[2023] FWC 2705

The attached document replaces the document previously issued with the above code on 22 December 2023.

This decision has been refiled to amend the Applicant's name from 'Construction, Forestry, Maritime, Mining and Energy Union' to 'Mining and Energy Union'.

Associate to Commissioner Mirabella

Dated: 16 January 2024

[2023] FWC 2705 [Note: This decision has been quashed - refer to Full Bench decision dated 14 August 2024[[2024] FWCFB340][Note: An appeal pursuant to s.604 (C2023/8160) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.739—Dispute resolution

Mining and Energy Union
v
EnergyAustralia Yallourn Pty Ltd T/A EnergyAustralia
(C2023/3998)

COMMISSIONER MIRABELLA MELBOURNE, 22 DECEMBER 2023

Alleged dispute about a matter arising under an enterprise agreement.

[1] On 11 July 2023, the Mining and Energy Union (union) filed an application under s.739 of the *Fair Work Act 2009* (FW Act) in the Fair Work Commission (Commission) alleging a dispute with EnergyAustralia Yallourn Pty Ltd trading as EnergyAustralia (company) pursuant to clause 29 of the *EnergyAustralia Yallourn Enterprise Agreement 2020*[1] (Agreement).

[2] The union made its application raising a dispute regarding clause 9.5.3. The dispute relates to whether the company is required to make contributions to an employee's superannuation account regarding payments received for time off in lieu (TOIL).

[3] The parties agree that the question for the Commission to determine is as follows:

> Is the company's existing practice consistent with the correct application of clause 9.5.3 of the Agreement?

[4] The union argues that clause 9.5.3 required the company to make contributions to the superannuation accounts of certain employees equal to 12% of an employee's ordinary time earnings (OTE) or a percentage of 2% greater than the Federal Government Superannuation Guarantee of their OTE when they took TOIL under clause 12.3 of the Agreement.

[5] The company contends payments made with respect to TOIL under clause 12.3 were not superable because these payments were referable to overtime and not OTE.

[6] The dispute was the subject of a conference before me on 27 July 2023. The parties have filed and served written submissions pursuant to my directions, to which I have had regard in determining the question before me. I have determined the matter on the papers.

Jurisdiction

[7] Section 739 of the FW Act empowers the Commission to deal with certain disputes under enterprise agreement dispute settlement terms. The Agreement contains such a term at clause 29. The parties agreed that the Commission should deal with this matter by conciliation and arbitration.

[8] The Agreement that is the subject of these proceedings has been replaced by a new enterprise agreement, the *EnergyAustralia Yallourn Enterprise Agreement 2023* (the new agreement).[2] The new agreement came into operation on 16 August 2023.

[9] The union relies on the Full Bench decision in *Construction, Forestry, Maritime, Mining and Energy Union & others v Falcon Mining Pty Ltd (Falcon Mining)*[3] to support its contention that the Commission has jurisdiction to resolve the present matter and submits that the Commission seized jurisdiction on 27 July 2023 when I conciliated the matter and when the parties referred it to the Commission for arbitration.

[10] The union refers to *Tracey v BP Refinery (Kwinana) Pty Ltd (Kwinana)* where the Full Bench stated that they:

> '[D]o not accept *Simplot* has now been overtaken by *Falcon Mining*. What we have is conflicting decisions about the same subject matter by differently constituted Commission Full Benches. So much was acknowledged in *Falcon Mining* itself.'[4]

[11] The union submits that these comments in *Kwinana* are obiter and that subsequent to that decision, *Falcon Mining* has been cited authoritatively in Full Bench decisions.

[12] The company does not contest the union's submissions regarding jurisdiction and its reliance on *Falcon Mining*.

[13] I agree with the Full Bench in *Kwinana* that there are conflicting Full Bench decisions of the Commission regarding its jurisdiction to arbitrate a dispute arising from a superseded enterprise agreement.

[14] In this matter, I prefer the Full Bench's reasoning in *Falcon Mining*. All of the following occurred prior to the new agreement coming into operation: the application was made on 11 July 2023; the conciliation was conducted on 27 July 2023; and the directions for the arbitration were emailed on 31 July 2023. Although the Agreement has been replaced, as per *Falcon Mining:*

> 'There is nothing in the text of s 739(4) or elsewhere in the FW Act that provides or infers that the required agreement to arbitrate is later revocable by any party or is vitiated if the relevant enterprise agreement subsequently ceases to operate.'[5]

[15] Accordingly, I find that I have jurisdiction to arbitrate this dispute.

The Agreement

[16] The Agreement applied to the company in respect of a wide class of employees, including Unit Controllers, Power Workers, and Technical Officers.

[17] Section 9 of the Agreement deals with terms regarding superannuation.

[18] Clause 9.3 defines the superannuation:

> **'9.3 FUND SALARY**
>
> The Fund Salary (or superannuation salary) of Employees for superannuation benefit purposes shall be equal to their salary shown in Appendix 1 plus normally received shift allowance and weekend penalties.
>
> Except where payments are in relation to overtime, and provided an Employee is in regular receipt of such payment, the Yallourn Allowance, Shift Allowance, and Weekend Penalties shall be included as part of the salary used to calculate:
>
> (a) Superannuation Fund Salary; and
>
> (b) Final Average Salary; and
>
> (c) the Company's Superannuation Guarantee (Administration) Act obligation.'

[19] This dispute concerns the interpretation of clause 9.5.3 of the Agreement which stipulates the company's superannuation contribution obligations with respect to certain employees. This clause is as follows:

> **'9.5.3 DIVISION D ONLY MEMBERS**
>
> From 1st January 2014 Employees whom are members of ***Equipsuper*** Superannuation Fund Division D, but not Division B or Division C, the Company shall make contributions to the Employee's superannuation account equal to twelve percent (12%) of their superannuation salary or two percent more than the Federal Government Superannuation Guarantee, whichever is the greater.'

[20] Clause 10.3.4 provides for the rostering of employees on a '2x12' shift roster cycle which involves the rostering of employees on various configurations of two 12-hour shifts.

[21] Clause 12 deals with overtime. Clause 12.3 is headed 'Time Off in Lieu of Overtime (DILs)' and is as follows:

> 'Where overtime is worked and payment is due in the terms of this clause, time off in lieu may be granted on the following basis:
>
> One day off in lieu may be substituted for a portion of the payment due with the balance of the payment being made in money where:

> (a) at least a full shift of overtime is worked on a rostered day off by a shift work Employee, or where a shift work Employee works a double shift in the absence of the incoming shift relief.
>
> (b) Where a maintenance worker on arranged overtime or overtime continuous with normal hours and a minimum of 4 hrs has been worked the Employee shall have the option to be paid the actual hours worked at single time and 'bank' the equivalent time in off in lieu.
>
> Maintenance Employees will be required to clear their 'banked' time off in lieu within 12 months of its accrual. Where the time off in lieu has been accrued for a period of 12 months or more, this accrual will be paid out on the 31 January of each year of the operation of this Agreement.
>
> For all Employees, a maximum of ten such days off shall be granted in any year. The year period for the granting of the maximum of ten days will be the leave year for each Employee. The taking of time is subject to operational requirements.
>
> Operations Employees cannot bank days in lieu once their bank reaches 144 hours at any point in time. For any Operations Employee with a bank which exceeds 144 hours upon commencement of this Agreement, the Employee:
>
> a) Is unable to bank any additional time in lieu until their bank falls below 144 hours; and
>
> b) Any existing balance above 144 hours must be taken by the nominal expiry date of this Agreement (or will be cashed out at the Employee's Base Rate of Pay in the next available pay period following that nominal expiry date).
>
> In the event that an Employee's employment ends after they have been granted a request to take time off in lieu of overtime (DILs) pursuant to this clause 12.3, but before some or all of the time off is taken, the balance of the overtime entitlement that was to be taken as time off in lieu will be paid out at the Base Rate of Pay.'

[22] The dispute resolution procedure is at clause 29 of the Agreement and provides for discussion of disputes at the workplace level and if unresolved, referral of the dispute to the Commission for conciliation and, if the dispute is in relation to a matter arising under the National Employment Standards or this Agreement, arbitration.

Agreed facts

[23] The employees to whom this matter pertains are '2x12' shift workers as outlined in clause 10.3.4 of the Agreement and Equipsuper Superannuation Fund Division D members as outlined in clause 9.5.3 of the Agreement (the relevant employees).

[24] Clause 12.3 entitles relevant employees to take one day off in lieu of payment for part of the overtime they have worked. For example, if a relevant employee works one shift (twelve

hours) in excess of their ordinary hours, then rather than being paid at overtime rates for the twelve hours, they are instead paid at their base rate of pay for twelve hours and may take twelve ordinary hours off in lieu of the remainder of the payment.

[25] The company's existing practice is to not make any superannuation contributions in relation to ordinary hours not worked by an employee who elects to take time off in lieu of payment for overtime pursuant to clause 12.3 of the Agreement.

Consideration

[26] The principles to be applied to the interpretation of an enterprise agreement are well articulated and settled.[6] The first step is to determine whether the disputed terms of an agreement have a plain meaning or are instead ambiguous or susceptible to more than one meaning. The language of disputed terms is to be construed objectively, having regard to both context and purpose, and a narrow or pedantic approach to interpretation is to be avoided.

[27] The Full Bench in *United Firefighters Union of Australia v Emergency Services Telecommunications Authority T/A ESTA*[7] considered the application of these principles in relation to matters of ambiguity and said:

> **'[35]** As stipulated in *Berri*, the starting point for interpreting an enterprise agreement is to have regard to the ordinary meaning of the words used. Further, the text must be interpreted in the context of the agreement as a whole. Principles 7 and 10 elicited in *Berri* emphasise that ambiguity in a provision within an enterprise agreement must be identified before one is to have regard to evidence of the surrounding circumstances. However, principle 8 makes it clear that, in determining whether ambiguity exists, one may have regard to evidence of the surrounding circumstances. That is, such evidence can be used to identify and resolve any ambiguity.'

[28] I have applied these principles without repeating them.

[29] The union submits that the company has not correctly paid superannuation to the relevant employees because in the company's calculation of superannuation, the company has not calculated and paid an amount referable to TOIL that is taken when an employee elects to convert part of their overtime earnings to TOIL as per clause 12.3.

[30] The union asks that I determine the following question in the negative:

> Is the company's existing practice consistent with the correct application of clause 9.5.3 of the Agreement?

[31] There is no dispute that the company's existing practice is that when a relevant employee elects to take time off in lieu of payment for overtime pursuant to clause 12.3 of the Agreement, the company has not made superannuation contributions in relation to the ordinary hours not worked by the relevant employee.[8]

[32] The language in clause 9.5.3 is clear in so far as it describes the calculation of the superannuation liability for relevant employees. The company's superannuation liability is the

greater of either 12% of an employee's superannuation salary or 2% more than the Federal Government Superannuation Guarantee as prescribed in the *Superannuation Guarantee Charge Act 1992* (SGA Act). There is no dispute that the correct percentage is 12%.

[33] Clause 9.5.3 states that the relevant percentage is applied to an employee's superannuation salary.

[34] There is no dispute between the parties, and I accept, that the reference to superannuation salary in clause 9.5.3 is to be construed as per the OTE definition in the SGA Act. That is, the company is obliged to calculate and make superannuation contributions by reference to a percentage of an employee's OTE.[9]

[35] Without diminishing the Commission's role in arbitrating this dispute, an alternate view about the most practical process to resolve this matter would be to seek a private ruling from the Australian Taxation Office.

[36] As the parties have agreed that the OTE is the remuneration amount to be used in calculating superannuation entitlements, and the dispute relates to whether TOIL that is taken in partial substitution of an overtime payment should be included in the calculation of the relevant employees' superannuation entitlements, I need to determine whether TOIL accrued because overtime was worked pursuant to clause 12.3 is part of OTE.

[37] For the reasons below, I do not find that the overtime benefit restructured in the form of TOIL is OTE.

[38] The union submits that TOIL is OTE because it is taken on a day that a relevant employee would have been rostered to work and occurs in normal rostered hours and relies on *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union (Bluescope)*[10] for the proposition that:

> '[T]he purpose of the SG Act was to ensure employees received superannuation contributions that reflected their earnings for their ordinary hours of work. In the present case, this means that there can be no deduction against the requirement to pay at least 12% of superannuation salary on all ordinary hours for which an employee is paid. To do so would be to fall beneath the legislated floor of employer contributions.'[11]

[39] The union submits that the relevant employees' superannuation salaries should be paid on 36 hours per week, those being the hours averaged across a roster cycle and that OTE is closely linked to an employee's earnings with respect to ordinary hours of work.[12]

[40] I am persuaded by the company's submission that the union's reliance on paragraph 56 of *Bluescope* is misplaced and that, in fact, the wording in that paragraph supports determining the classification of an employee's earnings as the starting point.[13] It is more logical to first determine whether the earnings are in respect of the employee's ordinary hours of work before they can be included in the calculation of superannuation salary because not all salary can be used in the calculation of superannuation.

[41] Although the union accepts that payment for overtime worked is not part of superannuation salary, they submit that the taking of TOIL, even where this is taken as a result of having worked overtime, is simply a day off without loss of pay within a normal roster cycle.

[42] Overtime provisions are contained within clause 12 of the Agreement which is titled 'Overtime'. Clause 12.3 allows an employee to convert part of an overtime payment to TOIL. It is not in dispute that had a relevant employee not worked overtime, there would be no ability to take off time under clause 12.3. The payment made to employees when taking TOIL is a result of the employee having earned overtime earnings and I do not agree with the union's submission that the payment made to relevant employees when taking TOIL is a payment that arises under clause 10.3.4.

[43] It is not in dispute that had a relevant employee not worked overtime, there would be no ability to take time off under clause 12.3. The payment made to employees when taking TOIL is as a result of the employee having earned overtime earnings.

[44] The words of clause 12.3 refer to TOIL as a substitution for a portion of overtime earnings. Part of the value of the overtime payment is substituted or converted to TOIL. That is, the portion of the overtime payment converted to TOIL is effectively the reconstitution of the overtime earnings.

[45] In opposition to the union, the company submits that there must be actual earnings in respect of notional wages for 36 ordinary hours and that only ordinary hours for which a relevant employee worked and was paid attracts superannuation. The company says that where an employee elects to receive payment for overtime or converts part of their overtime to paid time off, it is the fact that they worked overtime that entitles them to any of these earnings, and as they are referable to overtime, they are exempt from superannuation.

[46] I accept the company's submission that it is a sensible industrial outcome to have consistent treatment of all overtime benefits. It is not controversial that overtime payments are exempt from superannuation. It would be illogical to convert part of the overtime benefit to an amount that is subject to superannuation because an employee has elected to convert part of the benefit to a paid leave entitlement in the form of TOIL. That is, there is a distinction between OTE and overtime earnings. It does not logically follow that the TOIL, which results from a conversion of part of overtime earnings, then morphs into OTE.

[47] Where a relevant employee works overtime and payment is due, including as per clause 12.3, the benefit obtained by the relevant employee, whether taken in cash or taken as TOIL or as some other type of benefit, is referable to the overtime worked. Whatever the benefit is called and however it is structured, it is because the overtime has been worked.

[48] That is, the package of benefits, including the TOIL, exists because the overtime was worked.

[49] As such, the benefits, including the TOIL, are not OTE and ought not be included in the calculation of the relevant employees' superannuation salaries.

Conclusion

[50] On the basis of the foregoing, the question for determination proposed by the union is answered in the following manner:

> Q: Is the company's existing practice consistent with the correct application of clause 9.5.3 of the Agreement?
>
> A: Yes

[51] The dispute is determined accordingly.

COMMISSIONER

Determined on the papers.

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[1] AE508007.

[2] AE521043.

[3] [2022] FWCFB 93.

[4] [2022] FWCFB 210, [45].

[5] [2022] FWCFB 93, [73].

[6] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited* [2017] FWCFB 3005; *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited* [2014] FWCFB 7447.

[7] [2017] FWCFB 4537.

[8] Agreed statement of facts filed 11 August 2023, paragraph 5.

[9] Applicant's outline of submissions filed 31 August 2023, paragraph 11; Respondent's outline of submissions filed 22 September 2023, paragraph 9.

[10] [2019] FCAFC 84.

[11] Form F10 application filed 11 July 2023.

[12] Applicant's outline of submissions filed 31 August 2023, paragraph 17-20.

[13] Respondent's outline of submissions filed 22 September 2023, paragraph 22.