DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Transport Workers' Union of Australia
v
Prosegur Australia Pty Limited
(C2020/5070)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT YOUNG
COMMISSIONER CIRKOVIC

SYDNEY, 13 JULY 2020

Appeal against decision [2020] FWC 3139 of Deputy President Sams at Sydney on 17 June 2020 in matter number C2020/4003.

Introduction

[1] The Transport Workers' Union of Australia (TWU) has lodged an appeal, for which permission to appeal is required, against a decision of Deputy President Sams published on 17 June 2020[1] (decision) concerning a "jobkeeper enabling direction" (direction) issued by Prosegur Australia Pty Limited (Prosegur) to employees at its Moorooka Depot in Queensland pursuant to s 789GDC(1) of the *Fair Work Act 2009* (FW Act). The substance of the direction was that "*Your normal working hours will reduce to 50 hours per fortnight*" and it was expressed as effective from 10 June 2020. The direction applied to all employees for whom Prosegur was eligible to receive a JobKeeper subsidy, which group was comprised of 8 full-time employees, 6 part-time employees and 11 long-term regular casual employees. In the decision, against the case advanced by the TWU, the Deputy President relevantly determined that the direction was not unreasonable. In its appeal, the TWU contends that the decision was in error because it involved a misconstruction of the statute and an error of fact.

[2] The appeal was filed on 30 June 2020. The TWU sought an expedited hearing of the appeal on the basis that the direction was in place only until 28 September 2020, it was causing significant financial prejudice to the TWU's members, and the appeal concerned matters of general importance and significance. Expedition of the appeal was granted and the hearing of the appeal took place on 9 July 2020. It is necessary in the circumstances to issue a decision in the matter as soon as practicable, and consequently the reasons for decision are expressed somewhat more concisely than they otherwise would have been.

Statutory background

[1] [2020] FWC 3139

[3] The statutory framework is as follows. In response to the current COVID-19 epidemic, the FW Act has been amended by the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Amending Act) to insert a new Part 6-4C, *Coronavirus economic response*. The object of the Part is set out in s 789GB, which provides:

> **789GB Object**
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> The object of this Part is to:
>
> (a) make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from:
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> (i) the COVID-19 pandemic; and
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> (ii) government initiatives to slow the transmission of COVID-19; and
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> (b) help sustain the viability of Australian businesses during the COVID-19 pandemic, including by preparing the Australian economy to recover with speed and strength after a period of hibernation; and
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> (c) continue the employment of employees; and
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> (d) ensure the continued effective operation of occupational health and safety laws during the COVID-19 pandemic; and
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> (e) help ensure that, where reasonably possible, employees:
>
> (i) remain productively employed during the COVID-19 pandemic; and
>
> (ii) continue to contribute to the business of their employer where it is safe and possible for the business to continue operating.

[4] Part 6-4C authorises employers to give "jobkeeper enabling directions" to employees in respect of whom it is entitled to receive the wage subsidies provided for in the Amending Act. Relevant to this matter, s 789GDC(1) provides as follows:

> (1) If:
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> (a) after the commencement of this section, an employer of an employee gave the employee a direction (the ***jobkeeper enabling stand down direction***) to:
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> (i) not work on a day or days on which the employee would usually work; or
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> (ii) work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
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> (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.

[5] Section 789GG(1) separately requires an employee to consider and not unreasonably refuse a request made by their employer, where the employer qualifies for the jobkeeper scheme in respect of the employee, to make an agreement under s 789GG(2) to perform duties on different days or at different times. Under s 789GG(2), such an agreement must satisfy a number of conditions, including (in s 789GG(2)(d)) that "*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)*".

[6] Section 789GG(3) provides that "*This section has effect despite a designated employment provision*". The expression "*designated employment provision*" is defined in s 789 to include a provision of the FW Act (other than a provision in Pt 6-4C or mentioned in s 789GZ), a fair work instrument, a contract of employment or a transitional instrument).

[7] The authorisation of a direction of the type to which s 789GDC(1) is subject to compliance with the payment conditions in ss 789GD, 789GDA and 789GDB. It is not necessary to reproduce these provisions since no issue has been raised concerning Prosegur's compliance with these obligations. There are also relevant requirements concerning prior consultation (s 789GM) and the form of the direction (s 789GN) about which there is no issue arising in this appeal. The critical requirement for the purpose of this appeal is s 789GK, which provides:

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.

[8] Section 789GV provides that the Commission may deal with a dispute about the operation of Part 6-4C in the following terms:

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.

[9] Section 789GW provides that a person must not contravene a term of an order made by the Commission pursuant to s 789GV.

Factual background

[10] Prosegur is a cash in transit business which performs a combination of armoured car and covert cash transportation operations. The COVID-19 pandemic and its economic effects have caused a serious reduction in Prosegur's work and revenue. The reduction of work at the Moorooka depot has been in the order of 35 percent. Prosegur has taken a number of measures to deal with this, including ceasing to offer work to its short term casual employees. On 15 April 2020, employees at Moorooka were advised in writing that the remaining employees (that is, full-time, part-time and long-term regular casual employees) were to have their hours reduced to a minimum of 25 hours per week. There was a meeting with the TWU's delegates about this on 21 April 2020. At some stage, the TWU's representatives made a counter-proposal that all permanent employees should remain on their pre-pandemic hours, but this was rejected by Prosegur. On 5 May 2020, Prosegur sent a notice to the employees which outlined the challenges it faced to the viability of its business, stated that it was necessary to make changes to employees' hours of work, and identified various options to implement this. Employees were then invited in the notice to provide input into the direction by contacting directly Prosegur's Acting Transport Manager. On 3 June 2020, employees were sent correspondence entitled "*JobKeeper Enabling Direction*", which set out the intended direction in the following terms:

> "… Prosegur intends to reduce your normal working hours to 50 hours per fortnight effective from Tuesday 9th June 2020. 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.
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> . . .
>
> 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."

[11] In its final form, the direction was issued by correspondence to employees on 9 June 2020 in the form and with the operative date identified in the opening paragraph of this decision.

[12] On 27 May 2020, the TWU filed an application pursuant to s 789GV(3) for the Commission to deal with a dispute concerning the direction made by Prosegur. It contended that the direction was invalid because Prosegur failed to comply with the consultation requirements in s 789GM, and because the direction was unreasonable within the meaning of s 789GK in that:

(1) the direction imposed an unfairly disproportionate reduction of hours on permanent employees as compared to casual employees, as full-time employees and part-time employees had regularly worked, pre-COVID-19, up to 50 hours and 30-35 hours respectively including overtime; and

(2) employees were only being advised of their start time the day before commencing work and did not know how long they would be working for until they attended the workplace the following day.

[13] The TWU sought that the following orders be made in resolution of the dispute:

(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

(v) 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.

The decision

[14] The first issue dealt with by the Deputy President in the decision was the construction of the term "*unreasonable*" in s 789GK. The Deputy President said:

"[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 *[no]* 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…"

[15] The Deputy President then referred to the decision of a single member of the Commission in *Mac v Bank of Queensland Limited*[2], which discussed the meaning of the expression "*reasonably believes that he or she has been bullied at work*" in s 789FC of the FW Act. The Deputy President then stated his conclusion as to this issue:

> "[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."

[16] After the Deputy President summarised the evidence given before him, he dealt with and rejected the TWU's contention that the prior consultation required by s 789GM had not occurred. Because the Deputy President's conclusions as to this issue are not the subject of challenge in the TWU's appeal, it is not necessary to refer to the Deputy President's reasoning in this respect. The decision then contained the subheading "Is the Company's enabling direction reasonable and fair in the circumstances?", and the Deputy President said:

> "[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.

[2] [2015] FWC 774, 247 IR 274

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

[17] The Deputy President then set out, in tabular form, the actual and rolling average hours for all employees for the week 1 to 5 June 2020, incorporating the previous weeks (hours table). This is reproduced in the Annexure to this decision. The Deputy President then said:

> "[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."

[18] Finally, the Deputy President dealt with the aspect of the TWU's proposed alternative direction that would prohibit employees being required to work more hours than they had prior to the pandemic and, in that connection, referred to evidence adduced by the TWU that in the case of some casual employees this compromised their capacity to accept secondary employment in order to make ends meet. The Deputy President acknowledged that some

casual employees had undertaken secondary employment with the knowledge and imprimatur of Prosegur, but then said:

> "[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."

[19] The Deputy President rejected the proposition that, as a matter of construction, s 789GG prohibited an agreement increasing an employee's hours of work, and went on to say:

> "[37] … 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:
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> - 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."

[20] On the basis of these reasons, the Deputy President concluded that the direction was not unreasonable for the purposes of s 789GK and declined to make the orders sought by the TWU.

Appeal grounds and submissions

[21] The TWU's amended notice of appeal contained two grounds of appeal as follows:

1. The Deputy President erred in construing and applying s 789GK of the Act and failing to resolve the dispute by:

    1.1 failing to analyse and assess the reasonableness or otherwise of the jobkeeper enabling direction issued by the Respondent on 3 June 2020;

    1.2 taking into account and/or focusing exclusively on the number of hours employees had worked prior to the direction coming into effect.

2. The Deputy President erred by mistaking the facts in holding that full-time and part-time employees were not working 25 hours a week and, in the case of full-time employees, were working close to or in excess of 38-hours a week.

[22] The TWU submitted in relation to the first ground of appeal that the Deputy President proceeded upon a misconstruction of the expression "*unreasonable in all the circumstances*" in s 789GK in that he adopted a limited definition of the adjective "*unreasonable*" that was akin to the administrative law concept of unreasonableness derived from *Associated Provincial Picture Houses Ltd v Wednesbury*[3] of a decision being irrational, illogical or so unreasonable that no reasonable person could have arrived at it. The TWU contended that this construction was in error because:

- section 789GV is directed to the review of the employer's direction itself and its substance, not the employer's decision to make it.

- the word "*unreasonable*" is used in collocation with the words "*in all the circumstances*", and this captured circumstances pertinent to both the employer and the employee and required an evaluative assessment as to the reasonableness of the direction in those circumstances rather than merely whether it has some rational or logical basis;

- it is unlikely that the legislature intended such an unfettered power to interfere with existing contractual and statutory rights; rather, the power was intended to operate fairly to both the employers and employees in the circumstances;

- s 789GK is a provision which ensures that jobkeeper directions power is not abused or exploited, protects an employee's interests and ensures that a direction is not inequitable, unfair or unjustifiable; and

- the Note to s 789GK makes it clear that "*unreasonable in all the circumstances*" is referable to whether a direction is, in the context of the circumstances of both the employer and the employee, equitable, fair and just.

[23] The TWU submitted that the sole basis upon which the Deputy President found that direction was not unreasonable was that the hours table showed that in the week of 1-5 June 2020 and on a rolling basis thereto, employees were working well in excess of 25 hours per

[3] [1948] 1 AC 223

week, with full-time and part-time employees working over 30 hours per week and with no casual employee working over 30 hours. However, this related to the situation which applied before the direction took effect, and the Deputy President failed to actually consider whether the direction was reasonable. The Deputy President, it was submitted, appears to have assumed that the direction would either be ignored by Prosegur or not implemented, but there was no basis for such an assumption.

[24] As to the second ground of appeal, the TWU submitted that the Deputy President erred in his relying on the data in the hours table as demonstrative of hours worked, when in fact for full-time and part-time employees it included hours taken as leave or RDOs. Once this was taken into account, the hours of work of full-time and part-time employees were considerably reduced, and this vitiated the basis upon which the Deputy President found the direction not to be unreasonable.

[25] The TWU submitted that permission to appeal should be granted, the appeal upheld, the decision quashed, and its dispute application re-heard by the Full Bench. It submitted that the Full Bench should set aside the direction and substitute a direction that Prosegur proportionately reduce employee hours commensurate to the loss of work it experiences.

[26] Prosegur submitted that the direction was intended to set minimum working hours at 50 per fortnight, with other additional hours to be spread evenly across all categories of employees, and it did not oppose any order clarifying that the direction was intended to set minimum working hours and that additional hours will be spread as evenly as possible across all categories of employees. In assessing whether the direction was unreasonable, it was necessary to take into account that there had been a 35 percent reduction in required labour hours at Marooka, and that the pandemic had introduced a range of different and variable circumstances bearing upon factors such as the type of work, changing customer requirements, runs required, skills and experience, short notice of work, employee availability, refusal to work and leave requests. Prosegur emphatically rejected any proposition that the direction was made for any ulterior motive and submitted that it was entitled to maximise the business benefit of the jobkeeper wage subsidy.

[27] As to the Deputy President's construction of "*unreasonable*" in s 798GK, Prosegur submitted that:

- there is no positive obligation upon the employer to make a reasonable direction; rather the employer has a discretion to determine a direction appropriate to the operation of its business, so long as it is unreasonable;

- the assessment of reasonableness must be practical, the standard is not one of perfection and it is sufficient that an employer has acted upon proper principles and in good faith;

- it would be wrong to impose a standard of fairness in place of an assessment of reasonableness; and

- while acknowledging that the Deputy President did not expressly refer to the sense of "unreasonableness" as meaning inequitable, unfair or unjustifiable, he acknowledged the requirement to take into account fairness between the parties in dealing with the dispute.

[28] As to the reasonableness of the direction, Prosegur submitted that the Deputy President did not err in determining that, in the context of a 35 percent loss of business hours, a minimum of 25 hours for all employees was a balanced, rational and practical and tried to balance equity and fairness for employees with the needs of the business. There was no error in considering what was happening in the business as shown by the hours table as relevant to an assessment of reasonableness. The significance of any concession that the hours table included leave and RDOs was overstated.

[29] Prosegur submitted that if a re-hearing was required, the same result should pertain. A reduction to 25 hours per week for full-time employees corresponded with the 35 percent reduction in work. There is no basis to treat different categories of workers differently and it was not unreasonable to spread the burden evenly between employees. Pre-pandemic income carries little weight under Part 6-4C and must yield to considerations of business viability and maintaining connection of all employees to the business. The direction accorded necessary and practical flexibility to the business to deal with administrative and rostering realities. The substitute direction proposed by the TWU was vague and unworkable.

[30] Prosegur did not oppose the grant of permission to appeal on the basis that a Full Bench had not yet ruled on the operation of s 789GK.

Consideration

Permission to appeal

[31] Because the appeal raises an issue concerning the proper interpretation and application of s 789GK which is new and of general importance, permission to appeal is granted.

Merits of the appeal

[32] We consider that the appeal should be upheld on two bases. The first is that the Deputy President proceeded upon an incorrect construction of the meaning of the expression "*unreasonable in all of the circumstances*" in s 789GK. In *AEU v State of Victoria*,[4] the Federal Court of Australia (Bromberg J) considered the meaning of "*unreasonable*" in s 326(1) of the FW Act. In his consideration, Bromberg J first stated the uncontroversial proposition that what is "unreasonable in the circumstances calls for an evaluative judgment in which competing consideration need to be assessed",[5] and then said:

> "[149] Relevantly, the *Oxford English Dictionary* contains the following definitions of "unreasonable:"
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> > 2. Not within the limits of what would be rational or sensible to expect; excessive in amount or degree.
> >
> > 3.a. Of an idea, attitude, action, etc.: not guided by, or based upon, reason, good sense, or sound judgement; illogical.

[4] [2015] FCA 1196, 239 FCR 461, 255 IR 341

[5] Ibid at [148]

> b. Inequitable, unfair; unjustifiable. *Obs*
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> Of the three senses of the word "unreasonable" there identified, it is the third ("inequitable, unfair; unjustifiable") that best captures the use made by s 326(1)(c) of the word "unreasonable". Beyond that observation, as *Stroud's Judicial Dictionary of Words and Phrases* (4th ed, Sweet & Maxwell Limited, 1974, at 2258) says in its definition for the word "reasonable" – "it would be unreasonable to expect an exact definition of the word 'reasonable.'" Whilst the word "unreasonable" is used in various provisions of the FW Act, the context is different to that of s 326(1)(c) and no useful guidance can be drawn from cases where the term has been judicially considered. It is the genesis of the scheme established by Division 2 and the origin of s 326(1)(c) itself that shed greater light on the mischief being addressed and the considerations that are likely to be of greatest relevance in an assessment of whether a deduction is "unreasonable in the circumstances".

[33] Although the Deputy President touched at various points upon the concept of fairness in the decision, the interpretation upon which he landed in paragraph [20] encompassed the first two elements of the dictionary definition referred to by Bromberg J but not the third. The result was that the Deputy President posited a standard of review of jobkeeper enabling directions which resembles the *Wednesbury* standard of legal unreasonableness or irrationality in the context of judicial review of administrative action and excludes notions of unfairness and inequity as between the employer and employee. We consider this approach to be in error when regard is had to the statutory context. The following features of the context are significant in this respect:

(1) The object of Part 6-4C in s 789GB, which has earlier been set out, balances a number of objectives which pertain to the interests of employers and employees respectively. The employer interests referred to include the sustenance of the viability of businesses and the maintenance of the contribution of employees to their employer's business. The employee interests include the maintenance of employment and the continuation of productive employment during the pandemic.

(2) The power to make jobkeeper enabling directions in Part 6-4C is an extraordinary one, since it authorises the employer to take action which has the effect of modifying or removing entitlements which the employee has under the FW Act, modern awards, enterprise agreements, or their contract of employment. The most significant restraint placed upon the exercise of this power is that, under s 789GK, a jobkeeper enabling direction will not apply to an employee if the direction is unreasonable in all the circumstances. It is apparent that this provision is directed to the protection of the interests *of the employee* from unreasonable use of the jobkeeper direction power, and therefore directs attention to the interests of the employee in an assessment of what is unreasonable.

(3) The restraint in s 789GK is that the direction is unreasonable *in all of the circumstances*. These circumstances necessarily include the relevant circumstances of the employee. (It may be noted, as an aside, that in paragraph [20] of the decision, the Deputy President appears on one view to have

regarded "all the circumstances" as referring only "the context of the unparalleled circumstances (COVID-19)". If the expression was read in this confined way, we would consider this to be a separate instance of error).

(4) The position in the above respect is confirmed by the statutory note to s 789GK, which gives as an example the impact on an employee's caring responsibilities as rendering a jobkeeper direction unreasonable. That is, this is an example of a way in which the employee's particular interests may render a jobkeeper direction to be non-applicable to the employee because it is unreasonable.

[34] The above contextual considerations support a construction of the expression "unreasonable in all the circumstances" in s 789GK as meaning or at least encompassing a direction that is inequitable, unfair or unjustifiable having regard to the object in s 789GB and the respective circumstances of the employer and the employee. We consider that the Deputy President's adoption of an incorrect approach to the construction of s 789GK meant that there was a failure to properly take into account the relevant circumstances of employees in the assessment of the reasonableness of the direction.

[35] The second instance of error in the decision is that the Deputy President did not direct himself to the substance of the direction itself, which in terms reduced the hours of work of all remaining employees to 50 per fortnight, but rather assessed the reasonableness of the direction by reference to the hours table. The Deputy President's reasoning appears to have been that the direction was not unreasonable because the hours table showed that full-time employees would receive well in excess of the 25 hours, notwithstanding what the direction actually said. This was an erroneous approach because:

(1) The hours table was concerned with a period before the direction came into effect, and thus was not illustrative of the effect of the direction.

(2) It was the reasonableness or otherwise of the direction which the Deputy President was required to consider, which in terms reduced hours to 50 per fortnight. The Deputy President was not entitled to determine that the direction was not unreasonable by reference to a factual scenario which is at odds with what the direction actually said.

[36] It is necessary to interpolate at this point that the parties, both before the Deputy President and in the appeal, appear to have conducted their cases on the implicit premise that a finding that the direction was not reasonable (or not valid due to non-compliance with some other requirement attached by the provisions of Pt 6-4C to the making of a jobkeeper enabling direction) was necessary in order for the Commission to exercise its powers under s 789GV(4). This is not the case. There is no such prerequisite to the exercise of the powers, and we consider that the Commission is invested with a broad discretion which is constrained only by: (1) the need to have regard to the object of Part 6-4C in s 789GB; (2) the achievement of the purpose of s 789GV to deal with and resolve the dispute at hand; and (3) the requirement in s 789GV(7) to take into account fairness between the parties concerned.

[37] In any event, having regard to the way in which the case was conducted by the Deputy President, we consider that the two errors identified above caused the evaluative assessment of the direction to miscarry. In the circumstances, the appeal should be upheld and the

decision quashed. That makes it necessary for there to be a re-hearing of the dispute application brought by the TWU. The most convenient course is for this re-hearing to be undertaken by this Full Bench.

Re-hearing

[38] We consider that the following propositions should guide the determination of this matter:

(1) The loss of 35 percent of the pre-pandemic working hours at the Moorooka depot means that some form of jobkeeper direction reducing hours of work for full-time employees is necessary, since the hours table appears to demonstrate that business is unable to sustain full-time working hours.

(2) The position with part-time employees is unclear, since there was no evidence as to what the ordinary hours of part-time employees under their contracts of employment are, and the parties were unable to give any information about this in the appeal. If the weekly ordinary hours of part-time employees are 25 or less, there would appear to be no reasonable purpose in issuing the direction. If the effect of the direction was to *increase* the ordinary hours of part-time employee (because, say, their contractual ordinary hours were 20 per week), in circumstances where full-time employees were having their ordinary hours reduced, we would consider that to be unreasonable and (for the purpose of s 789GV(7)) unfair.

(3) There is no need for any direction to be issued to *reduce* the ordinary hours of work of casual employees, since casual employees ordinarily do not have any defined number of ordinary hours but are engaged to perform work as required. However it may be accepted that, for long-term regular casual employees, it is reasonable for them to be provided with some guarantee of hours in order to maintain their connection with the workplace and for Prosegur to derive commercial value from the jobkeeper subsidy it is receiving in respect of them. In that connection, we note the submission made by Prosegur, which was not contradicted by the TWU, that the value of the jobkeeper subsidy for casual employees approximately equated to payment for 50 hours per fortnight.

(4) Prosegur accepts that the terms of its direction does not accurately reflect its intention, namely that all remaining employees are to receive a minimum of 50 hours per fortnight, with any hours in excess of this to be distributed equally amongst employees.

(5) The reasonableness or otherwise of the direction may usefully be assessed by reference to the position that would apply if the direction was not made. The hours table is the most reliable guide to this, since it shows the hours worked and leave hours taken by the employees in the period immediately before the direction took effect. We would conclude from that table that there is enough working hours in total to allow full-time employees to work well in excess of 25 hours per week, and indeed well in excess of 30 hours per week, while still affording the long-term regular casual employees about 25 hours per week. There is no suggestion that, having regard to the distribution of skills in the

workforce, Prosegur was unable to meet customer needs over this period. The direction does not reflect this.

(6) It appears unusual and, prima facie, unfair that the hours table shows that part-time employees are generally receiving the same hours, or in some cases, more hours, than full-time employees.

(7) The assessment of the reasonableness or otherwise of the direction must take into account in a significant way the statutory, award, agreement and contractual entitlements of the employees which are affected by the direction. There was little evidence about this. It can safely be said that the full-time employees have an entitlement to 38 paid ordinary hours per week and that part-time employees have an entitlement to a fixed number of ordinary hours per week which is less than 38 (but is otherwise unknown). The long-term regular casual employees have no entitlement to a fixed number of ordinary hours, but merely an expectation of ongoing work, and the 25 percent casual loading which they receive compensates, in part, for this lack of guaranteed hours. We consider that the assessment of the reasonableness of the direction must take into account whether the deprivation or reduction of pre-existing entitlements to hours of work disproportionately and unfairly affects one category of employee over another. Prima facie, the direction imposes a disproportionate reduction in entitlements for full-time employees.

(8) It is relevant that full-time employees and part-time employees may, depending on the extent of their accruals, have the capacity to access leave entitlements if necessary to supplement their income in the face of reduced hours of work, and full-time employees may also have access to accrued RDOs.

(9) The position which applied before the pandemic in respect of working hours is of limited relevance. The evidence about this, which was not statistical in nature, suggests that the hours previously worked by full-time and part-time employees included overtime hours. We agree with the statement made by the Deputy President in paragraph [30](1) of the decision, which is set out above, concerning overtime. There is (in the absence of a specified enterprise agreement or contractual provision otherwise) no entitlement to overtime, so that a jobkeeper direction is not necessary to reduce overtime hours. Similarly, as earlier stated, a jobkeeper direction is not necessary to reduce the hours that a casual employee might have enjoyed prior to the pandemic.

(10) The alternative direction proposed by the TWU at first instance is plainly unworkable. Prosegur cannot reasonably be expected to operate a system of allocating work which requires them to ensure that every employee is receiving the same proportionate reduction in hours as compared to the position prior to the pandemic and at the same time properly service their clients' needs. If there is to be any alternative direction, it must be administratively workable and allow Prosegur to conduct its operations efficiently.

[39] We consider that the appropriate course is to direct Prosegur and the TWU to confer having regard to the propositions above as a matter of urgency. Should the dispute not be resolved, the parties may file further written submissions in response to the above

propositions and generally by 5.00pm Friday 17 July 2020, and the dispute will then be re-determined by arbitration. Such submissions may include any proposals any party wishes to advance for the making of an alternative jobkeeper direction, and should contain information concerning the contracted guaranteed ordinary hours of the part-time employees. If the parties consider that further mediation or conciliation by the Commission would be of utility, this will be provided on request.

Conclusion

[40] The following orders and directions are made:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The decision ([2020] FWC 3139) is quashed.

(4) The parties are directed to confer in relation to the above reasons for decision.

(5) The parties are directed to file any further written submissions in the re-hearing of the matter by 5.00pm Friday 17 July 2020.

VICE PRESIDENT

Appearances:

Mr M Gibian SC with *Mr P Boncardo* of counsel on behalf of the Transport Workers' Union of Australia Queensland Branch.

Mr P O'Grady QC with *Mr M Champion* of counsel on behalf of Prosegur Australia Pty Ltd.

Hearing details:

2020.
Sydney (via video-link):
9 July.

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Annexure – the "hours table"

Crew	Total Hours	Rolling Average	Weekly 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**