DECISION

Fair Work Act 2009
s.604—Appeal of decision

Australian Workers' Union
v
BlueScope Steel (AIS) Pty Ltd
(C2021/2778)

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT COLMAN
COMMISSIONER MCKINNON

MELBOURNE, 13 AUGUST 2021

Appeal against decision [2021] FWC 1849 of Commissioner Riordan at Sydney on 27 April 2021 in matter numbers C2020/6290.

[1] The Australian Workers' Union (AWU) has lodged an appeal against a decision[1] of Commissioner Riordan made on 27 April 2021 in which the Commissioner determined a dispute that had been referred to the Commission for determination under clause 36.6(j) of the *BlueScope Port Kembla Steelworks and Springhill Enterprise Agreement 2019*[2] (Agreement). The Agreement relevantly covers BlueScope Steel (AIS) Pty Ltd (BlueScope) and employees of BlueScope at Port Kembla. The subject of the dispute concerned BlueScope's proposal to implement change in its bulk berth department. The proposal is to have contractors perform machining and trimming of ships' hatches, which will result in a reduction of eight operator roles from the department.

[2] Clause 36.6 of the Agreement mandates consultation when BlueScope has an idea or concept which could result in significant change. Clause 36.1(c) of the Agreement states that '*in considering the desirability and business case for any proposed change the tests to be applied are requirements for the change to be safe, efficient, legal and fair'*. This is referred to as the 'SELF' test. Clause 36.6(j) provides that where a party disagrees with the change to be implemented, it is to refer the matter to the Commission in accordance with the steps in the Agreement's dispute settlement procedure.

[3] In his decision, the Commissioner concluded that the proposal accorded with the provisions of the Agreement, and in particular that it passed the SELF test. The AWU contends that the Commissioner erred in his consideration of the SELF test. It asks the Full Bench to grant permission to appeal, quash the decision, rehear the application, and conclude that the proposal does not pass the SELF test and should not proceed.

[1] [2021] FWC 1849

[2] [2019] FWCA 3947, AE503801

[4] At the hearing on 24 June 2021, we granted the parties' applications for permission to be represented pursuant to s 596 of the *Fair Work Act 2009* (the Act) and proceeded to hear the parties both in respect of the application for permission to appeal and the substantive appeal.

Decision under appeal

[5] The substance of the Commissioner's decision focused on the critical question of whether the proposal passed the SELF test. The Commissioner considered first whether the proposal was safe. He concluded that it was. The Commissioner was satisfied that the proposal had resolved the safety concerns previously raised by Vice President Hatcher in 2015 in a proceeding involving a similar proposal by BlueScope, because the current proposal had reduced the amount of overtime required of operators, and addressed manning and leave issues (at [46]). The Commissioner was also satisfied that BlueScope would ensure that any contractor performing trimming and machining would hold the relevant competency verification and be trained on the BlueScope's safety principles, and relevant legislative obligations (at [47]).

[6] The Commissioner then examined the efficiency of the proposal. He considered that the proposal would outsource 'the minor and basically unskilled portion' of the relevant function and concluded that there would be improved labour flexibility and associated benefits for BlueScope which would outweigh any costs associated with contractors' unfamiliarity with the workplace or turnover of personnel. The Commissioner was satisfied that the proposed change was efficient (at [52]).

[7] The Commissioner's consideration of whether the proposal was legal is set out [53] to [57] of the decision. The parties' arguments before the Commissioner had proceeded on the basis that, in order for a proposal to be 'legal' for the purposes of the SELF test, it needed to 'substantially comply' with the Agreement. This was the conclusion that had been reached by Vice President Hatcher in another previous matter involving these parties, which concerned the interpretation and application of the SELF test in the context of an earlier enterprise agreement, the *BlueScope Port Kembla Steelworks and Springhill Enterprise Agreement 2015* (2015 Agreement) (see *AWU v BlueScope Steel Ltd* [2016] FWC 3848, referred to by the parties as the '*PFD* case'). The Commissioner rejected the AWU's contention that the proposal was not legal because Bluescope had failed to 'substantially comply' with the consultation provisions in the Agreement. He stated that on the contrary, there had been more consultation about the proposal than any about other matter he had seen in his nine years as a member of the Commission (at [55]). The Commissioner stated that he was not persuaded that BlueScope 'had not substantially complied with the provisions of the Agreement' (at [53]), that he was satisfied that the proposal was 'not illegal', and that 'any non-compliance with the Agreement is insignificant' (at 57]).

[8] From [58] to [66] of the decision the Commissioner considered whether the proposal was 'fair'. He noted that the concept of fairness applied to both parties, and that clause 36.1 recorded the parties' acknowledgement that change is an inevitable and increasingly necessary part of the steel industry. The Commissioner stated that he was satisfied that the contracting out of the role would not undermine the job security of the remaining operators in the department, who were highly skilled. He noted that the company believed that alternative and meaningful positions at the steelworks could yet be identified, and that for this reason, voluntary redundancy had not been offered to the affected employees; nevertheless, if

alternative positions could not be found within six months, the employees would be retrenched and receive the benefits prescribed by the Agreement ([63]). The Commissioner was satisfied that the displaced employees would be treated fairly and with dignity, and that the employees remaining in the bulk berth department would also be treated fairly, because they would continue to work their normal roster utilising their core skill and would no longer be required to perform the physically demanding work of trimming and machining (at [65]). The Commissioner also found that it would be unfair to deny BlueScope the option of introducing the proposed change and achieving the financial benefits of the improved labour flexibility it delivers (at [66]).

Permission to appeal

[9] The dispute resolution procedure in clause 35 of the Agreement does not afford any right of appeal from a decision of the Commission made under the Agreement. Therefore, the general position applies, which is that a person aggrieved by a decision of the Commission may appeal that decision under s 604 of the Act, but only with the permission of the Full Bench. Subsection 604(2) of the Act *requires* the Commission to grant permission to appeal if it is satisfied that it is in the public interest to do so. Permission may otherwise be granted under s 604(1) on discretionary grounds.

[10] We have decided to refuse permission to appeal. The public interest is not engaged. The decision does not manifest an injustice. The outcome is not counterintuitive. There is no diversity of opinion at first instance. Importantly, having heard both the application for permission to appeal and the appeal, and having considered the appeal grounds, we have concluded that the Commissioner's decision was not affected by appealable error. In relation to appeal ground one, there is a further reason to refuse permission, which we explain below.

The appeal grounds

[11] Appeals exist for the correction of error. The approach of a Full Bench to the determination of an appeal depends on the nature of the decision below. It is accepted by the parties that the effect of clause 36.1(c) is that, in order to proceed, the proposal must be 'safe, efficient, legal and fair'. Where this question is disputed, the Commission is authorised by clauses 35 and 36 of the Agreement to determine the answer. Whether a proposal is safe, efficient or fair seems to us to be a question involving an informed value-judgment, with the consequence that there will be no single answer that could be regarded as definitively correct. The Commission's decision in respect of such matters is discretionary in nature. To the extent that the present appeal challenges the Commissioner's conclusions that the proposal was safe, efficient or fair, it is concerned with error of the kind identified by the High Court in *House v The King* ([1936] HCA 40). On the other hand, the word 'legal' can only have one meaning, and the answer to a question of whether a proposal is legal must either be right or wrong. The AWU's challenge to the Commissioner's conclusion in respect of the legality of the proposal therefore involves the correctness standard.

[12] Seven grounds of appeal are advanced by the AWU. Grounds 1 to 3 concern the Commissioner's conclusion that the proposal was legal. Ground 4 and 5 contest the determination that the proposal was fair. And grounds 6 and 7 challenge the Commissioner's conclusion that the proposal was safe.

Appeal grounds 1, 2 and 3

[13] Appeal ground 1 contended that the Commissioner erred by concluding that 'substantial compliance' with the terms of the Agreement was sufficient in order for the proposed change to be 'legal' within the meaning of clause 36.1(c) of the Agreement, and that the SELF test requires that a proposal comply strictly with the terms of the Agreement. The AWU contended that the terms of the Agreement are contextually and materially different from those of the enterprise agreement that was before the Vice President in the *PFD* case and that on a proper construction of the terms of the present agreement, the SELF test requires strict compliance.

[14] BlueScope objected to this appeal ground on the basis that it was not part of the AWU's case at first instance. The AWU's case below was that, insofar as the SELF test was concerned with the legality of a proposal, it required 'substantial compliance' with the terms of the Agreement. This is clear from the AWU's final written submissions (see paragraphs 20 and 21). We note that footnote 12 in these submissions states that the Commission 'could easily be satisfied that there had not been strict compliance if that is the test to be applied.' But this was clearly not a submission that the Commission was required to apply a test of strict compliance.

[15] Therefore, by its first appeal ground, the AWU seeks to present a different case on appeal from the one that it put before the Commissioner. The proper administration of justice requires that the substantial issues between the parties generally be settled at first instance. A party to an appeal will be held to its case below, unless there are exceptional circumstances (see *University of Wollongong v Metwally* (No 2) (1985) 59 ALJR 481 at 483). This principle has been applied consistently in Full Bench decisions of this Commission (see for example *Abulamoun v Nathan Jackson* [2020] FWCFB 5593 at [13], and *Linfox Australia Pty Ltd v Terence Howell* [2018] FWCFB 464 at [15]). Unless there is some compelling argument to the contrary, it is contrary to the public interest to allow a party to run new arguments on appeal. There is no such compelling argument in this case. For this reason, we decline to grant permission to appeal in respect to appeal ground 1. We would however note that we consider the Vice President's conclusions in the *PFD* case to be correct and applicable to the Agreement, as the relevant textual differences between the Agreement and the 2015 Agreement are not substantial.

[16] The AWU's second ground of appeal contended that if 'substantial compliance' was sufficient in order to be 'legal' for the purposes of the SELF test, the Commissioner erred by concluding that any non-compliance by BlueScope with the Agreement was insignificant. The AWU contended that clause 36 embodies the principle of genuine consultation which involves giving employees the opportunity to fully understand the nature and impact of employer's proposal, that consequently clause 36.6(a) required BlueScope in its initial notification to outline the possible effects on employees of the proposed idea for change, and that this did not occur. It said that clause 36.6(c) prioritises and emphasises in the consultation process the consideration of a proposal's impact on employees and that in the present case this dimension of the consultation was deficient. The AWU said that at the conclusion of consultation, clause 36.6(g) requires BlueScope to provide written notification of the impact of the change sought to be implemented and the steps to manage that impact, and that the content of clause 36.6(g) is informed by its context and the proceeding provisions, understood in the manner for which the union contends. The AWU contended that BlueScope could not have substantially complied with these requirements in circumstances where its plans for the eight surplus employees remain 'amorphous'.

[17] We reject the second ground of appeal. The AWU has simply not established that BlueScope failed to comply, substantially or otherwise, with the terms of the Agreement. We briefly consider what we discern to be the alleged points of non-compliance. First, clause 36.6(a) states:

> "(a) When the Company has an idea or concept which could result in a significant change, the Company will commence a consultation process by notifying in writing employees and their union of the idea or concept that could be implemented. The written communication will outline the idea or concept and the possible effects that the idea or concept could have on employees."

[18] BlueScope's letter to the union and employees of 2 December 2019, referred to in the proceedings as the 'first letter', stated that the company wished to commence a consultation process with employees on a matter that could result in a significant change, namely the introduction of contractors to perform trimming of ships hatches at bulk operations, and that it was 'possible that this change could result in the reduction of operating positions on each crew'. Contrary to the AWU's contention, the possible effects of the proposal were squarely raised. It was suggested that this letter failed to comply with clause 36.6(a) because it did not mention that eight positions in the department may be lost, or that displaced employees would be transferred to as yet unidentified roles. This appears to be a complaint that the company did not deliver a *fait accompli*. Genuine consultation involves taking account of the views of affected persons and will inform the outcome. Further, we note that clause 36.6 (a) is engaged when the company has an 'idea or concept which could result in a significant change'. Because the clause is engaged at the contemplative stage, no great detail is expected, or possible.

[19] Secondly, clause 36.6(c) states:

> "The consultation process will consider of all aspects of the idea or concept. As a priority, the consultation will consider the impacts on employees and what steps are to be put in place to manage the impacts on employees."

[20] The AWU contends that this did not occur. We disagree. There is no need to recite here the evidence about the substantial and extensive consultation in which Bluescope engaged. As to the impact of the proposal on affected employees, it is evident that this may include redeployment to a suitable position, or retrenchment if this is not possible, in which case employees will receive the benefits prescribed by the Agreement. The very presence of these provisions affirm that redeployment during a transition period and termination of employment for redundancy are recognised and legitimate processes.

[21] The AWU contended that the company's letter of 4 August 2020, referred to in the proceedings as 'letter 2', failed to comply with clause 36.6(g). That provision states:

> "(g) When consultation is concluded, the Company will advise and provide written notification to employees and the relevant unions what change is intended to be implemented, the arrangements to manage the impact of the change, the date the change will commence, the impact the change will have on employees, and what steps are to be put in place to manage the impact that the changes will have on employees."

[22] Letter 2 is set out at [20] of the Commissioner's decision. Among other things, the letter stated:

> "The consultation has now concluded. This letter is being sent to you to inform you that the Company wishes to implement a significant change that was discussed. This is a requirement of Clause 36.6 (g) of the 2019 Enterprise Agreement.
>
> I confirm the Company's intention to implement that following change(s):
>
> • Contractors to be introduced in the department to supplement workload with machining and trimming hatches.
>
> • Contractors to be introduced in the department to assist with other tasks including tying up and letting go of vessels, and rope work.
>
> This change will be introduced from the 28th September 2020.
>
> Taking into account the outputs of the consultation team, the effects the proposed changes are likely to have on employees include:
>
> • A reduction of 8 Operator roles from the Bulk Berth Operations department.
>
> • Reassignment of 8 current employees to suitable alternative BlueScope Operator roles.
>
> The following steps will be put into place to manage the impact the change may have on employees:
>
> • Clause 34.3 of the Agreement (security for employees affected by workplace change) will be applied, with individual transaction plans discussed with employees.
>
> • Employees who wish to volunteer to leave the Department will be transitioned. If enough volunteers cannot be identified, then the remaining employees will be subject to a Merit Based Selection process to identify those employees who will be transition to other suitable alternate roles.
>
> • Clause 11 of the Agreement (Retention of Rate) will apply if employees are appointed to a classification which receives a lower rate of pay than your current Bulk Berth Operator rate.
>
> • Retention of shift earnings will apply if employees move to a roster that results in a reduction in shift earnings of greater than $20 per week."

[23] The AWU contended that, at the point in the letter where the change is identified, there is no mention of a reduction in operator numbers or that displaced operators would be assigned to alternative roles. The complaint appears to be that the reference to the use of contractors to *supplement* workload, rather than to replace certain existing roles, was incorrect or misleading. We disagree. The letter must be read as a whole. It is clear from the letter that the change will cause the displacement of eight positions. In our view, it is a contention such as this that the Vice President likely had in mind when observing, in the *PFD* case, that an 'overly technical' approach to the consultation provisions in the agreement before him would defeat its intended purpose without adding anything of substance. The second complaint of the union was that the second letter failed to identify the alternative roles for displaced employees or the rates of pay in those roles. But the simple point is that efforts to identify suitable roles were to continue. It was not known whether alternative roles would be found. Thirdly, the AWU said that the letter did not specify that that retention of shift earnings would only be for a 6 month period. But nothing in the provision required this point of detail to be articulated.

[24] We note that clause 36.6(g) requires the employer to notify employees of 'the impact the change *will* have on employees', whereas the second letter refers to 'the effects the

proposed changes are *likely* to have on employees'. However, to say that the effects are likely rather than certain merely holds open the possibility that some contingency might affect them. This in itself serves to further describe the impact that the change *will* have.

[25] BlueScope did not fail to comply with clause 36.6. In our view, the Commissioner reached the same conclusion. His statement that 'any non-compliance with the Agreement is insignificant' is to be understood in the light of the nature of several of alleged points of non-compliance, which, if substantiated, would in our view have been insignificant.

[26] The third ground of appeal contended that the Commissioner erred by failing properly to consider the AWU's contention that BlueScope had not complied with clause 36.6(g) of the Agreement, and that he did not address its contentions at paragraphs 33 to 36 of its final written submissions. We consider that the Commissioner took all of the AWU's contentions into account, even if he did not cite and individually respond to each of them. The arguments said by the union to have been overlooked by the Commissioner have also been considered and rejected above. In any event, the Commissioner concluded that the proposal was legal. The Commissioner's application of the SELF test in relation to the question of whether the proposal was 'legal' was correct. It reached the right conclusion.

Appeal grounds 4 and 5

[27] Appeal ground 4 contended that the Commissioner erred by failing to consider and make findings as to the AWU's contention that the Commissioner could not be satisfied as to how surplus employees would be treated as a result of the proposed change. Ground 5 contended that the Commissioner erred in finding that the proposed change was fair in circumstances where the positions, rates of pay, hours and other employment conditions of displaced employees were uncertain and largely unknown.

[28] These appeal grounds rest on a false premise, namely that no assessment of the fairness of the proposal could be made until efforts to identify alternative employment had been completed. Nothing in the text of clause 36 or any other provision points to such a conclusion. The Commissioner knew that BlueScope had the 'ambition' to find 'alternative and meaningful positions' for the affected employees, but that if after the six month 'transition period' (see clause 34.3.5(c)) this had not occurred, the provisions of the Agreement would apply, and severance payments would be made (at [63]).

[29] The union contended that the alternative role that might be offered to an employee could be on a much lower salary, however the Commissioner took account of the 'retention of rate' provision in clause 11 that applies to redeployed employees (at [60]), as well as BlueScope's 'retention of earnings policy' ([61]). We would add that under clause 34, an employee who is offered suitable alternative employment but rejects it will nevertheless receive a severance payment (clause 34.3.5(j)). And disputes about whether an offer of alternative employment is suitable could be referred to the Commission under the disputes procedure. It was plainly open for the Commissioner to conclude, as he did, that the employees would be treated fairly.

Appeal grounds 6 and 7

[30] Appeal ground 6 contended that the Commissioner erred by failing to consider the AWU's contention that the proposed change was not safe due to significant concerns about

labour levels when two cranes and/or two berths are in operation. Ground 7 contended that the Commissioner erred in finding that the proposed change was different to, and resolved the safety issues raised by, the proposal that had been the subject of the recommendation of Vice President Hatcher in 2015.

[31] These grounds of appeal disclose no error. The Commissioner clearly had a close understanding of the 2015 recommendation. In it the Vice President expressed concerns about the size of the crews. These were associated with the taking of leave and the safe coverage of work when two ships were at berth or when two cranes were being operated (at [47] of the 2015 recommendation). The Vice President also expressed doubt in relation to the cost models attached to the proposed use of contractors to meet those concerns. Before the Commissioner, there was competing evidence in respect of what labour levels would be safe when two cranes or two berths are in operation, and in respect of the implications that would flow from the proposal. The finding of the Commissioner at [46] of the Decision indicates that he was alive to the concerns that had previously been articulated by the Vice President six years earlier, but also that he was ultimately satisfied that they had subsequently been addressed in the proposal that was before him. The Commissioner was not required to mention every fact or argument relied on by the AWU, nor was he required to expose every step of his chain of reasoning (see *Tenterfield Care Centre Limited v Wait* [2018] FWCFB 3844 at [27]). It is apparent, reading the decision as a whole, that the Commissioner had a deep understanding of the operations of BlueScope at Port Kembla and that he also understood and considered the parties' contentions concerning the safety implications of the proposed change. The Commissioner's conclusions were plainly open on the evidence. Moreover, we agree with them.

Conclusion

[32] The grounds of appeal do not establish any appealable error on the part of the Commissioner. Permission to appeal is refused.

DEPUTY PRESIDENT

Appearances:
J. Tran and J. Wang of counsel for the appellant.
K. Brotherson of counsel for the respondent.

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