be granted on discretionary grounds.

[14] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[7] The public interest is not satisfied simply by the identification of error, or a preference for a different result.[8] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> "... 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

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

[7] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44] -[46].

[8] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28].

> 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..."[9]

[15] Other than the special case in s.604(2), the grounds for granting permission to appeal are not specified. Considerations which have traditionally been treated as justifying the grant of permission to appeal include that the decision is attended with sufficient doubt to warrant its reconsideration and that substantial injustice may result if leave is refused.[10]

[16] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[11] However, as earlier stated the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

[17] We find that permission to appeal should be granted in this matter. We are of the view that the appeal raises important questions about the scope and application of the "reasonable business grounds" requirement for a refusal of a flexible working hours arrangement request. We consider these to be important matters, and therefore, the dispute arising in this case is a matter of public interest. Accordingly, permission to appeal is granted

The Appeal

Ground one

[18] The Appellant submits that the Commissioner erred in concluding[12] that the prospect of the Appellant being short-changed on additional hours covered by the Commuted Overtime Allowance **(COT)** was not itself a reasonable business ground for refusing DSC Emery's Request. A comparison needed to be drawn between the additional hours under the two different scenarios: the existing scenario (the hours DSC Emery was typically working under the standard roster) and the proposed scenario (the hours likely to be worked by DSC Emery under the requested 4 x 10 roster). The Commissioner had to make findings of fact on the evidence, identifying the quantum (or at least the range) of additional COT hours for each of the two comparators – but did not do so. It was an error for the Commissioner to dismiss Inspector Conford's evidence as being "anecdotal" and not objective. The evidence showed that objectively, the hours per shift worked by DSC Emery averaged at least 9.5 hours per shift. The Commissioner was also in error in respect of his analysis of DSC Emery's timesheet data. He did not make a finding about the quantum of the hours normally worked by DSC Emery on the standard roster and therefore did not undertake the relevant comparison.

[19] The restriction on additional COT hours worked would be "minor"[13] was contrary to the evidence[14] which demonstrated that the likely restriction on DSC Emery's additional COT

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[9] [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

[10] Also see *CFMEU v AIRC* (1998) 89 FCR 200; and *Wan v AIRC* (2001) 116 FCR 481.

[11] *Wan v AIRC* (2001) 116 FCR 481 at [30].

[12] Decision at [73] and [99].

[13] Decision at [99].

[14] Appeal Book tab 13, at 399-400 at [16]-[17]; AB tab 12 (DSC Brock), at 395 at [16] and 396 at [27]; tab 14 (DSC Simpson), at 403 at [17] and 406 at [35].

hours would be significant. Using the timesheet data, the Commissioner found that the maximum available additional hours were "demonstrably lower ... and significantly so"[15] for the proposed roster as compared to the standard roster. This halving of opportunities to require DSC Emery to work additional COT hours should have been seen as a significant factor. Instead, the Commissioner discounted it, finding that "the hours DSC Emery actually worked on Commuted Overtime was (sic) 8 hours 20 minutes."[16] On the timesheet data, the total additional COT hours actually worked by DSC Emery over the data period were 29.67 hours. In proceeding on the basis that there would be "some, but not likely great" curtailment of additional hours covered by COT,[17] the Commissioner addressed the wrong issue, as it was not for the Appellant to show that the curtailment would be "great" before it could establish this as a reasonable business ground; and failed to take into account a relevant consideration that there would likely be a *significant* curtailment of additional COT hours.

[20] The Respondent submits that beyond the analysis of the snapshot of hours and what additional hours might be required of DSC Emery, the Commissioner was not obliged to take the additional steps or make the findings contended for by the Appellant. The COT allowance or the 12 hour excess threshold do not reflect the work needs or the expectations to work additional hours. Evidence demonstrates significant opportunity for DSC Emery to choose what work he performed as well as when and how it should be undertaken.

[21] With the COT allowance payable in lieu of overtime payments, the COT allowance is for *unplanned* activity *directed by the work*. No evidence demonstrated that the Appellant would suffer a reduction in DSC Emery's unplanned work if the Request were approved. The evidence demonstrated that work in DSC Emery's group is routine and planned, with unplanned work occasional. Not all, or even most, of DSC Emery's average additional 1.5 hours is unplanned work, negating any adversity to the performance of additional COT hours to cover the work the Appellant wants to be performed.

[22] The so-called opportunity to require DSC Emery to work additional COT hours is hypothetical and as such does not amount to a reasonable ground for denying the Request, particularly given the evidence demonstrating the purpose of the COT allowance and how additional hours are worked by detectives. Clause 14 of the Agreement and s.65 of the Act confers the benefit of changed work arrangements on eligible employees, and s.65(5A) indicates a high degree of adverse impact required to be shown to justify an employer's request.

Ground two

[23] The Appellant asserts that the Commissioner wrongly concluded that it had not established a loss of resource would occur if the Request was granted and, as a consequence, failed to take into account a relevant consideration.[18] The prospect of the Request leading to a loss of resource on the fifth day was a logical consequence of the prospect of the Request significantly curtailing additional COT hours on a 4 x 10 hour shift arrangement. The Commissioner failed to take into account the evidence of Commander Hollowood and Inspector Cecchin in this regard.

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[15] Decision at [69].

[16] Decision at [69].

[17] Decision at [73].

[18] Decision at [89] and [98]).

[24] The Respondent submits that a *House v King* error cannot be made out with respect to the prospect of a loss of resource. The fact that the Request *could* create a loss of resource, and in the absence of any evidence supporting such a prospect, is insufficient to establish this ground of appeal. Further, there is evidence which indicates that the rostering following the Request being granted has subsequent benefits for Victoria Police in its management of detectives.[19] To that end, it negates the potential for a loss of resource following the Request being approved. In the alternative, as the asserted loss of resource reason did not form part of the letter dated 21 June 2017, it is not a relevant consideration for the purposes of determining "reasonable business grounds".

Ground 3

[25] The Appellant posits that having correctly identified that one of the Appellant's reasons for refusing the Request was its apprehension that it would open the door for similar requests and that this could get out of hand,[20] the Commissioner erred by failing to take this consideration into account and instead erected a 'tipping point' requirement for reasonable business grounds.[21] Section 65(5) of the Act does not preclude the employer from taking "floodgates" considerations into account before the business actually reaches the "tipping point".

[26] The Respondent submits that whilst the the inability or the impracticality of accommodating flexible working arrangements was not a fact in issue, the Commissioner was merely observing that there would be, at some point, difficulties in accommodating to future requests by reason of prior requests having being made.

Ground 4

[27] The Appellant contends that the Commissioner erred to the extent that he considered that the Commission's arbitral role was limited to determining whether the grounds as stated in the written refusal (as opposed to additional grounds relied on during the dispute) constituted reasonable business grounds for refusing the Request. Disputes can evolve and develop and the Commission should not erect artificial limitations on the scope of the dispute by reference to early 'battle lines'.[22]

[28] The Respondent submits that based on the procedure for providing reasons in response to a request for a flexible working arrangement within 21 days, that reasons provided outside the relevant time frame should not be considered. As such, there is no obligation imposed upon the Commission to consider the additional reasons provided almost a year after the letter dated 21 June 2017 from Victoria Police to DSC Emery.

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[19] AB, p. 84 at PN415-PN41; p. 115-116 at PN694-PN705; p. 204 at [22] and [23]; p. 94 at PN513-PN517; p. 116 at PN706-PN705; AB, p. 114 at PN675; p. 423 at [24] and [32]; p. 99-100 at PN573-PN575.

[20] Decision at [106]-[107].

[21] Decision at [109].

[22] *Re United Firefighters' Union of Australia* (2006) 158 IR 1 at [14]-[24]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Holden Ltd* (2003) 128 IR 101 at [45]-[47].

Consideration

[29] We note that the Decision under appeal is of a discretionary nature and as such it can only be successfully challenged on appeal if it is shown that the discretion was not exercised correctly. In that regard, 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 appealable nature in the Commissioner's Decision. As the High Court said in *House v The King*:[23]

> "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. 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."

[30] It is noteworthy to mention firstly that the Appellant has sought to introduce a number of additional grounds for refusing DSC Emery's Request, and has relied on these additional grounds at first instance and in its grounds of appeal. Discernible from the 21 June 2017 letter and Inspector Cornford's May 2018 witness statement, there were five reasons advanced by the Appellant for refusing DSC Emery's request:

- That the regular performance of overtime and recall to duty are an inherent requirement of DSC Emery's position. This matter is stated in the June 2017 correspondence but appears not to be restated in the same or similar language anywhere within Inspector Cornford's witness statement or oral evidence;

- That the costs flowing from granting the request would either impose an unreasonable financial burden of the Appellant, which is the argument mounted in the June 2017 refusal letter; or that whilst the costs incurred by the Appellant, would remain unchanged they would losing a resource one day each week…

- That granting the proposal would be damaging to the morale and effectiveness of the unit in which DSC Emery worked;

- That granting the request would mean that a resource would be lost; and

- That because of the nature of the role of the detective, elements of DSC Emery's role would not be suited to the arrangement he proposed.[24]

[23] [1936] 55 CLR 499.

[24] Decision at [20].

[31] In this appeal, the Appellant asserts that because "disputes can evolve and develop", the Commission should not "erect artificial limitations on the scope of the dispute by reference to early battle lines". We do not agree. While it is the case that disputes can evolve and develop, it is not the case that the Appellant can procure and rely on additional grounds for refusing a flexible working arrangement almost a year after the initial request and response was made and given to DSC Emery. This is especially the case where the additional grounds for refusal are procured in the course of litigation.

[32] As the Commissioner correctly points out:

> "No part of the legislation underpinning clause 14 gives a warrant to [the Appellant] to make up its reasons many months after the refusal has been given. The obligation [the Appellant] holds and should honour is to make its decision within 21 days and if that decision is to refuse the request to say why it has been refused at that time. Having chosen its colours it must then reasonably expected to be constrained to them".[25]

[33] A request for flexible working arrangements made under this particular Agreement requires reasonable business grounds to exist and to be communicated according to a specified procedure. Namely, the Appellant was required to assess DSC Emery's Request in accordance with the provisions of s.65 of the Act. Section 65(4) stipulates that the Appellant must give the DSC Emery a written response to the request within *21 days* stating whether the employer grants or refuses the request. If there is a refusal, s.65(6) of the Act provides that the written response under s.65(4) *must* include details of the reasons for the refusal – that is, details of the reasonable business grounds (s.65(6)). These provisions clearly do not permit reliance on further reasons which go beyond reasons that have already been disclosed under s.65(4) of the Act. On this basis we see no reason to depart from the provisions of the Act, and therefore we discern no *House v King* error on the part of the Commissioner. Accordingly, ground four is dismissed and given that ground two relies on a reason for refusal which did not form part of the 21 June 2017 letter, ground two is also dismissed.

[34] In relation to ground three, the Commissioner was simply making an observation and therefore we see no *House v King* error.

[35] Going to ground one, the Appellant contends that the Commissioner misunderstood and underestimated the extent of the impact that the Request would have on available COT hours that could be worked by DSC Emery. The likely impact on DSC Emery's was in fact significant. The Commissioner failed to draw a comparison between the additional hours under the hours DSC Emery was typically working and the hours likely to be worked by DSC Emery under the requested 4 x 10 roster. In failing to do so, it is said that the Commissioner was in error. We do not agree with this submission.

[36] The issue that the Commissioner was considering was whether it was "objectively correct that DSC Emery's proposed working arrangement will mean that he is unable to perform the inherent requirements of his job."[26] This question stems from one of the two reasons provided by the Appellant in the 21 June 2018 letter. The Commissioner noted that the question was "unlikely to be answered in the affirmative" without meeting one or both of the two conditions:

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[25] Decision at [104].

[26] Decision at [62].

"• that DSC Emery's actual capacity to work on Commuted Overtime is curtailed through the arrangement; and

• that claims of fatigue are more likely than not to eventuate into restrictions about his working hours, days or patterns that previously did not exist."[27]

[37] In relation to the second condition the Commissioner found that there was not enough evidence to substantiate matters with respect to fatigue,[28] and in relation to the first condition, the Commissioner stated that as compared to the anecdotal opinion of a number of people in relation to hours, the snapshot of hours provided by the Appellant together with Inspector Cornford's analysis of that material, was the only objective evidence that assisted in discerning the impact on available COT hours. Having preferred the snapshot of hours as the evidentiary basis for determining the objective impact of the Request, the Commissioner then went on to examine the snapshot of hours for the 17 day period between 14 May 2017 to 10 June 2017:

"[67] There were 10 shifts in the period in which DSC Emery worked less than a total of 10 hours and there were 7 in which he worked for longer than 10 hours, but less than 12 hours in total. It is doubtful on the basis of this evidence that it could be said that a changed shift arrangement flowing from a flexible work arrangement would lead to [the Appellant] being short-changed on its Commuted Overtime allowance in the case of DSC Emery.

[68] If DSC Emery had been given the working arrangements he wanted, he would have worked less than 17 shifts in the period. While it is not absolutely clear what the number would have been, it may be assumed that since he would work 2 less shifts in a 14 day period, he may have worked 14 shifts in the 17 day period, instead of 17. If that were the case, then some work between the 8th and 10th hour of the shift could be done by him simply because he was rostered at work. The proportion of that time is not identifiable on the evidence. However, it may be assumed that it is something more than 0% and less than 100%. That is, not all of the hours worked between the 8th and 10th hour of the shifts actually worked would be pushed beyond the 10th hour of the restructured shift arrangements – but some potentially may.

[69] In a restructured flexible work arrangement shift pattern in the 17 day period of 14 shifts of 10 hours duration, a maximum of 28 hours would have been available by DSC Emery to work in Commuted Overtime, compared with the maximum 68 hours under the arrangement actually worked. While the restructured maximum is demonstrably lower than the actual maximum, and significantly so, the hours DSC Emery actually worked in Commuted Overtime was 8 hours 20 minutes. By no stretch does this lead to the finding that DSC Emery is working a large amount of Commuted Overtime, or that [the Appellant] will be short-changed with the arrangement he proposes.

[70] Even so, it is the case that on the basis of Inspector Cornford's analysis DSC Emery will likely have less capacity to work during Commuted Overtime than might

[27] Decision at [62].

[28] Decision at [71].

be demanded. It would seem from Inspector Cornford's analysis, in which he imputed an average shift length of 9.8 hours, that in the actual 17 day period referred to above DSC Emery would have worked just over 30 hours during the COT, whereas in the hypothetical 14 day period working a 10 hour shift roster pattern DSC Emery would only be able to work a total of 28 hours during COT. While plainly the latter is less than the former, illustrating the concern which Inspector Cornford holds, it may also be the case that for reason of physical endurance that DSC Emery may have some difficulty in achieving the 28 hours COT over the 14 shifts, since it would come at the price of having to work 12 hours on every one of those shifts, which crystallises the dilemma inherent in the questions posed above.

…

- DSC Emery's proposed flexible working arrangement will curtail to some degree his ability to be available to work overtime, with it likely to be the case that if he is able to establish and maintain a 12 hour shift working pattern that such curtailment is either low or not significant…

[73] With there being some, but likely not great, restriction in hours worked stemming from granting the flexible work request, I find that the matter is to be properly considered as a contributor, perhaps in tandem with other matters to reasonable business grounds for the request to be refused, but not a strong enough ground on its own."

(Emphasis added).

[38] Whilst it is apparent that the Commissioner did not make an express finding on the hours DSC Emery was typically working and the hours likely to be worked under the requested 4 x 10 roster, it is clear that the Commissioner did rely on DSC Emery's average shift length: that is, 9.8 hours per shift in discerning the impact on available COT hours. Using this figure the Commissioner found that in the 17 day period, DSC Emery would have worked just over 30 hours during the COT, whilst in the hypothetical 14 day period working a 10 hour shift pattern DSC Emery would only be able to work a total of 28 hours during COT. Having made this finding, the Commissioner concludes that while the opportunity for DSC Emery to work COT hours is to "some degree" curtailed under the requested 4 x 10 arrangement (as applied to this particular period), the impact would not likely be great and was therefore not strong enough on it own as a reasonable business ground for refusing the Request. In our view no *House v King* error is disclosed from the Commissioner's reasoning or conclusion. These were matters of weight and the fact that the Appellant agitates for a different conclusion on matters that were properly considered and reasoned at first instance, does not support a finding that a *House v King* error exists.

[39] Notwithstanding, based on the evidence at first instance, there would appear to be no significant impact on the Appellant's business if the Request was granted. We have formed this view because on the evidence at first instance, DSC Emery was either working 9.8 or 9.5 hours per shift. In both scenarios, neither the 10 hour shift clause (the undesirability of working overtime following a 10 hour shift), and the 12 hour penalty clause will have been engaged. Moreover, when considered in the context of Mr Hocking's evidence (DSC Emery's rostering sergeant and crew supervisor) that he had no issues with DSC Emery working the 4 x

10 roster,[29] the evidence of Commander Hollowood that only unplanned hours/work would engage the COT,[30] the evidence of DSC Emery that he would regularly work beyond 8 hours because of his work ethic and because of how he structured his day (that is, to undertake administrative duties during the COT hours),[31] the evidence of Detective Sweetman that on the flexible arrangement DSC Emery would likely end up doing less administrative overtime but would still perform the unanticipated overtime, it certainly appears to us that no significant and adverse impact would result from the Request being granted.[32]

[40] Lastly, we note that the flexible working arrangement sought in DSC Emery's Request is not for an indefinite period. Rather the Request is for a 12 month period, upon which the Appellant will have the opportunity to review the impact of the flexible working arrangement and determine at that time whether the arrangement is to continue. In our view this is a factor which tells against a finding of error in the Commissioner's Decision to grant DSC Emery's Request.

Conclusion

[41] For the reasons given, we have determined to dismiss the appeal. Accordingly, we order as follows:

(1) Permission to appeal is granted.
(2) The appeal is dismissed.

VICE PRESIDENT

Appearances:

Mr R. Dalton, of Counsel, instructed by *Ms E. Richardson* (Corrs Chambers Westgarth) for the Appellant.

Mr M. Harding, of Counsel, instructed by *Ms B. Murphy* (Maurice Blackburn) for the Respondent.

[29] Appeal Book, p. 204 at [22] and [23].

[30] Appeal Book, p. 122 at PN759-PN760.

[31] Appeal Book, p. 205 at [30].

[32] Appeal Book, p.399-400 at [16]-[17].

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Melbourne
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