DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

PHI (International) Australia Pty Ltd T/A HNZ Australia Pty Ltd
v
Mr Martin Nash, Mr Paul Micheletti, Mr Gregory McAllister
(C2024/4398)

VICE PRESIDENT GIBIAN

SYDNEY, 2 JULY 2024

Appeal against a decision of Deputy President O'Keeffe at Perth on 26 June 2024 in matter numbers C2024/1934; C2024/1992 and C2024/1993 – decision at first instance to refuse permission to be represented – stay application – stay refused.

Introduction

[1] PHI (International) Australia Pty Ltd T/A HNZ Australia Pty Ltd (**PHI** or the **appellant**) filed a notice of appeal on 30 June 2024 in relation to a decision of Deputy President O'Keeffe of the Fair Work Commission (the **Commission**). The reasons for the decision are yet to be published, but the parties were notified of the outcome of the Deputy President's decision by way of an email from his Chambers on 26 June 2024.

[2] The decision concerns the representation of the appellant in proceedings which are listed for hearing at 10:00am on 2 July 2024 in Perth. As such, the appellant has requested that an urgent stay in relation to the decision to refuse permission to be represented and that the stay application be dealt with on an urgent basis.

[3] Yesterday evening, I conducted such a hearing commencing at 5:30pm Sydney time. The nature of the relief sought developed somewhat in the course of the hearing. At the conclusion of the hearing, I reserved my decision to consider the issues raised overnight. I have considered those issues and, for the reasons outlined below, I have decided that the application for a stay must be refused.

Chronology of relevant events

[4] On 27 March 2024, an application to deal with a dispute pursuant to s 739 of the *Fair Work Act 2009* (Cth) (the **Act**) was filed and subsequently allocated to Deputy President O'Keeffe. The dispute arises under the *Karratha Helicopter Pilots MPT Operations Agreement 2017* (**Agreement**) and concerns the entitlements of casual employees.

[5] On 18 April 2024, PHI filed its response to the application, raising a jurisdictional objection that the Commission does not have jurisdiction to deal with the dispute on the basis

that the Dispute Resolution Clause in the Agreement had not been followed. Concurrently, the legal representatives of PHI, Corrs Chambers Westgarth, filed a Form F53 – Notice of Representation.

[6] As a result, the matter was programmed for a hearing of the jurisdictional objection raised by the appellant. As part of this programming, the parties were to file submissions on representation pursuant to s 596 of the Act and then each party was to later indicate if they opposed the other party being represented. The applicants are represented by the Australian Federation of Air Pilots (**AFAP**) and did not seek permission to be represented by a lawyer or paid agent under s 596 of the Act.[1]

[7] On 7 June 2024, the appellant filed their submissions seeking to be represented pursuant to s 596 of the Act and, on 17 June 2024, the AFAP filed submissions opposing the request for the appellant to be legally represented.

[8] On 19 June 2024, the Deputy President indicated a provisional view that permission pursuant to s 596 of the Act should be granted to the appellant to be represented. The email from his chambers reads as follows:

> Dear Parties,
>
> Deputy President O'Keeffe notes the submissions of the AFAP opposing the Respondent being represented in the above matters. While the Deputy President notes that the Respondent has made submissions on s.596 of the Act, it appears that the basis of the AFAP's objection lies within the terms of the relevant Agreement in addition to s.596. The Deputy President advises that his provisional view on representation is that notwithstanding the AFAP's s.596 objections, permission should be granted. However, the AFAP's objection does raise the issue of whether the relevant Agreement itself prohibits the Respondent being represented notwithstanding the discretion afforded to the Deputy President by s.596. As such, and mindful that the matter is listed for hearing in early July, the Deputy President directs that the Respondent file any submissions it wishes to make in reply to the AFAP's submissions opposing representation by no later than 4.00pm (AWST) Friday 21 June.
>
> The Deputy President advises that if the Respondent seeks to have the issue of representation heard, he will consider listing an urgent hearing to consider the issues raised by the AFAP arising from the Agreement's dispute resolution procedure.

[9] Further written submissions in reply were then made by both parties on the issue of legal representation. These submissions addressed the capacity of the of the Commission to grant permission for representation and the interaction between s 596 of the Act and the Agreement's Dispute Resolution Clause.

[10] On 26 June 2024, the Deputy President advised the parties that permission to be represented would not be allowed. The Deputy President's reasoning, and the email from his Chambers to the parties, is as follows:

> Dear Parties,
>
> Deputy President O'Keeffe is mindful that the above matters are due to be heard next week. As such, he feels it is important to advise the parties of his decision regarding representation for the

> Respondent as early as possible. Parties are advised that representation for the Respondent will not be allowed. Detailed reasons will be provided, however, the Respondent should be aware that the Deputy President's decision is not based on s596(2) of the Act but rather the particular terms of the dispute resolution procedure and how those provisions operate based on previous case findings.

[11] By way of email on 28 June 2024, the appellant communicated to the Deputy President's chambers and to the AFAP that it intended to appeal the decision of the Deputy President to not grant permission for it to be represented. In this email, the appellant sought that the hearing listed on 2 July 2024 be vacated.

[12] Later that evening, the Deputy President indicated that the matter would proceed according to the issued directions. The email from the Deputy President's Chambers to the parties reads as follows:

> Dear Parties,
>
> Deputy President O'Keeffe notes the correspondence from the Respondent regarding a possible appeal of his decision – for which reasons have yet to be delivered – regarding representation and the accompanying request to vacate the hearing scheduled for Tuesday 2nd July.
>
> Parties are advised that the Deputy President does not consider that there is any adequate reason advanced by the Respondent to vacate the hearing. As such the matter will proceed according to the issued directions.

[13] On the evening of Sunday 30 June 2024, the appellant filed a notice of appeal. The decision appealed against was described as the decision to refuse to permit the appellant to be represented. The description of the decision being appealed in the Notice of Appeal reads as follows:

> The Deputy President made a decision refusing to grant permission for the Respondent to be represented at the hearing in the above matters listed for 2 July 2024, and any subsequent hearings or conferences.
>
> The decision is recorded in an email from Chambers dated 26 June 2024. The email from Chambers advises that Deputy President's decision was not based on section 596(2) of the Fair Work Act 2009 (Cth), but rather on the particular terms of the dispute resolution procedure in clause 22 of the Karratha Helicopter Pilots MPT Operations Agreement 2017 and how those provisions operate based on previous case findings.
>
> The decision was made in the context of a hearing listed on 2 July 2024, where Deputy President O'Keeffe conveyed to the parties his preliminary view that section 596(2) was satisfied.

[14] The notice of appeal sets out a single ground of appeal which is as follows:

> The Deputy President erred in law in finding that he did not have jurisdiction under s 596 of the Act to grant the Appellant the right to be represented by a lawyer at the hearing in the above matter listed for 2 July 2024, and any subsequent hearings or conferences.

[15] The stay application was allocated to me on the afternoon of 1 July 2024. Understandably, the matter was listed for an urgent hearing given that the appeal relates to

representation at a hearing listed the following day. At the hearing, the appellant was represented by Mr Howard of counsel and the AFAP by Mr Crosthwaite of counsel.

Proceedings before the Deputy President

[16] At present, I have only a general understanding of the nature of the proceedings being dealt with by the Deputy President. As has been observed, the proceedings involve a dispute which has been referred to the Commission under clause 22 of the Agreement. I have been informed that the substance of the dispute concerns the alleged underpayment of casual employees. The matter listed for hearing on 2 July 2024 is a preliminary jurisdictional objection being that, it is said, the dispute procedure in the Agreement was not followed.

[17] Given the centrality of the provision to the issues sought to be raised in the appeal, it is appropriate to set out clause 22 of the Agreement which provides as follows:

> **22. DISPUTES AND GRIEVANCE PROCEDURE**
>
> 22.1. Preamble and Principles of the Disputes Resolution Process (DRP)
>
> 22.1.1. In the event of a disagreement regarding the interpretation or application of the terms of this agreement, the NES or any other matter pertaining to the employer-employee relationship that the following Disputes Resolution Process (DRP) be followed.
>
> 22.1 .2. The parties agree to participate in the DRP in good faith and in recognition that the satisfactory resolution of any dispute is in the interests of all parties to this agreement.
>
> 22.1.3. A person subject to this agreement may initiate a dispute concerning the interpretation or application of this agreement at any time.
>
> 22.1.4. A person(s) initiating a dispute may appoint and be accompanied and represented at any stage by another person, organisation or association, including a Union representative or Company association in relation to the dispute. Ready access to Pilots shall be provided to the Pilot's nominated representative so that relevant information and instructions can be provided. However not at a time such that it will impact with the Company's normal contracted operations.
>
> 22.1 .5. Unless otherwise agreed, in the first instance a dispute will be dealt with at a workplace level. If the dispute remains unresolved conciliation may occur and in the event that the dispute remains unresolved, a party may seek arbitration as a means of resolving the dispute.
>
> 22.2. Disputes Resolution Process

22.2.1. If a dispute arises about this Agreement, the NES (including subsections 65(5) or 76(4), or any other work related matter (including a dispute about whether a workplace right has been breached), the parties to the dispute will attempt to resolve the dispute at the workplace level.

22.2.2. Once a dispute has been initiated the parties shall, unless otherwise agreed, meet and confer within seven (7) days at the focal workplace level in an attempt to resolve the dispute.

22.2.3. 1f a dispute in relation to a matter arising under the agreement is unable to be resolved at the workplace, and all agreed steps for resolving it have been taken, the dispute may be referred to FWC for resolution by mediation and/or conciliation and, where the matter in dispute remains unresolved, arbitration. If arbitration is necessary FWC may exercise the procedural powers in relation to hearings, witnesses. evidence and submissions which are necessary to make the arbitration effective.

22.2.4. 1t is a term of this agreement that while the dispute resolution procedure is being conducted work shall continue normally unless a Pilot has a reasonable concern about an imminent risk to his or her health or safety.

22.3. Appeal rights of the parties

22.3.1. The decision of FWC will bind the parties, subject to either party exercising a right of appeal against the decision to a Full Bench of FWC.

22.4. Powers of FWC

22.4.1. The parties agree that FWC shall have the power to do all such things as are necessary for the just resolution of the dispute.

22.4.2. FWC shall be provided access to the workplace to inspect or view any work, material, machinery, appliance, article, document or other thing or interview any Pilot who is usually engaged in work at the workplace.

22.4.3. The parties agree that FWC may give all such directions and do all such things as are necessary for the just resolution and determination of the dispute. This includes but is not limited to mediation or conciliation or arbitration.

22.5. Alteration of Rights

> The parties agree that to the extent that any decision of FWC alters the rights and responsibilities of any of the parties to the agreement that those rights are so altered and are enforceable in a court of competent jurisdiction.

Consideration

Arguable Case on Appeal

[18] The power to grant a stay pending the hearing and determination of an appeal lodged under s.604 is contained in s.606(1), which provides:

> (1) If, under section 604 or 605, the FWC hears an appeal from, or conducts a review of, a decision, the FWC may (except as provided by subsection (3)) order that the operation of the whole or part of the decision be stayed, on any terms and conditions that the FWC considers appropriate, until a decision in relation to the appeal or review is made or the FWC makes a further order.

[19] The principles applying to the determination of stay applications were not in dispute as between the parties. A commonly cited formulation of the principles is found in the decision of the Australian Industrial Relations Commission in *Kellow-Falkiner Motors Pty Ltd v Edghill* [2000] AIRC 758 in which Ross VP (as his Honour then was) said:[2]

> In determining whether to grant a stay application the Commission must be satisfied that there is an arguable case, with some reasonable prospects of success, in respect of both the question of leave to appeal and the substantive merits of the appeal. In addition, the balance of convenience must weigh in favour of the order subject to appeal being stayed. Each of the two elements referred to must be established before a stay order will be granted."

[20] That is, the usual principles require a preliminary assessment of the merits of the appeal, both on the question of permission to appeal and the substantive merits of the appeal. This assessment is necessarily preliminary in nature, given that the Commission will not (at that stage) have the benefit of full argument in relation to the appeal or of having access to, or the opportunity to consider, all relevant materials. That is particularly so where, as here, the stay application is required to be dealt with on an urgent basis.

[21] It is nonetheless appropriate to record that I am satisfied that the appellant has demonstrated an arguable case in relation to the appeal. A preliminary assessment of the prospects of the appeal encounters some difficulty given that the Deputy President has not yet had the opportunity to produce detailed reasons for his decision to refuse to permit the appellant to be represented. The AFAP did not suggest that the absence of reasons, in itself, prevents an appeal. It does submit that, in the absence of reasons, the Commission should not be satisfied that the appellant could demonstrate an arguable case of error.

[22] I do not accept that submission. It is tolerably clear from the communications between the Deputy President's chambers and the parties that the Deputy President must have concluded that clause 22 of the Agreement does not permit representation in proceedings under that clause other than representation of the person initiating a dispute. The combined effect of the emails of 19 June and 26 June 2024 is sufficient to make clear that the Deputy President did not refuse

permission because of an assessment of the criteria in s 596(2), but rather as a result of his understanding of the effect of clause 22 of the Agreement. Given that question turns on an interpretation of clause 22 of the Agreement, it is possible to form a view as to whether the appellant has an arguable case on appeal.

[23] The role of the Commission in dealing with a dispute under a dispute settlement procedure of an enterprise agreement is as a private arbitrator.[3] The nature and extent of the function to be undertaken by the Commission, and the procedure to be adopted, is dictated by the agreement of the parties. The agreement itself may provide that the parties have a right to be legally represented or that the parties are not entitled to be represented. If the agreement is silent, it is generally assumed that the parties intended to take the Commission as they find it,[4] such that the default position in s 596 of the Act applies and representation is possible albeit with the permission of the Commission.

[24] Here, the question turns on the proper interpretation of clause 22. The AFAP relied on the fact that clause 22.1.4 expressly confers a right on a person 'initiating a dispute' to be represented and the absence of any provision permitting representation of any other party. That was said to give rise to a negative implication that the Agreement prohibits any other party being represented. Whilst that position may be arguable, I accept that the contrary position advanced by the appellant is also arguable. Clause 22.1.4 is, on its face, concerned with ensuring a pilot is entitled to be represented at all stages of the dispute process and that such a representative have access to the pilot to obtain information and instructions. The clause is, arguably, not concerned with precluding other parties being represented if the matter is referred to the Commission.

[25] Arguably, clause 22.1.4 must also be read in the context of clause 22.4 which, among other things, confers a power on the Commission to 'do all such things as are necessary for the just resolution of the dispute' and that the Commission 'may give all such directions and do all such things as are necessary for the just resolution and determination of the dispute'. Those provisions might be said to provide an arguable basis for concluding that the Commission is able to grant permission for parties to be represented notwithstanding clause 22.1.4. I express no view other than this is a potential argument.

[26] For these reasons, I am satisfied that the appellant has a sufficiently arguable case on appeal. However, that is not the end of the matter. Aside from the question of whether the balance of convenience favours the granting of a stay, doubts emerged in the hearing as to the appropriateness and availability of the stay orders sought.

Availability and Appropriateness of the Relief Sought

[27] During the hearing, the nature of the relief sought by the appellant by way of a stay was clarified to some extent. The notice of appeal simply indicated that a stay was sought and recorded as follows:

> A stay is required following Deputy President O'Keeffe's refusal to vacate the hearing listed on 2 July 2024.

[28] When Mr Howard was asked to explain the relief sought, it became clear that the practical relief the appellant wanted to achieve was that the hearing listed for 2 July 2024 be

vacated pending the determination of the appeal. When I raised with Mr Howard that a stay of the decision refusing permission to be represented would not achieve that outcome, he initially agreed that the appellant was seeking a stay of proceedings.

[29] When the appellant's attention was drawn to decisions casting doubt upon the capacity of the Commission to make orders staying proceedings, Mr Howard altered his position. Ultimately, the position of the appellant was that it sought a stay under s 606(1) of the Act of the decision of the Deputy President refusing permission for it to be represented and, as a term or condition of the stay, an order vacating the hearing listed on 2 July 2024.

[30] It is apparent that the order sought by the appellant was to vacate the hearing listed on 2 July 2024. That would, in effect, involve a stay of the ongoing proceedings before the Deputy President. There are at least two decisions which have cast doubt upon the capacity of the Commission to grant orders in the nature of a stay of proceedings. In *Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Limited* [2014] FWC 4276, Hatcher VP (as his Honour then was) dealt with an appeal from certain procedural rulings made at first instance. Having set out the usual principles with respect to the granting of a stay, his Honour observed:[5]

> However the application of those principles is necessarily subject to it being demonstrated at the outset by the applicant for a stay that there is an operative decision with ongoing or future effect capable of being stayed under s.606(1). It is not clear to me that this has been demonstrated here. For example, the CFMEU seeks as part of its stay application that the decision of the Senior Deputy President to refuse an adjournment be stayed. It is not apparent how a stay of such a decision could have any practical effect. The refusal or dismissal of an application does not usually give rise to anything capable of being stayed pending an appeal.3 It appears that, in substance, the CFMEU seeks a stay of the proceedings before the Senior Deputy President pending the hearing and determination of the appeal. Section 606(1) does not provide power to do this. The CFMEU seeks to surmount this difficulty by applying for terms and conditions attaching to the stay order that the proceedings before the Senior Deputy President be adjourned. I doubt that this solves the difficulty, for two reasons: firstly, there must in the first place be a properly founded stay order to which any term or condition under s.606(1) can attach; and secondly the adjournment requirement sought by the CFMEU is not in substance a term or condition of a stay order but an entirely separate order. As for the other procedural rulings made by the Senior Deputy President, it is likewise difficult to identify any practical effect of a stay upon those rulings, since the hearing before the Senior Deputy President has now been completed.

[31] His Honour did not express a final conclusion on those matters given that he determined that a stay should be refused on balance of convenience grounds.

[32] In *Woodside Energy Ltd v The Australian Workers Union* [2022] FWC 2573, a stay was sought in connection with an appeal from a decision of a Deputy President of the Commission declining to recuse herself and refusing to vacation directions for the preparation of proceedings at first instance. That matter was also dealt with by Hatcher VP. His Honour noted:[6]

> It is necessary to say at the outset that I do not consider that the grant of the stay sought by Woodside would have any meaningful effect. Woodside submitted that it is possible for an order dismissing or refusing an application to be the subject of a stay; in that circumstance, the effect of the stay would be to restore any previously applicable orders or where, as in this case, there

> are no such orders, then to restore the status quo ante by bringing about a situation in which there are no operative orders. I reject this submission: the "status quo ante" existing prior to the making of the vacation decision was that the extended directions had been made and were operative. It seems to me that what Woodside seeks in substance is a stay of the entire proceedings before the Deputy President pending the hearing and determination of its appeal. I doubt that s 606(1) of the FW Act empowers this, for the reasons stated in *CFMEU v Collinsville Coal Operations Pty Limited*.

[33] Mr Howard accepted that, under s 606(1) of the Act, an order granting a stay would have to be directed at the decision subject of the appeal. That was the reason the appellant ultimately articulated its position as being that it seeks a stay of the decision refusing it permission to be represented and, as a condition of that stay order, that the hearing on 2 July 2024 be vacated.

[34] In *Collinsville*, the current President doubted that such an approach resolved the difficulty for two reasons. First, his Honour observed that there would need to be a properly founded stay order to which such a term or condition could attach. By this I understand his Honour to be referring to the necessity for there to be an operative decision with ongoing or future effect capable of being stayed under s 606(1).[7] In this matter, it is unclear what practical effect would be achieved by staying a decision to refuse the appellant permission to be represented. It would not mean that the appellant was given permission to be represented. At best, it might mean the appellant could renew its application to the Deputy President for permission to be represented. That is something which is open to the appellant in any event. In those circumstances, the decision subject of the appeal does not appear to be one which is capable of being stayed under s 606(1) of the Act.

[35] The second difficulty identified in *Collinsville* was that the adjournment requirement sought could not properly be described as a term or condition of the stay order and, rather, represented an entirely separate order. Section 606(1) of the Act permits the Commission to order that the operation of the whole or part of the decision be stayed 'on any terms and conditions that the FWC considers appropriate'. The precise scope of the 'terms and conditions' that may be imposed does not appear to have been explored by the Commission.

[36] In my opinion, the intention of the section is that the Commission have the capacity to impose terms and conditions such that the stay will operate only if the condition imposed were met. For example, a condition might be imposed requiring steps to be taken to ameliorate or reduce any prejudice caused by the stay order. A common example is that a reinstatement order may be stayed on condition that the employer pay the dismissed employee his or her usual wages pending determination of an appeal. I do not believe that the 'terms or conditions' contemplated by s 606(1) could convert an order staying a decision to something else or cause it to have an effect beyond staying the decision subject of the appeal.[8] That is the effect of the condition sought by the appellant. It seeks to convert a stay of a decision to a stay of proceedings.

Balance of Convenience

[37] In any event, even if it is possible to impose a condition of the type sought by the appellant, I would not grant the stay sought as a matter of discretion having regard to the balance of convenience considerations raised. The appellant submitted that the balance of convenience

favouring the granting of a stay because, if not granted, it would be denied the opportunity to be represented at the hearing on 2 July 2024. It was said that would result in procedural unfairness and the appellant being denied the fundamental right of legal representation.

[38] In my opinion, the possible prejudice to the appellant does not justify a stay. If the proceeding goes forward, the Deputy President will presumably determine the jurisdictional objection. If the appellant is dissatisfied with the outcome, it has a right to appeal under clause 22.3.1 of the Agreement. If the Deputy President erred in determining that the appellant was not able to be granted permission to be represented, one ground of appeal could be that the appellant was wrongly denied the opportunity to be represented. No irrevocable prejudice will be caused to the appellant.

[39] I have some sympathy for the submissions of the appellant that it is undesirable for the hearing to proceed if there are arguable grounds for contending that an error has been made in relation to the question of representation. If the appeal is successful, one possible outcome is that the jurisdictional objection will have to be heard again. Even though the matter is listed only for one day, this will occasion additional costs and delay for the parties. That consideration favours the granting of a stay if that were available.

[40] However, on balance, that matter is best determined by the Deputy President rather than by me. The Deputy President has carriage of the proceedings and far greater knowledge of the background to and nature of the dispute and the nature of the matters required to be considered in the course of the jurisdictional objection hearing. The Deputy President is better placed to assess whether it is appropriate to proceed with the hearing today and should be permitted to make that determination.

Conclusion

[41] For the reason outlined above, I order that the application for a stay order in the notice of appeal be refused. The parties will be contacted shortly in relation to the future conduct of the appeal.

VICE PRESIDENT

Appearances:

L Howard, counsel, instructed by Corrs Chambers Westgarth for the Appellant.
H Crosthwaite, counsel, instructed by the Australian Federation of Air Pilots for the Respondents.

Hearing details:

2024.
Sydney (via video link):
1 July.

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[1] *Fair Work Act* 2009 (Cth), s 596(4)(b).

[2] *Kellow-Falkiner Motors Pty Ltd v Edghill* [2000] AIRC 758 at [5].

[3] *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 at [31]-[32]; *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2012] FCAFC 87; (2012) 203 FCR 371 at [41] (Buchanan and Katzmann JJ); *Linfox Australia Pty Ltd v Transport Workers' Union of Australia* [2013] FCA 659; (2013) 213 FCR 479 at [27] (Rares J).

[4] *DP World Brisbane Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8557; (2013) 237 IR 180 at [47]-[48].

[5] *Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Limited* [2014] FWC 4276 at [11].

[6] *Woodside Energy Ltd v The Australian Workers Union* [2022] FWC 2573 at [14].

[7] See also *Krcho v University of New South Wales (t/as UNSW Sydney)* [2020] FWC 4926 at [12]; *Australian Manufacturing Workers' Union (AMWU) v Opal Packaging Australia Pty Ltd* [2022] FWC 2448 at [14].

[8] See, by way of analogy, *Department of Health (NSW) v Industrial Relations Commission (NSW)* [2010] NSWCA 47; (2010) 77 NSWLR 159 at [23] (Spigelman CJ).