[2020] FWC 3139 [Note: This decision has been quashed - refer to Full Bench decision dated 13 July 2020 [2020] FWCFB 3655.
A further Full Bench decision dated 23 July 2020 [2020] FWCFB 3865 has been issued.]

DECISION

Fair Work Act 2009
s 789GV - Application to deal with a dispute under Part 6-4C

Transport Workers' Union of Australia Queensland Branch
v
Prosegur Australia Pty Limited
(C2020/4003)

DEPUTY PRESIDENT SAMS SYDNEY, 17 JUNE 2020

Application by Transport Workers' Union of Australia Queensland Branch - application to have the Commission deal with a JobKeeper dispute – significant adverse economic effects of COVID-19 on 'cash in transit' industry – JobKeeper enabling direction that all employees work a minimum of 25 hours a week – validity of direction – whether direction disproportionately and unfairly impacts on permanent employees over regular long term casual employees – whether direction unreasonable and unfair – Union proposes that all employees receive a percentage reduction in hours commensurate to the percentage of the work lost due to COVID-19 -whether casual employees required to work more hours than the ordinary hours they worked pre-COVID-19 – other secondary employment, personal and family circumstances – evidence largely uncontested – employer JobKeeper enabling direction not unreasonable in all the circumstances – statutory provisions do not prohibit casual workers from working more than their ordinary pre-COVID-19 hours-application determined and dispute resolved.

[1] This is an *ex tempore* decision delivered in transcript on Monday 15 June 2020.

[2] On 27 May 2020, the Transport Workers' Union of Australia Queensland Branch (the 'applicant' or the 'Union') filed an application with the Fair Work Commission (the 'Commission) pursuant to section 789GV in Part 6-4C of the *Fair Work Act 2009* (the 'Act') in which the Union seeks to have the Commission deal with a JobKeeper dispute in accordance with recent amendments to the Act, commonly known as the *Coronavirus Economic Response Package Omnibus (Measures No. 2 Act 2020* (the 'CERPO Act').

[3] The dispute concerns a purported JobKeeper-enabling direction issued by Prosegur Australia Pty Limited (the 'respondent', the 'Company' or 'Prosegur') to employees at its Moorooka Depot in Queensland. The respondent is engaged in the cash in transit business,

and at its Moorooka Depot, employs around 25 armoured vehicle operators, made up of 8 full time and 6 part time permanent employees, with the remaining 11 employees being regular long-term casuals. I note that a number of casuals (about seven) of short service, who are ineligible for JobKeeper payments, are no longer being offered any shifts, effectively ending their employment.

[4] Australia-wide, Prosegur employs around 1000 employees across 26 locations in all States and Territories. It would seem to be common ground that the consequences of the COVID-19 pandemic on a business such as this, is enormous, although likely not totally crippling such as to lead to a complete temporary or permanent shutdown. Prosegur's clients include the banks, clubs, hotels, the retail, restaurant and hospitality industries, and the servicing of ATMs and transport and parking ticketing machines. It is estimated that from February 2020, there has been a reduction of 30-40% in work, and a 65% decrease in revenue from March 2020, compared to pre COVID-19. At Moorooka, there has been reduction of work of 35%. Prosegur has implemented a number of measures in response to its declining volumes and revenue, including:

(a) implementing a leave reduction programme across the business,
(b) scheduling extra rostered days off ('RDOs') where employees had accrued but untaken RDOs;
(c) all senior managers taking a 20% pay cut with no corresponding reduction in hours;
(d) an immediate recruitment freeze;
(e) no longer offering shifts to short term casual employees so that it can give preference to its permanent and regular long term casual workforce;
(f) retrenching some regular long term casuals in smaller branches where it does not expect the demand to return to pre-COVID levels for the foreseeable future,
(g) spreading the remaining work amongst the remaining employees evenly; and
(h) a range of non-labour related cost cutting measures across the business including negotiating the postponement of payments to suppliers and terminating a number of non-essential programmes.

[5] The respondent advised employees at Moorooka on 15 April 2020 that as a result of the reduction of work due to the effects of COVID-19, all employees would be offered a minimum of 25 hours a week. This was confirmed following a meeting with the Union

delegates on 21 April 2020. Prosegur had qualified for the Federal Government's JobKeeper payments scheme in respect of all its employees which commenced on 30 March 2020. On 5 May 2020, Prosegur issued the following notice to employees:

> '**Impact of shut down of non-essential services**
>
> As you are aware, the efforts to contain the spread of Coronavirus have led to significant and unprecedented restrictions on trade and the use of cash throughout Australia.
>
> This stoppage of work has and continues to have a significant effect on our business. Unfortunately, the impact is such that to ensure the long-term viability of the business [we] have had to make a range of changes to employee's hours of work.
>
> These changes are designed to protect as many jobs as possible whether casual, part time or full time. The changes are in keeping with changes to the Fair Work Act introduced by the Federal Government to try and protect Australian jobs during this time of crisis.
>
> Your manager has the following options to choose from:
>
> - not work on certain days they would normally work;
> - work for shorter hours on the days they would normally work; or
> - work a reduced number of hours in total.
> - undertake any duties for a period of time that are within their skill and competency; and
> - undertake their normal or other duties within their skill and competency at a different location
>
> We would like to invite you to provide your input into this direction by contacting me at [*email address provided*] or by phone on [*phone number provided*] by COB 08/05/2020.
>
> We acknowledge that this is very difficult news and we want to assure you that we are doing whatever we can to minimise the impact on as many of our employees as possible.
>
> Yours sincerely
>
> Anthony Coe
> Acting Transport Manager
> Prosegur Australia'

[6] Shortly stated, the Union contends that the purported JobKeeper enabling direction was invalid and does not apply to the employees as:

(a) no written notice was provided to the employees pursuant to s 789GM(a) and (b) of the Act; and

(b) the respondent had not engaged in proper consultation with employees as required by section 789GM(c) of the Act.

[7] The Union further contends that even if the respondent had complied with section 789GM, the direction was nevertheless unreasonable pursuant to section 789GK of the Act. This contention was made on two bases:

1. an encompassing direction to all employees being provided a minimum of 25 hours work a week unfairly and disproportionately impacted on permanent employees rather than casual employees, as full time and part time employees had regularly worked, pre-COVID-19, up to 50 hours and up to 30-35 hours respectively including overtime; and
2. employees are only advised of their start time the day before commencing work and do not know how long they will be working until they attend the workplace the following day.

[8] While there was some dispute about when the Union had put two alternative options (which the company ultimately rejected) I accept that early in the dispute the Union had proposed that all permanent employees remain on their pre-COVID-19 hours, with whatever was left over being allocated to casual employees. As an aside, this is a rather curious proposition, given the Australian Council of Trade Union's present campaign to have all affected casual employees paid JobKeeper payments, and continue to work. In my view, any enabling direction in the current circumstances, which guarantees that permanent employees retain their pre-COVID-19 hours, with the result that long term regular casual employees receive few, or no hours at all, would not only be unfair and unreasonable, but contrary to the spirit of legislative purpose of the COVID-19 amendments. That said, ultimately the Union only pressed a second option – that Prosegur should reduce the hours of all employees by a percentage equivalent for the percentage of work lost as a result of the restrictions caused by the pandemic. On its face, this option has some attraction. It is reflected in the alternative enabling directions, which the Union seeks to have the Commission order, in replacement of Prosegur's direction which it claims is unreasonable. The Union's proposals are as follows:

'The Applicant seeks an Order from the Commission:

a. setting aside the purported JobKeeper enabling stand down direction implemented by the Respondent on the basis that it is unreasonable in all of the circumstances and does not represent fairness between the parties; and
b. substituting a different Jobkeeper enabling stand down direction which:

    i. provides for a proportionate percentage reduction in hours for all employees, such that the financial burden of the direction is shared equally amongst employees to the extent possible;
    ii. Does not require any employee to work more hours in a week or fortnight than they worked prior to COVID19;
    iii. Requires the Respondent to genuinely consider requests for secondary employment and they not be refused solely on the grounds that the employee is receiving a JobKeeper wage subsidy from the Respondent and requires those hours to be worked, or otherwise unreasonably refused;
    iv. Genuinely consider requests by employees to not work on certain days, or work shorter hours or reduced hours; and

c. Provides for a fortnightly review of allocated hours, with a view to ensuring any unfairness in the distribution of hours is rectified in the following fortnight.'

[9] In accordance with the Commission's fast-tracking procedures and guidelines for dealing with matters of this kind, I convened a conference of the parties on 29 May 2020. Ms M *Cerrato* with Mr C *Williams* and Mr K *Suesee* appeared for the Union, and Ms S *Caylock*, Partner, with Mr G *Lynch* appeared for the Company, with permission for the respondent to be represented, pursuant to s 596 of the Act. While no agreement or resolution was reached, I directed the parties to confer in the next few days in order for the Union to be provided with employee rosters since 21 April 2020 to satisfy itself that its employees were being treated as equitably as practicable. It was my view at the time that the fact that new arrangements had been in place for over a month would give an actual picture of the impact on individual employees, and on work categories, rather than any hypothetical assumptions, as to the 25 hour week impact. At the end of that conference, liberty to apply at short notice was granted and discussions occurred in the week commencing 1 June 2020. However, the dispute did not resolve, and the Union requested an arbitration of the matter, pursuant to s 789GV of the Act. Again, for expediency, directions were issued for statements and submissions to be filed by 4:00pm on Wednesday 10 June 2020, and I listed the matter the following day (11 June 2020). In the meantime, on 3 June 2020, Prosegur had issued another enabling direction, reaffirmed on 9 June 2020, which reads:

‘**JobKeeper Enabling Direction**

As you are aware, the efforts to contain the spread of Coronavirus led to significant and unprecedented restrictions on trade and the use of cash throughout Australia. Whilst some of those restrictions are beginning to ease, they continue to have a significant effect on our business.

Prosegur has taken a range of steps to mitigate this impact and help sustain the viability of the business including registering for the JobKeeper scheme. You were nominated as an eligible employee and Prosegur is paying you in accordance with that scheme.

Unfortunately, we have also had to make changes to employees' days or hours of work, including standing employees down where they cannot be usefully employed for their normal days or hours, and will need to continue to do so for the foreseeable future. These measures are designed to protect as many Jobs as possible whether full time, part time or casual and are in accordance with the Fair Work Act ("the Act") which was amended by the Federal Government to try and protect Australian jobs during this time of crisis.

Accordingly, Prosegur intends to reduce your normal working hours to 50 hours per fortnight effective from Tuesday 9th June. This would continue up to and including 27 September 2020 unless the direction is withdrawn or replaced by a new direction in writing prior to that date.

We met with the TWU in April 2020 and again Tuesday 2nd June 2020 to discuss these issues and would also like to invite you to provide your input into this proposed direction by contacting me at [email address provided] or by phone on [phone number provided] by close of business on Monday 8th June 2020. In addition to the matters raised by the TWU, we will consider any such input and discuss this with you as needed.

Unless otherwise advised in writing, the direction will take effect from Tuesday 9th June 2020. In that case, this letter will become the jobkeeper enabling direction and will replace any previous direction
issued regarding your days/hours of work.

In the event you wish to take annual leave for any days or hours that you are not required to work please complete a leave request form and submit it to me at your earliest convenience.

We acknowledge that this is very difficult news and we want to assure you that we are doing whatever we can to minimise the impact on as many of our employees as possible.

Yours sincerely
Anthony Coe
Acting Transport Manager - Moorooka
Prosegur Australia’

[10] Although it might be said that this direction sought to regularise any defects in the original notice on 5 May 2020, the Union wisely accepted that breaches of the Act as earlier alleged were matters for Courts of competent jurisdiction, and not the Commission. Its focus in the arbitration was appropriately on the claimed unreasonableness of the enabling direction and the Commission's powers in that respect.

[11] I turn to the relevant statutory provisions. It is generally acknowledged that the new COVID-19 provisions have two underlying emergency and temporary objectives:

1. to assist employers who qualify for the JobKeeper scheme to deal with the adverse economic impacts of COVID-19 and any government initiatives to slow the spread of the virus; and
2. to make temporary changes to assist employees to keep their jobs, maintain their connection to their employers, and to provide JobKeeper payments to qualifying employees of $1500 a fortnight, through a direct payment supplementary scheme to their employer.

[12] To achieve these objectives the CERPO Act amends the Act with introducing a new Part 6-4C. The Part allows employers to give certain directions to employees and make certain requests of them. It also allows the Commission to deal with disputes about the operation of the new Part. The provisions of the new Part are confined to an employer that is a National System Employer, and to employees who are National System Employees. An extended meaning of these terms is found in Division 2A of Part 1-3 of the Act. The new Part also allows an employer who qualifies for the JobKeeper scheme becomes entitled to JobKeeper payments for an employee who becomes unemployment during the relevant period to give the employee three new kinds of directions. These three new kinds of directions are found in s 789GDC - JobKeeper enabling stand down - which reads as follows:

> **789GDC. Jobkeeper enabling stand down**
>
> (1) If:
>
> (a) after the commencement of this section, an employer of an employee gave the employee a direction (the jobkeeper enabling stand down direction) to:
>
> (i) not work on a day or days on which the employee would usually work; or

(ii) work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or

(iii) work a reduced number of hours (compared with the employee's ordinary hours of work);

during a period (the jobkeeper enabling stand down period); and

(b) when the jobkeeper enabling stand down direction was given, the employer qualified for the jobkeeper scheme; and

(c) the employee cannot be usefully employed for the employee's normal days or hours during the jobkeeper enabling stand down period because of changes to business attributable to:

(i) the COVID-19 pandemic; or

(ii) government initiatives to slow the transmission of COVID-19; and

(d) the implementation of the jobkeeper enabling stand down direction is safe, having regard to (without limitation) the nature and spread of COVID-19; and

(e) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the jobkeeper enabling stand down period; or

(ii) for periods that, when considered together, consist of or include the jobkeeper enabling stand down period;

the jobkeeper enabling stand down direction is authorised by this section.

(2) If the jobkeeper enabling stand down direction applies to the employee, then, during the jobkeeper enabling stand down period, the employer is still required to comply with:

(a) section 789GD (which deals with satisfying the wage condition); and

(b) the minimum payment guarantee (see section 789GDA); and

(c) the hourly rate of pay guarantee (see section 789GDB);

but is not otherwise required to make payments to the employee in respect of the jobkeeper enabling stand down period.

(3) The jobkeeper enabling stand down direction does not apply to the employee during a period when the employee:

(a) is taking paid or unpaid leave that is authorised by the employer; or

(b) is otherwise authorised to be absent from the employee's employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the jobkeeper enabling stand down direction would otherwise apply to the employee.

(4) For the purposes of subparagraph (1)(a)(iii), the reduced number of hours may be nil.

(5) This section has effect despite a designated employment provision.

[13] Section 789GG gives further guidance as to sub-s (c) of the above section. It reads as follows:

Days of work etc.

(1) If:

(a) an employer of an employee qualifies for the jobkeeper scheme; and

(b) the employer is entitled to one or more jobkeeper payments for the employee; and

(c) the employer gives the employee a request to make an agreement with the employer under subsection (2);

the employee:

(d) must consider the request; and

(e) must not unreasonably refuse the request.

(2) If:

(a) after the commencement of this section, an employer and an employee of the employer agree in writing to the employee performing duties during a period (the relevant period):

(i) on different days; or

(ii) at different times;

compared with the employee's ordinary days or times of work; and

(b) when the agreement was made, the employer qualified for the jobkeeper scheme; and

(c) the performance of the employee's duties on those days or at those times is:

(i) safe, having regard to (without limitation) the nature and spread of COVID-19; and

(ii) reasonably within the scope of the employer's business operations; and

(d) the agreement does not have the effect of reducing the employee's number of hours of work (compared with the employee's ordinary hours of work); and

(e) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the relevant period; or

(ii) for periods that, when considered together, consist of or include the relevant period;

the agreement is authorised by this section.

(3) This section has effect despite a designated employment provision.

[14] It is accepted that s 789GDG(2) is the subject of this dispute. Also relevant for present purposes is Division 6 dealing with the rules relating to JobKeeper enabling directions; in particular, sub-ss 789GK, GM, GN, and GU, which I set out below:

789GK. Reasonableness

A jobkeeper enabling direction given by an employer to an employee of the employer does not apply to the employee if the direction is unreasonable in all of the circumstances.

Note: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.

789GM. Consultation

(1) A jobkeeper enabling direction given by an employer to an employee of the employer does not apply to the employee unless:

(a) the employer gave the employee written notice of the employer's intention to give the direction; and

(b) the employer did so:

(i) at least 3 days before the direction was given; or

(ii) if the employee genuinely agreed to a lesser notice period--during that lesser notice period; and

(c) before giving the direction, the employer consulted the employee (or a representative of the employee) about the direction.

(2) The regulations may require that a notice under paragraph (1)(a) must be in a prescribed form.

(3) Subsection (1) does not apply to a jobkeeper enabling direction (the relevant direction) given by an employer to an employee of the employer under a particular section of this Part if:

(a) the employer previously complied with paragraphs (1)(a), (b) and (c) in relation to a proposal to give the employee another direction under that section; and

(b) in the course of consulting the employee (or a representative of the employee) about the proposal, the employee (or the representative of the employee) expressed views to the employer; and

(c) the employer considered those views in deciding to give the relevant direction.

(4) An employer must keep a written record of a consultation under paragraph (1)(c):

(a) with an employee of the employer; or

(b) with a representative of an employee of the employer.

789GN. Form of direction

(1) A jobkeeper enabling direction must be in writing.

(2) The regulations may require that a jobkeeper enabling direction must be in a prescribed form.

789GU. Employee requests for secondary employment, training etc.

If:

(a) a jobkeeper enabling direction given by an employer under section 789GDC (jobkeeper enabling stand down) applies to an employee of the employer; and

(b) the employee gives the employer any of the following requests:

(i) a request to engage in reasonable secondary employment;

(ii) a request for training;

(iii) a request for professional development;

the employer:

(c) must consider the request; and

(d) must not unreasonably refuse the request.

Note: This section is a civil remedy provision (see Part 4-1).

[15] The Commission's powers to deal with disputes under Part 6-4C of the Act are set out at s 789GV, and include the Commission's other more commonly used dispute powers under the Act, to mediate, conciliate, provide recommendations or offer opinions, and importantly, to arbitrate. Section 789GV of the Act reads as follows:

789GV - FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part.

(2) The FWC may deal with a dispute by arbitration.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with a dispute only on application by any of the following:

(a) an employee;

(b) an employer;

(c) an employee organisation;

(d) an employer organisation.

(4) The FWC may make any of the following orders:

(a) an order that the FWC considers desirable to give effect to a jobkeeper enabling direction;

(b) an order setting aside a jobkeeper enabling direction;

(c) an order:

(i) setting aside a jobkeeper enabling direction; and

(ii) substituting a different jobkeeper enabling direction;

(d) any other order that the FWC considers appropriate.

(5) The FWC must not make an order under paragraph (4)(a) or (c) on or after 28 September 2020.

(6) An order made by the FWC under paragraph (4)(a) ceases to have effect at the start of 28 September 2020.

(7) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

[16] It would seem that overarching all of the Commission's new powers and functions, are the well-known industrial objectives applying to the principles of fairness between parties (s 789GV(7)) and reasonableness in the sense of the Commission making findings as to whether a JobKeeper enabling direction is reasonable, or as is put in the negative in s 789GK, unreasonable, in which case the direction will not apply. There is only one reference in the new Part 6-4C which gives a specific guide to what might render an enabling direction unreasonable. This is the note to the section itself dealing with a direction being unreasonable given the impact on an employee's caring responsibilities (which is not relevant here in this dispute). It may be observed that the *Coronavirus Economic Response Package (Payments and Benefits) Bill 2020* gives no other guidance in this regard and there is certainly no definition in the Definitions clause as to the meaning of unreasonableness.

[17] Where a decision maker is required to consider what is reasonable or unreasonable, or what might constitute a person's reasonable belief in a particular factual framework, is to be found in various statutory contexts in many statutes and notably, in this case, elsewhere in the Act; see, for example, whether a dismissal is 'harsh, unjust or unreasonable' at s 387 of the Act. In the context of discrimination laws, the High Court in *Waters v Public Transport Corporation* [1991] HCA 49 at [43] held that what is reasonable must be ascertained by taking into consideration all of the circumstances of the case, including by reference to the scope and purpose of the Act in question. In determining what is reasonable in the context of an employee's obligation to comply with an employer's lawful and reasonable direction, it was said by the High Court in *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday* (1938) 60 CLR 601:

'The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument … governing the

> relationship, supply considerations by which the determination of what is reasonable must be controlled.'

[18] As I apprehend it, there has been judicial or Commission exegesis of the meaning of 'unreasonable' in s 789GK in Part 6-4C of the Act. That being the case, I consider that it is open for the Commission to consider the ordinary meaning or understanding of the word, and the meaning of the same word or expression in other sections of the Act. In this later regard, it is a principle of statutory construction that word or expression has the same meaning where it appears in different sections of the same Act, unless a contrary intention is expressly stated. As to the general understanding of the word unreasonable, the Macquarie Dictionary defines it as follows:

> 'Not endowed with reason; Not guided by or based on good sense; Not based on reason or sound judgment'.

[19] Some synonyms for 'unreasonable' include senseless, irrational, illogical, immoderate, disproportionate, unconscionable, unnecessary, unjustified, unwarranted, uncalled for or unwise. In a decision of Vice President *Hatcher* in *Mac v Bank of Queensland Limited; Michelle Locke; Matthew Thompson; Stacey Hester; Christine Van Den Heuvel; Jane Newman* [2015] FWC 774 albeit a decision in the Commission's anti-bullying jurisdiction, His Honour said at [79]:

> '[79] An applicant under s.789FC must not only be a worker but must be one who "reasonably believes that he or she has been bullied at work". The expression "reasonable belief" and similar expressions are utilised in a wide variety of contexts by the statutory and common law. It is clear from cases decided in those differing contexts that not only must the requisite belief be actually and genuinely be held by the relevant person, but in addition the belief must be reasonable in the sense that, objectively speaking, there must be something to support it or some other rational basis for the holding of the belief and it is not irrational or absurd. For example, in the context of the Federal Court rules concerning applications for preliminary discovery, which require the holding by the applicant of a reasonable belief that that there may be a right to obtain relief against another person not presently a party to a proceeding in the Court, it has been held that "there must be some tangible support that takes the existence of the alleged right beyond mere 'belief' or 'assertion' by the applicant" or that "there must be some evidence that inclines the mind towards the matter of fact in question". In relation to a NSW statutory provision prohibiting legal practitioners from providing legal services on a claim or defence of a claim for damages unless the practitioner reasonably believed that the claim or defence had reasonable prospects of success, it has been held that the practitioner's belief that there was material which justified proceeding will not be reasonable if it "unquestionably fell outside the range of views which could reasonably be entertained". In relation to the concept of a

> "reasonable hypothesis", it has been held that in order to be a reasonable one a hypothesis must be rationally based and possess some degree of acceptability or credibility, and must not be irrational, absurd or ridiculous. These examples all illuminate the way in which the Commission should approach the task of considering whether the applicant worker has the necessary reasonable belief such as to confer standing to make an application under s.789FC.' (*footnotes omitted*)

[20] It is also relevant to recognise that s 789GK has an important rider to be applied when considering unreasonableness; that is, whether the direction is unreasonable 'in all the circumstances'. In my opinion the meaning of 'unreasonable' in s 789GK of the Act can be ascertained when it is viewed from the standpoint of what a reasonable person would conclude in the context of the unparalleled circumstances (COVID-19) to be not credible or sensible, illogical, implausible or impractical. Applying these descriptors, I turn to the evidence in this case.

The evidence

[21] Statement and oral evidence was presented in the proceedings from the following persons:

For the Union

- Mr Craig Williams – Coordinator, Queensland Branch at the TWU Queensland;
- Mr Kenneth Suesee – full time, permanent Armoured Vehicle Operator ('AVO');
- Mr Michael Gardiner – full time, permanent AVO
- Mr Thomas Laszlo – casual AVO of 13 years' experience;
- Mr Cameron Rettke - casual AVO of 9 years' experience.

For Prosegur

- Mr Gavin Lynch – National Workplace Relations Manager; and
- Mr Anthony Coe – Transport Supervisor, Moorooka.

[22] Given the short time frame for preparing the evidence and submissions, it is a credit to both parties that the filed materials are detailed, comprehensive, well set out and have been of great assistance to the Commission in determining this manner. I would observe that most of

the evidence is uncontested and largely repetitive, and in that context, given the urgency, I will not set out the detail of all of the evidence. However, I have taken all of the evidence into account and refer to it periodically under headings which will follow.

[23] Essentially, the few areas of contested evidence concerned various alleged comments made by Mr Lynch such as in the meeting of 21 April 2020, that the casual workers who refused to work additional hours would not have a job, that he was not interested in listening to any employee concerns and feedback, that he would not be providing information about the allocation of work over the previous five weeks, and that any employee who has a second job and is not available for perform work for Prosegur would no longer be working for the Company. Mr Coe was alleged to have made comments about Mr Laszlo 'watching his back' if he was unavailable for work, and that he had told Mr Laszlo he would have to be available five days of week. Mr Coe denied both conversations and I accept his evidence in this respect. I found Mr Coe to be a helpful witness who has been faced with enormous pressure and great difficulties in managing on a day to day basis, the twin objectives of providing the fairest allocation of work as practicable, with the other numerous considerations of the reality of the business in the current circumstances.

[24] As to Mr Lynch's comments, essentially reflecting a lack of genuine consultation, I shall shortly come back to this issue. In respect to casuals who are not available, Mr Lynch denied the comments as alleged, and explained that a number of short term casuals and who are not eligible for JobKeeper had not been offered any shifts. His comment about not offering shifts was in the context of two factors:

1. whether a casual employee refused to work their usual hours at short notice and with no good reason; and
2. those few casuals who had secondary employment and who had prioritised that employment over work for Prosegur.

He noted that for an employee to qualify for JobKeeper payments, Prosegur must be nominated as the primary employer. As to Mr Lynch not providing information as to allocated hours over the last five weeks, he explained that he had privacy concerns as to the names of employees who were not Union members on the list. Further, at the meeting on 2 June 2020, no Union representative had actually requested the data that had been sought. In any event,

the information with redacted names has now been provided to the Union and the Commission.

[25] In my view, much of the cross examination of the witnesses was not determinative of the main issue before the Commission. Nevertheless, to the extent it concerned what was said by management can rationally be explained in the hothouse, intense atmosphere of rapidly changing circumstances, which had no predictability or certainty. It is understandable that words said in such an atmosphere might be misheard or mistaken. Overall, I find that all of the witnesses who gave evidence of meetings or conversations did so to the best of their recollection and ability.

Was there genuine consultation for the purposes of s 789GM(1)(c)?

[26] The meaning of the word 'consult' was considered by the Full Bench in *Consultation clause in modern awards* [2013] FWCFB 10165 at [30] to [33]:

> '[30] The word 'consult' means more than the mere exchange of information. As *Young* J said in *Dixon v Roy*:
>
> > "The word 'consult' means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response." [citations omitted]
>
> [31] The right to be consulted is a substantive right, it is not to be treated perfunctorily or as a mere formality. Inherent in the obligation to consult is the requirement to provide a genuine opportunity for the affected party to express a view about a proposed change in order to seek to persuade the decision maker to adopt a different course of action. As *Logan* J observed in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* (QR):
>
> > "... A key element of that content [of an obligation to consult] is that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon. Another is that while the word always carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according the nature and circumstances of the case. In other words, what will amount to "consultation" has about it an inherent flexibility. Finally, a right to be consulted, though a valuable right, is not a right of veto.

> To elaborate further on the ordinary meaning and import of a requirement to "consult" may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, "this is what is going to be done" and saying to that person "I'm thinking of doing this; what have you got to say about that ?". Only in the latter case is there "consultation. ..."

[32] We respectfully adopt his Honour's observations. Similar to the obligation to accord a person procedural fairness, the precise content of an obligation to consult will depend on the context. The extent and significance of a proposed change, in terms of its impact on the affected employees, will have a bearing on the extent of the opportunity to be provided. Hence a change of limited duration to meet unexpected circumstances may mean that the opportunity for affected employees to express their views may be more limited than would be the case in circumstances where the proposed change is significant and permanent. It is also relevant to note that while the right to be consulted is a substantive right, it does not confer a power of veto. Consultation does not amount to joint decision making.

[33] Some of the ordinary incidents of a requirement to consult are reflected in s.145A(2), that is:

- to provide information about the change; and
- to provide an opportunity for affected employees to give their views about the impact of the change; and
- to consider any views about the impact of the change that are given by the employees.' (*footnotes omitted*)

[27] Despite being one of the most frequently debated and controversial words in the industrial relations lexicon, a few fundamental principles are relevant to the debate. Consultation does not mean agreement, and a party is not required to abandon a strongly held position and agree to the other party's strongly held position. However, nor does consultation just mean an exchange of information. It is not a mere formality or triviality, and a party cannot merely pay lip service to an obligation to consult. Consultation must be meaningful, open and transparent, and involves a reasonable and realistic assessment of each other's views. In this matter, there were two meetings of the parties and a Commission conciliation. The evidence was that the meetings of 21 April 2020 and 2 June 2020 were for around an hour's duration. It is difficult to accept the Union was not prosecuting its position, in that it was not being discussed at these meetings. It is also clear that circumstances affecting individuals and groups of employees were also discussed. There was written communication to employees seeking feedback, and concerns of individual employees.

[28] It is also noteworthy, in my view, that from when the 25 hour week proposal was first communicated to employees on 15 April 2020 (albeit not in writing) to when this application was filed on 27 May 2020, that the Company had received only a few employee enquiries and no formal objection or grievance was raised by the Union, the delegates, or the employees over a five week period when the proposal was in effect. In my view, the claim the Company was not interested in the views or feedback from employees is not supported by the reality. As mentioned earlier, the concern over a start time notice being only given the day before, was addressed in part by an agreement that employees would receive at least 12 hours' notice of their start time. Given all the uncertainty and unpredictability and the ongoing impact on the Company, it is virtually impossible to know the day before what its labour requirements may be on any given day. Mr Coe, as I said earlier, who is responsible for this daily advice to employees, and balancing all their respective needs with the Company's operations, gave evidence which I accept about these logistical difficulties.

[29] In my opinion, the evidence in this case does not support a finding that the employer has not engaged in genuine consultation. However, as this may be a matter which is beyond the Commission's jurisdiction, I make these observations and give an opinion only, and for abundant caution, I do not make any orders in this respect.

Is the Company's enabling direction reasonable and fair in the circumstances?

[30] This question is largely directed to the Union's submission that all employees should receive a percentage equivalent reduction in hours for the percentage of work lost, and that the Company's particular direction disproportionately and unfairly disadvantages full time and part time employees over casual employees. A number of matters must be considered in respect to this submission.

1. Prior to COVID-19, full time employees regularly worked in excess of 38 hours a week, and on the Union's case, worked from 40 hours to 50 hours a week. Part time employees were working close to or more than 38 hour weeks, and some casuals were working up to and more than 38 hours, with others two to three days a week due to their secondary employment. It is trite that overtime, even regular overtime, is not, and should not be viewed as a permanent fixed arrangement, and that by its very nature, overtime is variable

and unexpected but, on occasion, is regular and over a long period, and is offered to employees and can be rejected by them according to business needs.

2. All casual employees were stood down for two weeks prior to 28 April 2020, and some are no longer employed. Mr Laszlo said he was offered no shifts from 24 March 2020 to 17 April 2020, but presumably was paid JobKeeper from 30 March 2020.

3. Full time and part time employees can also supplement their income by accessing accrued annual leave and RDOs, and accrual of leave is obviously ongoing at three hours a week and is available to be taken up. For example, Mr Suesee has 485 hours of accrued annual leave and 58 hours of RDOs. Obviously, casual employees have no such accrued entitlements.

4. It was Mr Coe's evidence that some casual employees are losing more hours than permanent employees.

5. Some work is not performed by permanent employees, such as public transport ticketing machines and parking meter collections, and covert (undercover) work for small shops and businesses. This work generally requires six casuals on a Monday (the busiest day), and three casuals on Tuesdays and Wednesdays.

[31] In any event, while there are some week by week variations, the rolling average hours for all employees for the week after the Commission's conference – that is, the week of 1 to 5 June 2020 –incorporating the previous weeks disclosed the following:

	Total	**Rolling**	**Weekly**
Crew	**Hours**	**Average**	**Total**
Full time	40.95	38.62	**1,304.26**
Full time	42.35	38.86	**1,275.58**
Full time	43.75	32.81	**1,317.75**
Full time	44.00	34.91	**1,325.28**
Full time	31.00	31.01	**933.72**
Full time	32.50	30.98	**978.90**
Full time	38.35	32.54	**1,155.10**
Full time	24.50	30.19	**737.94**
Part time	33.85	33.16	**1,019.56**
Part time	33.00	32.30	**975.79**
Part time	36.50	31.12	**1,099.38**
Part time	35.25	33.69	**1,061.73**
Part time	35.25	31.94	**1,061.73**

Part time	31.00	31.76	**933.72**
Casual	29.75	27.25	**1,088.85**
Casual	20.00	22.25	**707.40**
Casual	31.25	25.57	**1,091.57**
Casual	0.00	27.43	**1,083.23**
Casual	32.00	24.18	**0.00**
Casual	15.50	27.184	**1,171.20**
Casual	20.75	25.32	**552.39**
Casual	29.75	26.14	**759.45**
Casual	22.75	25.32	**1,057.97**
Casual	29.75	22.46	**784.19**
Casual	22.75	23.71	**567.30**
Casual	15.50		**219.60**
Casual			**0.00**
Casual			**714.47**
Casual			**0.00**
Casual			**0.00**
Casual			**739.84**

[32] It will be immediately apparent that all full time and part time employees are working in excess of 30 hours a week, and 2 are over 38, and no casual employees are working over 30 hours a week (between 24.46 and 27.43 hours). These are on a rolling average basis. Thus, it cannot possibly be said that permanent full time and part time employees are working 25 hours a week. For full time employees, weekly hours are close to or exceed minimum award hours of 38 hours a week. Accordingly, I consider that Prosegur's JobKeeper enabling direction was not unreasonable, having regard for all the circumstances.

Can casual employees be required to work more than they worked pre-COVID-19?

[33] The Union expresses its case about disproportionality by seeking an enabling direction which does not require any employee to work more hours in a week or fortnight than they worked pre-COVID-19. The effect of this is to revert casual employees to less hours they are now working, and for some casuals to increase their hours and availability where they have secondary employment or there is an impact on other family or personal circumstances. Two casual employees gave evidence; Mr Laszlo had regularly work 35 to 40 hours a week pre-COVID-19, and said that since 17 April 2020 he now works only three days a week instead of four days. He also works one to two days for an earth moving and excavation business. He claims his casual employment enables him to provide care and support for his young family.

In addition to his monetary loss, he says that there is the pressure he feels to make himself more available for work. I have some difficulty reconciling Mr Laszlo's 35 to 40 hours a week pre-COVID-19 hours, plus one or two days of secondary employment pre-COVID-19, with his claim that his current casual employment of three days plus the other days of secondary employment from which he is not banned, means he has less time for family or other responsibilities.

[34] Mr Rettke gave similar, uncontested evidence. He worked 3 days pre-COVID-19, sometimes 25 hours a week. He is now being asked to work three to four days a week, up to 28 hours a week. Mr Rettke was recently successful in gaining a ten-week work experience role with another employer from 15 June 2020. It was unclear if this role would lead to full time employment. He had approached Mr Coe about the matter who told him that if he was to be unavailable for work, he might have to be let go. Mr Rettke has other business commitments and his casual employment allows him flexibility to enrol and study for various courses, but he cannot afford to lose his job. He has not had an answer to his ten-week work experience predicament. Mr Coe pointed out Mr Rettke's rolling weekly hourly average in the five weeks prior to 5 June 2020 was 25.32 hours, and on each of those weeks it was 26.15, 28.15, 23.30, 26.15 and 23.45 hours. Given Mr Rettke's previous patterns of work pre and peri-COVID-19, I cannot discern such a disparity as to make it unreasonable for him to work an average of 25 hours a week as required.

[35] Generally, in respect to casual employees, I accept that those remaining have long service and have had regular casual engagements with the knowledge and *imprimatur* of Prosegur to engage in secondary employment.

[36] However, that does not mean that the essential basis for casual employment is in question; that is, employees can accept offers of casual engagements and that the employer can choose not to make such offers. For the employees, such arrangements can allow the type of flexibility referred to by Mr Laszlo and Mr Rettke, and for the loss of permanent entitlements is compensated by a 25% loading. For the employer, a cohort of casual employees is useful to manage business needs, and is necessary to cater for the peaks and troughs of work in a business. Nevertheless, I apprehend the Union's submission is that the employee's request to require an employee to work extra hours is unreasonable in accordance with JobKeeper rules, and as the hours of some casual employees have increased, not by consent, then this may not be permitted by these rules. This submission raises a general

question as to whether an employer's request to an employee is unreasonable, if it requires an employee to agree to an increase in their hours of work 'on different days or at different times', compared with the employee's ordinary days or times of work.

[37] It will be immediately apparent that different expressions are used in s 789GG to describe when an employee performs duties. For example, s 789GG(2)(a) refers to 'ordinary days or times of work', whereas s 789GG(2)(d) in respect to the prohibition on reducing hours of work, uses such terms as 'number of hours' and 'ordinary hours of work'. It seems to me that if Parliament had intended to have a prohibition on an agreement increasing hours of work, as it did using different words to prohibit a reduction in ordinary hours of work, it could have easily done so, either by adding such a prohibition in s 789GG(2)(d), or including a specific subsection to that effect. In my view, Parliament did not intend to prohibit an agreement increasing employee's hours of work, compared with their ordinary hours of work. It follows that absent other factors going to an unreasonable request, it will be unreasonable for an employee to refuse a request to increase his or her hours of work compared to their ordinary hours of work. In my view, the evidence and circumstances in this case do not support the 25 hour week enabling direction being unreasonable, if its effect is to increase the hours of work, compared to the ordinary hours of work of employees, specifically in this case, for casual employees. Given all the changing variables, it seems entirely reasonable to me that while some employees might work more hours than 25, and others less, that the stated intention of providing as far as practicable, a minimum of 25 hours for all employees, is the only balanced, rational and practical decision to have been made. Mr Coe's unenviable task is to try to balance equity and fairness for employees with the business needs, given a range of different and variable circumstances on a day to day basis, and include such factors as:

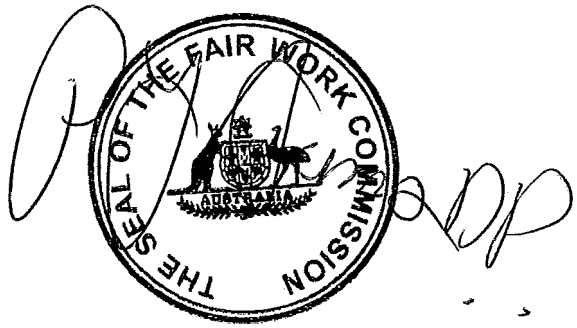
- the type of work; for example, whether it is covert or overt;
- the profile of customers and meeting their changing requirements;
- the number of runs required to operate the business on any particular day;
- the skills and experience of available AVOs;
- the short notice of the work;
- availability;
- refusals to work; and
- AVOs' leave requests

To rigidly ensure and apply exactly the same hours for all employees would, in my opinion, be an administrative and rostering nightmare, that would impose an unreasonable burden on Prosegur.

[38] Lastly, in respect to the Union's alternative directions to include a reference to secondary employment, such a proposal is not supported by evidence that the employer was not genuinely considering an employee's secondary employment request. In fact, the evidence is that the relevant employees continue to undertake secondary employment without sanction or criticism.

[39] For the foregoing reasons, I find that the JobKeeper enabling direction issued by Prosegur on 3 June 2020 is not unreasonable in all the circumstances for the purposes of s 789GK of the Act. Accordingly, in dealing with this dispute, and taking into account fairness between the parties, I decline to make orders setting aside the employer's JobKeeper enabling direction of 3 June 2020, or substitute that direction, or add to it by the Union's alternative directions.

[40] The dispute is determined accordingly and thereby resolved.



DEPUTY PRESIDENT

Appearances:

Ms M *Cerrato*, Senior Industrial Officer, TWU Queensland, appeared for the applicant.

Ms S *Caylock*, Partner, Rigby Cooke Lawyers, and Mr G *Lynch*, National Workplace Relations Manager, Prosegur, appeared on behalf of the respondent.

Hearing details:

2020.

Sydney (by Telephone):

11 June.

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