DECISION

Fair Work Act 2009
s.229—Bargaining order

Flight Attendants' Association of Australia
(B2021/1134)

COMMISSIONER P RYAN SYDNEY, 7 DECEMBER 2021

Application for an interim bargaining order to prevent vote on an enterprise agreement - requirements of s.230(3)(a) not met.

Introduction

[1] On 22 November 2021, the Flight Attendants' Association of Australia (**FAAA/Applicant**) applied to the Fair Work Commission (**Commission**) pursuant to s.229 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a bargaining order in relation to negotiations with Qantas Airways Limited (**QAL**) and QF Cabin Crew Australia Pty Limited (**QCCA**) (collectively **Qantas/Respondents**) for a proposed enterprise agreement (**Application**).

[2] The proposed enterprise agreement (**EBA11**) would cover international flight attendants.

[3] On 16 November 2021 and after a period of bargaining, Qantas informed the FAAA it was proposing to request the employees to approve EBA11 in the week commencing 6 December 2021.

[4] The matter was subsequently allocated to my chambers and set down for a case management and directions hearing at 10:00am on 26 November 2021.

[5] At 9:54am on 26 November 2021, the Applicant filed a proposed interim order which it sought to be made pursuant to s.598(2) of the FW Act, requiring the Respondents refrain from conducting a vote of their employees to approve EBA11 until further order, discontinuance or dismissal of the Application (**Interim Order**).

[6] After hearing from the parties, I issued directions and listed the matter for hearing of the application for the Interim Order.

[7] The hearing of the application for the Interim Order was held on 3 December 2021. Both parties sought, and were granted, permission to be represented by lawyers on the basis that I was satisfied as to the matters set out in s.596(2)(a) of the Act and that it was appropriate to exercise my discretion to grant permission.

[8] Witness statements were tendered from the following persons:

FAAA: Rebecca MacLean, Customer Service Manager (International Cabin Crew) employed by QCCA;
Steven Reed, Industrial Relations Manager employed by FAAA;
Hikaru Sugimoto, Long Haul Flight Attendant employed by QAL;
Tanya Tierney, Flight Attendant employed by QAL;

Qantas: Amelia Rochford, Senior Industrial Relations Manager employed by QAL;
Rachel Yangoyan. Executive Manager, Customer Experience and Operations employed by QAL;

[9] Mr Reed and Ms Yangoyan were required for cross examination.

[10] For the reasons that follow, I am not satisfied that the requirement in s.230(3)(a) of the FW Act is met, and therefore, I do not have any power to make the Interim Order.

Background

[11] The current enterprise agreement is the *Flight Attendants' Association of Australia-International Division, Qantas Airways Limited and QF Cabin Crew Australia Pty Limited Enterprise Agreement 2017 (EBA10)* (**EBA10**).

[12] A succinct summary of the background to EBA10 and its structure was set out by the Full Bench in *Flight Attendants' Association of Australia v Qantas Airways Limited QF Cabin Crew Australia Pty Ltd [2019] FWCFB 1556* as follows:

> "There are two entities involved in the employment of cabin crew on Qantas international flights. Flight attendants engaged before December 2007 are employed by Qantas while those engaged from December 2007 onwards are engaged by QF Cabin Crew Australia Pty Ltd (QCCA), a Qantas subsidiary. The approximately 1,900 flight attendants employed by Qantas work on "mainline" operations, consisting of flights using B747-400 and A330 aircraft, while the approximately 500 QCCA flight attendants are used to supplement mainline flying crews and also crew flights using A380 and B787 aircraft.
>
> The Agreement covers flight attendants employed by both entities, and is structured so that Part A contains provisions which are generally applicable to all flight attendants, Part 1 covers Qantas employees only, and Part 2 covers QCCA employees (as well as "*Transfer Employees*", who are Qantas employees who have applied for and been granted permission to transfer to the A380 or B787 fleet under Part 2 conditions for a period of at least 2 years). Part 1 preserves to a significant degree the "legacy" conditions of employment of Qantas employees, while the conditions of employment for QCCA employees under Part 2 are less beneficial to the employees in a number of respects to those in Part 1.
>
> One way in which Part 1 and Part 2 conditions are distinct concerns the methods for allocating flying duties to flight attendants. Qantas rosters its flight attendants

> in 56-day blocks known as "bid periods". In general terms, Part 1 of the Agreement provides for a system by which Qantas constructs duty patterns for a particular bid period, which are known as "bid lines", and then flight attendants employed by Qantas may "bid" for their preferred bid lines on mainline operations during an upcoming roster period and are allocated preferred flights in order of seniority. Under Part 2, QCCA flight attendants may indicate their preference for flight patterns but flights are allocated at Qantas/QCCA's absolute discretion."

[13] There are currently approximately 2650 employees covered by EBA10, approximately 500 of which are covered by Part 1 of EBA10.[1]

[14] The nominal expiry date for EBA10 is 17 June 2021.[2]

[15] On 19 March 2020 and following the Federal Government's imposed border closures, Qantas announced that it would suspend all international flying. On 21 March 2020 all long haul cabin crew were stood down.[3]

[16] Since March 2020, Qantas has operated a limited number routes at the request of, and sponsored by, the Commonwealth Government, as well as a number of repatriation charter flights for the Department of Foreign Affairs and Trade.[4] At any one time, Qantas has had approximately 350-400 of its cabin crew operating.[5]

[17] There is no doubt, and it was accepted by the FAAA, that the COVID-19 Pandemic has had a significant impact on Qantas. In her evidence, Ms Yangoyan states this is estimated to be more than $20 billion in revenue by the end of the calendar year 2021.[6]

[18] On 19 May 2021, Qantas and the FAAA met to discuss the challenges expected to arise during the recovery of international flying. As part of this meeting, Qantas provided the FAAA with a presentation of its 'key claims' for EBA11.[7]

[19] There were further meetings between representatives of Qantas and the FAAA on 8, 15 and 18 June 2021.[8]

[20] On 21 June 2021, Qantas issued the Notice of Employee Representational Rights (**NERR**) in relation to EBA11.[9]

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[1] Statement of Rachel Yangoyan (**Yangoyan**) at [16]-[17].

[2] Clause 3 of EBA10.

[3] Ibid at [5].

[4] Ibid at [6]-[8].

[5] Ibid at [66].

[6] Ibid at [5].

[7] Statement of Amelia Rochford (**Rochford**) at [10]; Statement of Steven Reed (**Reed**) at [26].

[8] Rochford at [15]; Yangoyan at [52].

[9] Rochford at [16]; Reed at [29].

[21] Following the issuing of the NERR, there were numerous meetings held, and items of correspondence exchanged, between the parties. Qantas also exchanged correspondence and/or held meetings with the other bargaining representatives for EBA11 namely, the Transport Workers Union of Australia (**TWU**) and Mr Moloney.

[22] The extent of the meetings held, and correspondence exchanged, between Qantas and the union/employee bargaining representatives is set out in the unchallenged evidence of Ms Rochford[10], and can be broadly summarised as follows:

- 28 June: Qantas provides copy of NERR to FAAA;
- 28 June: Mr Moloney/Qantas discussion (occurred during week commencing 28 June);
- 30 July: FAAA/Qantas meeting;
- 4 August: Qantas/TWU meeting;
- 9 August: Qantas correspondence to FAAA setting out details of key claims;
- 13 August: FAAA/Qantas meeting;
- 16 August: Qantas correspondence to TWU setting out details of key claims;
- 27 August: FAAA/Qantas meeting;
- 27 August: Qantas/TWU meeting;
- 30 August: FAAA correspondence to Qantas requesting further information re: claims;
- 9 September: Mr Moloney/Qantas discussion;
- 16 September: FAAA/Qantas meeting;
- 17 September: Qantas provides response to FAAA request of 30 August;
- 17 September: Mr Moloney/Qantas meeting;
- 23 September: FAAA/Qantas meeting;
- 23 September: Qantas TWU meeting;
- 24 September: FAAA correspondence to Qantas requesting further information re: claims;
- 28 September: FAAA/Qantas meeting;
- 1 October: Qantas correspondence to FAAA re: provision of information on AV span claim;
- 7 October: FAAA/Qantas meeting;
- 8 October: Qantas provides response to FAAA request of 24 September;
- 8 October: Qantas TWU meeting;
- 13 October: FAAA/Qantas meeting;
- 19 October: FAAA correspondence to Qantas re: FAAA claims;
- 22 October: FAAA/Qantas meeting;
- 28 October: Qantas correspondence to FAAA re: Qantas response to FAAA claims;
- 29 October: FAAA/Qantas meeting;
- 3 November: FAAA/Qantas meeting;
- 3 November: FAAA lodge application for the Commission to deal with bargaining dispute (s.240);
- 12 November: FAAA/Qantas attend bargaining dispute conference before the Commission;
- 15 November: Qantas correspondence to FAAA re: modification of Qantas' claims;

[10] Rochford [17]-[70].

- 16 November: FAAA/Qantas meeting;
- 16 November: FAAA correspondence to Qantas re: s.229 concerns;
- 18 November: Qantas responses to FAAA s.229 concerns;
- 19 November: FAAA correspondence to Qantas re: claims:
- 22 November: FAAA files Application;
- 25 November: Qantas responds to FAAA correspondence of 19 November and provides draft EBA11; and
- 1 December: FAAA/Qantas meeting.

[23] In addition to the meetings and correspondence exchanged with bargaining representatives, Qantas also held webinars with, and provided email updates to, the employees. The extent of these webinars and email correspondence is also set out in the evidence of Amelia Rochford, Senior Industrial Relations Manager[11], and can be broadly summarised as follows:

- 20 May: Qantas sends email to employees;
- 21 June: Qantas issues NERR to employees;
- 22 June: Qantas sends email to employees;
- 10 August: Qantas sends email to employees re: key claims;
- 12 August: Qantas holds webinar for employees on variety of topics including negotiations for EBA11;
- 13 August: Qantas sends email to employees summarising discussion of webinar held on 12 August;
- Week commencing 16 August: Qantas holds webinar for employees on variety of topics including negotiations for EBA11;
- 24 August: Qantas sends email to employees summarising discussion of webinar held in week commencing 16 August;
- 1 September: Qantas holds webinar for employees on variety of topics including negotiations for EBA11;
- 3 September: Qantas sends email to employees summarising discussion of webinar held on 1 September;
- 8 September: Qantas holds webinar for employees on variety of topics including negotiations for EBA11;
- 9 September: Qantas sends email to employees summarising discussion of webinar held on 8 September;
- 17 September: Qantas holds a webinar for employees and sends email summarising discussion of webinar. The email summary notes more than 300 crew participated in the webinar;
- 24 September: Qantas holds a webinar for employees and sends email summarising discussion of webinar. The email summary notes more than 250 crew participated in the webinar;
- 1 October: Qantas sends an email to employees summarising the discussion of a webinar held earlier that week;
- 8 October: Qantas holds webinar for employees on variety of topics including negotiations for EBA11;

[11] Rochford at [16], [71]-[84].

- 12 October: Qantas sends email to employees summarising discussion of webinar held on 8 October. The email summary notes more than 460 attendees participated in the webinar;
- 4 November: Qantas holds webinar for employees on variety of topics including negotiations for EBA11;
- 8 November: Qantas sends email to employees summarising discussion of webinar held on 4 November; and
- 18 November: Qantas sends email to employees providing an update on the negotiations for EBA11 and states preparation is underway for a vote on EBA11 to take place in the week commencing 6 December. This correspondence also invites employees to participate in a webinar on EBA11 to be held on 19 November 2021.

[24] As part of the negotiations for EBA11, Qantas pressed the following claims, which were provided to the FAAA on 9 August 2021 and which Qantas described as 'key claims'[12]:

1. **All crew to be on Part 2 Terms and conditions**
   a. QAL Cabin Crew currently in Part 1 of EBA10 to move to Part 2 terms and conditions. The effect of this claim will mean, amongst other things:
      i. All crew can be rostered up to 240 hours (with an average of 220 hours)
      ii. All crew can be multi-endorsed across all aircraft types
      iii. All crew have access to all flying through the fair share rostering system; and
      iv. QAL Cabin Crew retain the existing top up payment.

2. **Changes to Available Spans (AV Spans)**
   a. AV Spans did not meet the operational requirements of QAL and QCCA prior to the COVID-19 pandemic. In their current form, AV Spans often result in additional roster disruption and resource coverage to manage the operation. We will be seeking changes that address our reserve requirements.

3. **Slip allowances to be paid into payroll and set at a fixed rate per port**
   a. The requirement for hotels to hold cash allowances for our crew limited upline hotel optionality pre-COVID. As you are aware, we are currently not able to facilitate cash allowances (as a direct result of the pandemic), and we do not see this changing upon restart of the international business, due to the global movement away from cash payments as a result of health requirements...
   b. QAL and QCCA seek to use rates that are fair and reasonable and do not impact the overall amount crew receive for slip across our various ports.

4. **4-year agreement with a two-year wage freeze followed by 2% annual increase in year 3**

[12] Rochford at [21];

a. The Qantas Group (Group) has announced a wage freeze to enable the Group to recover from the devastating impact of the COVID-19 crisis.
b. In applying the two-year wage freeze to the LH cabin crew group, and subject to a total agreement being reached between the parties, the first 2% increase would commence from the first full pay period on or after 18 June 2023.

5. To support Sunrise flying, increase tour of duty to 23 hours planned

a. QAL and QCCA would like to extend the maximum planned tour of duty to 23 hours for single sectors to enable work such as 'Sunrise' (Sydney to New York or Sydney to London) to be performed under this agreement.
b. QAL and QCCA see this as a great opportunity for our international crew.
c. QAL and QCCA will not be able to entertain any counter claims of additional payments for additional planned hours or any claims which restrict planning or operational processes.
d. As always, any flying will be within QAL and QCCA's Fatigue Risk Management System (FRMS) parameters and we propose to discuss this claim in future bargaining meetings.

[25] The rationale for items 1 and 2 of the key claims is to place Qantas in a position where it can respond to the uncertainty and challenges of international travel and the COVID-19 Pandemic (and emerging variants) and the resultant, and ongoing, travel restrictions and quarantine requirements. In this respect Qantas seeks a common rostering/allocation system over 28 days, crew to be multi-endorsed across all operating aircraft and additional roster period coverage through changes to the AV spans.[13]

[26] It was not in dispute that Qantas had repeatedly advised the FAAA it was critical for the vote to go ahead prior to the end of 2021. It was also not in dispute that the FAAA had repeatedly advised Qantas the time frame was unrealistic and unlikely.

[27] While the FAAA is not opposed to all employees being covered by one set of conditions, it is the FAAA's preference that EBA11 should be an appropriate amalgam of Part 1 and Part 2 conditions.[14]

Relevant Legislative Provisions

[28] Section 589 of the FW Act provides as follows:

"**589 Procedural and interim decisions**

(1) The FWC may make decisions as to how, when and where a matter is to be dealt with.

[13] Yangoyan at [21]-[46].

[14] Reed at [65]

(2) The FWC may make an interim decision in relation to a matter before it.

(3) The FWC may make a decision under this section:

(a) on its own initiative; or

(b) on application.

(4) This section does not limit the FWC's power to make decisions."

[29] Section 229 of the FW Act provides as follows:

"229 Applications for bargaining orders

Persons who may apply for a bargaining order

(1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a ***bargaining order***) under section 230 in relation to the agreement.

Multi-enterprise agreements

(2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.

Timing of applications

(3) The application may only be made at whichever of the following times applies:

(a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:

(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or

(ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;

(b) otherwise—at any time.

Prerequisites for making an application

(4) The bargaining representative may only apply for the bargaining order if the bargaining representative:

(a) has concerns that:

(i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) has given a written notice setting out those concerns to the relevant bargaining representatives; and

(c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and

(d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Non-compliance with notice requirements may be permitted

(5) The FWC may consider the application even if it does not comply with paragraph (4)(b) or (c) if the FWC is satisfied that it is appropriate in all the circumstances to do so."

[30] Section 230 of the FW Act provides as follows:

"230 When the FWC may make a bargaining order

Bargaining orders

(1) The FWC may make a bargaining order under this section in relation to a proposed enterprise agreement if:

(a) an application for the order has been made; and

(b) the requirements of this section are met in relation to the agreement; and

(c) the FWC is satisfied that it is reasonable in all the circumstances to make the order.

Agreement to bargain or certain instruments in operation

(2) The FWC must be satisfied in all cases that one of the following applies:

(a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;

(b) a majority support determination in relation to the agreement is in operation;

(c) a scope order in relation to the agreement is in operation;

(d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

Good faith bargaining requirements not met

(3) The FWC must in all cases be satisfied:

(a) that:

(i) one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(c) that the applicant has complied with the requirements of subsection 229

(4) (which deals with notifying relevant bargaining representatives of concerns), unless subsection 229

(5) permitted the applicant to make the application without complying with those requirements.

Bargaining order must be in accordance with section 231

(4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify)."

[31] Section 228 of the FW Act provides as follows:

"**228 Bargaining representatives must meet the good faith bargaining requirements**

(1) The following are the ***good faith bargaining requirements*** that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement."

Summary of Submissions

[32] The FAA contended that the requirement of s 230(3)(a)(i) has been met, because Qantas has not met, and was not meeting, the good faith bargaining requirements in the following respects.

[33] First, the FAAA contended the request for employees to approve EBA11 by voting at a time when many of the employees would be returning to the workplace for the first time since the outbreak of the COVID-19 Pandemic after being stood down in March 2020 was unfair conduct that undermined collective bargaining.

[34] In support of this contention, the FAAA submitted:

(i) The isolation of employees during the period of stand down resulted in them being disengaged from their colleagues and their workplace, with many in secondary employment, and that this was causing anxiety about their ability to return to work;[15]
(ii) That it is an extraordinary proposition that employees could be asked to sensibly and immediately decide on the conditions of employment when effectively walking back into the workplace for the first time in 18 months;[16]
(iii) The bargaining process, and the (forthcoming) request by Qantas that the employees approve EBA11 is rushed, both in the broader circumstances set out above, and where the parties have yet to reach an impasse;[17] and
(iv) That Qantas' claims are not essential for the recommencement of international travel and are being pressed as a matter of convenience.[18]

[15] FAAA's Outline of Submissions at [22].

[16] Ibid at [24].

[17] FAAA's Outline of Submissions at [20]-[21].

[18] Ibid at [28].

[35] Second, the FAAA contended that Qantas had failed to disclose relevant information, genuinely consider and respond to its proposals and otherwise not act unfairly or capriciously in a manner that undermines collective bargaining.[19]

[36] In support of this contention, the FAAA submitted:

(i) That Qantas had failed to provide explanations in relation to its AV Span claim, data regarding the employees that have been stood down relevant to its wage freeze and details of savings Qantas would make through all crew being under Part 2 conditions;[20]
(ii) That Qantas has failed to consider the FAAA's claims and merely engaged in a 'blanket refusal' of claims of substance;[21] and
(iii) That Qantas' demand for access to recordings of an FAAA meeting was in breach of s.228(1)(e).[22]

[37] The FAAA submitted the above matters would satisfy that the Commission that the Interim Order is reasonable in all of the circumstances.

[38] Third, the FAAA contended that Qantas breached the good faithing requirements by communicating to its employees that its claims were essential to the recommencement of international flying and the effect of those communications have placed employees in the position that unless they vote yes, they will not be able to return to their jobs.

[39] In reply, Qantas submitted that the application for the Interim Order is lacking in substance and misconceived.[23]

[40] In the response to the contentions and submissions made by the FAAA, Qantas submitted:

(i) The uncertainty and challenges generated by the differing responses to COVID-19 (and emerging variants) within Australian and foreign jurisdictions requires Qantas to ensure its operations are able to respond to those challenges;[24]
(ii) The vote is not precipitous and there is no requirement for bargaining representatives to agree or to reach an impasse, before putting an agreement to vote;[25]
(iii) The conduct of the vote following a pandemic-affected bargaining period is not unfair or capricious and many organisations were now conducting aspects of their operations over videoconferencing;[26]

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[19] Ibid at [29].

[20] Ibid at [30]-[31].

[21] Ibid at [32].

[22] Ibid at [33].

[23] Qantas' Oral Submissions on 3 December 2021.

[24] Qantas' Outline of Submissions at [5]-[10].

[25] Qantas' Outline of Submissions at [19]-[29].

[26] Ibid at [30]-[39].

(iv) That it did not fail to provide information;[27]
(v) That it has not engaged in surface bargaining and has changed its position in relation to its key claims and has agreed to some of the claims advanced by the FAAA;[28]
(vi) That it has not set a 'yes vote' as a precondition to employees returning to the workplace and nor do the communications suggest that; and
(vii) That whether conduct is capricious or unfair must take in all the circumstances of the case.[29]

Approach to 'interim' bargaining orders

[41] Both parties contend (or accept) that the decision of the Full Bench in *Wills v Grant, Marley & The Government of New South Wales, Sydney Trains and Another* [2020] FWCFB 4514 (**Wills**) sets out the correct approach for orders where a requisite state of satisfaction must be reached.

[42] In Wills, the Full Bench generally agreed with the reasoning of Colman DP in *Mayson v Mylan Health Pty Ltd*[30]stating:

> **"[33]** For the reasons which follow we reject the Appellant's contention that an interim anti-bullying order may be issued based only on a *prima facie* case, or serious question to be determined, and the balance of convenience favouring the interim relief sought. In our view s.789FF allows the Commission to make an anti-bullying order, including an interim order, only if it is 'satisfied' that a worker has been bullied at work and that there is a risk that the bullying will continue.
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> **[34]** Contrary to the Appellant's submission we generally agree with the analysis of Deputy President Colman in *Mayson*. In particular:
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> > s.589(2) states that the Commission 'may make an interim decision in relation to a matter before it.' It is not an independent source of power to issue interim orders because absent a particular 'matter before it', the Commission has no power to do anything at all under s.589(2). To the extent that it might be contended that s.589(2) can be used in respect of any 'dispute' that might be referred to the Commission, s.595 makes clear that the Commission may deal with a dispute 'only if (it) is expressly authorised to do so under or in accordance with another provision of this Act.' Section 589(2) is not such a provision.
> >
> > The 'matter' now before the Commission, for the purpose of s.589(2), is an application made under s.789FC. That application alleges that a worker has been bullied at work. It seeks an order under s.789FF to prevent a worker from being bullied by an individual or group. Any order made in relation to this application

[27] Ibid at [43].

[28] Ibid at [44]-[46].

[29] Qantas' Oral Submissions on 3 December 2021.

[30] 2020 FWC 1404.

will be an order under s.789FF and the relevant requirements of that section must be satisfied.

Section 789FF confers jurisdiction on the Commission to make an anti-bullying order if, and only if, it is satisfied that a worker has been bullied at work, and that there is a risk that the worker will continue to be bullied at work. In order to be satisfied that a worker has been bullied at work, the Commission would first need to make factual findings about what has occurred and assess whether the behaviour of relevant persons may be characterised as falling within the definition of 'bullied at work' in s.789FD(1). This would require the Commission to make a finding that the impugned conduct was repeated and also unreasonable, that the conduct was towards a worker, and that it created a risk to health and safety.

Section 789FF deals directly and in general terms with the Commission's powers to make orders in relation to applications made under s.789FC. The Commission may make 'any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work.' Even if s.589(2) did not exist, the Commission could make an interim (temporary) order under s.789FF. But it cannot issue any order at all unless the relevant preconditions are met.

A conclusion that an applicant for an anti-bullying order has established an arguable case or serious issue to be determined falls short of the state of satisfaction required by s.789FF. One cannot be satisfied on an arguable basis. One is either satisfied, or not satisfied, that a certain state of affairs exists.

Section 589(2), a general provision which must relate to a 'matter before the Commission', would then have the effect of disengaging express requirements of the substantive provision and source of power – that the Commission be satisfied of the relevant matters. The applicant's argument reads s.789FF as requiring the Commission's satisfaction of these matters, unless an application is made for interim anti-bullying orders. This is not a sensible or coherent interpretation of the relevant provisions.

The Commission, unlike a court, has no inherent jurisdiction. It can only do what the Act allows, and it must do what the Act requires.

There is nothing to prevent the Commission from issuing interim decisions in an anti-bullying matter, consequent upon having reached the required state of satisfaction as to the matters set out in s.789FF(1). For example, the Commission might be satisfied that a worker has been bullied at work and that there is a risk of continued bullying but require further submissions from the parties as to the final orders; an interim order might be made 'in the interim' on the material before the Commission at that time. But what the Commission cannot do is issue an order under s.789FF, without being satisfied that a worker has been subjected to bullying at work, and that there is a risk that the bullying will continue. To make an order in such circumstances would be beyond power.

> The fact that an anti-bullying order under s.789FF can only be issued once the Commission reaches the requisite state of satisfaction about the relevant matters does not mean that the Commission cannot deal with anti-bullying matters quickly. The Commission may be able to conduct an expedited hearing, swiftly decide whether it is satisfied of the relevant matters in s.789FF and if so whether to issue an order. The Commission might decide to issue an interim (temporary) order, pending further deliberations on the appropriate framing of a final order, which might require further evidence. Or an expedited hearing might lead directly and quickly to the issuing of final orders."

[43] Although Wills was a matter concerning an application for an order to stop bullying, I am of the view that the approach adopted by the Full Bench is apposite and therefore consider it to be the correct approach to this matter. Accordingly, I can only make a bargaining order pursuant to s.229 of the FW Act, either as an interim order or as final order, if I reach the requisite state of satisfaction as to the matters set out in s.230 of the FW Act.

[44] Furthermore, in the context of an application for an 'interim' bargaining order, the assessment of the requisite state of satisfaction is undertaken by reference to the material before the Commission at that time.[31]

Consideration

[45] I have had regard to all of the materials filed, the evidence and the submissions of the parties. I found that each of the witnesses attempted to assist the Commission and I have generally accepted the evidence of each witness.

[46] There is no issue that all of the relevant preconditions[32] have been met.

[47] The issue in this matter is whether Qantas has not met, or is not meeting, the good faith bargaining requirements[33], and whether the Commission is satisfied that it is reasonable in all of the circumstances to make the Interim Order.[34]

Request for employees to approve EBA11 is unfair conduct

[48] The primary contention advanced by the FAAA that Qantas has not met, or is not meeting, the good faith bargaining requirements is the request for employees to approve EBA11 as they return to the workforce for the first time after being stood down in March 2020.

[49] The assessment of whether conduct is capricious or unfair can only be ascertained by an examination of all of the circumstances in a particular case.[35]

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[31] Wills at [49].

[32] ss.229(1); ss.229(3); ss.229(4); ss.230(1)(a); ss.230(2)(a) and ss.230(3)(b) of the FW Act.

[33] ss.230(3)(a)(i) of the FW Act.

[34] ss.230(1)(c) of the FW Act.

[35] *Construction, Forestry, Mining and Energy Union-Mining And Energy Division v Tahmoor Coal Pty Ltd [2010] FWAFB 3510* (**Tahmoor**) at [7], [24].

[50] I accept that it may unfair conduct to request employees to approve a proposed agreement following a long period of stand down where the employees have been totally disengaged from the workplace and there has been little or no communication.

[51] However, that is not case in this matter. The circumstances in this case include the extensive webinar and email communications that Qantas has maintained with its employees over the period since it issued the NERR. These communications clearly demonstrate the employees are not returning to the workplace cold and being asked to approve EBA11 with no notice other than the mandatory seven-day access period.

[52] Rather, Qantas has provided regular updates on the progress of negotiations for EBA11, including the EBA11 specific communication dated 18 November 2021. Further, and in addition to the communications set out earlier in this decision, Qantas readily acknowledges that it must comply with the mandatory requirements to take all reasonable steps to ensure the terms of EBA11, and the effect of those terms, are explained to the employees in an appropriate manner taking into account their particular circumstances and needs.[36]

[53] In relation to the mode of meetings being conducted by videoconferencing; I do not accept this is conduct that is capricious or unfair. On one view, being able to click and connect to these meetings from any location around Australia or beyond has made participation in meetings more accessible for employees.

[54] While, the FAAA may have preferred to have undertaken meetings with its members in the 'normal way' with face-to-face meetings and visits to various ports around the World, that does not lead to a conclusion that Qantas has engaged in capricious or unfair conduct undermining collective bargaining.

[55] Although a number of employees have obtained secondary employment during the period of stand down and that may have prevented them joining the webinars, those employees were provided with summaries from each webinar and I don't see this as being any different to meetings being held under 'normal circumstances', where at any given time any number of employees are mid-flight, in various locations around the World, or otherwise cannot attend.

Impasse not reached

[56] In relation to the FAAA's submission that the parties are yet to reach an impasse, I refer to the following passage of the Full Bench in Tahmoor[37]:

> "Although there may be circumstances in which the conduct of a ballot without the agreement of other bargaining agents constitutes a breach of the good faith bargaining requirements, it will not always be so. There is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot. In this case the Commissioner and the parties all referred to the notion of "impasse" as the touchstone by which to judge whether an employer who puts a proposed agreement to a ballot

[36] Section 180(5) of the FW Act.

[37] Tahmoor at [30].

> without the agreement of the other bargaining agent thereby fails to observe the good faith bargaining requirements. There was some debate about whether "impasse" had been reached at the relevant time. The Commissioner found that "negotiations for an enterprise agreement have reached a stalemate, or using Tahmoor's words: "an impasse". Another way of approaching the matter, as the CFMEU intimated in its submissions, might be to ask whether there had been a reasonable opportunity to discuss Tahmoor's latest proposal. **Yet another formulation might be to ask whether negotiations had reached such a stage that the employer was entitled to put its proposal to a ballot in order to see if progress could be made.** However it is put, we are satisfied that in arranging to put its proposed agreement to the employees in a ballot, Tahmoor was not acting capriciously or unfairly in the circumstances prevailing at the time." (Emphasis added).

[57] It is clear from the decision in Tahmoor that the agreement of bargaining representatives is not a pre-condition to an employer requesting employees to approve a proposed agreement, although to do so *may* constitute a breach of the good faith bargaining requirements. It is also clear that an impasse is not required.

[58] The FAAA submitted that an impasse has not yet been reached and that it remains open to continuing to bargain. Qantas has submitted that an impasse is not required to be reached, but in any event, Mr Reed communicated as much to members of the FAAA during a Facebook Live and Zoom meeting on 30 October 2021.

[59] Mr Reed accepts he used the word 'impasse' in a meeting with FAAA members[38] but sought to qualify it as being momentary in nature. The recording was not in evidence and I do not propose to make any finding at this stage of the proceedings as to whether Mr Reed used the word in the context of that particular stage of bargaining or whether it was used in the context of finality in bargaining positions.

[60] Furthermore, and irrespective of any potential finding in relation to Mr Reed's comment that might ultimately be made in the substantive hearing of the Application, there seems on one view to be an impasse. Qantas seeks to have all employees covered by Part 2 conditions with a common rostering/allocation system, amongst other things.

[61] Conversely, the FAAA has stated their goal has been to steadily lift the conditions of QCCA employees to that of QAL employees, that is Part 1 employees[39], notwithstanding they would be open to agreeing to the appropriate set of merged conditions.[40]

[62] A divergence of positions is not an uncommon feature of bargaining for a proposed agreement where the relevant parties seek the best outcome in pursuit of their industrial interests.

[63] However, that does not automatically lead to a conclusion that a party, in this case Qantas, has engaged in capricious or unfair conduct. It is unambiguously clear that the good

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[38] Reed at [78].

[39] Reed at [12].

[40] Reed at [65].

faith bargaining requirements do not require a bargaining representative to make concessions or that agreement must be reached on the terms to be included in an agreement.[41]

[64] Irrespective of whether an impasse has been reached or not, I am not satisfied that Qantas' request for the employees to approve EBA11 is capricious or unfair conduct undermining collective bargaining.

[65] As to authorities which found putting a proposed agreement to vote was considered a breach of the good faith bargaining requirements, the parties referred me to the following cases.

[66] In its outline of submissions, the FAAA relied on the decision in *AMWU v Ridders Fresh [2013] FWC 1250* (**Ridders Fresh**) as authority that the act of putting a proposed agreement to vote can be capricious or unfair 'in the right circumstances'.[42] In Ridders Fresh, the employer agreed to meet with the AMWU, after it had commenced the access period and had failed to tell the AMWU of that, rendering any bargaining otiose. The circumstances in Ridders Fresh are clearly distinguishable from the matter before me.

[67] In its outline of submissions, Qantas referred me to the decision in *National Union of Workers v Ross Cosmetics Australia Pty Ltd [2012] FWA 3252* (**Ross Cosmetics**), another matter where putting a propose agreement to vote was found to be inconsistent with the good faith bargaining requirements. In Ross Cosmetics, Roe C found the unilateral declaration of an impasse in bargaining after only two short meetings and without discussion on all of the key issues was conduct inconsistent with the good faith bargaining and undermines collective bargaining.[43] Similarly to Ridders Fresh, the circumstances in Ross Cosmetics are clearly distinguishable from the matter before me.

Qantas claims are not essential, mere convenience

[68] I do not accept the FAAA's contention that Qantas' claims are not essential for the recommencement of international travel and are mere convenience. The rationale of Qantas' key claims has been set out in the evidence of Ms Yangoyan. Ms Yangoyan was subject to cross examination on this aspect and despite some concessions, I accept her evidence regarding Qantas' position that it requires greater flexibility in EBA11 to respond to the uncertainty of international travel.

Qantas failed to provide information

[69] I do not accept the FAAA's contention that Qantas has failed to provide information and responses as set out at paragraph [30] in the FAAA's Outline of Submissions.

[70] Ms Rochford's evidence clearly sets out the information and responses provided by Qantas in relation to those matters and other requests for information from the FAAA.[44]

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[41] Section 228(2) of the FW Act.

[42] FAAA's Outline of Submissions at [19].

[43] Ross Cosmetics at [50].

[44] Rochford at [29], [32], [37]-[38], [46] and [109].

Qantas failed to consider the FAAA's claims

[71] I do not accept the FAAA's contention that Qantas has failed to give genuine consideration to the FAAA's claims.

[72] On 28 October 2021, Qantas provided a written response to each of the FAAA's claims.[45] Further discussion on these matters took place on 29 October 2021.[46]

[73] Qantas has modified its position in relation to the AV Spans claim[47] and the meal allowance claim[48], and it has withdrawn (for now) the Sunrise Flying claim.[49]

[74] Qantas has also accepted several of the FAAA's claims, including language allowances, swap courses, inflight procedures committee, grievance procedure, part-time clauses, time to report or duty during standby and Schedule 4.[50] That Qantas might have accepted some of the FAAA's '*little ticket*' items but rejected their '*big ticket*' items is not conclusive to the issue in the matter before me. As noted earlier, the good faith bargaining requirements do not require bargaining representatives to make concessions or reach agreement.

Qantas' demand for access to recording of FAAA meeting

[75] Qantas made a request of the FAAA to provide a recording of the Facebook Live and Zoom meeting held with FAAA members on 30 October 2021. Qantas made this request in the context that Mr Reed had referred to an impasse in negotiations for EBA11 in that meeting.[51]

[76] I do not consider the making of this request by Qantas in that context is inconsistent with the good faith bargaining requirements.

[77] In any event. the FAAA did not provide the recording.

Qantas' communications re: yes vote.

[78] I accept Qantas has advised its employees that the flexibilities and operational capacity that its key claims would provide is essential to the recommencement of international travel.

[79] However, I do not accept the FAAA's contention that Qantas' communications had the effect of pressuring the employees into a 'yes vote' or conveyed the message that unless there was a 'yes vote', employees would not be able to return to work.

[80] While I have had regard to the unchallenged evidence of Rebecca Maclean, Hikaru Sugimoto and Tanya Tierney, a fair reading of the materials does not support the contention.

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[45] Ibid at [45].

[46] Ibid at [46].

[47] Ibid at [47].p

[48] Ibid at [54].

[49] Ibid at [54].

[50] Ibid at [54].

[51] See paragraph [59].

Application for Order for Production

[81] At the directions hearing on 26 November 2021, Qantas made an oral application for an order for production to require the FAAA to produce the recording of the Facebook Live and Zoom meeting. This was in the context of Mr Reed using the word 'impasse' during that meeting.

[82] I refused to accept the oral application for the order for production and directed Qantas to file the application in the correct form and provided an opportunity for FAAA to make any submissions in response.

[83] Qantas filed the application for the order for production later that day. The document categories sought to be produced in the application filed were far wider than what was foreshadowed in the case management and directions hearing.

[84] In those circumstances and taking into consideration that the proceedings were at an interlocutory stage with a short timetable, and the application for the Interim Order was proceeding expeditiously, I declined to grant the order at that stage, and advised the parties that it would be dealt with as part of the Application.

Conclusion

[85] I am not satisfied that Qantas has not met, or is not meeting, the good faith bargaining requirements. Therefore, the requirement in s.230(3)(a)(i) of the FW Act has not been met. In those circumstances, I do not have any power to make the Interim Order.

[86] The application for the Interim Order is dismissed.

[87] The Application will be listed for further mention and programming on a date to be advised.

COMMISSIONER

Appearances:

Ms *L Saunders* of counsel for the Applicant.
Mr *R Dalton QC* and Mr *M Follett* of counsel for the Respondents.

Hearing details:
2021.
Sydney (via Microsoft Teams video-link):
3 December.

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