DECISION

Fair Work Act 2009
s.739—Dispute resolution

Nick Clemann
v
Victorian Department of Energy, Environment & Climate Action T/A Arthur Rylah Institute for Environmental Research
(C2023/7159)

COMMISSIONER TRAN MELBOURNE, 4 JUNE 2024

Alleged dispute about any matters arising under the Victorian Public Service Enterprise Agreement 2020 – whether the Commission has jurisdiction to deal with a dispute that includes a period before the currently operative enterprise agreement – savings provisions – whether exercise of jurisdiction inconsistent with the Act

[1] This decision relates to an application made by Mr Clemann in relation to his classification under various enterprise agreements that applied to him from 2012 until 2024.

[2] The parties could not agree on the questions for determination. Mr Clemann put 8 questions; and the Respondent put two. During a case management conference conducted on 15 April 2024, I determined that the first question to be answered would be as put by the Respondent, which was:

> *Does the Fair Work Commission have jurisdiction to deal with the dispute in so far as it pertains to matters predating the commencement of Victorian Public Service Enterprise Agreement 2020 on 9 October 2020 and arising under the Public Service Enterprise Agreement 2016 and/or of the Victorian Public Service Workplace Determination 2012?*

[3] As the first question was one relating to the Commission's jurisdiction to deal with the dispute, I considered it appropriate for it to be dealt with first.

[4] I have determined that I do have jurisdiction to deal with the dispute in so far as it pertains to matters predating 9 October 2020. My detailed reasons follow.

Substantive dispute

[5] The Respondent's second question pre-supposed the answer to the first question to be *No*. However, as I have determined otherwise, I propose that the second question to be determined is as follows:

> *Based on work value and work requirements, what is the correct classification of the Applicant's former role as 'Senior Scientist Threatened Fauna Program, Arthur Rylah Institute for Environmental Research, Victorian Department of Environment, Energy and Climate Action'?*

Background

[6] Mr Clemann first applied to the Commission to deal with a dispute relating to his classification on 17 October 2022. The matter number for that application was C2022/6958 and it was allocated to then Deputy President Young, who conducted conferences on 22 November and 12 December 2022. Mr Clemann discontinued this application on 13 December 2022.

[7] Mr Clemann again applied to the Commission on 22 November 2023 to deal with substantively the same dispute relating to his classification. In the 2023 dispute application, Mr Clemann said that,

> "This dispute relates to multiple requests by [Mr Clemann] for reclassification from Science C to Science D in recognition of [Mr Clemann] being directed by his employer to undertake tasks in his role at ARI that demonstrate consistency with the Science D classification descriptors.
>
> In summary:
> a. Between 2012 and 2016 – reclassify from 5.2 (Science C.2) to 6.1 (Science D.1)
> b. From 2016 – reclassify from 6.1 (Science D.1) to 6.2 (Science D.2)"

[8] I conducted conferences on 23 January 2024, 28 February 2024 and 27 March 2024 in attempts to resolve this matter. On 27 March 2024, the parties agreed that the matter could not be resolved by conciliation and Mr Clemann asked for the Commission to arbitrate the matter.

[9] On 15 April 2024, I determined that it was appropriate to answer the first question separately from the substantive dispute, as it related to the Commission's jurisdiction and the answer to the question could potentially limit the matters that the parties needed to address in the substantive dispute. I issued directions and both parties filed submissions in accordance with those directions.

[10] The parties agreed for the jurisdictional question to be determined on the papers.

What is the dispute about?

[11] The dispute relates to Mr Clemann's correct classification under the currently operating enterprise agreement, and 2 predecessor agreements.

[12] The currently operating enterprise agreement is the *Victorian Public Service Enterprise Agreement 2020* (**the Current Agreement / the 2020 Agreement**). It was approved by Deputy President Gostencnik on 2 October 2020 and commenced operation on 9 October 2020. Its nominal expiry date is 20 March 2024. It continues to operate in accordance with ss 54 and 58 as it has not been terminated or replaced.

[13] The predecessor agreement to the Current Agreement was the Victorian Public Service Enterprise Agreement 2016 (**the 2016 Agreement**). It was approved by Deputy President Gostencnik on 11 May 2016 and commenced operation on 18 May 2016. Its nominal expiry date was 31 December 2019 but it continued to operate in accordance with ss 54 and 58(2)(e) until it was replaced by the 2020 Agreement.

[14] The predecessor agreement to the 2016 Agreement was the Victorian Public Service Workplace Determination 2012 (**the 2012 Determination)**. That determination was made by a Full Bench of the Commission. The 2012 Determination commenced operation on the first pay period on or after 23 July 2012 and continued to operate in accordance with ss 276 and 278(1) until 11 May 2016 when it was replaced by the 2016 Agreement.

What is this decision about?

[15] The Respondent argues that the Commission only has jurisdiction to deal with the dispute as it relates to matters arising under the Current Agreement – that is Mr Clemann's classification after 9 October 2020.

[16] Mr Clemann argues that the Commission has jurisdiction to determine the question of his classification from the commencement of the 2012 Determination as he first sought re-classification in around 2011 and that he was continuously in dispute with the Respondent about his classification from this time raising the dispute again on occasions between 2013 and 2018, and in 2021 when the dispute progressed to an investigation by an external HR consultant whose investigation concluded in July 2022.

Jurisdiction of FWC to arbitrate in accordance with a dispute settlement procedure

[17] The Commission's powers to arbitrate disputes is conferred by statute.

[18] Section 595 of the Act provides for the Commission's power to deal with disputes only if it is expressly authorised to do so or in accordance with another provision of the Act. Section 739 provides for the Commission's power to deal with a dispute where an enterprise agreement includes a term that provides a procedure for dealing with disputes under section 738(b). An enterprise agreement must contain a term about settling disputes as s 186(6) of the

Act provides that the Commission must be satisfied that an agreement contains a term about settling disputes, among other matters, in order to approve an enterprise agreement.

[19] The Full Bench in *CFMMEU v Falcon Mining Pty Ltd* said:[1]

> "It is s 739(4) which gives effect to an agreement by parties for the arbitration of a dispute by the Commission pursuant to dispute resolution term of a type described in s 738, and it is s 739(3) which limits the powers of the Commission to deal with the dispute by reference to any such limitations contained in the relevant dispute resolution term. Therefore, the scope of the authority of the Commission to engage in arbitration of disputes pursuant to a dispute resolution term is ultimately the question statutory construction although, in a particular case, the application of the statutory provisions will be affected by the terms of the relevant dispute resolution procedure."

[20] The Current Agreement contains a dispute resolution procedure in Clause 13. Clause 13.12 of the Agreement gives the Commission power to arbitrate the dispute on request by a party to the dispute if the dispute has not been settled after conciliation has been completed. In dealing with a dispute, the Agreement confirms that the Commission may conduct the matter in accordance with the powers available to it under Sub-division B – Conduct of matters before the FWC in Division 3 of Part 5-1 of the Act.

[21] It is not in dispute between the parties that the Applicant has followed the procedure in Clause 13 of the Agreement and is able to refer the dispute to the Commission for resolution. The referral occurred in October 2022 (but was discontinued) and again in November 2023, both times under the Current Agreement.

[22] I note that I have not received evidence about the raising of the disputes, nor the steps taken under the dispute settlement procedure in Clause 13 of the Current Agreement prior to the lodgement of this application. I sought submissions concerning only the question of whether the Commission has jurisdiction to deal with the dispute prior to 9 October 2020. The factual basis for the Commission's jurisdiction must still be addressed in materials to be filed.

Does the Commission's jurisdiction cease?

[23] I was taken to the decisions of the Full Bench in *Simplot v AMWU*[2] and *Falcon Mining*. These decisions were concerned with whether the Commission had power to arbitrate a dispute where a dispute was notified to the Commission under an enterprise agreement that ceased to operate while the Commission was dealing with the dispute but before it had determined the dispute. To the extent that the decisions deal with that issue, they are not relevant to this matter, as this dispute was notified to the Commission during the operation of the Current Agreement, and the Current Agreement continues to operate.

[24] I do note that the Current Agreement's nominal expiry date was 20 March 2024, but the Agreement has not yet been replaced, and so is still in operation. For completeness, I will deal with the decisions in *Simplot* and *Falcon Mining* as it may be the case that the Current Agreement is replaced before I finally determine the dispute.

[25] *Simplot* stands for the proposition that:[3]

> "The Commission has no jurisdiction to deal with a dispute under a disputes procedure in an enterprise agreement that has ceased to operate."

[26] Insofar as *Simplot* stands for only the above proposition, it is not incorrect. However, the conclusion in *Simplot* was that the Commission ceased to have jurisdiction to deal with a dispute that had been notified to it during the operation of an agreement when that agreement ceased to operate.

[27] The Full Bench in *Falcon Mining* noted that the approach in *Simplot* was inconsistent with the object of the Act in s 3(e) and said:

> "The part of the object in s 3(e) of "providing accessible and effective procedures to resolve grievances and disputes" is plainly not served if the Commission cannot resolve a dispute which has arisen during the currency of an agreement by decision in accordance with the dispute resolution procedure in that agreement because it runs out of time to do so prior to the agreement ceasing effect."

[28] As referenced above, the Full Bench in *Falcon Mining* stated that it is the Act which confers power on the Commission to deal with a dispute. So, when a dispute is notified to the Commission and all other conditions precedent contained in the disputes settlement term itself are satisfied, that is when the Commission has jurisdiction to arbitrate the dispute.[4] As the power to arbitrate is not conferred by the agreement itself, the fact that the agreement ceases to operate does not deprive the Commission of the power to arbitrate,[5] which is the "whole process of adjudication leading to the making of a final decision."[6]

[29] The Full Bench in *Falcon Mining* also said:[7]

> "In the case of an enterprise agreement, the agreement does not need to be currently in effect in order for the Commission to determine a dispute about the rights and obligations under that agreement relating to a time when it was in effect."

[30] Thus, the Commission's power to arbitrate this dispute arose on 27 March 2024 when the parties agreed that the dispute would not be settled after conciliation was completed. Once seized of the power to arbitrate the dispute, the Commission does not lose that power because the agreement ceases to operate (which has not occurred in this matter). The Commission's jurisdiction to deal with the dispute continues until the making of a final decision.

What is the dispute that the Commission can deal with?

[31] Section 739 provides that the Commission may only deal with a dispute if a term in s 738 requires or allows the Commission to deal with a dispute and in dealing with the dispute, the Commission must not exercise any powers limited by the term. The Commission may only arbitrate the dispute if the parties have agreed that the Commission may arbitrate the dispute.

> **"Disputes dealt with by the FWC**
>
> (1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
>
> (2) [*repealed*]
>
> (3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.
>
> (4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.
>
> Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).
>
> (5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.
>
> (6) The FWC may deal with a dispute only on application by a party to the dispute."

[32] Clause 13 of the Agreement relevantly provides:

> **"13. Resolution of Disputes**
>
> 13.1 For the purposes of this clause 13, a dispute includes a grievance.
>
> 13.2 Unless otherwise provided for in this Agreement, a dispute about a matter arising under this Agreement or the National Employment Standards set out in the FW Act, other than termination of employment, must be dealt with in accordance with this clause. To avoid doubt, a dispute about termination of employment cannot be dealt with under this clause.
>
> …
>
> 13.6 Obligations
>
> (a) The parties to the dispute and their representatives must genuinely attempt to resolve the dispute through the processes set out in this clause and must cooperate to ensure that these processes are carried out expeditiously.
>
> 13.8 Discussion of Dispute

(a) The dispute must first be discussed by the aggrieved Employee(s) with the immediate supervisor of the Employee(s).

(b) If the dispute is not settled, the aggrieved Employee(s) can require that the dispute be discussed with another representative of the Employer appointed for the purposes of this procedure.

13.9 Internal Process

(a) If any party to the dispute who is covered by this Agreement refers the dispute to an established internal dispute resolution process, the matter must first be dealt with according to that process, provided that the process is conducted as expeditiously as possible and:

(i) is consistent with the rules of natural justice; and

(ii) provides for mediation or conciliation of the dispute; and

(iii) provides that the Employer will take into consideration any views on who should conduct the review; and

(iv) is conducted with as little formality as a proper consideration of the dispute allows.

(b) If the dispute is not settled through an internal dispute resolution process, the matter can be dealt with in accordance with the processes set out below.

(c) If the matter is not settled either party to the dispute may apply to the FWC to have the dispute dealt with by conciliation.

…

13.11 Conciliation

(a) Where a dispute is referred for conciliation, a member of the FWC will do everything that appears to the member to be right and proper to assist the parties to the dispute to agree on settlement terms.

(b) This may include arranging:

(i) conferences of the parties to the dispute presided over by the member; and

(ii) for the parties to the dispute to confer among themselves at conferences at which the member is not present.

(c) Conciliation before the FWC will be regarded as completed when:

(i) the parties to the dispute have reached agreement on the settlement of the dispute; or

(ii) the member of the FWC conducting the conciliation has, either of their own motion or after an application by a party to the dispute, satisfied themselves that there is no likelihood that, within a reasonable period, further conciliation will result in a settlement; or

(iii) the parties to the dispute have informed the FWC member that there is no likelihood of agreement on the settlement of the dispute and the member does not have substantial reason to refuse to regard the conciliation proceedings as completed.

13.12 Arbitration

(a) If the dispute has not been settled when conciliation has been completed, a party to the dispute may request that the FWC proceed to determine the dispute by arbitration.

(b) If a member of the FWC has exercised conciliation powers in relation to the dispute, the member must not exercise, or take part in the exercise of, arbitration powers in relation to the dispute if a party to the dispute objects to the member doing so.

(c) Subject to clause 13.12(d), the determination of the FWC is binding on the persons covered by this Agreement.

(d) A determination of a single member of the FWC made pursuant to this clause may, with the permission of a Full Bench of the FWC, be appealed.

13.13 General Powers and Procedures of the FWC

Subject to any agreement between the parties in relation to a particular dispute and the provisions of this clause, in dealing with a dispute through conciliation or arbitration, the FWC may conduct the matter in accordance with Subdivision B of Division 3 of Part 5-1 of the FW Act."

[33] The Respondent submits that, in accordance with Clause 13.2 of the Agreement, the only matter that the Commission has jurisdiction to arbitrate are those matters relating to the Applicant's classification under the 2020 Agreement and which occurred after 9 October 2020. This is because, at the time that Mr Clemann lodged his application (November 2023), the predecessor agreements had ceased to operate. The Respondent's argument is that in relation to Mr Clemann's arguments that he was incorrectly classified under the predecessor agreements, they are not matters arising under the Current Agreement.

[34] Mr Clemann submits that he started his dispute in 2011 and that he has been continuously in dispute with the Respondent about his proper classification under the agreements that applied to him at the relevant time. He makes no claim that the predecessor agreements continue to apply after they ceased to operate.

[35] Mr Clemann takes issue with the way the Respondent characterises his dispute based on the date that he lodged his application with the Commission, as he lodged an earlier application in October 2022, which he discontinued. For present purposes, both dispute applications were lodged under the Current Agreement. Even if he had not discontinued the earlier one, its lodgement does not advance his argument. He discontinued the October 2022 application; the only application that can be dealt with is this one, which was lodged in November 2023.

[36] It is the case that Clause 13.2 of the Current Agreement requires that the dispute be about **a matter arising under this Agreement**. Mr Clemann's proper classification is a matter arising under the Current Agreement. However, his proper classification prior to the time when the Current Agreement commenced operation is not a matter arising under the Current Agreement. So it is that Clause 13.2 does not apply to the dispute in so far as it relates to Mr Clemann's classification under predecessor agreements, as his classification prior to 9 October 2020 cannot be a matter that arises under the Current Agreement.

[37] I find this distinction artificial. Much like questions concerning an employee's continuous service, classification can span current and previous enterprise agreements. In *AMIEU v Primo Foods Pty Ltd*,[8] Deputy President Asbury (as she then was) observed:

> "That the dispute lodged under a dispute settlement term in a currently operative enterprise agreement involves an employee's continuous service under a previous agreement that is inoperative when the dispute is notified, does not deprive the Commission of power to deal with the dispute under the terms of an operative enterprise agreement, in a manner authorised by s 739(4) of the Act, and the terms of the relevant agreement."

[38] This observation is also consistent with the Full Bench's observation in Falcon Mining referred at [29] that the Commission can determine disputes about rights and obligations under an agreement even if they have ceased to operate.

[39] I do not, however, rely upon these observation in my finding that the Commission has jurisdiction to deal with the dispute relating to Mr Clemann's classification prior to the commencement of operation of the Current Agreement on 9 October 2020.

Was the dispute being considered under the predecessor agreement?

[40] I find that the Commission has jurisdiction to deal with Mr Clemann's classification prior to 9 October 2020 as it was a dispute or grievance being considered under the predecessor agreements.

[41] Clause 6 of the Current Agreement provides:

> **"6. Savings Provisions and Relationship with other Awards and Agreements**
>
> 6.1 This Agreement operates to the exclusion of all previous awards and orders of the FWC and replaces all previous industrial instruments under the FW Act in respect of the Employees. However any entitlement in the nature of an accrued entitlement to an individual's benefit which has accrued under any such previous industrial instrument will not be affected by the making of this Agreement.
>
> 6.2 No Employee will, on balance, have their overall pay and conditions reduced as a result of making this Agreement.
>
> 6.3 No Employee's overall terms and conditions of employment will, on balance, be reduced as a result of any Machinery of Government Changes that occur during the life of this Agreement.
>
> 6.4 A dispute or grievance that is being considered pursuant to clause 12 of the Victorian Public Service Enterprise Agreement 2016 at the time this Agreement commences operation may continue to be considered pursuant to clause 13 of this Agreement."

[42] Clause 6 of the 2016 Agreement is in the same terms, except that where 6.4 of the Current Agreements references the 2016 Agreement, the 2016 Agreement references the 2012 Determination. Clause 12 of the 2016 Agreement is in the same terms as Clause 13 of the Current Agreement.

[43] In a decision of a Full Bench of the AIRC in *Davies v ATO*,[9] the Full Bench found that a dispute under a procedure of an earlier agreement could continue under the next agreement because the current agreement provided:

> "at clause 136.4, for disputes arising under previous certified agreement which were unresolved at the time the 2006 Agreement came into operation, to be progressed under the 2006 Agreement."

[44] In *Davies*, the dispute related to whether the applicant was entitled to an allowance under the then operative agreement (the 2006 Agreement) and retrospectively to 1 September 2001. At first instance, Commissioner Spencer noted the above clause, but found that the Commission did not have jurisdiction to deal with the dispute in relation to events prior to 1 July 2006, when the 2006 Agreement came into operation, because the applicant first raised a

dispute on 23 February 2007 and there was no evidence that the applicant had formally raised a dispute under the previous certified agreement.[10]

[45] The Full Bench allowed the appeal on two grounds. The first related to a preservation clause of the 2006 Agreement, which preserved rights, obligations or liabilities that accrued or incurred under the provisions of superseded awards or agreements and "any benefits accrued shall be subject to the operation of this agreement."[11] The second related to an unresolved dispute that could be subject to clause 136.4. The applicant gave evidence of raising the matter with her team leader in October 2003, and the Full Bench found that this is when the dispute arose and it was unresolved at the time of the 2006 Agreement. As a result of Clause 136.4, the dispute could be progressed under the 2006 Agreement.[12]

[46] Mr Clemann submits that he first raised the dispute in 2011, and again at various times between 2013 and 2018. If in the substantive matter, he provides evidence of having commenced the dispute procedure in Clause 12 of the 2006 Agreement, then Clause 6.4 of the Current Agreement means that the dispute resolution procedure in Clause 13 applies to that dispute. Similarly, if Mr Clemann provides evidence of having commenced the dispute procedure in Clause 11 of the 2012 Determination, then it continued under Clause 6.4 of the 2006 Agreement and under Clause 6.4 of the Current Agreement.

[47] The Respondent submits that Mr Clemann did not commence the dispute until 22 November 2023 and therefore it was not a dispute or grievance under Clause 6.4 of the Current Agreement. The Respondent submits that the provision pre-supposes that a dispute must have already been commenced in the Commission under the predecessor agreement.

[48] Clause 6.4 is clear in its terms that it relates to a 'dispute or grievance that is being considered pursuant to clause 12 of the [2016 Agreement].' Clause 12 is the whole of the dispute resolution clause, from initiating discussions at the workplace level until appeal of an arbitrated outcome. Clause 6.4 does not refer only to the provision of the 2016 Agreement that requires that the dispute be commenced in the Commission in order for Clause 6.4 to apply. I note too that the Full Bench in *Davies* found that the dispute commenced when it was raised at the workplace level, and not when it was referred to the Commission.

[49] The Respondent referred me to the decision of then Deputy President Mansini in *Arivalagan v Department of Transport*.[13] The matter is relevantly different from this one as the dispute related to the commencement of a performance improvement process under an enterprise agreement which ceased to apply as the applicant's employment was transferred and the 2016 Agreement applied to him after the transfer. The previous agreement that applied to the applicant was not a predecessor agreement to the 2106 Agreement. In Arivalagan therefore, the previous agreement that applied to the applicant before his transfer was not referred to in Clause 6.4 of the 2016 Agreement. In this matter, the dispute commenced under a predecessor agreement which did apply to Mr Clemann for the period in which those agreements were operative, and could continue by operation of in Clause 6.4 of the 2016 and Current Agreements respectively.

Would determining the question of classification for the entire period asserted by Mr Clemann be inconsistent with the Act?

[50] Section 739(5) provides that the Commission must not make a decision that is inconsistent with the Act. Section 544 provides for general time limits on applications under the Act where applications are made for orders for which civil remedies may be granted. That time limit is 6 years after the day on which a contravention occurred.

[51] While a dispute settlement procedure is not an application under the relevant part, I am of the view that any determinations I make regarding Mr Clemann's proper classification should not pre-date 21 November 2017, which is 6 years prior to the date that he filed this dispute application. Despite my finding that the Current Agreement and 2016 Agreement permit me to consider Mr Clemann's classification from when he first raised the dispute at the workplace level, I am of the view that the matters pre-dating 21 November 2017 would be inconsistent with s 544 of the Act and similar provisions in s 545(5) which provides the time limit for orders in relation to underpayments.

[52] I observe that Mr Clemann seeks orders relating to 'back-payments' for the entirety of the period from the commencement of the 2012 Agreement to 2024. He is prevented from doing so by the provisions of ss 544 and 545, and in determining his dispute, I can only determine whether he was properly classified in accordance with the terms of the relevant agreement but cannot award payments or penalties as referred to in his submissions, as these are orders that a court may make and not the Commission.

Conclusion

[53] For the above reasons, I have found that the Commission has jurisdiction to deal with Mr Clemann's dispute in so far as it relates to his classification under the Current Agreement and from 9 October 2020, as well as his classification under the 2016 Agreement in so far as it post dates 21 November 2017. This is because he had a dispute or grievance being considered under the 2016 Agreement, which by virtue of Clause 6.4 of the Current Agreement can be dealt with in accordance with Clause 13 of the Current Agreement. I find that I cannot deal with Mr Clemann's dispute in so far as it relates to his classification pre-dating 21 November 2017 as doing so would be contravene s 739(5) and be inconsistent with the Act.

COMMISSIONER

Final written submissions:

15 May 2024.

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[1] [2022] FWCFB 93 at [62].

[2] [2020] FWCFB 5054.

[3] *Simplot* at [18].

[4] *Falcon Mining* at [68].

[5] *Falcon Mining* at [73].

[6] *Falcon Mining* at [72]; see also *TWU v Linfox Armaguard Pty Ltd* [2024] FWC 868 at [640].

[7] *Falcon Mining* at [74].

[8] [2023] FWC 570.

[9] [2008] AIRCFB 676.

[10] *Davies* at [7].

[11] *Davies* at [18].

[12] *Davies* at [22].

[13] [2020] FWC 1792.