DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Princes Linen Services Pty Ltd
v
United Workers' Union
(C2020/9007)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER LEE

SYDNEY, 8 APRIL 2021

Appeal against decision [2020] FWC 6400 of Deputy President Hamilton at Melbourne on 27 November 2020 in matter number C2020/2182 – permission to appeal granted – appeal upheld.

[1] Princes Linen Pty Ltd (the Appellant) has lodged an appeal under s 604 of the *Fair Work Act 2009* (Cth) (the Act) for which permission to appeal is required against a decision[1] (the Decision) of Deputy President Hamilton (the Deputy President) issued on 27 November 2020. The Decision dealt with an application by the United Workers' Union (the Respondent) under s 739 of the Act for the Fair Work Commission (the Commission) to deal with a dispute in accordance with the dispute settlement procedure in clause 10.2.3 of the *Princes Linen Services Pty Ltd Enterprise Bargaining Agreement Altona 2019 – 2020* (the Agreement).

[2] The matter on appeal was subject to a telephone hearing on 19 February 2021. The Appellant sought permission to be legally represented. The Full Bench granted the Appellant's application for permission to be represented pursuant to s 596(2)(a) of the Act in the hearing, there being no objection from the Respondent. The Full Bench was not required to grant the Respondent permission to be represented at the hearing, as the Respondent was represented by an employee of an organisation as defined by s 596(4)(b)(i) of the Act.

[3] The Full Bench has heard the parties on permission to appeal and the substantive appeal.

Decision under appeal

[4] The parties agreed on the following statement of facts and the arbitral question to be determined by the Commission:

> "1. On or after the 28 January 2020:

[1] *United Workers' Union v Princes Linen Services Pty Ltd* [2020] FWC 6400.

a. Trang Ly was a weekly employee of Princes Linen Services (PLS) to whom the Princes Linen Services Pty Ltd Enterprise Bargaining Agreement Altona 2019-2020 (PLS EA) applied;

b. Trang was engaged by PLS as an employee other than a shift worker and rostered to commence work at 7.00am and finish work at 3.30pm;

c. Trang did commence work at 7.00am;

d. At some time between 7.00am and 3.30pm, Trang was approached by a PLS Supervisor who asked her if she wanted to work additional hours beyond her rostered finish time on applicable overtime rates;

e. Trang agreed to work additional hours beyond her rostered finish time on applicable overtime rates;

f. Trang finished work at 5.30pm;

2. Was Trang entitled to be paid a meal allowance pursuant to cl 18.6.1 of the PLS EA?"

[5] Clause 18.6.1 of the Agreement provides as follows:

"An employee other than a shift worker who is required to work two (2) hours overtime which overtime finishes after 4.30pm, or is required to work after 6.30pm, (whichever is the earlier) without being notified on the previous day or earlier that he will be so required will receive an allowance in accordance with clause 18.7."

[6] Clause 18.7 provides for a meal allowance in the amount of $15.36.

[7] The parties differed on their interpretation of the word 'required'.[2] The Appellant contended that for an employee to be entitled to the meal allowance, there must be a direction from the employer to do the work. In essence, their interpretation of the word 'required' carries with it an element of an imposition or directive and the meal allowance is some form of payment for that imposition. The Respondent contended that the word 'required' does not carry an element of an imposition and that it is simply enough that the employer needs the work to be done.

[8] The Deputy President first considered the approach to interpreting enterprise agreements.[3] After considering the historical context of the Agreement,[4] the ordinary meaning of the word required,[5] clause 18.6.1 in context with other clauses of the Agreement[6] and

[2] Decision [9].

[3] Ibid [12].

[4] Ibid [16] – [21].

[5] Ibid [22] – [23].

[6] Ibid [24] – [50]

issues of award modernisation,[7] the Deputy President came to the conclusion that the answer to the arbitral question is 'yes'.[8]

[9] For the reasons that follow, we find that this conclusion is incorrect.

Principles of appeal

[10] An appeal under s 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are exercisable only if there is error on the part of the primary decision maker.[9]

[11] The Decision under appeal did not involve the exercise of discretion. It was concerned with determining whether Ms Ly was entitled to be paid a meal allowance pursuant to clause 18.6.1 of the Agreement. There is no discretionary element involved in such a task. It follows that our task on appeal is to determine whether the interpretation adopted of the Agreement was correct.[10] If the instrument was erroneously interpreted or the facts erroneously applied to its proper interpretation then it is open for an appellate bench to grant the appeal.

[12] Accordingly, the question on appeal, as concerns the Deputy President's interpretation of the Agreement, is whether his interpretation was correct.[11] Error might also be discussed in the reasoning process, where construction principles are misapplied or not understood. Other decisions made in the course of hearing and determining the dispute might involve the exercise of discretion. Such decisions are appealable on the bases identified in *House v The King*.[12]

Consideration

[13] The Appellant advances only one ground of appeal. It contends that the Deputy President erred in finding that Ms Ly was entitled to be paid a meal allowance pursuant to clause 18.6.1 of the Agreement.

[14] The Appellant contends that a proper interpretation of the Agreement results in a finding that the word "required" as it is used in clause 18.6.1 carries with it an element of compulsion. The Appellant further contends that in the particular factual circumstances of this case, Ms Ly was not "required" to work additional overtime. On the agreed statement of facts, Ms Ly was asked if she wanted to work additional hours on overtime rates to which she agreed to do so.

Principles of interpretation

[15] The correct principles of interpretation of enterprise agreements applicable to the resolution of the arbitral question were not in dispute between the parties. The most succinct

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[7] Ibid [51] – [60].

[8] Ibid [64].

[9] *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[10] *Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd* [2014] FWCFB 7447 at [7].

[11] *Energy Australia Yallourn Pty Ltd T/A Energy Australia v Construction, Forestry, Mining and Energy Union* [2017] FWCFB 3574 applying *Pawel v AIRC* [1999] FCA 1660.

[12] [1936] 55 CLR 499.

expression of the correct approach is that articulated by the Federal Court Full Court in *WorkPac Pty Ltd v Skene*[13] as follows (citations omitted):

> "[197] The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context. The interpretation "… turns on the language of the particular agreement, understood in the light of its industrial context and purpose…". The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament. To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced."

[16] The Full Court observations are consistent with the approach taken by the Full Bench of this Commission in Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited[14] (*Berri*). The principles found in *Berri* are well established and we will not restate them here.

The meaning of 'required'

[17] As identified by the Deputy President, the word 'required' is of wide import and has a range of ordinary meanings, including compulsory and needed or desired.[15] This is not disputed by the parties. Plainly, interpreting the word 'required' to mean 'compulsory' favours the Appellant's construction while an interpretation of the word as merely 'a need or desire' favours the Respondent's construction.

[18] In his oral submissions, counsel for the Appellant advanced three bases that he contended support the Appellant's construction:

1. The drafting of clause 18.6 demonstrates that the requirement to work overtime is directed in respect of the perspective of the employee.

2. The drafting of clause 18.6 involves a concept of notice and that if adequate notice is given, there is not an entitlement to the meal allowance. This confirms that the word 'required' carries an element of compulsion.

3. The allowance with which clause 18.6.1 is concerned is a meal allowance and is paid to compensate an employee who is not given the opportunity to bring a meal from home.

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[13] [2018] FCAFC 131, 264 FCR 536.

[14] [2017] FWCFB 3005.

[15] Decision [23].

[19] Regarding the first point above, we accept that clause 18.6.1 is drafted in such a manner that the requirement to work overtime is laid at the feet of the employee. The words of the clause clearly reference an employee who is required to work, it is not drafted from the perspective of an employer who desires or has a need for work to be done.

[20] We accept that clause 18.6.1 plainly involves a concept of notice. The clause is structured in such a way that if an employee is given adequate notice of the overtime, they will have no entitlement to the meal allowance, regardless of whether the overtime was compulsory or merely desired by the employer. The fact that giving such advance notice of the overtime operates as a disentitlement to the meal allowance does not, in our view, support a construction of 'required' that involves a level of compulsion. We do accept, however, that the notice aspect of clause 18.6.1 assists to reveal the purpose of the provision. The purpose of the meal allowance payment in clause 18.6.1 is to compensate an employee who has effectively been taken by surprise in the requirement to work overtime and, as such, has no opportunity to plan ahead to be able, if they wish, to bring a meal from home for the relevant afternoon or evening. In those circumstances, given the requirement to work overtime without warning, the purpose of the meal allowance is to ensure that the employee will not be out of pocket by being required to purchase a meal for the relevant afternoon or evening.

[21] The Respondent relies on the relevance and purpose of meal breaks to support their construction of the Agreement. It contends that meal breaks are provided in order to prevent employee fatigue and that the meal allowance is paid so that employees are incentivised to take their break rather than forego it and have a meal from home later in order to avoid financial disadvantage. We reject this contention. What is required here is a pure, textual analysis of clause 18.6.1, construed in context and having regard to the purpose of the provision. Analysing the relevance of meal breaks is of little assistance in this task. Further, clause 18.6.1 is concerned with the payment of a meal allowance and does not have any bearing on the requirement of the Appellant to comply with other clauses in the Agreement which impose obligations on it to provide employees with meal and other breaks at particular times.

[22] The Appellant also contends that clause 18.6.1, being a clause directly referrable to overtime, can only be properly construed in light of the relevant overtime clauses. We accept this contention. The Appellant points to clauses 21 and 22 as the relevant overtime provisions within the Agreement.

[23] Clause 21 of the Agreement is entitled "*Allocation of Overtime*" and reads as follows:

> "21.1 The employer will aim to **distribute overtime evenly and fairly**. As soon as practicable, once the need for overtime hours has been identified, the **employer will ask for volunteers** to work the additional hours needed based on a rotation of the regular roster and numbers achieved by the employee based on the Spindle hours."[16] (emphasis added)

[24] Clause 22 of the Agreement is entitled "*Overtime*". Clause 22.2 relevantly provides:

> "22.2 An employer may **require** any employee to work reasonable overtime at overtime rates. An employee will work overtime in accordance with such requirements. An

[16] Appeal Book [39].

> employer **must not request or require** an employee to work overtime unless the additional hours are reasonable."[17] (emphasis added)

[25] A fair reading of clause 21.1 reveals an intent to distribute overtime evenly and fairly to volunteers who are asked beforehand if they wish to perform overtime work. This supports the contention that there is a distinction between employees who volunteer to perform overtime work and employees who are required to perform such work.

[26] Furthermore, clause 22.2 recognises that there is a distinction between the employer making a request of an employee to work overtime, and the employer requiring an employee to work overtime. This supports the Appellant's contention that the word 'required' as it appears in clause 18.6.1 carries an element of a compulsion or directive.

[27] The scheme envisaged by clauses 21 and 22 is one in which employees will be asked if they wish to work available overtime. The working of such overtime at the request of the Appellant is voluntary. If the Appellant does not get enough volunteers for the overtime it wishes to be undertaken, it can compulsorily require one or more employees to work the overtime, subject to the requirement that the additional hours must be reasonable. If the additional hours are not reasonable for one or more particular employees, the employee(s) in question cannot be forced to work the additional hours. This aspect of the Agreement is consistent with the National Employment Standards which expressly permit an employee to refuse to work additional hours if they are unreasonable (s 62(2) of the Act).

[28] We consider that the meal allowance in clause 18.6.1 fits into the scheme established by clauses 21 and 22 in the following way: where an employee is not given prior notice of the availability of overtime and they are asked on the day in question whether they wish to work overtime later that day, the employee has a choice available to them under the Agreement. They may decline the offer of overtime. Alternatively, they may voluntarily accept the overtime offered to them in the knowledge that they will be paid overtime rates for undertaking such work but will not be paid a meal allowance. In making that choice, the employee will no doubt consider the number of additional hours of work on offer and the time they are likely to complete such work in deciding whether or not they will need to purchase a meal for that afternoon or evening. If the employee rejects the offer of voluntary overtime and is then directed by the employer to work the overtime, the employee will be required to work the overtime (assuming the additional hours are reasonable) and they will be paid a meal allowance in recognition of the fact that they have not had sufficient notice to bring in a meal from home *and* they have been required (in the sense of compelled) to work.

[29] Having considered the text of clause 18.6.1 both alone, and together with the other overtime provisions of the Agreement, and the principles of interpretation outlined above, we find that properly construed, the word 'required' carries with it an element of a compulsion or directive. Therefore, clause 18.6.1 is not enlivened merely by a need or desire by the employer for overtime work to be done, or by the acceptance by an employee of an offer to work overtime; there must be a direction made to the employee to work the additional hours.

[30] In considering the ordinary meaning of the word 'required' the Deputy President relied on *Telstra Corporation Limited v Peisley*[18] (*Telstra*). In that case, it was held that an

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[17] Ibid [39].

[18] [2006] FCAFC 79.

employee is 'required' to work overtime within the meaning of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) in circumstances where an agreement is struck between the employer and the employee for overtime to be worked, and having made that agreement, the employee was "required" by the agreement to work the overtime.[19] The Deputy President found that this construction of the word required in *Telstra* supported the Respondent's case.[20]

[31] In our view, the provision of the national legislation that was subject to interpretation in *Telstra* turned on its own drafting and relevant context. The court preferred a construction where any request for overtime created a requirement to work that overtime within the meaning of the statute. In the present case, the clause in question and the surrounding clauses in the Agreement need to be taken into account in construing the Agreement as discussed above.

Was Ms Ly required to work overtime?

[32] The agreed facts in this case are straightforward. Ms Ly was approached by a supervisor who "**asked** her if she wanted to work additional hours beyond her rostered finish time" (emphasis added). Ms Ly then "**agreed** to work additional hours beyond her rostered finish time" (emphasis added). In such a factual scenario, it is clear that there was no directive or compulsion for Ms Ly to work the over time. A question was put to her if she wanted to perform the work and she accepted that request.

[33] The Respondent further contends that even making a request of an employee to work overtime carries with it the requisite element of compulsion to enliven clause 18.6.1 because of the power imbalance that exists between a supervisor and an employee. It contends that due to the nature of the employment relationship and the power imbalance, an employee cannot realistically refuse a request made by the employer to work overtime and therefore, they have been compelled to work.

[34] This argument is a contention not supported by any evidence and even if there was such evidence it would be of marginal assistance. Our task is one of interpretation of the Agreement.

[35] Given the above, we find that Ms Ly was not required to work additional hours within the meaning of clause 18.6.1 of the Agreement. Accordingly, she was not entitled to be paid a meal allowance.

Permission to appeal

[36] Having regard to the above, we are satisfied that the appeal enlivens the public interest. The Appellant has identified an appealable error. It is in the public interest to ensure that enterprise agreements are properly construed and applied. Appellate intervention is both warranted and necessary to examine the identified error and vary the Decision under s 607(3)(a) of the Act insofar as answering 'no' to the arbitral question.

Conclusion

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[19] Ibid [42].

[20] Decision [58].

[37] We have read the Decision fairly and as a whole and considered all of the materials filed by the parties. The error warrants the varying of the Deputy President's Decision.

[38] We order as follows:

- Permission to appeal is granted.
- Appeal ground one is upheld.
- The Decision ([2020] FWC 6400) is varied and the answer to the arbitral question is 'no'.

VICE PRESIDENT

Appearances:

Mr *J Bourke QC* and Mr *A Denton* for the Appellant

Ms *L Ablett* for the Respondent

Hearing details:

2021

Telephone hearing.

19 February.

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