DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Ms Susan Lloyd
v
Department of Justice and Community Safety
(C2019/5122)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
COMMISSIONER SPENCER

MELBOURNE, 25 NOVEMBER 2019

Appeal against decision [2019] FWC 5020 of Commissioner Wilson at Melbourne on 30 July 2019 in matter number C2019/148 – scope of dispute settlement term in enterprise agreement – whether power to arbitrate certain questions proposed by the appellant – decision at first instance was correct – permission to appeal refused.

Introductory background

[1] Ms Susan Lloyd is an Assistant District Supervisor employed by the Department of Justice and Community Safety (Department) in its Sheriff's Office.[1] She has been employed in the Sheriff's Office since about July 1990.[2] Since 2005, after moving to Phillip Island, Ms Lloyd has worked in the Bass Coast/South Gippsland region[3] and is currently assigned to Wonthaggi at the Department's Justice Centre.[4]

[2] As a consequence of some operational changes in the Department, Ms Lloyd was given notice that her work location will be changed from Wonthaggi to Warragul, a distance of approximately 76 kilometres. The practical effect of the operational changes is to relocate the position occupied by Ms Lloyd from the Wonthaggi Justice Centre to Warragul. Thereafter there will be three Sheriff's Officers at Warragul.[5] An effect of the change will be to increase Ms Lloyd's travel time to and from work. In essence, this is the underlying subject matter of the unresolved dispute between Ms Lloyd and the Department, the result of which has been an application under s.739 of the *Fair Work Act 2009* (Act) for the Commission to deal with a dispute in accordance with the dispute settlement term of the *Victorian Public Service Enterprise Agreement 2016* (VPS Agreement).

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[1] Appeal Book, p.125 at [1]

[2] Ibid at [2]

[3] Ibid at [3]

[4] Ibid at [4]

[5] Ibid, p.50 at PN199 and p.60 at PN346

[3] Ms Lloyd proposed the dispute be determined by arbitration and contended the Commission could do so by answering six questions, which were as follows:

1. Has the Applicant been afforded procedural fairness during the process leading to the decision?
2. Did the Department comply with the consultation provisions of clause 10?
3. Is the Department's proposal unfair to the Applicant?
4. Did the Department have insufficient regard to the negative personal impacts on the Applicant?
5. Should the proposal of the Department or the Applicant or another model be preferred?
6. Should the Department rescind its decision and adopt the Applicant's proposal or another model?[6]

[4] Relevantly, the Department contended the Commission's jurisdiction to arbitrate the proposed questions was limited to the second question[7] because the Commission's jurisdiction or power to arbitrate was limited by the terms of the dispute resolution clause of the VPS Agreement. Specifically, the exercise of arbitral power was limited to resolving a dispute about a matter arising under the VPS Agreement or the National Employment Standards (NES).[8] The Department contended the other questions were not within the Commission's jurisdiction or power to arbitrate because they were not concerned with a matter arising under the VPS Agreement or the NES.[9]

[5] Ms Lloyd contended that the dispute settlement procedure in the VPS Agreement was not so confined and extended to resolving grievances about matters that pertain to the employment relationship.[10]

[6] By a decision published on 30 July 2019[11] (Decision), Commissioner Wilson determined the Commission did not have jurisdiction to answer questions 1 and 3–6 and determined the answer to question 2 was "yes".[12]

[7] By a notice of appeal lodged on 19 August 2019 (amended on 8 September 2019), Ms Lloyd applies for permission to appeal and if granted appeals the Decision.

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[6] Ibid, p.124

[7] Ibid, p.335 at [4]

[8] Ibid, p.338 at [31]–[38]

[9] Ibid, p.338 at [41]–[49]

[10] See for example Appeal Book, p.116 at PN973 - PN975

[11] [2019] FWC 5020

[12] Ibid at [70]

The Decision

[8] After setting out the background to the dispute,[13] the questions posed by Ms Lloyd,[14] some of the relevant principles concerning the construction of an enterprise agreement[15] and some of the relevant terms of the VPS Agreement,[16] the Commissioner turned to consider the second question posed by Ms Lloyd.[17] We need not deal further with the Commissioner's analysis and conclusion in this regard as no issue is taken on appeal about that conclusion.

[9] As to the remaining questions and whether there was jurisdiction or power to deal with them by arbitration, the Commissioner concluded that he did not have jurisdiction to determine questions 1, 3, 4, 5 and 6.[18] In so doing the Commissioner relevantly reasoned as follows:

> "[57] The remaining five questions are objected to by the Respondents (sic) as not being within the Commission's jurisdiction. Those questions, set out again immediately above, go to whether Ms Lloyd has been afforded procedural fairness; whether the decision against her alternative proposals is substantively unfair; whether for some other reason the Department's decision-making should be varied by the Commission.
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> [58] Those propositions are not favoured by me. Firstly, and most importantly the questions posed by Ms Lloyd are not within the Commission's jurisdiction…
>
> [61] I am not satisfied that the proper construction of the VPS Agreement would attract jurisdiction in the way advocated by the Applicant.
>
> [62] Clause 12 provides a confined opportunity for disputes including grievances to be raised, progressed and resolved under the procedure set out therein. That process plainly includes conciliation and arbitration of the dispute by the Commission. The considerations in *UFU v MFB; CFA* do not apply to this matter, which does not include a dispute resolution procedure so wide as to deal with matters pertaining to the employment relationship. There are important differences in the MFB and CFA dispute resolution clauses which means they are far from analogous with the one in the VPS Agreement. The clause in the VPS Agreement enables the raising and progression of a confined class of matters being "a dispute about a matter arising under this Agreement or the National Employment Standards set out in the FW Act, other than termination of employment". In contrast, the terms under consideration in *UFU v MFB; CFA* allows disputes to be raised over "all matters arising under this agreement … which the parties have agreed includes … all matters pertaining to the employment relationship". The latter clauses are significantly broader than that in consideration in this matter, and their meaning is plainly different.
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> [63] The proposition advanced by Mr Langmead is to the effect that the clause allows disputes and grievances to be raised about the Agreement and the NES and that it

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[13] Ibid at [6]-[25]

[14] Ibid at [26]-[28]

[15] Ibid at [29]-[34]

[16] Ibid at [35]-[36]

[17] Ibid at [37]-[56]

[18] Ibid at [66]

separately allows grievances to be raised about any other matter at all, provided that it pertains to the employment relationship. Such proposition is not to be found within the words of the clause:

> • which defines a dispute to include a grievance, imputing that a dispute is something wider than a dispute (clause 12.1);
>
> • and after providing that "Unless otherwise provided for in this agreement" mandates progression of a dispute in accordance with the clause while limiting that progression to "a dispute about a matter arising under this agreement or the National employment standards set out in the FW act, other than termination of employment" (clause 12.2); and
>
> • finally prevents disputes either about termination of employment or bargaining claims to be dealt with under the clause (clauses 12.2; 12.3).

[64] Were clause 12 to have the intention that grievances unconnected with matters arising under the Agreement or the NES could be separately raised and progressed it would likely read "a dispute about a matter arising under this agreement or the National Employment Standards set out in the FW act, other than termination of employment, <u>or a dispute about a matter pertaining to the employment relationship</u> …". It would be a strain on the language of clause 12.2 to see such intention within the clause.

[65] Ms Lloyd also raises the proposition that she has a grievance about the Department's decision-making under clause 10.4 and 10.5 and that such grievance is a dispute that may be raised and progressed under clause 12. Ms Lloyd may well be aggrieved about the outcome of the things that she has raised under clauses 10.4 and 10.5, but the grievance or dispute which she may progress under clause 12 are the things directly connected with the two former clauses. In the case of clause 10.4 she is entitled to argue, and has, that she has been inadequately consulted with or that the Department has not given prompt consideration to the matters that she raised (noting that the third element of clause 10.4 relating to the provision of appropriate training is not a subject of these proceedings). Under clause 10.5 Ms Lloyd is entitled to argue that she did not receive considered reasons for the Department's rejection of her alternative proposals. It is to be noted that other than for the broad nature of Question 2 which asks whether the Department complied with consultation provisions of clause 10 the elements of clause 10.5 are not dealt with in Ms Lloyd's questions for determination for the Commission.

[66] As a result of this consideration, I find that the Commission does not have jurisdiction to determine questions 1, 3, 4, 5 and 6."[19] [Endnotes omitted]

Grounds of appeal and contentions

[10] Although Ms Lloyd advances four appeal grounds in the amended notice of appeal, at the commencement of the hearing we were advised that the parties had agreed that appeal grounds 2 to 4 concerned *obiter* observations made by the Commissioner and were advanced

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[19] Ibid at [57]-[58], [61]–[66]

out of an abundance of caution. The parties agreed that the resolution of the appeal turns on the question of the jurisdiction, so that if the Commissioner was correct as to jurisdiction (ground 1), the remaining grounds of appeal would fall away in any event.[20]

[11] We are content to proceed on that basis.

[12] Consequently, the relevant appeal ground and the parties' competing contentions in relation to that ground may be briefly stated.

[13] By her first appeal ground, Ms Lloyd contends the Commissioner erred in concluding that clause 12 of the VPS Agreement meant that he did not have jurisdiction to determine questions 1, 3, 4, 5 and 6. In support of this ground Ms Lloyd contends in summary:

- the Commissioner erred in concluding at [66] of the Decision that clause 12 of the VPS Agreement meant that he did not have jurisdiction to determine questions 1, 3, 4, 5 and 6;

- clause 12.1 which provides "[f]or the purposes of this clause 12, a dispute includes a grievance" should be construed according to its ordinary meaning. The word "grievance" has a plain and ordinary meaning. It is a wrong, real or fancied, considered as grounds for complaint; a real or fancied ground of complaint;

- in the result any grievance can be dealt with under clause 12 provided it concerns a permitted matter as described in s.172(1);

- the questions posed identified her grounds of complaint. These grounds embodied her grievance;

- properly construed clause 12.1 makes provision for dealing with any grievance and it does not qualify, or otherwise fetter, the subject-matter of the grievance. That being so, it becomes of itself a matter arising under the Agreement;

- clause 12.2 did not limit the scope of the disputes that could be dealt with under clause 12 and was likely included for the purpose of ensuring compliance with s.186(6). It does not in its terms, nor read in the context of the whole clause, operate to confine disputes under clause 12 to disputes of the character of a matter arising under the Agreement or the NES; and

- clauses 12.3 and 12.6 provide contextual support for a construction that clause 12 is not confined in the manner concluded by the Commissioner.

[14] The Department contends in summary:

- the Commission is permitted to arbitrate a dispute in accordance with the terms of the VPS Agreement if that dispute can be dealt with under clause 12;

- the only disputes that can be dealt with pursuant to clause 12, are those disputes "about matters arising" under the VPS Agreement or the NES;

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[20] Transcript of proceedings at PN8-PN10

- clause 12.2 of the VPS Agreement makes that proposition clear by use of the phrase “must be dealt with in accordance with this clause”, and by expressly and exhaustively referencing the kinds of disputes to which clause 12 is directed;

- clause 12.3 provides further clarity as to the scope of clause 12, by expressly prohibiting disputes about matters arising in the course of bargaining for a proposed enterprise agreement being dealt with in accordance with its terms; and

- the word “matters”, in the context of clause 12.2 of the VPS Agreement, is confined to controversies between parties to the VPS Agreement about the proper application of the instrument itself. It is only disputes about the proper application of the VPS Agreement that can be dealt with under clause 12. Therefore, if a dispute cannot be characterised as a “matter arising under” the VPS Agreement or the NES, then the Commission has no power to deal with the dispute by way of arbitration.

[15] We deal with these contentions below.

Consideration

[16] The Commissioner was dealing with an application under s.739 of the Act for the Commission to deal with a dispute in accordance with the dispute settlement term in the VPS Agreement. That section applies if “a term” referred to in s.738 of the Act requires or allows the Commission to deal with a dispute.

[17] Section 186(6) of the Act prescribes one of the content requirements of an enterprise agreement, satisfaction about which is a condition precedent to approve an enterprise agreement by the Commission. The section requires the Commission to be satisfied that the agreement includes a term:

“(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.”

[18] Save that an enterprise agreement is one that is about one or more permitted matters,[21] s.186(6) does not otherwise confine the kinds of disputes that may be progressed through a dispute resolution term of an enterprise agreement to those that are about “matters arising under the agreement and in relation to the NES”. Rather, it is concerned with ensuring that a dispute settlement term of an enterprise agreement, as a minimum, provides for a procedure for the settlement of such disputes. An enterprise agreement dispute resolution term may also make provision, *inter alia*, for dealing with disputes about matters that pertain to the

[21] *Fair Work Act 2009*, s.172(1)

relationship between the employer covered by the agreement and the employer's employees who are covered by the agreement, whether or not all such matters are dealt with by a term of the agreement. This much is clear from the terms of s.738(b) of the Act which provides that Division 2 of Part 6-2, in which s.739 appears, applies if "an enterprise agreement includes a term that provides a procedure for dealing with disputes, *including a term referred to in subsection 186(6)*." (Emphasis added)

[19] Section 739(3) of the Act provides that the Commission must not exercise any "powers" limited by "the term". Section 739(4) provides that if, in accordance with "the term", the parties have agreed that the Commission may arbitrate the dispute, the Commission may do so.

[20] A dispute resolution term need not actually use the word "arbitrate" if on a proper reading, it is plain the parties have agreed that the Commission may decide the dispute. So much is clear from the words "(however described)" immediately following the word "arbitrate" in s.739(4). Clause 12.12 of the VPS Agreement provides, relevantly that "in dealing with a dispute through conciliation or arbitration, the FWC may conduct the matter in accordance with Subdivision B of Division 3 of Part 5-1 of the FW Act".

[21] That is, in accordance with "the term", the parties have agreed that the Commission may arbitrate a dispute about matters with which clause 12 is concerned, including by hearing the parties to the dispute, considering relevant evidentiary material and making a decision.

[22] As s.739(5) of the Act makes clear, the Commission must not make a decision that is inconsistent with the Act, or a fair work instrument that applies to the parties.

[23] The question whether the matters raised by Ms Lloyd in her application under s.739 of the Act (distilled in the questions posed) can be the subject of the exercise of arbitral power therefore turns on the scope of clause 12 of the VPS Agreement, which in turn requires a consideration of the proper construction of clause 12. The principles applicable to the proper construction of an enterprise agreement were canvassed at length in *Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*.[22] The summary of the applicable principles set out in *Golden Cockerel* was modified in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*[23] to take account of the discussion by the Full Bench of the extent to which evidence of prior negotiations and positions adopted in negotiations might be called in to aid a construction in light of the statutory scheme under which an enterprise agreement is made and the fact that it is made when a majority of relevant employees vote to approve the agreement.

[24] The applicable principles need not be rehearsed at length here and were not put in issue in the appeal. In short compass, much like the approach to construing a statute, the construction of an enterprise agreement begins with a consideration of the ordinary meaning of the words used, having regard to the context and evident purpose of the provision or expression being construed. Context may be found in the provisions of the agreement taken as a whole, or in their arrangement and place in the agreement being considered. The statutory framework under which the agreement is made may also provide context, as might an

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[22] [2014] FWCFB 7447 and the cases therein cited

[23] [2017] FWCFB 3005

antecedent instrument or instruments from which a particular provision or provisions might have been derived.

[25] Clause 12 of the VPS Agreement provides the following:

"**12 Resolution of Disputes**

12.1 For the purposes of this clause 12, a dispute includes a grievance.

12.2 Unless otherwise provided for in this Agreement, a dispute about a matter arising under this Agreement or the National Employment Standards set out in the FW Act, other than termination of employment, must be dealt with in accordance with this clause. For the avoidance of doubt, a dispute about termination of employment cannot be dealt with under this clause.

12.3 This clause does not apply to any dispute regarding a matter or matters arising in the course of bargaining in relation to a proposed enterprise agreement.

12.4 A person covered by this Agreement may choose to be represented at any stage by a representative, including a Union representative or Employer's organisation.

12.5 Obligations

(a) The parties to the dispute and their representatives must genuinely attempt to resolve the dispute through the processes set out in this clause and must cooperate to ensure that these processes are carried out expeditiously.

(b) Whilst a dispute is being dealt with in accordance with this clause, work must continue in accordance with usual practice, provided that this does not apply to an Employee who has a reasonable concern about an imminent risk to his or her health or safety, has advised the Employer of this concern and has not unreasonably failed to comply with a direction by the Employer to perform other available work that is safe and appropriate for the Employee to perform.

(c) No person covered by this Agreement will be prejudiced as to the final settlement of the dispute by the continuance of work in accordance with this clause.

12.6 Agreement and Dispute Settlement Facilitation

(a) For the purposes of compliance with this Agreement (including compliance with this dispute settlement procedure) where the chosen Employee representative is another Employee of the Employer, he/she must be released by the Employer from normal duties for such periods of time as may be reasonably necessary to enable him/her to represent Employees concerning matters pertaining to the employment relationship including but not limited to:

(i) Investigating the circumstances of a dispute or an alleged breach of this Agreement;

(ii) Endeavouring to resolve a dispute arising out of the operation of this Agreement; or

(iii) Participating in conciliation, arbitration or any other agreed alternative dispute resolution process.

(b) The release from normal duties referred to in this clause is subject to the proviso that it does not unduly affect the operations of the Employer.

12.7 Discussion of Dispute

(a) The dispute must first be discussed by the aggrieved Employee(s) with the immediate supervisor of the Employee(s).

(b) If the dispute is not settled, the aggrieved Employee(s) can require that the dispute be discussed with another representative of the Employer appointed for the purposes of this procedure.

12.8 Internal Process

(a) If any party to the dispute who is covered by this Agreement refers the dispute to an established internal dispute resolution process, the matter must first be dealt with according to that process, provided that the process is conducted as expeditiously as possible and:

(i) is consistent with the rules of natural justice;

(ii) provides for mediation or conciliation of the dispute;

(iii) provides that the Employer will take into consideration any views on who should conduct the review; and

(iv) is conducted with as little formality as a proper consideration of the dispute allows.

(b) If the dispute is not settled through an internal dispute resolution process, the matter can be dealt with in accordance with the processes set out below.

(c) If the matter is not settled either party to the dispute may apply to the FWC to have the dispute dealt with by conciliation.

12.9 Disputes of a Collective Character

(a) The Parties acknowledge that disputes of a collective character concerning more than one Employee may be dealt with more expeditiously by an early reference to the FWC.

(b) No dispute of a collective character may be referred to the FWC directly unless there has been a genuine attempt to resolve the dispute at the workplace level prior to it being referred to the FWC.

12.10 Conciliation

(a) Where a dispute is referred for conciliation, a member of the FWC shall do everything that appears to the member to be right and proper to assist the parties to the dispute to agree on settlement terms.

(b) This may include arranging:

(i) conferences of the parties to the dispute presided over by the member; and

(ii) for the parties to the dispute to confer among themselves at conferences at which the member is not present.

(c) Conciliation before the FWC shall be regarded as completed when:

(i) the parties to the dispute have reached agreement on the settlement of the dispute; or

(ii) the member of the FWC conducting the conciliation has, either of their own motion or after an application by a party to the dispute, satisfied themselves that there is no likelihood that, within a reasonable period, further conciliation will result in a settlement; or

(iii) the parties to the dispute have informed the FWC member that there is no likelihood of agreement on the settlement of the dispute and the member does not have substantial reason to refuse to regard the conciliation proceedings as completed.

12.11 Arbitration

(a) If the dispute has not been settled when conciliation has been completed, a party to the dispute may request that the FWC proceed to determine the dispute by arbitration.

(b) Where a member of the FWC has exercised conciliation powers in relation to the dispute, the member shall not exercise, or take part in the exercise of, arbitration powers in relation to the dispute if a party to the dispute objects to the member doing so.

(c) Subject to clause 12.11(d), the determination of the FWC is binding upon the persons covered by this Agreement.

(d) A determination of a single member of the FWC made pursuant to this clause may, with the permission of a Full Bench of the FWC, be appealed.

12.12 General Powers and Procedures of the FWC

Subject to any agreement between the parties in relation to a particular dispute and the provisions of this clause, in dealing with a dispute through conciliation or arbitration, the FWC may conduct the matter in accordance with Subdivision B of Division 3 of Part 5-1 of the FW Act."

[26] Clauses 12.1 through 12.4 deal with the scope of the dispute settlement procedure and with representation. Clause 12.1 is definitional. It does not establish a broad overarching subject matter that may be dealt with under the dispute settlement procedure in clause 12. The phrase "a dispute includes a grievance" explains that the word "dispute" when used in clause 12 includes "a grievance". The phrase does not have the result that a grievance at large, whatever be its subject matter, comes within the scope of the procedure. If a "dispute" that engages clause 12 is confined by subject matter, so to is a grievance, because as clause 12.1 explains, a "dispute includes a grievance".

[27] The subject matter or the kind of dispute that is to be dealt with under the procedure is explained in clause 12.2 as one that is "about a matter arising under this Agreement or the National Employment Standards… other than termination of employment". Thus, taking into account the definitional provision in clause 12.1, the subject matter or scope with which the dispute settlement term is concerned is a dispute (including a grievance) about a matter arising under the Agreement or the NES. As a dispute that engages with clause 12 is confined in its subject matter by the terms of clause 12.2, so too is a grievance, since a grievance is a subset or one kind of dispute. This is clear from clause 12.1.

[28] Clause 12.2 is not as suggested by Ms Lloyd expressed in the manner it is in order to satisfy s.186(6) of the Act. It is directed to confining the subject matter of the disputes (including grievances) that are to be dealt with under the procedure to the matters identified. Indeed, if clause 12.1 operated in the expansive fashion for which Ms Lloyd contends, except for the termination of employment exclusion, the remainder of clause 12.2 would be otiose as the subject matter would be encapsulated by "grievances" about matters pertaining to the employment relationship.

[29] As to the remainder of the dispute settlement term, clause 12.5 contains the parties' obligations when dealing with disputes. Clause 12.6 facilitates the release from duty of an employee representative to assist in dispute resolution. Contrary to a contention advanced by Ms Lloyd, the inclusion of the words "to enable him/her to represent Employees concerning matters pertaining to the employment relationship", does not expand the subject matter of disputes that may be dealt with under the term to include any matter pertaining to the employment relationship whether or not arising under this Agreement or the NES. It is clear from the terms of clause 12.6 that it is concerned with more than just release from duty for the purposes of the dispute procedure. The clause sets out the purpose of the release from duty. It provides that release is "[F]or the purposes of compliance with this Agreement (including compliance with this dispute settlement procedure)". The reference to "matters pertaining to the employment relationship" is thus explicable by the broad purpose for which a release from duty may be obtained.

[30] Indeed a cursory review of the VPS Agreement shows that employee representation is available when an employee is negotiating for an individual flexibility arrangement (clause 8.3); in consultation about changes to rosters or hours of work (clause 11.3); in the

management of unsatisfactory performance (clause 20.6); and in dealing with misconduct (clause 21.5).

[31] The remaining clauses of the dispute settlement term (clauses 12.7–12.11) identify the steps to be taken by the parties to resolve a dispute. Each step (save for a referral to an internal dispute resolution process) is conditioned on the employee's compliance with the preceding step. There is nothing in these provisions which provides contextual support for the construction advanced by Ms Lloyd.

[32] The terms of the antecedent industrial instruments also provide contextual support for the construction favoured by the Department. Without reproducing the dispute settlement terms in full, the relevant provisions of the *Victorian Public Service Workplace Determination 2012* (2012 WD) and the *Victorian Public Service Agreement 2006 (2009 Extended and Varied Version)* (2009 VPS Agreement) each provided a limitation on the subject matter of a grievance which engaged the dispute settlement terms.

[33] Clause 11 of the 2012 WD which was included in the determination as an agreed term, is essentially in the same terms as clause 12 of the VPS Agreement and relevantly provides:

> 11.1 For the purposes of this clause 11, a dispute includes a grievance.
>
> 11.2 Unless otherwise provided for in this Determination, a dispute about a matter arising under this Determination or the National Employment Standards set out in the FW Act, other than termination of employment, must be dealt with in accordance with this clause. For the avoidance of doubt, a dispute about termination of employment cannot be dealt with under this clause.

[34] The earlier iteration contained in the 2009 VPS Agreement relevantly provides:

> 10.1 Unless otherwise provided for in this Agreement, *a dispute or grievance* about a matter arising under this Agreement, other than termination of employment, must be dealt with in accordance with this clause [our emphasis].

[35] The restructuring of the provision contained in the VPS Agreement and the 2012 WD from that which appeared in the 2009 VPS Agreement does not alter the operative limiting effect of the provision. All have the effect of allowing the "grievances" to be processed under the disputes procedure, but each confines the "grievances" to the subject identified.

[36] We consider the construction for which the Department contends, and which was accepted by the Commissioner, is plainly correct.

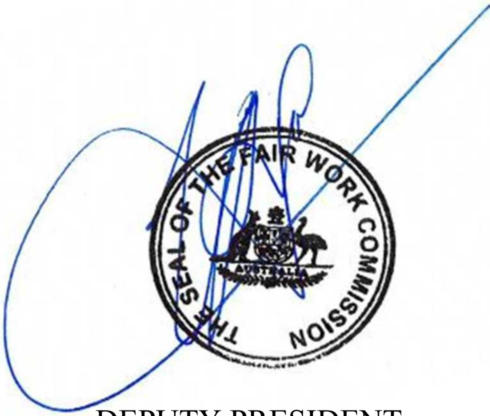
[37] Given the construction we favour there seems to us little that is controversial in concluding that question 2 was the only question which fell within the subject matter of clause 12 of the VPS Agreement. Ms Lloyd did not contend that on the Department's construction of clause 12, the remaining questions fell within the scope of the dispute settlement term. Indeed, the essence of the agreement of the parties as to the disposition of the appeal earlier noted would be inconsistent with such a contention.

[38] As the impugned questions did not fall within the subject matter with which clause 12 of the VPS Agreement is concerned, the Commissioner was not authorised by the terms of the VPS Agreement to arbitrate those questions.

[39] Although the appeal concerned the proper construction of a dispute settlement term of an enterprise agreement which has wide application, for the reasons stated we are not persuaded that Ms Lloyd has made out a case of arguable error. It will rarely be the case that permission to appeal will be granted absent an arguable case of error. We are not persuaded that the Decision is attended by sufficient doubt to warrant its reconsideration. Nor do we consider the Decision manifests any injustice. The result is not in our view counterintuitive and it is not disharmonious with other decisions of the Commission. Nor do we consider that the public interest is enlivened. But even if we were minded that a grant of permission to appeal should issue, for the reasons stated we would dismiss the appeal. The Commissioner's ultimate conclusion was in our view plainly correct.

Conclusion

[40] Permission to appeal is refused.



<u>DEPUTY PRESIDENT</u>

Appearances:

D Langmead of Counsel for the Appellant.
M Minucci of Counsel for the Respondent.

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Respondent, 25 October 2019.

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