



DECISION

Fair Work Act 2009

Section 526 - Application to deal with a dispute involving stand down

Mr Ryan La Plume

v

Thomas Foods International Pty Limited T/A Thomas Foods International
(C2020/4731)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 15 JULY 2020

Application to deal with a dispute involving stand down – export documentation clerk – impact of COVID-19 – whether stoppage of work – whether able to be usefully employed – reduced work demand but no stoppage of work – fairness principle – payment for portion of stand down in resolution of dispute

[1] On 18 June 2020 Ryan La Plume (Mr La Plume or the Applicant) applied to the Commission to deal with a stand down dispute under section 526 of the *Fair Work Act 2009* (FW Act).

[2] The responding party is the then employer, Thomas Foods International Pty Ltd (Thomas Foods or the Respondent).

[3] I conciliated the matter on 24 June 2020 and referred the parties into private conference. The dispute did not resolve. Mr La Plume requested it be arbitrated. What did resolve in private discussion was agreement between Mr La Plume and Thomas Foods that his position be made redundant effective 25 June 2020, and the terms of redundancy.

[4] I issued Directions on 26 June 2020 and heard the stand down dispute (by phone) on 9 July 2020.

[5] I received material by way of evidence and submission from Mr La Plume and Thomas Foods. I took oral evidence from Mr La Plume and from an officer of Thomas Foods, Ms Young (Group Human Resources Manager).

Facts

[6] The Thomas Foods group is a nationally operating meat processing and wholesale sales business based in Adelaide, South Australia with processing operations in multiple states supplying national and global export markets.

[7] The responding entity employing Mr La Plume (Thomas Foods International Pty Ltd) is but one of a number of corporate entities within the Thomas Foods group. That entity is the business which operates its corporate head office in Adelaide, where Mr La Plume worked. In

contrast, persons employed in processing (for example, at Lobethal in South Australia) are employed by different entities within the group.

[8] Mr La Plume commenced with Thomas Foods in May 2015 as an export documentation clerk. He was one of four members of the export document team, which included his immediate manager and two other clerks. His senior manager was Group Cold Chain and Logistics Manager, Mr Miller. The export documentation team was based in head office.

[9] As a matter of practicality, the team divided work into country or regional groupings though staff generally covered the absence of others. Mr La Plume had particular expertise in export documentation relating to the NAFTA countries (United States, Canada and Mexico). At the time of his stand down this was his core work. He also managed air freight paperwork. Occasionally he performed work in a separate unit (sales) when this was required.

[10] Mr La Plume was a full-time employee.

COVID-19 impacts

[11] Since January 2020, the COVID-19 pandemic has disrupted global economic activity, with impacts affecting the Australian economy from February and March 2020.

[12] Restrictions on economic activity have been implemented by governments on the advice of public health authorities. Global demand has fallen. Unlike some, Thomas Foods has not ceased operating. However, from both a logistical and demand perspective, the impact of COVID-19 on its business has been material.

[13] Although the situation remains fluid, the fall in global demand and constraints in supply chains have impacted export markets serviced by Thomas Foods. For example, the significant impact of COVID-19 in the United States has led to logistical delays in getting export product to market even where demand exists.

[14] These impacts have been felt by Thomas Foods over time but not uniformly. Parts of the business have been more impacted than others. Demand and logistic constraints, together with uncertainty and economic threat, has led Thomas Foods to take steps to protect its commercial interests. This has included reducing its labour force by not rostering some casuals, by standing down some permanent employees and by not filling some positions as they become vacant.

[15] Approximately 300 employees have been stood down to date. Most of these worked in processing operations. Most persons stood down were employed by an entity within the group eligible for the government wage subsidy (of \$1,500 per employee per fortnight) through the Jobkeeper programme. Eligibility was a product of the level of decline in processing activities.

[16] Decline in business activity in head office has been less significant. The employer of Mr La Plume and other head office staff (Thomas Food International Pty Ltd) is not currently eligible for Jobkeeper.

[17] On 28 April 2020 Mr La Plume was called into a meeting with Mr Miller. He was told that the impact of COVID-19 required the business to stand down some head office personnel, and that he would be stood down without pay from 4 May 2020 with his stand down to be reviewed on 29 June. He was given a letter which stated:¹

“Unfortunately, the Covid-19 Pandemic has also caused stoppages of work not only affecting your particular employer and workplace, but also stoppages across many other operations of Thomas Foods International. The organisation has been forced to stand down many employees.

The purpose of this letter therefore is to inform you that you will be stood down without pay from Monday the 4th of May, (sic) 2020. We have explored whether there is any other useful employment for you to do as an alternative to standing you down, but unfortunately there is none.

This stand down will be until further notice. We plan to keep you up to date as the situation develops. During the period of stand down you may access any annual or long service leave that you may have.”

[18] Mr La Plume was one of five head office employees stood down that day. No others were from his work unit (the export documentation team).

[19] Mr La Plume worked the remaining scheduled days of the week (29, 30 April and 1 May) until his stand down commenced. During this time he ascertained that only he from the export documentation team had been stood down, that his work on export and air freight documentation would be spread amongst the remaining three employees, and that access to Jobkeeper, whilst uncertain, did not appear promising. In discussions with Ms Young, Mr La Plume declined to access the remaining annual leave balance he had accrued (about seven days).²

[20] Over the next six weeks, whilst at home with a young family and not earning income, Mr La Plume became increasingly anxious. He spoke to Mr Miller on around 10 May 2020 and then corresponded extensively with Thomas Foods (Ms Young and Mr Miller) in the weeks that followed. Some seventeen emails were exchanged between 11 May and 25 June 2020.³ Nine were sent by Mr La Plume and eight were responses by Thomas Foods.

[21] The tone of these exchanges from both Mr La Plume and in reply from Thomas Foods was to the point, professional and respectful.

[22] Mr La Plume instigated these communications. He made reasonable inquiries about Jobkeeper, about the status and timing of the review of his stand down, about possible redeployment options, about a right to secondary employment, and then ultimately (on 10 June) his desire to be made redundant rather than remain on indefinite stand down.

¹ A2

² Hearing, 9 July 2020, audio recording at 1:28:00

³ A3: Emails 11/5, 11/5, 13/5, 14/5, 18/5, 18/5 and 19/5; A4: Emails 5/6, 9/6, 9/6, 10/6, 10/6, 11/6, 22/6, 24/6, 25/6 and 25/6

[23] When (on 11 June) Thomas Foods rebuffed his request to be made redundant (indicating that a decision had not then been made to permanently remove his position) Mr La Plume sought advice from the Fair Work Ombudsman.

[24] A week later, Mr La Plume commenced these proceedings (18 June).

[25] As noted, following private discussions recommended by the Commission, agreement was reached that Thomas Foods would make Mr La Plume's position in the export documentation team redundant. Terms of redundancy were agreed (in line with National Employment Standards).

[26] Mr La Plume's employment ceased on 25 June 2020. He was paid accrued leave plus pay for one public holiday during his stand down. Otherwise, Mr La Plume was not paid for the period of stand down.

Submissions

[27] Mr La Plume challenges the stand down on two grounds:

1. that it is not authorised by section 524 of the FW Act. In particular he says that the requirement in section 524(1)(c) that he "cannot be usefully employed because of...a stoppage of work for any cause for which the employer cannot reasonably be held responsible" has not been met; and
2. that, in any event, the terms of the stand down and the employer's conduct during the stand down made it unfair.

[28] Mr La Plume seeks an order that he be paid wages for the period of stand down, or in the alternative, eighty per cent of his wage (that is, pay for four out of five working days in each week of stand down).

[29] In support of these contentions Mr La Plume submits:

- the stand down took him by surprise and when notified on 28 April 2020 he was given too little time to prepare before it came into effect (4 May);
- there was no stoppage of work due to COVID-19 or any other reason. Up until he was stood down, he had a full work load, as did other members of the export documentation team;
- no proper consideration was given to redeployment or alternate options, such as the option of all members of the export documentation team taking reduced hours. Instead he was the only team member stood down;
- he had only a low annual leave balance at the time of stand down and this should have weighed against standing him down;
- Thomas Foods did not adequately communicate during the period of stand down, leaving him in the dark and feeling isolated from the workplace and frustrated; and

- the stand down would have been fairer if all members of the export documentation team had to work a shorter week (four days) rather than he alone being fully stood down.

[30] In response, Thomas Foods submit that the stand down was authorised by section 524 of the FW Act and fair in implementation. It submits:

- the employer held off making any head office employee stood down or redundant until absolutely necessary and well into the impact of COVID-19 on its business. Other business units experienced stand downs in advance of Mr La Plume;
- Mr La Plume was not singled out. He was one of five head office employees stood down on 28 April 2020;
- the stand down was a fair response as it mitigated (or delayed) the need for redundancies;
- by the end of April 2020 COVID-19 was having a material impact on export activities and the work performed by both the export documentation team and Mr La Plume in particular;
- redeployment and alternatives were considered and discussed with Mr La Plume but no viable options existed; and
- regular communication with Mr La Plume occurred during the stand down period. In an uncertain environment, the employer kept Mr La Plume as well informed as it could and acted promptly and respectfully in its responses.

Consideration

Jurisdiction

[31] Though Mr La Plume and Thomas Foods agreed during the life of these proceedings to a redundancy on agreed terms, each recognise that the redundancy agreement did not resolve the stand down dispute.

[32] No jurisdictional barrier exists to determining the stand down dispute despite the subsequent redundancy agreement, and no submission to that effect was made. Mr La Plume was at the time of making the application an employee who had been stood down. He has standing to apply under section 526 of the FW Act. He seeks that the conduct of Thomas Foods be adjudicated for consistency with section 524 and fairness. He seeks a remedy, not for a future period but for the period between his stand down and the redundancy taking effect. The private redundancy agreement was made on the basis that Mr La Plume would independently form a view whether he wished to pursue the stand down dispute beyond the (then) conciliation. He has done so. He has actively prosecuted his claim.

[33] In these circumstances there is no impediment, either at law or in discretionary considerations, not to deal with the application notwithstanding the employment relationship having now ceased. There is utility in doing so.

[34] Section 524 of the FW Act provides:

524 Employer may stand down employees in certain circumstances

- (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
 - (a) industrial action (other than industrial action organised or engaged in by the employer);
 - (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
 - (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

- (2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:
 - (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and
 - (b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

- (3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

[35] Section 526(4) provides:

- (4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

[36] Principles guiding the operation of these provisions were summarised by a full bench of the Commission in *SSX Services Pty Ltd v The Australian Workers Union*:⁴

“Importantly, the right to stand down employees under s.524 arises from the effect of the section itself. The right is not dependent on approval of the Commission. However, to the extent that a dispute arises in relation to the exercise of that right, the

⁴ [2015] FWCFB 3964 at [17]

Commission is empowered by s.526 to deal with that dispute by arbitration. The Commission is required to take into account fairness between the parties concerned and thereby incorporate an overall discretionary factor into the task of determining a dispute over whether the right to stand down is correctly invoked in the circumstances. The parties are bound by s.527 to comply with an order of the Commission dealing with a dispute.”

[37] The well-established canons of statutory construction apply to section 524. These require the ordinary meaning of words used by the parliament to be adopted having regard to context and purpose.

[38] A statutory right to stand down is an important qualification to an obligation which an employer would otherwise have to pay an employee lawfully applicable wages for work performed. As an exception to what would otherwise be a fundamental term of an employment contract (to pay wages) the provision needs to be applied without excessive breadth but in a manner that gives effect to its language and purpose.

[39] Context also matters, both statutory and factual.

[40] The FW Act establishes a national scheme for the regulation of workplace rights, responsibilities and relationships across employers and employees of different age and maturity in diverse industries and enterprises in urban and regional Australia. Unsurprisingly, the FW Act contains multiple objects directed at common and competing interests. No single object has primacy though all must be taken into account.

[41] The stand down provisions fall within a Part of the FW Act (Chapter 3 Part 3-5) directed at the protection of workplace rights which in turn is subject to the objects in section 3 directed at fairness and a balance between social and economic objectives. Those include the object of providing “fair” workplace relations laws that are “flexible for business” and “promote productivity and economic growth”⁵.

[42] A stand down under section 524 is a statutory tool available to a business (if pre-conditions are met) that sits alongside the right of an employer to make persons redundant where circumstances warrant. By providing the right to stand down there is a public policy purpose in giving an employer the option of retaining employment relationships in lieu of terminating employment. Doing so serves common and competing social and economic goals such as a continuing job but a temporary reduction in labour costs.

[43] The factual context applicable to Mr La Plume’s stand down is relevant. He was stood down in the context of a global pandemic that is materially shaking the economy and the markets in which Thomas Foods is operating. Those impacts continue to have unique features not the least of which is uncertainty as to duration and intensity.

[44] As Mr La Plume was employed by a head office entity not eligible for Jobkeeper, this dispute does not arise under Part 6-4C of the FW Act or the different language used by the parliament for a Jobkeeper enabling stand down (section 789GDC). This dispute is dealt with under the general stand down provisions of the FW Act (section 524).

⁵ Section 3(a) FW Act

[45] Two factual preconditions need to exist for Mr La Plume’s stand down to have been consistent with those provisions: that he could not be “usefully employed” and (given that neither (a) nor (b) apply) that this was because of “a stoppage of work for any cause for which the employer cannot reasonably be held responsible” (section 524(c)).

[46] A causal connection is required between the fact of not being able to be usefully employed, and the stoppage⁶.

[47] The only reason Thomas Foods stood Mr La Plume down was to mitigate against the impact of the COVID-19 pandemic on its business. This was made clear to Mr La Plume orally and in writing⁷. There is no dispute that the effects on the business were impacts for which the employer could not be reasonably held responsible. Indeed, the evidence is that senior management and owners of Thomas Foods have, since the outset of the pandemic, been diligently trying to mitigate those effects in order to retain markets, production capacity and employment.

[48] The issue in contention is whether there was a stoppage of work and whether Mr La Plume could not be usefully employed as a result of that stoppage.

[49] For the aforementioned reasons, what constitutes a “stoppage of work” in section 524 should not be so broadly construed as to include a mere downturn in business activity⁸ nor be so narrowly applied as to require the entire cessation of business activity. The statutory phrase is a stoppage of work, not a stoppage of the business. For there to be a stoppage of work some defined business activity with respect to which work is performed needs to cease⁹, but not the cessation of business activity entirely. Whilst in certain circumstances both may apply (for example, the fire at Thomas Foods Murray Bridge in January 2018 resulting mass stand downs and redeployments¹⁰) a business might still be operating notwithstanding an external event causing distinct areas of work to be sufficiently impaired so as to warrant stand downs.

[50] Similarly, an employee in those areas may not be able to be usefully employed even though other employees are able to continue working¹¹.

[51] In this matter it is not necessary to explore the outer boundaries of what is a “stoppage of work” or “useful employment” as I am not satisfied that the circumstances relating to Mr La Plume constituted a “stoppage of work” howsoever defined.

⁶ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Anor v FMP Group (Australia) P/L* [2013] FWC 2554 at [31]

⁷ R1 MY1

⁸ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Qantas Airways Limited* [2020] FCA 656 at [23] citing *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [26]-[28]; *Vehicle Builders Employees Federation of Australia v British Motor Corporation (Aust) Pty Ltd* (1966) 8 FLR 70 at 74-75; *Marson v Coral Princess Cruises (NQ) Pty Ltd t/as Coral Princess* [2020] FWC 2721 at [12]

⁹ *City of Wanneroo v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2008] AIRC 135 at [30]; *Bristow Helicopters Australia Pty Ltd v Australian Federation of Air Pilots* [2017] FWCFB 487 at [45] - [46]

¹⁰ See *Ball v Thomas Foods International Murray Bridge Pty Ltd* [2018] FWC 2486 at [26] to [28]

¹¹ See *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Qantas Airways Limited* [2020] FCA 656 at [21]

[52] Head office and the export documentation team experienced a downturn in overall work due to impacted supply chains. This warranted a reduction in hours worked. However, the work of head office continued. The work of the export documentation team continued. There was no stoppage of work of a defined business activity.

[53] There was however a causal connection between reduced work activity in the export documentation team and the fewer hours that needed to be worked by the four members of that team. Yet it cannot be said that Mr La Plume could not have been employed to do some of that work. Indeed, whilst demand relating to NAFTA countries was impaired, some United States supply chains remained and work was needed on export documentation. That work was reassigned to other team members once Mr La Plume was stood down, as was his work on air freight.

[54] Work did not stop; simply the demand for the level of work in a continuing business unit reduced in response to an external event. That is not a stoppage of work within the meaning of section 524.

[55] In drawing this conclusion, I take into account fairness, as required by section 526(4) of the FW Act.

[56] In this matter, those fairness considerations cut both ways.

[57] It was fair for Thomas Foods to reduce working hours in the export documentation team. A circumstance beyond its control had impacted demand, and whilst the relevant business activity did not stop the employer needed to make consequential reductions in labour. It was also reasonable for Thomas Foods to, at least initially, maintain employment relationships and use options short of redundancy. I am also satisfied that Thomas Foods genuinely considered redeployment opportunities, which neither the employer nor Mr La Plume could identify.

[58] Yet the employer chose to impose the whole burden of reduction in hours on one full time employee, Mr La Plume whilst retaining full time employment amongst other members of the business unit. That was unfair. I am not satisfied that Thomas Foods fairly selected Mr La Plume to carry the burden of reduction on an objectively verifiable basis. Some broad regard appears to have been had to his low annual leave balance and to skills. Yet his skills regarding NAFTA countries were not questioned, were still in demand and he was a longer serving employee than some others. To the extent relevant, an employee with a low leave balance is likely to have more trouble accommodating an income loss when being stood down compared to a person with a higher balance who can call on those accruals (or part of them) to sustain income for a temporary period.

[59] A fair approach would have been for Thomas Foods to apply some apportionment to the reduction to comparable employees in the export documentation team, not singularly to Mr La Plume.

[60] There being no stoppage of work, and taking into account fairness considerations, the stand down was not consistent with the FW Act.

Remedy

[61] It is appropriate to provide a proportionate remedy to resolve the dispute. It is appropriate that the remedy bear some relationship to the component of the income loss incurred by Mr La Plume which was unwarranted or unfair.

[62] There is no specific formula to apply in these circumstances though I adopt the approach below tested against overall fairness.

[63] Mr La Plume's stand down was across a period of seven weeks and three days (38 working days). He was paid one day (the 8 June public holiday) but not otherwise. He declined to use his remaining seven days of accrued annual leave to mitigate his income loss.

[64] Not all of the four persons in the export documentation team were comparable employees. All were full-time, but one was a manager. It was reasonable for Thomas Foods to seek to retain a manager on full hours where possible, as she could (and did) operational and managerial work. Fairness would have required the reduction in work imposed on Mr La Plume (38 working days) to be apportioned amongst at least the other three most comparable employees (including Mr La Plume).

[65] That would have equated to a warranted reduction of about thirteen days of income loss for Mr La Plume compared to the thirty-eight days he sustained (a difference of twenty-five days).

[66] By way of discount against this loss, I take into account the public holiday he was paid and the fact that he could have mitigated his loss by using his accrued leave (which he was paid on redundancy). That is a discount of around eight days.

[67] I also take into account the contingency that Thomas Foods did not know how long the stand down period would last (though it estimated until at least 30 June), did not know exactly how the pandemic would impact actual work flows, was acting to avert redundancies and was endeavouring to protect its business in a rational way by seeking to reduce costs especially amongst employee groups whose wages were not subsidised by Jobkeeper. I apply a discount of around two days on these accounts.

[68] Consequently, it is reasonable to deduct twenty-five days in total from the actual income loss during the stand down period.

[69] This leaves a period of fifteen working days (three weeks) which I consider in all the circumstances to be a proportionate and reasonable payment that Thomas Foods should make to Mr La Plume as a contribution to his income loss during his stand down (a stand down that I have found not to have been consistent with the FW Act).

[70] On the material before me this equates to a figure of approximately \$3,008.75 gross.

Conclusion

[71] It is unnecessary to make an order in these terms as both Mr La Plume and Thomas Foods have demonstrated a willingness to submit to this arbitration process. Each now has the opportunity, in light of this decision, to check what dollar amount equates to three week's pay (gross) and agree a reasonable time for payment (which should not be more than 14 days).

[72] If an order is required, I will make an order in these terms.

[73] Subject to the need to make an order, the dispute is determined on this basis.



DEPUTY PRESIDENT

Appearances:

Mr R La Plume, in his own right.

Ms M Young, for Thomas Foods International Pty Ltd.

Hearing details:

2020.

Adelaide (by telephone).

9 July.

Printed by authority of the Commonwealth Government Printer

<PR 720975>