[2023] FWC 2504 [Note: An appeal pursuant to s.604 (C2023/6325) was lodged against this decision - refer to Full Bench decision dated 23 February 2024 [[2024] FWCFB 100] for result of appeal.]

DECISION

Fair Work Act 2009
s.739—Dispute resolution

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU)
v
Programmed Facility Management Pty Ltd
(C2023/2015)

DEPUTY PRESIDENT O'NEILL MELBOURNE, 28 SEPTEMBER 2023

Alleged dispute about any matters arising under the enterprise agreement – obligation to make superannuation contributions to employees on long service leave – CoInvest scheme - dispute determined.

Introduction

[1] The AMWU has referred a dispute over whether the *Programmed Facility Management Melbourne Water AMWU Mechanical and Field Services Agreement 2022* ("the **Agreement**") requires Programmed Facility Management Pty Ltd to make superannuation contributions to employees whilst they are on long service leave and receiving payments from the CoInvest scheme.

[2] The Respondent has not paid superannuation contributions in these circumstances and contends there is no requirement under the Agreement to do so. The AMWU contends that there is. The parties agree that the dispute would be resolved by answering the following question:

> Does long service leave paid by CoInvest constitute 'any paid leave from the employer' for the purposes of clause 4.8 of the Agreement?

Factual Context, Relevant Agreement and Award Provisions

[3] The CoInvest scheme is established under the *Construction Industry Long Service Leave Act (Vic)* 1997 ("the **CILSL Act**"). Under the CILSL Act, employers in the industry are required to pay a charge to CoInvest for every employee, and every employee is entitled to long service leave and to be paid benefits out of the fund.[1]

[4] The CoInvest scheme recognises that construction industry employees often work from project to project, and so whilst they may work in the industry for a long time, they have less opportunity to accrue continuous service with the one employer.

[5] The Agreement is a greenfields agreement. The key provisions relevant to the dispute are found in clauses 4.8 and 6.11. Clause 6.11 provides that employees are entitled to long service leave in accordance with State legislation and includes the Company contributing to Portable Long Service Leave fund CoInvest.

[6] The relevant part of Clause 4.8 provides:

> **4.8 Superannuation**
>
> All superannuation contributions will be paid monthly at the contribution rate required by the Superannuation Guarantee Legislation ("**SGL**")[2] while at work or on authorised leave paid by the Company.
>
> …
>
> 4.8.1 Absence from work
>
> Subject to the governing rules of the relevant superannuation fund, the Employer must also make the superannuation contributions provided for:
>
> a. Paid leave – while the employee is on any paid leave from the employer.
>
> b. Work-related injury or illness – for the period of absence from work (subject to a maximum of 52 weeks) of the employee due to work-related injury or work-related illness provided that:
>
> (i) The employee is receiving workers compensation payments or is receiving regular payments directly from the Employer in accordance with the statutory requirements; and
>
> (ii) The employee remains employed by the Employer.

[7] The Agreement incorporates the *Manufacturing and Associated Industries and Occupations Award 2020* ("**Award**") including Clause 31 – Superannuation. Subclause 31.5 is in similar terms to subclause 4.8 and reads:

> **31.5 Absence from work**
>
> Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause 31.2 and pay the amount authorised under clauses 31.3(a) or (b):
>
> **(a) Paid leave**
>
> While the employee is on any paid leave.
>
> **(b) Work related injury or illness**

> For the period of absence from work (subject to a maximum of 52 weeks in total) of the employee due to work-related injury or work-related illness provided that:
>
> (i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and
>
> (ii) the employee remains employed by the employer.

Principles in construction of an enterprise agreement

[8] The principles to be applied in construing an enterprise agreement are settled. As set out by the Full Court in *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [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 (*references omitted*).

[9] Further, as the Full Court in *King v Melbourne Vicentre Swimming Club Inc*[3] said in the context of construing an award:

> The circumstances may lead the court to conclude that a clause in an award is a product of history; in such circumstances it may be possible to discern the purpose of the award only by reference to its history. But there are limits to that; as the primary judge said in the present case (at PJ [128]-[129]), the texts of modern awards are widely available to members of the public and should be reasonably capable of being understood and implemented by participants in the relevant industry by reference to the language of the award itself, without having to delve into the pedigree of the instrument. That is especially so where, as here, non-compliance with an award can expose a person to pecuniary penalties. (*references omitted)*

[10] The same observation is also apposite to the construction of an enterprise agreement, where the employees covered by the agreement should be able to understand it from the language of the agreement, without knowing the industrial history of a term.

Submissions

[11] The AMWU submits that the answer to the question is 'yes', based on the proper construction of clause 4.8.1.a of the Agreement. [4] It contends that employees who are on long service leave and being paid out of the CoInvest fund are on 'any paid leave from the employer'; that this phrase is synonymous with 'any authorised absence from the employer for which payment is received', and that there are textual and contextual bases for this construction.[5]

[12] The Respondent takes the contrary view. It submits that considering the text, the context and the purpose of clause 4.8, no such obligation exists. It has treated the nine employees covered by the Agreement who have taken long service leave as being on unpaid leave.[6]

[13] As to the text, the Respondent submits that clause 4.8 creates an entitlement to monthly superannuation contributions in two situations - when an employee is working and whilst the employee is on authorised leave that is paid by the Respondent. Clause 4.8.1 then prescribes ."further situations" in which the contributions will be made. Firstly, clause 4.8.1.a restates what is already said in clause 4.8. In other words, the phrase "*on any paid leave from the employer*" is synonymous with the words "*on authorised leave paid by the Company*." Subclause 4.8.1.b, it submits, extends the contribution obligation to work related injury or illness absences where pay is not being provided by Programmed but through a statutory workers' compensation scheme. It submits that 'paid leave' has to be read as leave that is both authorised and paid for by the Respondent. This meaning is said to be confirmed by the words "*from the employer'* which would otherwise have no work to do.[7]

[14] The Respondent also contends that the clause, viewed in its industrial context, supports its construction. The elements of the industrial context it points to are:

(a) that under the SGL, third party leave payments (including CoInvest payments in respect of long service leave) and workers' compensation payments (where no work is performed) do not constitute ordinary time earnings for which an employer is required to make superannuation contributions; and

(b) that an interpretive ruling of the ATO determined that for the purposes of the SGL, neither CoInvest nor the employer are obliged to make superannuation contributions in relation to CoInvest long service leave payments because the payments are not 'ordinary time earnings' and no payment is made by the employer.[8]

In this context, the Respondent contends that clause 4.8.1.a is "*simply giving effect to this legal situation*"[9]

[15] The Respondent submits that the introductory words to clause 4.8.1 "*subject to the governing rules of the relevant superannuation fund*" means subject to the rules that govern the question of ordinary time earnings, including the ATO Ruling.[10] It contends that the inclusion of the word "*also*" is essentially a direct transplant from the Award provision and should not be treated as an intentional expansion of entitlements beyond the SGL and should not be given any particular emphasis.[11] At the same time, the Respondent accepted that the clause supplements the position under SGL, but within limits.[12]

[16] The Respondent also submits that its construction is consistent with the position under clause 31.5 of the Award, which is almost identical to clause 4.8 of the Agreement. It submits that the drafter/s of the Agreement have simply 'cut and pasted' clause 31.5(a) of the Award into the Agreement, save for the addition of the words "*from the employer*" after paid leave in clause 4.8.1. Accordingly, based on *Short v FW Hercus,*[13] the Award provision is an important contextual consideration.

[17] As to the purpose of the provision, the Respondent submits that the text and industrial context considerations make it clear that the purpose of clause 4.8 is to provide the same entitlement to superannuation contributions as exist under the superannuation legislation and the Award.

Consideration

[18] In my view, the answer to the question is 'yes'.

[19] In reaching this conclusion, I largely accept the submissions of the AMWU as to the proper construction of the clause. In my view there is no ambiguity in subclause 4.8. The first sentence of clause 4.8 imposes an obligation on the Respondent to make superannuation contributions at the rate required by the SGL in respect of its employees "*while at work or on authorised leave paid by the Company*." It creates an obligation under the Agreement that essentially replicates the obligation under the SGL. However, subclause 4.8.1 requires the Respondent to make contributions in addition to or beyond the requirements under the SGL. That is clear from the use of the words "*must also*" in the subclause, rather than the use of language such as 'includes'. In other words, subclause 4.8.1 prescribes circumstances where contributions are required to be made that are supplemental to the minimum statutory obligations. The two additional circumstances where contributions are required to be made are firstly, while an employee is on "*any paid leave from the employer*" and secondly, for the period of absence from work (subject to a maximum of 52 weeks) of the employee due to work-related injury or illness subject to the qualifications in clause 4.8.1.b(i) and 4.8.1.b(ii).

[20] I do not agree with the Respondent that subclause 4.8.1.a merely restates what is said in the first sentence of clause 4.8 and that 'by' and 'from' mean the same thing. It seems to me that there is a meaningful distinction between "*on authorised leave paid by the Company*" on the one hand, and "*on any paid leave from the employer*" on the other. "By" and "from" are different concepts and the adoption of different language signifies a difference in meaning. As defined in the Macquarie Dictionary, the ordinary meaning of 'by' as used in clause 4.8 is 'through authority of' or 'through the agency of', whereas 'from' means 'a particle specifying a starting point' and 'to express removal or separation'.[14]

[21] I consider the correct construction of the phrase "any paid leave from the employer" as being synonymous with an authorised absence for which payment is received. The phrase requires that the leave is paid (as distinct from unpaid) and it is leave from the Company. It is significantly different to the description of the obligation commensurate with the SGL in clause 4.8, which makes clear that the leave must be both authorised and paid by the Respondent. In this way, it distinguishes leave that is paid from unpaid leave from the employer, such as where personal leave entitlements have been exhausted but the employer allows the employee to take

unpaid leave, but which would not attract superannuation contributions. The fact that the Respondent has treated the nine employees who have taken long service leave as being on unpaid leave is of no significance, it does not change the character of the leave in question from being paid leave to unpaid leave. The language in clause 4.8.1 differs from the clear language in clause 4.8 of "*authorised leave paid by the Company*" in which it is clear that the leave must be both authorised and must also be paid by the Company. Such a construction reflects the ordinary meaning of the words, with the word "*paid*" used as an adjective describing the leave. As the AMWU submitted, it is also consistent with the word order adopted by the drafters, namely:

(a) object-verb-preposition-subject in "*leave paid by the employer*" in clause 4.8; and
(b) adjective-object-preposition-subject in "*paid leave from the employer*" in clause 4.8.1.a.

[22] The Respondent acknowledged the import of the words "*must also*" in clause 4.8.1 as imposing obligations to make contributions beyond those required under the SGL 'within limits.' It pointed out that under the SGL not all forms of paid leave attract contributions, such as parental and jury service leave, because they do not constitute ordinary time earnings being the concept that governs contributions.[15] Accordingly, it submits that clause 4.8.1.a has 'work to do' by requiring the employer to make contributions in respect of these forms of leave beyond its obligations under the SGL (and clause 4.8). Whilst that is the case, it does not follow that such circumstances describe the *only* work clause 4.8.1.a does.

[23] The Respondent also submitted that if "*paid leave from the employer*" is synonymous with an authorised absence for which payment is received, as contended by the AMWU, it leaves no work for subclause 4.8.1.b to do. That is because an absence from work whilst receiving workers compensation payments or payments directly from the employer, would also meet the description of an 'authorised absence from the employer for which payment is received'. There is some force to that proposition, however, I agree with the AMWU's submission that firstly, there is a meaningful difference in subclause 4.8.1.b, namely a limit of 52 weeks, that the subclause specifically deals with circumstances where the employee is receiving statutorily required payments directly from the employer or receiving payments from a third-party insurer.

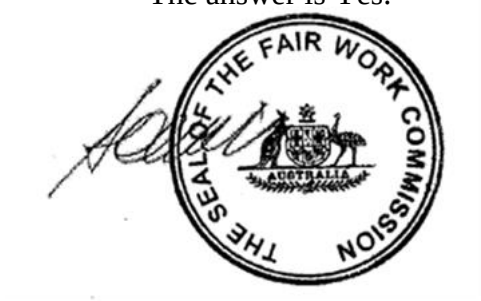
[24] In relation to the industrial context, I do not find the Respondent's submissions compelling. I accept that the context does include an interpretive ruling of the ATO that there is no obligation under the SGL on either CoInvest or the employer to make contributions in respect of an employee on long service leave receiving payment from CoInvest.[16] However, the ATO ruling only deals with the obligations under the SGL. As the AMWU submitted, it says nothing about obligations under the Agreement. The Agreement and not the SGL is the source of the obligations in this case. Further, it does not follow that the existence of the ruling in respect of the SGL supports the Respondent's conclusion as to the proper construction of the Agreement. Indeed, viewed through a different lens, the existence of the ATO ruling may have led to the parties agreeing to include such an obligation in the Agreement. The point is simply that the existence of the ATO ruling does not necessarily point to an intention to replicate the situation under the SGL in the Agreement.

[25] As to the Respondent's proposition that its construction is consistent with the position under the Award, neither party was able to identify any authority as to the correct interpretation

of the Award provision. Accordingly, I do not consider that *Short v FW Hercus* greatly assists the Respondent, as there is no settled interpretation of the meaning of the Award provision. I am not satisfied that clause 31.5 of the Award has the confined meaning claimed by the Respondent. On its face, it appears to require contributions to be made in respect of any period of paid leave, including long service leave where payments are made from the CoInvest scheme.

[26] The key distinction between the Award clause and subclause 4.8.1 is the addition of the words "*from the employer*". The Respondent submits that the inclusion of these words makes it clear that the Respondent wished to clarify and make abundantly clear that the entitlement to contributions beyond the SGL only extends to leave from and paid by the employer and does not extend to situations where payments come from third parties such as CoInvest. It submits there is no other reason for the inclusion of those words.[17] However, as the Full Bench in *AMWU v Berri Pty Ltd* held, "*the common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties*". [18] Further, what may or may not have been the subjective intention of the Respondent, there is no evidence before the Commission as to how the words "*from the employer*" came to be included in clause 4.8.1.a. Rather, in considering the industrial context that the clause arose from, it appears to me to be relevant that, broadly speaking, employees are entitled to be paid superannuation contributions whilst on long service leave paid by an employer. That is the general position, and the distinction relied on here is the fact that payments are not made by the employer but by the CoInvest fund. In light of the broader context, clear language excluding an entitlement in those circumstances might be expected.

[27] The agreed question for determination is: Does long service leave paid by CoInvest constitute 'any paid leave from the employer' for the purposes of clause 4.8 of the Agreement? The answer is Yes.



DEPUTY PRESIDENT

Appearances:
S Fodrocy for the Applicant.
L Howard of Counsel, with permission on behalf of Programmed Facility Management Pty Ltd, for the Respondent.

Hearing details:
2023
August 2, 23
Video Hearing.

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<PR766665>

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[1] AMWU's Outline of Submissions, Digital Hearing Book ("DHB") pg.66; CILSL Act s.3-4, 6.

[2] Defined in clause 1.6 of the Agreement as the *Superannuation Guarantee (Administration) Act* 1992 (Cth) and the *Superannuation Guarantee Charge Act 1992* (Cth) ("**SGL**").

[3] [2021] FCAFC 123 at [43].

[4] Transcript PN82-83.

[5] AMWU Outline of Submissions, DHB p.67.

[6] Witness Statement of Rebecca Ower, DHB p.84-85.

[7] Respondent's Outline of Submissions, DHB p.88-89.

[8] ATO Ruling ID 2005/33.

[9] DHB, p.90.

[10] Transcript PN156-158.

[11] Transcript PN 160-161.

[12] Transcript PN166-167.

[13] *Short v FW Hercus Pty Ltd* (1993) 46 IR 128.

[14] AMWU Outline of Submissions, DHB p.69, referring to Macquarie Dictionary definitions.

[15] Transcript PN153-154.

[16] ATO ID 2005/33.

[17] Transcript PN151.

[18] [2017] FWCFB 3005 at [114].