[2021] FWC 3272 [Note: An appeal pursuant to s.604 (C2021/4939) was lodged against this decision - refer to Full Bench decision dated 1 November 2021 [[2021] FWCFB 6040] for result of appeal.]

DECISION

Fair Work Act 2009
s.526—Stand down

Albert Ch Ng
v
Skystar Airport Services Pty Ltd T/A Menzies Aviation
(C2021/2543)

COMMISSIONER PLATT ADELAIDE, 30 JULY 2021

Application to deal with a dispute involving stand down.

[1] On 6 May 2021, Mr Albert Ch Ng (the Applicant) lodged a Form F13 Application, under s.526 of the *Fair Work Act 2009* (Cth) (the Act), concerning a dispute with his employer Skystar Airport Services Pty Ltd T/A Menzies Aviation (Menzies) regarding the decision of Menzies to stand down Mr Ch Ng.

[2] The Application was listed for a telephone conference on 13 May 2021. The Applicant represented himself, whilst Menzies was represented by Ms Helene McKenna, Ms Patricia Redmond and Ms Kathryn Weeks.

[3] The matter was unable to be resolved by conciliation, and the matter was listed for Hearing with Directions issued for the filing of material.

[4] The Hearing was conducted in Perth, on 9 June 2021. The Applicant represented himself, whilst the Respondent was represented by the Ms Amber Roncoroni and Ms Karen Nelson of Australian Industry Group (permission not being required).

Background

[5] Menzies is a global ground-handling agent, who provides services to a number of airlines at both the international and domestic terminals in Perth Airport. The Applicant's Customer Service Operator role is responsible for duties including checking passengers in prior to flights (for airlines which the Applicant is trained in), checking identification, ensuring passengers have the correct visas and passports, receiving the passenger's baggage, giving passengers their boarding passes, going up to boarding to ensure the passengers board the aircraft correctly, meeting aircrafts on arrival, and sometimes providing assistance to passengers such as helping passengers with wheelchairs off the aircraft and/or taking them through to customs.

[6] Menzies and the Applicant are bound by the Skystar (Perth Airports) Collective Agreement 2015 (the Agreement). The Agreement does not contain a stand down provision.

[7] Menzies was significantly impacted by the COVID-19 pandemic. Employees were stood down in the period of 19 March 2020 to 29 April 2020 (the First Stand Down).[1] A JobKeeeper stand down direction was issued for the period of 30 April 2020 to 9 March 2021 (the Second Stand Down). The Applicant does not contest the legitimacy of these two stand downs.[2]

[8] On 8 March 2021, a memorandum from Mr Kogilan Moodley was circulated to Menzies employees based in Brisbane, Sydney, Perth and Melbourne. The document was titled "End of JobKeeper subsidy and next steps from 29th March 2021". The memorandum advised:

> "Where work is not available and all other available options are exhausted, then employees will be stood down as per legislation or applicable enterprise agreements for the period following the 29th of March."

[9] The Applicant subsequently received a stand down letter on 27 March 2021, sent by Ms Weeks. The letter advised:

> "Effective on the 30 March 2021, you will be stood down temporarily as per Fair Work Act s.524, due to a stoppage of work for any cause for which the employer cannot reasonably be held responsible." (the Third Stand Down).

[10] The Third Stand Down ceased on 3 May 2021. The Applicant was rostered to work between 3 to 7 May and on 10, 12, 13 and 15 May 2021[3]. The Applicant did not attend for those shifts. The Applicant's employment ceased 13 May 2021.

[11] The period of the Third Stand Down is that between 30 March and 2 May 2021.

Submissions

[12] In respect of this period, the Applicant contends that there was no stoppage of work of which Menzies cannot be held responsible, and that he could have been usefully employed, and thus the stand down was not available to Menzies. The Applicant seeks an order that he be paid at the rate 19 hours per week for the period of the Third Stand Down in accordance with his contract of employment.

[13] Menzies contends that the Third Stand Down was made in accordance with s.524 of the Act and that the Commission should make no order. Menzies contended that the process it took in determining employees' rosters during the Third Stand Down was fair. It further submitted that I had no power to make any order as it would be an exercise of judicial power.[4]

Evidence

[14] The Applicant submitted a witness statement[5] and gave evidence. His relevant evidence is summarised as follows:

- The Applicant was employed as a part time Customer Service Operator (with a minimum of 76 hours per four week cycle) and was paid $28.20 per hour.

- The Applicant had a flexible work arrangement (FWA) with Menzies which restricted the hours in which he was available to work to between 8.00 pm and 2.00 am. In the November 2020 environment, this FWA together with the Applicant's skillset enabled him to be offered 3 shifts per fortnight. [6]

- On 27 March 2021, the Applicant received a letter signed by Ms Weeks advising him that he would be stood down temporarily from 30 March 2021, in accordance with s.524 of the Act. The Applicant complained that the Respondent was not entitled to stand him down.

- On 15 April 2021, the Applicant wrote to Ms Weeks complaining that he had not been paid in accordance with his contract of employment and other employees were being offered work.

- The Applicant conceded that whilst he sought[7] and was offered training opportunities during the Second Stand Down, he did not enrol or undertake additional training. The applicant advised that he was unable to lift bags.

- The Applicant did not receive any payment for the Respondent in respect of the period between 30 March and 13 May 2021, when he submitted his resignation.

- An analysis of the rosters indicates that in the first week of the Third Stand Down seven flights were handled, with eight in the following week and seven in the third week.[8]

- There was no material reduction in passenger flights operating out of Terminal 1 in Perth immediately before or after 30 March 2021, and in fact the flight number had increased.

- The Third Stand Down was selective, targeted and without legal merit.

- The Applicant contended he was able to perform work for Cathay Pacific (CK) and Malindo Airlines (Malindo) as well as arrivals work.

- There was sufficient work for the Applicant to be offered shifts, but Menzies had determined to deny work to a small number of employees including the Applicant. The Applicant was entitled to receive 76 hours of work per 4-week cycle.

[15] Menzies submitted witness statements from:

- Angela Adam (Passenger Services Administrator);[9]

- Patricia Redmond (Acting Human Resources Manager);[10]

- Richard Bonner – Vice President – NW Australia Ground Handling;[11] and

- Kathryn Weeks (Passenger Service Manager)[12].

[16] Mr Bonner's evidence is summarised as follows:

- Mr Bonner gave detailed evidence as to the impact of the COVID-19 pandemic on the operations of Menzies. An analysis of that data (which is not in dispute) is summarised in the table below:

Month	Total number of flight departures serviced
Jan 2020	450
Feb 2020	379
Mar 2020	237
Apr 2020	35
May 2020	41
Jun 2020	41
Jul 2020	54
Aug 2020	52
Sept 2020	70
Oct 2020	72
Nov 2020	68
Dec 2020	85
Jan 2021	60
Feb 2021	50
Mar 2021	61
Apr 2021	68
May 2021	30 in the first two weeks [60][13]

- Mr Bonner advised that between 1 January 2020 and 18 March 2020, there was one Malindo flight each day. Between the period of 19 March 2020 and 13 May 2021, however, there was only a single Malindo flight.

[17] Ms Redmond's evidence is summarised as follows:

- Ms Redmond gave evidence as to the work performed by a Customer Service Operator, the basis upon which the Applicant was engaged as a part time Customer Service Operator, the Applicant's FWA entered into on 22 January 2020 and the arrangements which applied to the First and Second Stand Downs.

- Ms Redmond gave evidence of a process whereby invitations to employees to participate in training occurred during the Second Stand Down.

- Ms Redmond's evidence was largely uncontested.

[18] Ms Adam's evidence is summarised as follows:

- In her role as Passenger Services Administrator her duties include rostering staff according to flight schedules and ensuring the payroll data reflects the hours worked.

- Prior to determining the roster, Ms Adam received information as to the flight schedule, which normally does not change except for flight cancellations. Ms Adam then created a worksheet based on the flight schedule, which details the type of shift

and the number of persons required. From this information, a roster is built and emailed to employees via a group distribution list.

- Each airline serviced by Menzies has specific training requirements and requires employee participation in a training program. After the training is completed a number of 'buddy shifts' are worked prior to the employee being signed off. In addition to airline specific services, Menzies provides 'arrivals duties' which involves assisting passengers at counters once they have arrived, providing wheelchair assistance and assisting unaccompanied minors. Generally, employees who have completed more airline specific training can be used to provide a wider range of services.

- During the Third Stand Down rosters were prepared taking into account which airlines employees were trained in. A check was then performed to see if each employee was rostered for 19 hours in a week, and if an employee was rostered for less than 19 hours they would be rostered on arrival duties to make up the gap.

- Employees who were trained to work across multiple airlines were prioritised for shifts.[14] Arrival shifts were provided more to those employees who were trained to perform work for more airlines over those persons (including the Applicant) who were less 'qualified'.

- On 2 May 2021, the Applicant was advised by email that he was 'stood up' and was rostered to work on 10, 12, 13 and 15 May 2021.[15]

[19] Ms Weeks' evidence is summarised as follows:

- Ms Weeks outlined the services provided by the Passenger Services Department (PAX) of which the Applicant was a part of. In March 2020, there were 116 employees in PAX, by 28 March 2021 this number had reduced to 100 and by 10 May 2021, only 90 persons were employed in PAX.

- Ms Weeks advised that each airline for which Menzies provides services has their own operating systems in which the Customer Service Operator must be competent in. This competence is gained by training and a short period of practical experience. Some airlines require regular confirmation of competence.

- Ms Weeks outlined the training process, which relies on expressions of interest (EOI) by staff and the provision of training based on that interest and operational demand.

- Ms Weeks identified that the Applicant was signed off for Malindo and that he also had CK training which had expired. The Applicant was trained in 'mishandled luggage'. No training was required for arrivals duties.

- Ms Weeks advised there were three CK flights per fortnight but that the airline had requested that the Applicant not be rostered on their flights due to a customer service issue that arose in February 2020.

- In May 2020, the Applicant had been invited to express interest in Jetstar training. No EOI was received.

- Malindo ceased scheduling flights from July 2020.
- In September 2020, EOI were sought for Qantas training. No EOI was received from the Applicant.
- In October 2020, the Applicant attended Malaysian Airlines training but did not complete the practical component.
- The Applicant was not rostered to do mishandled luggage duties due to a wrist injury.
- The Applicant was rostered to work on 3 and 4 May 2021 but did not attend for work.
- In the period post 30 March 2021, arrivals work was provided to employees who were trained to provide services to other airlines (including Cathay Pacific, Scoot, Qatar Airways, Garuda Indonesia, Malaysian Airways, Alliance, Qantas and Jetstar International).
- Customer Service Operators who were able to work for a variety of airlines were seen as more valuable, and Menzies rostered them to perform more shifts (including arrivals work) so as to reduce the risk of these employees resigning. Employees (such as the Applicant) with a low number of airline competencies were seen as less valuable and given less preference for shifts.

[20] I was provided with work rosters[16] for all PAX employees for the relevant period and copies of communications between Menzies and the Applicant which advised him that he would not be rostered to work.

[21] No substantial issues of credit arise from the evidence although I detected some angst between Ms Weeks and the Applicant.

Relevant Provisions

[22] Section 524 of the Act falls within Part 3-5 of Chapter 3 of the Act and relevantly provides:

> **"524 Employer may stand down employees in certain circumstances**
>
> (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
>
> (a) industrial action (other than industrial action organised or engaged in by the employer);
>
> (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
>
> (b) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

> (2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:
>
> (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and
>
> (b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.
>
> Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.
>
> Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).
>
> (3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period."

[23] Section 526(1) of the Act provides that the Commission may deal with a dispute about the operation of Part 3-5 of Chapter 3. Section 526(2) states that the Commission may do so by arbitration. Section 526(3) sets out certain standing requirements, which have been met by the Applicant.

[24] Section 526(4) of the Act provides:

> "In dealing with the dispute, the FWC must take into account fairness between the parties concerned."

Consideration

[25] The Applicant accepts that the First Stand Down and the Second Stand Down (one being a stand down as contemplated by s.524 of the Act and the other a JobKeeper direction) were legitimate.

[26] I accept the evidence that the Applicant was rostered to work between 3-7 May 2021 and on 10, 12, 13 and 15 May 2021 and that that coincided with the end of the Third Stand Down.

[27] Prior to the Third Stand Down, the Applicant was offered training opportunities by Menzies. It is unfortunate that the Applicant did not enrol in these training programs designed to increase his range of competencies and allow him to be rostered to perform a wider range of duties.

[28] I find that the Applicant was only able to perform Malindo work plus arrivals work.

[29] The Applicant and Menzies made a FWA which allowed the Applicant to provide for the care of his children by restricting the hours in which he could be required to perform work. Whilst I am not critical of the arrangement, in so far as the available work fell outside these hours, the Applicant was not able to perform it.

[30] The Applicant's acceptance that the first two stand downs were legitimate infers acceptance that for these periods there was a stoppage of work for a cause (the COVID-19 pandemic) that Menzies could not be reasonably be held responsible for, and that the Applicant could not be usefully employed during this period.

[31] The evidence of Mr Bonner clearly established that the operation of Menzies had been considerably impacted by the COVID-19 pandemic prior to 30 March 2021. In 2021, flight departures were consistently 13.5% of the January 2020 levels. In March 2021, the Federal Government's JobKeeper support (which allowed Menzies to retain employees despite low operational requirements) ceased.

[32] I am satisfied that the circumstances that Menzies faced at 30 March 2021 arose as a result of the continued COVID-19 pandemic, and were circumstances for which Menzies could not reasonably be held responsible. The evidence establishes that the frequency of flights serviced was significantly impacted and this had the effect of substantially reducing the shifts that were available to be worked.

[33] I have been guided by the Full Bench decision of *The Peninsula School t/a Peninsula Grammar School v Independent Education Union of Australia*[17] in respect of the requirements of s.524. This case also arose as a result of the COVID-19 pandemic.

[34] I am satisfied that Menzies was entitled to stand down employees in accordance with s.524 between 30 March 2021 and 2 May 2021.

[35] The question that most concerns me in this matter is that posed by s.526(4) of the Act. The evidence of Ms Weeks (which is corroborated by Ms Adam) was that Menzies issued rosters that preserved (so far as possible) the hours of the more diversely skilled employees to the detriment of employees in the position of the Applicant.

[36] I accept that the only airline for which the Applicant remained qualified (Malindo) was not operating, which reduced the work available for him to arrivals work that met the scheduling requirements of his FWA. However, the evidence confirms that there was work available that fell within his skills.

[37] In *SSX Services Pty Limited v The Australian Workers' Union,*[18] the Full Bench determined that:

> "The Commission is required to take into account fairness between the parties concerned and thereby incorporate an overall discretionary factor into the task of determining a dispute over whether the right to stand down is correctly invoked in the circumstances."

[38] In *Stelzer v The Trustee for The Ideal Acrylics Unit Trust T/A Ideal Acrylics,*[19] Deputy President Anderson found (in the context of a COVID-19 stand down) that Ideal Acrylics' choice to impose almost the whole burden of the reduction in labour on one full time employee

whilst retaining full time employment amongst other members of its manufacturing workforce was inconsistent with the concept of fairness and that "a fair approach would have been for Ideal Acrylics to apply some apportionment to the reduction of labour between Mr Stelzer and other manufacturing employees performing work that he was also capable of performing."

[39] The decision in *Stelzer* was quoted with approval in *Carter v Auto Parts Group Pty Ltd*.[20] The Full Bench stated:

> "[28] The decision of the Commission (Anderson DP) in *Stelzer v Ideal Acrylics Pty Ltd*, …. contains what is in our view a proper articulation and application of the relevant principles. In that decision, having found that the stand down in question was not consistent with the FW Act, the Deputy President commenced his consideration of "remedy" (which we think may be an inapt term) as follows:
>
> > "[72] I now turn to whether a remedy in settlement of the dispute is appropriate.
> >
> > [73] The Commission does not have jurisdiction to determine legal rights, such as whether the employer was legally correct in unilaterally running down Mr Stelzer's three weeks of annual leave accrual or whether Mr Stelzer had a lawful right to be paid personal leave once stood down.
> >
> > [74] However, the Commission has jurisdiction to consider these questions in the context of making orders or recommendations for the fair and just settlement of this dispute."
>
> [29] Having disposed of issues concerning annual leave and personal leave, the Deputy President gave consideration to what would be an appropriate outcome as follows:
>
> > "[87] It is nonetheless appropriate to provide a proportionate remedy to resolve the dispute. It is appropriate that the remedy bear some relationship to the component of the income loss incurred by Mr Stelzer which was unwarranted or unfair.
> >
> > [88] There is no specific formula to apply in these circumstances though I adopt the approach below tested against overall fairness.
> >
> > [89] Mr Stelzer's stand down was across a period of twelve weeks. For three of these weeks he was paid (annual leave accrual to around 13 May). For the following three weeks he was unfit for work (until 5 June). This leaves a remaining period of six weeks before his redundancy.
> >
> > [90] On the basis that he would have been entitled to work an equal portion of the available (684) hours worked by the three fabrication employees in this six week period, he would have received payment for 171 hours (684 hours divided by 4). This equates to 4.5 weeks' pay.
> >
> > [91] I also take into account that this time was available to Mr Stelzer to mitigate his loss by looking for alternate work (not that work was readily available in the midst of a pandemic), and that following the 1 July conference the employer was entitled time to reconsider its position. I also take into account the contingency

> that Ideal Acrylics did not know how long the stand down period would last, could not predict how the pandemic would impact actual work flows, was acting to avert redundancies, was endeavouring to protect its business in a rational way by seeking to reduce costs and was not eligible for a JobKeeper wage subsidy. I will provide a one week discount on account of these factors.
>
> [92] I note that Mr Stelzer was apparently in receipt of Jobseeker support during this period. Consistent with the Commission's established approach in such circumstances, I do not discount social welfare payments from an amount to be payable by an employer. Whether any portion of the Jobseeker payments apparently received by Mr Stelzer should be repaid in light of this decision is a matter between Mr Stelzer and Centrelink.
>
> [93] Consequently, it is fair and reasonable for Mr Stelzer to be paid by Ideal Acrylics an additional 3.5 weeks in partial compensation for his income loss during the period of stand down in circumstances where I have found the stand down to have been based on rational business reasons but, in implementation, not consistent with the provisions of the FW Act.
>
> [94] On the material before me this equates to a figure of $3,657.50 gross."

[40] In *Ball v Thomas Foods International Murray Bridge Pty Ltd,*[21] Deputy President Anderson stated:

> "[92] Fairness involves what is just and right between the parties having regard to the relevant statutory framework and the facts and circumstances established by evidence.
>
> [93] Importantly, fairness in this statutory context is expressed as fairness "between the parties". It is not a narrow question of what is fair to Mr Ball or fair to Thomas Foods. It concerns fairness having regard to their dual circumstances and interests. In the case of a stand down this is a point of particular importance. By definition, a stand down (at least one reliant on section 524(1)(b) or (c)) involves a disruption to production not caused by the conduct of the person being stood down nor the conduct of the business employing them. In those circumstances, it would not be unsurprising if a fair outcome involves some or both parties feeling that they are required to bear a burden or sustain a loss that is not theirs or their responsibility. Fairness between the parties, objectively assessed, may not displace some sense of lingering injustice felt by one or both sides.
>
> [94] As in this case, resolving a stand down dispute involves making judgments about how to make the best (in the sense of the fairest) of a bad situation."

[41] Menzies determined to seek to retain its more diversely skilled (and who it viewed as more valuable) employees by offering them as much work as possible to the detriment of the less diversely skilled employees, including the Applicant. As a result, the Applicant was not offered any hours at all whilst others were rostered hours up to their full compliment.

[42] Whilst I can understand Menzies seeking to retain its more valued employees, Menzies' decision not to provide any work to the Applicant imposed an unfair burden upon him and did not result in a fair outcome.

[43] Mr Bonner's evidence indicates that at the time of the Third Stand Down, the operational demands were approximately 13.5% of that prior to the pandemic.

[44] In my view the considerations in s.526(4) would have been met had the Applicant been rostered to perform 20% of the hours required by his contract of employment for the period of the Third Stand Down. In reaching this conclusion, I have taken into account the work that was available which the Applicant could perform, the limits on his capacity to work, and that during the course of the pandemic some Customer Service Employees had left the employ of Menzies (which would have increased the work available to the remaining employees).

[45] In my view a monetary award in respect the considerations detailed at s.526(4) of the Act is not an exercise of judicial power and is consistent with the position of the Full Bench in *Carter v Auto Parts Group Pty Ltd*.[22]

[46] I have determined that it is appropriate to make a monetary award in accordance with s.526 to resolve the dispute. That order will be that the Applicant be paid compensation in the amount of $547.20, less applicable tax, within 7 days.

COMMISSIONER
Appearances:

A Ch Ng, Applicant

Ms Roncoroni and Ms Nelson for the Respondent

Hearing details:

2021.
Perth:
June 9.

Final written submissions:

Applicant and Respondent, 21 June 2021.

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[1] The Applicant describes this as the Pre JobKeeper stand down in his Reply Submission.

[2] Applicant's Reply Submissions paragraphs 14-24.

[3] Exhibit R10

[4] *Christopher Carter v Auto Parts Group Pty Ltd* [2021] FWCFB 1015

[5] Exhibit A1

[6] Exhibit A4 Email from Ms Weeks dated 17 November 2020

[7] Exhibit A4 Email from Applicant dated 17 November 2020

[8] See table 1 of Exhibit A1

[9] Exhibit R9

[10] Exhibit R1

[11] Exhibit R14 – noting that paragraph 16 was deleted, and the information replaced by that contained in attachment RB1.

[12] Exhibit R12

[13] Note that the data provided (30 departures) was for the first half of the months and the reference to 60 is extrapolated.

[14] Exhibit R9 paragraph 29

[15] Exhibit R10

[16] Exhibit R4

[17] [2021] FWCFB 844

[18] [2015] FWCFC 3964 at [17]

[18] [2020] FWC 4129[20] [2021] FWCFB 1015 at [16]–[32]

[21] [2018] FWC 2483.

[22] [2021] FWCFB 1015 at [16]–[32]