DECISION

Fair Work Act 2009
s.217 - Application to vary an agreement to remove an ambiguity or uncertainty

Qube Logistics (Rail) Pty Ltd Trading AS Qube Logistics
v
Australian Rail, Tram and Bus Industry Union
(AG2023/2561)

DEPUTY PRESIDENT CROSS SYDNEY, 3 NOVEMBER 2025

Application for variation of the QUBE Logistics (Rail) Train Crew and RTBU NSW Enterprise Agreement 2019 and the QUBE Logistics (Rail) Train Crew and RTBU NSW Enterprise Agreement 2015- whether a fair-minded lay observer might reasonably apprehend that the Member might not bring an impartial mind to the resolution of the question the Member is required to decide – whether apprehension reasonable – recusal application granted.

Procedural Background

[1] The Applicant (Qube) applied to the Fair Work Commission under s 217 of the *Fair Work Act 2009* (Cth)(the Act) for orders that the Commission vary with retrospective effect two enterprise agreements to remove a claimed ambiguity or uncertainty (the Application). The two enterprise agreements (the Agreements) were:

(a) The *QUBE Logistics (Rail) Train Crew and RTBU NSW Enterprise Agreement 2015* (the 2015 Agreement); and

(b) The *QUBE Logistics (Rail) Train Crew NSW Enterprise Agreement 2019* (the 2019 Agreement).

[2] The variations were sought on the grounds that the Agreements were ambiguous or uncertain in their application because they did not reflect the objectively ascertained common intention of Qube, the Australian Rail, Tram and Bus Industry Union (the RTBU), and the employees who voted on the agreements. Qube sought orders from the Commission that the Agreements should be varied so that their terms accorded with what it asserted was the objectively ascertained common intention.

[3] At first instance, I dismissed the Application[1] (the Decision), for two reasons:

(a) The 2015 Agreement was no longer in operation at the time Qube made the Application, and therefore in relation to that agreement, Qube did not have standing under s 217 because it was no longer covered by that agreement;[2]

(b) While there was an ambiguity or uncertainty in the application of the Agreements, I did not accept that Qube had established on the facts the common understanding or intention for which it contended.

[4] Qube sought permission to appeal the Decision to the Full Bench of the Commission. The Full Bench granted permission to appeal but dismissed the appeal[3] (the FB Decision). The Full Bench held that the Decision did not disclose error in the rejection of Qube's claimed common intention, going further to hold that any contrary finding was not available on the evidence. The Full Bench further held that the Decision did not disclose error in holding that Qube lacked standing to apply to have the 2015 Agreement varied.

[5] Qube commenced proceeding in the Federal Court's original jurisdiction seeking the issue of constitutional writs to quash the FB Decision, and in turn the Decision at first instance. Qube also sought a writ of mandamus to require the Commission to hear and determine the Application according to law.

[6] In a judgment dated 2 June 2025 (the FC Judgment), the Full Court of the Federal Court issued a writ of certiorari to quash the FB Decision and the Decision. Additionally, the Full Court issued a writ of mandamus requiring the Commission to hear and determine Qube's application to vary the 2019 Agreement according to law.

[7] The Full Court also held there was no utility in requiring the Commission to hear the Application to the extent that it concerned the 2015 Agreement because Qube lacked standing to make that application.

The Source of Error Found by the Full Court

[8] Witness evidence was adduced by the parties. Qube's witnesses were:

(a) Mr Dan Coulton, General Manager – Industrial Relations for Qube;

(b) Mr Rodney Rich, a Train Driver with Qube; and

(c) Mr Shayne Johnson, also a Train Driver with Qube.

Mr Rich and Mr Johnson were involved as representatives of the RTBU in bargaining for the 2015 Agreement.

[9] The RTBU's witnesses were Kevin Pryor, a RTBU Organiser, and Peter Matthews, a RTBU Legal Officer.

[10] All the witnesses gave their evidence-in-chief by written witness statements and all except Mr Matthews were subject to cross-examination.

[11] In the Decision I dealt with the evidence given by the individual witnesses. I found that:

(a) Neither Mr Rich's nor Mr Johnson's evidence withstood the slightest scrutiny and that their evidence given in cross-examination was supportive of the RTBU's case;

(b) Mr Coulton exhibited a tendency to provide evidence, and answers to questions asked of him, with content that he thought would best advance the case of Qube, and made findings adverse to Mr Coulton's credit; and

(c) Mr Pryor's evidence concerning what he told, or did not tell, employees about the negotiation of the 2015 Agreement warranted criticism, but those failures had limited impact on the question of the common intention of the parties.

[12] I then made various findings concerning bargaining meetings which occurred in early 2014, including meetings on 22 January and 14 March 2014, and accepted Mr Pryor's explanation of various notations recording agreement to allow for the incorporation of the Award, and to provide for shift penalties and penalties for weekends.

[13] In its submission urging against the above findings, Qube relied upon a submission document entitled *'Qube's "Road map" of propositions and subsidiary findings necessary to find that Qube agreed to pay the Award penalties and loadings'* (The Road Map). This document contained 15 propositions each of which, Qube contended, would have to be accepted for the RTBU's case to be accepted.

[14] In the Decision, I did not make express findings in respect of each of the 15 propositions contained in Qube's Road Map. While the Full Bench did not consider appealable error arose from that approach,[4] the Full Court did find error, and held:[5]

> *The Road Map submission was significant to Qube's case, as it reflected an accumulation of detail that Qube submitted supported its case. It formed the basis of a submission by Qube to the Deputy President that the evidence of Mr Pryor that Qube had agreed to pay Award Penalties at the 22 January 2014 meeting should not be accepted because it could not be reconciled with a large body of consequential propositions which, on Qube's case, were founded on objective circumstances and other established facts. A submission of this type to a tribunal of fact in support of a claim that the evidence of a witness should not be accepted is entirely conventional. In Fox v Percy [2003] HCA 22; 214 CLR 118, Gleeson CJ, Gummow and Kirby JJ referred at [31] to judges limiting their reliance on the appearance of witnesses, and reasoning their conclusions, as far as possible, "on the basis of contemporary materials, objectively established facts and the apparent logic of events".*

[15] The Full Court concluded their consideration of the Decision by finding:[6]

> *The propositions in the Road Map that related to the actual intention of the parties were clearly relevant to Qube's application to the Commission and required careful consideration. That the Deputy President set out the propositions from the Road Map at D [82] in a high-level summary did not demonstrate an adequate consideration of those submissions. In our view, the Deputy President's reasons at D [109] show the inadequacy of his consideration of those submissions.*

Recusal Application

(a) Qube's Submission

[16] Qube submitted that the basic principles of apprehended bias are well-settled, being:

> *(a) Subject to presently irrelevant issues of waiver and necessity, a decision-maker is "disqualified if a fair-minded lay observer might reasonably apprehend that [they] might not bring an impartial mind to the resolution of the question [they are] required to decide".*[7]
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> *(b) "The question is one of possibility (real and not remote), not probability".*[8] *"[I]t is a 'double might' test, requiring a possibility, on reasonable grounds, that a hypothetical lay observer think it possible that the [decision-maker] might fail to bring an impartial mind to the question [they are] tasked with resolving".*[9]
>
> *(c) The application of the principle "requires two steps. First, it requires the identification of what it is said might lead [the decision-maker] to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".*[10] *"To this is added the express or implied requirement, also sometimes referred to as a third step to the test, that the apprehension of bias so identified must itself be reasonable in all the circumstances".*[11]
>
> *(d) "While the fair-minded lay observer is not assumed to have a detailed knowledge of the law, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice".*[12] *"[T]he hypothetical fair-minded lay observer will be aware of the question the [decision-maker] is tasked with deciding and its legal, statutory and factual context".*[13]

[17] Qube further submitted there existed a line of authorities[14] explaining how general recusal principles apply in a situation where a decision-maker is called-upon to determine a factual issue about which he or she had already made a finding in prior litigation. Those authorities establish that ordinarily such a decision-maker is generally disqualified by apprehended bias. That line of authority was most succinctly observed in *British American Tobacco Australia Services Ltd v Laurie,*[15]where a majority of the High Court observed:

> *In Livesey it was recognised that the lay observer might reasonably apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature.*

[18] Qube submitted that I will be required to make fresh factual findings in substitution for my own prior factual findings on the same issues, including re-assessing the credibility of witnesses. That in itself would ordinarily cause a fair-minded lay observer to consider that the I may not bring an impartial mind to the re-making of these factual findings. Qube particularly focussed on my previous findings regarding the 22 January 2014 meeting.

(b) RTBU's Submission

[19] The RTBU did not materially cavil with the statement of principles concerning reasonable apprehension of bias at stated by Qube. Additional propositions identified by the RTBU were:

(a) Disqualification on the grounds of apprehended bias must be firmly established;[16]

(b) A finding of apprehended bias is not to be reached lightly;[17]

(c) An apprehension that an issue may be decided adversely to a party does not constitute an apprehension that the issue might be determined other than impartially;[18] and

(d) The question of apprehended bias must be considered in the context of the issue or issues the Commission has to decide. Thus, the question of apprehension of bias is inextricably interwoven with identification of the issues the Commission is called upon to decide, which requires identification of the issues that may arise at the final hearing.[19]

[20] To the extent that Qube submitted that the *"ordinary position"* is that there will always be a reasonable apprehension of bias where a decision-maker has expressed a view of the facts, the RTBU submitted there was no such decision-rule and what Qube needs to demonstrate is that by reason of my previous conclusions on particular factual matters, I will be immovable, or at least very difficult to move, from those positions at the rehearing.

[21] The RTBU noted that Qube applied for an order that the Application be remitted for determination to someone other than myself, and the Full Court made no such order.[20]

[22] The RTBU ultimately submitted that it is untenable for Qube to argue that my mind is not open to persuasion on an issue about which I did not consider or engage with in Qube's submissions. There is no logical or rational reason why a fair-minded lay observer would conclude that I would not be willing or able to reach a different result on this issue after carefully considering and engaging with Qube's *"Road Map"*.

(c) Qube's Reply Submission

[23] Qube submitted the RTBU seeks to impermissibly downplay the significance of the 22 January 2014 meeting, notwithstanding that what happened in that meeting bears on issues of discretion, ambiguity and common intention.

[24] While Qube asked the Full Court to remit the matter to the Commission differently constituted and the Full Court did not do so, the Full Court's reasons did not address that issue. The Full Court was simply silent on the issue.

Consideration

[25] The test for apprehension of bias to be applied is what is described in the authorities as the double might test. I must recuse myself if a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the questions I am required to decide. The test is concerned with the possibility, not probability, and is assessed objectively through the prism of a lay bystander.

[26] I accept that there is a line of authorities involving situations where a decision-maker is called-upon to determine a factual issue about which he or she had already made a finding in prior litigation, or express a view about the credit of a witness, and that the authorities recognise such situation as ordinarily giving rise to a reasonable apprehension of bias.

[27] It is clear that what in fact occurred in the 22 January 2014 meeting is relevant to both the question of ambiguity/uncertainty, and whether the discretion should be exercised to make a variation. I have already made findings as to the version of that meeting that I accepted. I previously found:[21]

> *[53] On 22 January 2014, a high level meeting occurred at the RTBU National Office at Trades Hall in Sydney. Qube were represented by Mark Owens, and the RTBU was represented by Mr Pryor and Mr Barden. Other bargaining representatives did not attend. I accept that Mr Pryor had taken a printed copy of the Shift Penalties Allowance Multiplier clause from the Pacific National NSW Bulk Rail Enterprise Agreement to facilitate discussions on the topic of shift penalties. Mr Pryor wrote his notes directly onto the Pacific National clause. Those notes, that were signed and dated, described where and when the meeting occurred, who attended, and included the notation:*
>
> > *"MO. No Rosters in Place*
> > *Agree to leave clause 4 (Part A) to cover shift penalties & weekends*
> > *Make sure above Award"*
>
> *[54] I accept Mr Pryor's explanation that the above notation records Mr Owens rejecting the idea of including a clause similar to the Pacific National NSW Bulk Rail Enterprise Agreement as that clause required forecast master rosters to work out applicable penalties in advance, a style of rostering Qube could not accommodate. Instead, there was agreement to allow clause 4 of Part A, which incorporates the Award, to provide for shift penalties and penalties for weekends. Further, by the notation "Make sure above award", Mr Pryor was referring to the way shift penalties were calculated under the Rail Industry Award, which relied on a nominal classification and a formula to create an applicable hourly loading.*

[28] A further issue of significance to the question of ambiguity and the discretion as to whether or not to vary the Agreements is Mr Coulton's credibility, because his evidence goes to whether Qube agreed to pay the award penalties on top of the rates.

[29] While Mr Coulton wasn't at the 22 January 2014 meeting, he attended the subsequent meeting on 14 March 2014, and there are competing versions of what occurred at that meeting.

[30] I have already made findings as to Mr Coulton's credit. In particular, I have found as follows:[22]

[34] Mr Coulton exhibited a tendency to provide evidence, and answers to questions asked of him, with content that he thought would best advance the case of Qube. The most potent example of that tendency related to the draft document from the RTBU provided on 24 March 2014, being a draft of the 2015 EA. In his first statement, Mr Coulton deposed, extraordinarily, as follows:

> *There were various updated drafts of the Core Conditions Document prepared by Qube and the RTBU during the course of bargaining for the 2015 EA, but clauses 4 and 5 did not change and were ultimately included in the final version of the 2015 EA. The clauses did not change because, as discussed further below, they were never discussed or raised by either party. No-one ever said or stated what the clauses were supposed to do, nor how they were supposed to operate (if at all).*

[35] Mr Coulton was the General Manager of Industrial Relations and experienced in enterprise bargaining. He understood that enterprise agreements could incorporate terms from other instruments, including awards, and was familiar with the provisions of the Rail Industry Award.

[36] Notwithstanding his ample experience in enterprise bargaining, Mr Coulton had to be taken in the finest detail to clause 4.2 of the 2015 EA, in order to have him, reluctantly, accept that the clause in the 2015 EA was identical to that put by the RTBU on 24 March 2014. Even if the RTBU document of 24 March 2014 could have been afforded the scant attention assertedat that time, which I do not accept, it is simply incomprehensible that Mr Coulton could be so vague as to its contents and impact where it the apparent source of these proceedings and the Underpayment Claim.

[31] It is undoubted that, should I not recuse myself, I will be required to revisit many factual determinations, including the 22 January 2014 meeting, the 14 March 2014 meeting. I will also be required to revisit issues of the credit of Mr Prior and Mr Coulton, in relation to which I have made detailed findings. In any such remittal, I would have to consider making different findings to those contained in the Decision.

[32] I consider that fair minded observer of such circumstance might reasonably apprehend that I might be unable to bring an impartial mind to the remittal in which the same facts must be determined. That lay bystander, recognising human frailty, might reasonably apprehend that I might be disinclined to arrive at different conclusions.

Conclusion

[33] In the particular circumstances of this matter, I am satisfied that in the Decision I have made factual and credit findings that may lead a lay observer to apprehend that I may not bring an impartial mind to the determination of the Application.

[34] I am satisfied in the circumstances that I should recuse myself from further hearing the Application.

[35] The file shall be reallocated, and the parties will be contacted for further programming of the matter in due course.

DEPUTY PRESIDENT

Appearances:

Mr R Dalton KC, on behalf of the Applicant.
Mr D Ward of Counsel, on behalf of the Applicant.

Mr P Boncardo of Counsel, on behalf of the Respondent.
Mr P Matthews instructing, on behalf of the Respondent.

Hearing details:

10AM.
Sydney.
10 September 2025.

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[1] *Qube Logistics (Rail) Pty Ltd v Australian Rail, Tram and Bus Industry Union* [2024] FWCA 616.

[2] *Qube Ports Pty Ltd v Construction, Forestry and Maritime Employees Union* [2024] FCAFC 132; 305 FCR 554 *(Qube Ports v CFMEU*).

[3] *Qube Logistics (Rail) Pty Ltd v Australian Rail, Tram and Bus Industry Union* [2024] FWCFB 331.

[4] FB Decision at [72].

[5] FC Decision at [145].

[6] FC Decision at [158].

[7] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (*Ebner*) at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[8] *Ebner* at [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[9] *ASIC v Sunshine Loans Pty Ltd* (2025) 308 FCR 514 (*Sunshine*) at [85] (Bromwich J).

[10] *Ebner* at [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[11] *Sunshine* at [77] (Bromwich J).

[12] *Sunshine* at [139] (Colvin J).

[13] *Sunshine* at [82] (Bromwich J).

[14] *Livesey v NSW Bar Association* (1983) 151 CLR 288 (*Livesey*); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343 at [14]; and *Sunshine*.

[15] (2011) 242 CLR 283 at [139].

[16] *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 (Mason J) and 360 (Wilson J).

[17] *CNY17 v Minister for Immigration and Border Protection (2019) 268 CLR 76* at [56] (Nettle and Gordon JJ).

[18] *Re JRL; Ex parte CJL* at 352.

[19] *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 109 at [97] (Brereton J).

[20] FC Decision at [86].

[21] Decision at [53] and [54]. See also [109(a)].

[22] Decision at [34] to [36].