DECISION

Fair Work Act 2009
s.604—Appeal of decision

The Australian Workers' Union
v
Alcoa of Australia Limited
(C2019/2897)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT COLMAN
COMMISSIONER CIRKOVIC

MELBOURNE, 7 JUNE 2019

Appeal against decision and order of Deputy President Beaumont at Perth on 2 May 2019 in matter number AG2018/919 – permission to appeal granted – appeal upheld – scope of redetermination discussed – order quashed – matter referred to the Deputy President to issue further directions consistent with this decision.

[1] On 12 March 2018 Alcoa of Australia Limited (Alcoa) made application to the Fair Work Commission (Commission) pursuant to s.225 of the *Fair Work Act 2009* (Act) to terminate the *Alcoa World Alumina Australia WA Operations AWU Enterprise Agreement 2014* (Agreement). The Agreement covers Alcoa, the Australian Workers' Union (the AWU) and various Alcoa employees. On 20 December 2018, Deputy President Beaumont issued a Decision[1] determining that the Agreement must be terminated because the preconditions in s.226 of the Act were met.[2] The Deputy President was satisfied that it was not contrary to the public interest to terminate the Agreement and considered that it was appropriate to do so.[3] The AWU lodged an appeal against the Decision pursuant to s.604 of the Act.

[2] Subsequently on 16 April 2019, a Full Bench of the Commission issued an Appeal Decision[4] in which it granted the AWU permission to appeal and upheld grounds six and seven of the AWU's amended Notice of Appeal.[5] The Full Bench quashed the Decision and remitted to the Deputy President Alcoa's application under s.225 of the Act to terminate the Agreement for redetermination.[6] The Full Bench observed that matters sought to be agitated by the first supplementary appeal ground (which was not upheld) could be pursued during redetermination. That ground of appeal concerned detriment that the AWU might suffer from the termination of the Agreement, which is relevant to the question whether termination of the Agreement is appropriate.

[1] [2018] FWCA 7624.

[2] Ibid at [3].

[3] Ibid.

[4] [2019] FWCFB 2427.

[5] Ibid at [65].

[6] Ibid at [66].

[3] On 17 April 2019, the Deputy President conducted a directions hearing in relation to the application[7] during which she explained that she was minded to list the application for a hearing of two days in which "the discrete matters concerning grounds of appeals six and seven would be dealt with in addition to the supplementary ground of appeal."[8]

[4] During the directions hearing the Deputy President said she would send the parties a draft order setting out the directions allowing the parties to file material in relation to the confined appeal grounds and supplementary appeal ground one. The parties were permitted to file written submissions in relation to the draft order.[9] A draft order and directions for written submissions in relation to the draft order were issued on 17 April 2019.[10] Submissions were subsequently filed in accordance with the directions.[11] In its submissions Alcoa said "that it may, depending on the nature of the evidence, be possible for other evidence to be led in the redetermination (beyond the issues identified in appeal grounds 6 and 7 and in supplementary appeal ground one)."[12]

[5] On 2 May 2019, the Deputy President's Associate advised the parties that the Deputy President had determined to direct the parties in accordance with an order attached to the communication.[13] Reasons for making the order would be given at the hearing listed for 26 and 27 June 2019 unless requested earlier.[14] On 2 May 2019, the AWU requested written reasons on an urgent basis.[15] On 3 May 2019, the Deputy President's Associate advised parties the matter would be listed for mention on 13 May 2019, at which time reasons would be provided. However, on 7 May 2019, the Deputy President published a decision (Directions Decision) containing her reasons.[16]

[6] After setting out some background matters and summarising the parties' competing contentions, the Deputy President set out her reasoning for making the order as follows:

> "[23] It is evident that before providing the parties with the draft Order for their consideration, I had contemplated the directions that should be issued given the matter had been remitted for re-determination. In this respect, I refer to my comments on transcript.
>
> [24] My reasons for arriving at the directions contained in the draft Order were simple. As observed by Counsel for Alcoa, the matter had been remitted for a 're-determination', not a 're-hearing'. There was no express order from the Full Bench allowing either party to be able to lead evidence on the re-determination on an issue not raised at first instance. I observed that the Full Bench had stated that the

[7] Appeal Book at p 35 - 42.

[8] Ibid at p 37, [13].

[9] Ibid at p 39 [30].

[10] Appeal Book at p 45.

[11] Appeal Book at pp 47-52 and 53-58.

[12] Appeal Book p 57, [17].

[13] Appeal Book p 59.

[14] Ibid.

[15] Appeal Book p 63.

[16] [2019] FWC 3103.

supplementary appeal ground one could be pursued during the re-determination, and therefore considered that evidence would be led regarding this ground, in addition to the issues in grounds six and seven. I considered that the Full Bench would make an express order if it intended a party to be able to lead other evidence.

[25] Regarding my factual findings in the Decision, I had considered that they had not been disturbed, with the exception of course regarding the issues identified in appeal grounds six and seven and in supplementary appeal ground one. I considered that I could rely on factual findings made at first instance, particularly given that the Full Bench quashed, as a matter of law, the Termination Order, not the reasons for the Decision. As was observed by Alcoa, it did not appear to me that the Full Bench had criticised or impugned the factual findings on the appeal (with the exception noted).

[26] However, in light of the objections raised by the AWU regarding the proposed directions, I decided to afford the parties the opportunity to file submissions regarding the draft Order, before arriving at a final decision concerning the programming content of the same.

[27] Having considered the submissions of the parties I remained satisfied with the content of the draft Order with the exception that I concluded the Respondent would file its material first regarding supplementary appeal ground one.

[28] Supplementary appeal ground one states that I had erred in concluding 'there would be no adverse effect on the AWU by the termination'. The Full Bench expressed that I was required to consider whether it was appropriate to terminate the Agreement taking into account all of the circumstance including, relevantly, the circumstances of the AWU including the likely effect that termination will have on the AWU. The Full Bench stated that I could not be criticised for not divining from the materials a detrimental effect on the AWU which it neither identified, nor claimed. Similarly, I have concluded that Alcoa would be similarly placed were it compelled to put on evidence first regarding supplementary appeal ground one. Consequently, the direction concerning the filing of materials reflects this, with the AWU compelled to file its evidence first regarding that supplementary appeal ground."[17] [Endnotes omitted]

[7] By its Notice of Appeal lodged on 6 May 2019 the AWU seeks permission to appeal and appeals the Directions Decision and the order. The Notice of Appeal contains three grounds. The first contends that the Deputy President erred in making the decision and order because it will result in the Commission failing to properly exercise the discretion under s.226 of the Act. This is because when Alcoa's termination application is re-determined the Commission will fail to properly take into account all the relevant circumstances. The AWU contends that the effect of the Deputy President's order is that the redetermination will be confined to evidence about whether bargaining was at an impasse, whether the AWU has been unwilling to work with Alcoa to address the key issues and whether there will be adverse effects on the AWU as a result of the termination. Limiting the hearing to these matters will result in the Commission not undertaking the statutory task which s.226 requires and therefore failing to properly exercise the discretion under s.226.

[17] Ibid at [23]–[28].

[8] Alcoa contends that the first appeal ground is misconceived because the Full Bench did not intend, and did not direct, that the Deputy President consider all issues "afresh" but instead necessarily limited the evidence to be led in the redetermination to the three matters it identified. It contends in any event that the impugned order does not preclude the AWU from making submissions during the redetermination beyond the three matters nor does it limit the Deputy President considering or taking into account other circumstances relevant to the matters in s.226 of the Act.

[9] The second appeal ground contends that the Deputy President erred in failing to afford the AWU procedural fairness, in that she has denied it the opportunity to adduce evidence on matters relevant to the discretion under s.226 of the Act. Alcoa contends that this ground of appeal is affected by the same misconception as the first appeal ground. It also contends that the AWU has already been afforded the opportunity to lead evidence on the circumstances relating to the two factors in s.226 and it availed itself of that opportunity at the first hearing before the Deputy President.

[10] The third appeal ground contends that the Deputy President erred in not conducting a redetermination of Alcoa's application as required by the order of the Full Bench in its Appeal Decision. It contends that the Appeal Decision did not provide that only the confined matters are to be considered. The Appeal Decision quashed the Deputy President's Decision and the corresponding order and directed a redetermination of Alcoa's termination application.

[11] Alcoa contends the third ground is also based on the alleged misconception earlier identified.

[12] We are persuaded that the Deputy President's decision to make the impugned order containing the directions is attended by sufficient doubt to warrant reconsideration on appeal and that if permission to appeal is not granted, there would be a substantial injustice to the Appellant. We therefore grant permission to appeal.

[13] We find it necessary only to deal with the first appeal ground and are satisfied that it has been made out. Consequently, we have decided to uphold the appeal and to quash the Directions Decision and order. Our reasons may be shortly stated.

[14] As earlier noted, in upholding the appeal and quashing the Decision, the Full Bench remitted Alcoa's application to terminate the Agreement for redetermination. Although the Full Bench upheld the appeal on limited grounds, it quashed the decision and it did not, nor given the text of s.226 of the Act could it properly, limit the matters to which the Deputy President is to have regard in the redetermination.

[15] An order of a Full Bench requiring a member to redetermine a matter requires the member to determine the matter again. The scope of any redetermination is to be assessed by reference to the source of power that supports the decision the subject of the redetermination. In the present case, the matter that requires redetermination is Alcoa's application under s.225 of the Act to terminate the Agreement. The source of the power to terminate the Agreement is found in s.226. It must be exercised, and can only be exercised, if the member is satisfied that it is not contrary to the public interest to terminate the agreement and the member considers it appropriate to do so, taking into account 'all the circumstances', including the matters referred to in s 226(b)(i) and (ii). The matter to be re-determined entails two broad evaluative questions that must be considered by the member in the context of all the relevant

circumstances. It is different from the matter that was at issue in *CFMEU v Sparta Mining Services Pty Ltd*,[18] referred to in Alcoa's submissions, where the Full Bench remitted to a single member for redetermination a discrete question as to whether one of the various different preconditions for the approval of an enterprise agreement had been met, namely whether s 180(2) had been complied with. In that case, other approval requirements, such as the Commission's satisfaction that the agreement passed the better off over all test, were not in issue and were unaffected by the matter that required redetermination.

[16] We agree with the AWU that it is of no consequence in the present matter that in the appeal against the Decision only some grounds of appeal were upheld. The Decision was quashed and the application to terminate the Agreement remains before the Deputy President. She must determine whether she is satisfied that termination is not contrary to the public interest and whether she considers that it is appropriate to do so taking into account all of the circumstances including those in s.226(b)(i) and (ii). It may be that much of the evidence adduced in the original proceedings remains relevant. It is not necessary to lead this evidence again in the redetermination. The Appellant confirmed during the appeal hearing, it will rely on the evidence it led.

[17] The terms of s.226 of the Act seem to us to require the Commission to act on the basis of up-to-date material in relation to all the matters in s.226.[19] Nearly six months have passed since the Deputy President reached her conclusions as to the various matters in s 226 in the first proceeding. We consider that the Deputy President is bound to receive further evidence that is current and relevant, though not repetitious of evidence given in the first proceeding which might conveniently be identified by the relevant party and adopted for the purpose of the new proceeding. In our view, by confining additional evidence to the matters relevant to the upheld appeal grounds and to supplementary ground one, the Deputy President would not be properly engaging with s.226, as the relevant factual position that pertained in December 2018 might have materially changed.

[18] Accordingly, the Deputy President erred in concluding that the redetermination of the application to terminate the Agreement could be limited to receiving evidence relating to the matters raised by appeal grounds six and seven and to supplementary ground one. The Deputy President is required to re-determine the application under s.225 by considering all of the matters required by s.226 including by receiving supplementary evidence relevant to those matters.

[19] The proper course is for the Deputy President to consider the evidence already adduced in the first instance proceeding as evidentiary material in the redetermination, and to allow each of the parties to adduce such supplementary evidentiary material as is relevant to one or more of the matters in s.226 of the Act.

[20] We order as follows:

1. Permission to appeal is granted;
2. The appeal is upheld;

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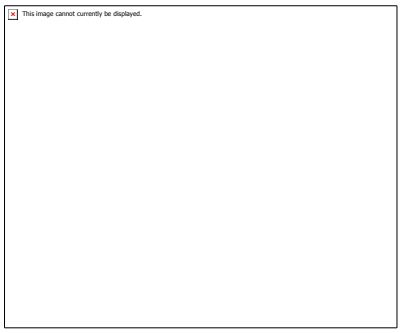
[18] [2016] FWCFB 7057

[19] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 45

3. The decision of the Deputy President made on 2 May 2019, the reasons for which are set out in [2019] FWC 3103 and the order dated 2 May 2019 setting out directions for the filing and serving of materials in relation to that redetermination, are quashed; and
4. The Deputy President is to issue further directions for the conduct of the redetermination of Alcoa's application under s.225 of the Act to terminate the *Alcoa World Alumina Australia WA Operations AWU Enterprise Agreement 2014* consistently with the penultimate paragraph of this decision.



DEPUTY PRESIDENT

Appearances:

Mr Y Bakri, Counsel for the Appellant
Mr H J Dixon, Counsel for the Respondent

Hearing details:

2019.
Sydney:
June 6.

Written submissions:

May 30 2019.

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