[2023] FWCFB 200

The attached document replaces the document previously issued with the above code on 31 October 2023.

The words “Appeal Decision” in [20] have been changed to “Approval Decision”.
The words “such that they have changed their vote” in [37] have been changed to “such that they would have changed their vote”.

Associate to Vice President Catanzariti

Dated 2 November 2023.

DECISION

Fair Work Act 2009
s.604—Appeal of decision

National Tertiary Education Industry Union
v
Southern Cross University, CPSU, the Community and Public Sector Union-SPSF Group
(C2023/5323)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ANDERSON
DEPUTY PRESIDENT ROBERTS

SYDNEY, 31 OCTOBER 2023

Appeal against decisions [2023] FWC 2077 and [2023] FWCA 2691 of Commissioner P Ryan at Sydney on 18 and 23 August 2023 in matter number AG2022/4745 – whether enterprise agreement approval contrary to FW Act – whether genuinely agreed by employees covered – whether representations concerning sign-on bonus were misrepresentations – whether misrepresentations affected voting intention – whether voter roll lawfully included casual employees – whether casual employees employed at relevant time – whether BOOT satisfied – permission to appeal granted – misrepresentations material to voting intention – unsafe to conclude majority genuinely agreed – unnecessary to determine casual eligibility or BOOT issues – appealable error – appeal allowed – approval decision set aside – misrepresentation unable to be cured by undertakings – application for approval dismissed.

Background

[1] The National Tertiary Education Industry Union (NTEU or the Appellant) has lodged an appeal, for which permission is required, against decisions[1] of Commissioner P Ryan on 18 and 23 August 2023 approving the *Southern Cross University Enterprise Agreement 2021* (Agreement). There are two Respondents to the appeal: the Southern Cross University (SCU, the First Respondent, the University or the employer) and the Community and Public Sector Union (CPSU) (Second Respondent).

[2] The appeal (including the application for permission) was heard on 18 October 2023. Permission was granted for the Appellant and the First and Second Respondents to be represented.

[3] We note that the Commissioner made a Confidentiality Order during the course of proceedings limiting access to and disclosure of certain evidentiary material. We continued that Confidentiality Order. It remains in place. We do not traverse that material in this decision though it forms part of the body of evidence that informs our decision.

Decision under appeal

[4] The decision under appeal concerned an application by the University for approval of the Agreement pursuant to s 185 of the *Fair Work Act 2009* (Cth) (FW Act). The background facts before the Commissioner were not in contention. For context, they are summarised below.

[5] Bargaining for the Agreement occurred during 2022, including with the NTEU and CPSU. In October 2022, the University put a proposed Agreement to a ballot of those employees to be covered. The access period was from 26 October 2022 to 1 November 2022 inclusive. The voting period was from 2 to 4 November 2022 inclusive.

[6] The employer supported the making of the proposed Agreement. It was opposed by the NTEU but supported by the CPSU. Both Unions were industrial associations covered by the Agreement. The proposed Agreement covered academics, professional staff and casual academics variously employed on a full time, part time, casual and fixed-term basis. Amongst other matters, the proposed Agreement provided for wage increases and a $750 sign-on bonus.

[7] There were 1,931 persons on the roll of voters. The roll contained some errors.[2] 1,289 persons voted. 685 voted to approve the agreement. 604 voted no. This constituted a majority, by a relatively small margin.

[8] Following the making of the Agreement, on 15 November 2022 the employer applied to the Commission for its approval under s 185 of the FW Act. Approval was opposed by the NTEU. It was supported by the CPSU. Approval proceedings were conducted on 6 and 10 March 2023. Issues in dispute were narrowed. Six contested matters required determination. These were set out by the Commissioner in the Merits Decision.[3] A decision on the approval application was reserved.

Decision 18 August

[9] In a decision on 18 August 2023 (Merits Decision), the Commissioner dealt with the matters in dispute. The Commissioner concluded:

> "[176] Subject to the revised consolidated undertakings referred to in this decision, I am satisfied that the Agreement will pass the better off overall test and that the various requirements for approval of the Proposed Agreement have been met."

[10] The Commissioner directed the employer to file a consolidated set of undertakings and provided an opportunity for the Unions to express a view on them.[4]

Decision 23 August

[11] On 23 August 2023 the Commissioner granted the application for approval (Approval Decision). The Commissioner stated:

> "[4] Further to my decision and subject to the undertakings referred to above, I am satisfied that each of the requirements of ss.186, 187, 188 and 190 as are relevant to this application for approval have been met." (footnote omitted)

[12] The Agreement was ordered to operate from 13 September 2023 with a nominal expiry date of 23 August 2026.

The Appeal

[13] The NTEU's Notice of Appeal contains thirteen grounds. For current purposes these can be distilled into three subject matters:

- Grounds 1 to 3: whether casual employees were "employed at the time" within the meaning of s 181(1) of the FW Act and therefore entitled to vote to approve the agreement (the casual eligibility issue);

- Grounds 4 to 7: whether the Agreement had been genuinely agreed in light of alleged misrepresentations by the employer immediately prior to and during the voting period (the misrepresentation issue); and

- Grounds 8 to 11: whether the Agreement passed the Better Off Overall Test (BOOT) in light of its provisions concerning fixed-term contracts.

[14] Grounds 12 and 13 are catch-all in nature and dependent on whether the aforementioned grounds are made out.

Consideration

Permission to appeal

[15] An appeal under section 604 of the FW Act is an appeal by way of rehearing. The Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[5] There is no right to appeal, and an appeal may only be made with permission of the Commission.

[16] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[6] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[7]

[17] We have decided to grant permission to appeal.

[18] We do so on the ground that the appeal raises a question of importance that warrants Full Bench consideration, being the proper application of s 186(2)(a) and s 188 of the FW Act (concerning genuine agreement) in circumstances where a material misrepresentation of fact has occurred impacting voting intention for an enterprise agreement.

[19] We note that should it have also been necessary to decide the casual eligibility issue (below) we would have granted permission on the ground that determining that question would also have concerned a matter of public importance as to when a casual is "employed at the time" within the meaning of s 181 particularly in the light of the somewhat discordant Full Bench decisions in *McDermott*[8] and *Noorton*,[9] and the subsequent High Court decision in *Rossato.*[10]

[20] We also grant permission on the basis that as we have concluded that the Agreement was not approved in accordance with the requirements of the FW Act and that as the errors in approval cannot be cured by undertakings, then it is not in the public interest for the Approval Decision to stand.

[21] We now deal with the grounds of appeal. For reasons that follow, it is convenient to deal firstly with the misrepresentation issue (grounds 4 to 7).

Grounds 4 to 7: the misrepresentation issue

[22] A ground on which approval was opposed by the NTEU was the contention that the employer had misled employees in relation to statements made by the University immediately prior to and during the voting period regarding a $750 sign-on bonus.

[23] The Commissioner set out the relevant facts at [123] to [128] of the Merits Decision:

> "[123] The issue concerning this clause arose when immediately prior to, and throughout, the voting period, the Applicant issued various communications to its employees via email and SMS Text message.
>
> [124] Email communications sent at 6:06pm on 1 November 2022 and 9:34am on 3 November 2022 stated:
>
> > *That is why the proposed pay offer not only increases the hourly rates of pay available to you by between 9 and 10.5% over the life of the agreement, but also, critically, why the sign-on bonus of $750 is available to every current casual staff member should the agreement be endorsed by a majority of staff.*
>
> [125] An email communication sent at 11:00am on 3 November 2022 which stated:
>
> > *I am reaching out to encourage you to have your say and to clarify a couple of points raised with me.*
> >
> > *Casual Staff:*
> > ***ALL casual staff with a current contract are entitled to vote**, so please take this opportunity to have your say.*
> >
> > *All casual staff salary rates will increase, **and all casual staff with a current contract will receive the $750 sign-on bonus** (if the agreement is endorsed by a majority of staff).*
> >
> > *All Staff:*

> *All staff salary rates will increase, and* ***all staff, regardless of fixed-term appointment or fractional/part-time hours, will receive the sign-on bonus of $750*** *(if the agreement is endorsed by a majority of staff).*
>
> (Emphasis in original)

[126] The Applicant's HR website/portal contained the following text on its home page:

> *…If a majority of SCU colleagues VOTE YES you will be eligible for salary increases including a $750 one-off payment.*

[127] An SMS text message sent at 11:17am on 3 November 2022 stated:

> *The University's Enterprise Agreement ballot is now open and you are eligible to vote.*
>
> *You should have received an email to your @scu.edu.au account from Bigpulse Voting at 9am yesterday with a personalised link that will enable you to cast your vote.*
>
> *Between 9 and 10.5% salary increase over the life of the agreement +$750 payment is available to every current casual staff member should the agreement be endorsed by a majority of staff.*

[128] It is not in dispute that the communications were sent by the Applicant. The dispute concerns whether the communications were misleading, particularly for casual employees." (emphasis in original, footnotes omitted)

[24] The Commissioner rejected the NTEU contention for the following reasons:[11]

"[137] The CPSU also submitted that there is no evidence that any employee was misled or that they changed their vote. The CPSU referred to the decision in *University of New South Wales (Professional Staff) Enterprise Agreement 2010* and submitted that there needs to be a proper basis for supposing that these statements were misleading such that the employees did not genuinely agree to the Proposed Agreement.

…

[138] Having regard *(sic)* to the submissions and the (lack) of evidence before me, I am not satisfied that the communications were misleading and/or that any employee was misled by them.

[139] As both the Applicant and the CPSU submitted, there is no evidence that any employee was misled or changed their vote as a result of the communications. To the contrary, there is a greater weight of evidence that the communications were not determinative in causing employees to vote for the Proposed Agreement.

[140] The NTEU submitted, with reference to *Maurice Alexander*, that it is a matter of common sense that at least some employees would have been influenced. However, in that case the statement was much stronger and even in those circumstances, the Deputy President, having inferred that at least some employees would have been influenced, stated that "*it does not follow that the agreement of the employees was not genuine*."

[141] Furthermore, and as stated in *University of New South Wales (Professional Staff) Enterprise Agreement 2010, "there needs to be a proper basis for supposing that the misleading statements may have determinative in the vote getting over the line*."

[142] Accordingly, even if I was to accept the NTEU's submission that I should infer, as a matter of common sense, that a sufficient number of employees were influenced such as to determine the vote, I would not otherwise have concluded that the agreement of the employees was not genuine." (footnotes omitted)

[25] Grounds 4 to 7 (inclusive) of the Notice of Appeal provide:

"4. The Commissioner erred in finding at [138] of the Decision that the relevant communications were not misleading.

5. The Commissioner erred at [138] and [139] of the Decision by applying the wrong test of requiring evidence that employees were misled or that they changed their vote because of the relevant communications.

6. The Commissioner erred by failing to give any, or any adequate, reasons for his finding at [138] of the Decision that the relevant communications were not misleading.

7. The Commissioner erred in concluding at [142] of the Decision that even if a sufficient number of employees were misled such as to alter the outcome of the vote, he would otherwise have concluded that the Agreement was genuinely agreed."

[26] Were the communications misleading?

[27] In the impugned communications the University variously represented:

- "that the $750 sign-on bonus was available to every current casual staff member should the agreement be endorsed by a majority of staff" (1 and 3 November, emails);
- "all casual staff with a current contract will receive the $750 sign-on bonus" (3 November, email); and
- a "$750 payment is available to every current casual staff member should the agreement be endorsed by a majority of staff" (3 and 4 November, texts).

[28] These representations, in their various forms over this three day period, were misleading. They incorrectly stated that the sign-on bonus was payable upon endorsement of the Agreement by a majority of staff (that is, should the Agreement be voted up by a majority of persons voting) whereas in fact the Agreement provided for a sign-on bonus of $750 upon approval by the Commission (that is, should it be approved).

[29] This was misleading in two respects. Firstly, there is a clear difference between a majority of employees voting to make an agreement and a decision by the Commission to approve an agreement. Materially different events would trigger the sign-on bonus in each instance.

[30] Secondly, the occurrence of the two events differs in time with consequent impact on which persons are entitled to receive the sign-on bonus consistent with the representations made. Self-evidently, an approval decision follows a vote to make an agreement. This only occurs once an application is made to the Commission, formalities prescribed by the FW Act are complied with, proceedings are conducted and a decision is made whether or not to approve the agreement. The consequence of this is that a gap in time necessarily occurs between the making of an agreement and its approval. The cohort of persons employed at a time an agreement is made is not likely to be identical to the cohort at the time an agreement is approved. This is particularly so in the context of the tertiary sector where the date an agreement is made and the date of approval crosses academic years, as it did in this matter.

[31] We take into account the employer's submission that the erroneous representations made on 1 and 3 November 2022 occurred in the context of earlier accurate representations made by the University on multiple occasions in the days and weeks prior.[12] However, we do not consider that an earlier accurate representation cures the problem of later misrepresentations or alters their character. In this matter, the terms of the later misrepresentations, neither expressly nor by inference, could reasonably be understood as having been subject to or qualified by the language of the earlier representations.

[32] We also reject the employer's submission that the representations on 1 and 3 November 2022 given their use of the phrase "current casual staff" or "casual staff with a current contract" is ambiguous rather than misleading. The reference to "current" wherever occurring in the impugned emails and text takes its meaning from the sentence in which it appears and the date of the communication. It cannot be read down to connote currency to a future contingent event (approval) when its terms expressly refer to persons with a then current contract and who are entitled to vote.

[33] Accordingly, we consider that the Commissioner was wrong to conclude, as he did at [138] of the Merits Decision, that the communications were not misleading. They were misleading on their face.

[34] We note that the Commissioner provided no reasons for this conclusion. In failing to do so we consider that the Commissioner also erred in that this was a significant conclusion made in circumstances where contested propositions concerning an alleged misrepresentation had been advanced at first instance.

[35] However, we agree with the First Respondent that the fact that a misrepresentation is made in the course of an access or voting period does not, of itself, mean that the Agreement was not genuinely agreed. The issue which determines that question is whether, in the words of the Full Bench in *Appeal by Australian, Municipal, Administrative, Clerical and Services Union:*[13]

> "…it could reasonably be expected to have the effect of deceiving those employees into voting for something which, if they had known the true position, they would not have voted for."

[36] Were the misrepresentations such that they could have reasonably been expected to have had this effect? The Commissioner concluded at [139] to [142] of the Merits Decision that this conclusion was not open to be made. In so deciding, the Commissioner erred.

[37] Firstly, we agree with the NTEU that, in deciding that this was not open because no person had given evidence that they had in fact been deceived such that they would have changed their vote, the Commissioner applied the wrong test. The test is not whether evidence from a particular voter or voters is before the Commission. The test is whether the evidence taken as a whole, when considered objectively, leads to such a conclusion.

[38] Nor was this a matter where all that was available to the Commissioner was the application of a "common sense"[14] view of the impugned communications and their effect. The Commissioner had more than that before him.

[39] The evidence before the Commissioner was:

- the fact of the false statements as sent by email and by text;
- the fact that the false statements were made immediately prior to and during the voting period;
- the fact that the false statements were made in the same communication by the University which encouraged persons to vote;
- the fact that the representations were made to staff including casual staff and that the representation on 1 November 2022 was exclusively directed to casual staff[15];
- the fact that casual staff comprised more than 50% of persons entitled to vote;
- the fact that the subject matter of the representations was a financial inducement in the form of a sign-on bonus to vote in favour of the Agreement;
- the fact that casual employees in particular, paid as they are by the hour, were likely to consider a financial inducement to be material to their interests and relevant to their voting intention; and
- the fact that the majority which voted in favour did so by a relatively slender margin.

[40] These considerations were not engaged in by the Commissioner in a substantive way. In failing to do so, the Commissioner fell into error. Further, collectively these considerations constituted a proper basis for supposing that the misleading statements may have materially affected the outcome of the ballot.

[41] That being so, it cannot have been safely concluded that the majority which voted in favour "genuinely agreed" within the meaning of ss 186(2)(a) and 188. In so concluding the Commissioner erred. Further, the proposition advanced by the Commissioner at [142], that even accepting the NTEU submission it could not be concluded that the Agreement was not genuinely agreed, is advanced without explanation, is inherently inconsistent and cannot be sustained.

[42] For these reasons grounds 4 to 7 are made out. That being so, the decision is affected by appealable error.

Grounds 1 to 3: the casual eligibility issue

[43] Grounds 1 to 3 raise substantive and important questions concerning when a casual is "employed at the time" within the meaning of s 181 particularly in the light of the somewhat discordant Full Bench decisions in *McDermott* and *Noorton*, and the subsequent High Court decision in *Rossato*.

[44] Having determined that the Merits Decision and Approval Decision were affected by appealable error on account of the Commissioner's finding of genuine agreement, it is not necessary to deal with the casual eligibility issue.

[45] We do not consider it appropriate to do so as any observations we make would necessarily be *obiter* given that the appeal can be disposed of on the aforementioned basis. The proper application of s 181 in the context of a substantial casual voting cohort and the implications, if any, of the High Court decision in *Rossato* is a matter best dealt with where it is determinative of a matter.

Grounds 8 to 11: the BOOT issue

[46] For similar reasons, it is not necessary to deal with grounds 8 to 11. We simply make one observation on this question.

[47] The NTEU advanced the proposition at first instance that a greater capacity for the use of fixed-term contracts in the Agreement meant that the Agreement failed to pass the BOOT. It advanced two reasons. It relied upon alleged contingent impacts on entitlements to redundancy pay and notice of termination rights (first limb of argument) and on general notions of alleged greater job insecurity (second limb).

[48] Leaving aside whether those propositions were merited, we note that the Commissioner dealt at some length with the first limb of the NTEU contention and the alleged mathematical calculations that underpin it.[16] However, the Commissioner appears to not have expressly dealt with the second limb or provided reasons why it was rejected. Whilst we accept that submissions concerning contingent impacts on job security may involve more opaque value

judgements and less orthodox calculations for BOOT purposes, those matters, when they fall for decision, must be dealt with at first instance if they are seriously advanced.

Conclusion

[49] As the Commission could not have been satisfied that the requirements of s 186(2)(a) had been met (genuine agreement) a necessary precondition to approval of the Agreement did not exist. The decision to approve the Agreement was made in error because the University had inadvertently caused the voting period to be infected by misrepresentation which then reasonably called in question whether the Agreement had been genuinely agreed by a majority of voters.

[50] The University submitted that, should the decision be affected by error, the shortcomings could be cured by an undertaking or by this Full Bench providing the University an opportunity to consider the terms of a revised or additional undertaking.

[51] We do not consider that error of the type identified is amenable to being cured by an undertaking. The Agreement was unable to be approved because of the misrepresentations that had been made to the voting cohort. Whilst undertakings can restore or remediate rights or commit to future conduct, they cannot retrospectively alter established facts; in this case that doubt reasonably exists about whether a majority of voters in the ballot genuinely agreed. Whilst not all errors or misrepresentations in a bargaining or balloting process are incapable of being cured by undertakings, a closely contested ballot distorted by a material misrepresentation concerning a contingent financial payment to encourage a cohort of casuals to vote cannot be cured by a latent undertaking to make the payment to that voting cohort. It matters not that the misrepresentation was unintended or that the University may have already done so.

[52] It follows that the decision approving the Agreement must be quashed.

[53] In light of the aforementioned findings, there is no basis upon which the Commission can conclude that the Agreement, as voted on in November 2022, is capable of approval. Sections 186(2)(a) and 188 of the FW Act are not satisfied. As the originating application was not capable of being granted it must be dismissed.

Disposition

[54] We order as follows:

1. Permission to appeal is granted;

2. The appeal is allowed;

3. The decision to approve the *Southern Cross University Enterprise Agreement 2021* (Agreement) [2023] FWCA 2691 is quashed; and

4. The application (AG2022/4745) to approve the Agreement is dismissed.

VICE PRESIDENT

Appearances:

Mr C Dowling SC, *of Counsel*, *with permission*, with Mr J Kennedy, *on behalf of* the National Tertiary Education Industry Union

Mr R Dalton KC and Mr N Burmeister, *of Counsel*, *with permission*, on behalf of Southern Cross University
Mr N Keats, *with permission*, on behalf of the Community and Public Sector Union

Hearing details:

2023
Sydney (in person)
18 October

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[1] [2023] FWC 2077; [2023] FWCA 2691.

[2] Merits Decision [86] – [90].

[3] At [11].

[4] At [177] – [178].

[5] This is so because on appeal the Commission has power to receive further evidence, pursuant to s 607(2); see *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47, 203 CLR 194, 74 ALJR 1348, 174 ALR 585, 99 IR 309 at [17] per Gleeson CJ, Gaudron and Hayne J.

[6] *Wan v AIRC* [2001] FCA 1803, 116 FCR 481 at [30].

[7] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089, 202 IR 388 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, 192 FCR 78, 207 IR 177; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28].

[8] *McDermott Australia Pty Ltd v The Australian Workers' Union* (2016) 255 IR 146.

[9] *Construction, Forestry, Maritime, Mining and Energy Union v Noorton Pty Ltd T/A Manly Fast Ferry* [2018] FWCFB 7224.

[10] *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456.

[11] At [137] to [142].

[12] As summarised in Aide Memorie submitted on appeal at pages 6-7 (19 October 2023), Page 8 (Proposed Agreement), page 9 (Explanatory Document), page 10 (On-line power point) and pages 11, 12 and 13 (Q & A Session Briefing Notes).

[13] [2013] FWCFB 7453, [28].

[14] *Application by Maurice Alexander Management Pty Ltd* [2022] FWC 3236, [53] per Gostencnik DP.

[15] Attachment SF17 to Witness Statement of Sharon Farquhar.

[16] Merits Decision at [143] – [160].