DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Martin Nash
v
PHI (International) Australia Pty Ltd
(C2024/1934)

and

Paul Micheletti
v
PHI (International) Australia Pty Ltd
(C2024/1992)

and

Gregory McAllister
v
PHI (International) Australia Pty Ltd
(C2024/1993)

DEPUTY PRESIDENT O'KEEFFE PERTH, 9 JULY 2024

Permission for Respondent to be represented – interpretation of disputes resolution procedure – interaction of disputes resolution procedure with provisions of the Act – permission to be represented not granted

[1] The Applicants are all casual pilots employed by the Respondent. With their union the Australian Federation of Air Pilots (**the AFAP**) they raised a dispute with the Respondent regarding two pay-related issues. The Respondent has objected to the Fair Work Commission (**the FWC**) dealing with the applications on the grounds that it does not have jurisdiction. The Respondent makes this argument on the basis of its allegation that the Applicants and the AFAP have not followed the dispute resolution procedure in the relevant agreement.

[2] The matter was programmed for hearing and the Respondent asked for permission to be represented. In doing so it addressed s.596(2) of the *Fair Work Act 2009* (Cth) (**the Act**). The Applicants objected to the Respondent being given such permission. The objections of the Applicants were based on s.596(2) of the Act and also the wording of the dispute resolution procedure. Specifically, the Applicants argued that the dispute resolution procedure did not

allow the Respondent to be represented. I advised the parties that based solely on s.596(2) I would have granted permission for representation. However, as the Applicants had a further objection, it was necessary to consider the merit of that objection.

[3] I invited the Respondent to make reply submissions to the Applicant's argument about the dispute resolution procedure. Such submissions were received. At the request of the Applicants, I gave permission for them to address those reply submissions in writing which they did. Having considered all of the relevant submissions I find that the Respondent should not be allowed to be represented. My reasons are set out below.

The Issues

[4] In making this decision I found that there were two primary issues to determine. Firstly, what does the dispute resolution procedure in the relevant agreement say about representation. Secondly, how do the terms of the dispute resolution procedure interact with the Act. Specifically, if the dispute resolution procedure sets out the circumstances for representation, do the provisions of the dispute resolution procedure over-ride the representation provisions of the Act.

The Dispute Resolution Procedure

[5] The relevant agreement is the *Karratha Helicopter Pilots MPT Operations Enterprise Agreement 2017* (**the Agreement**). The dispute resolution procedure is found at clause 22. With respect to representation, clause 22.1.4 states as follows:

> *"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…"*

There is no further specific discussion of representation in the dispute resolution procedure.

Submissions from the Applicants

[6] On behalf of the Applicants, the AFAP submitted that when properly construed, clause 22.1.4 is clear that only a person initiating a dispute may be represented. As the dispute was initiated by the Applicants, it follows that only they could be represented. The AFAP also noted that the relevant provisions of the Act – being s.186(6) – do not prescribe that the employer must be permitted representation in a dispute resolution procedure. As such, the AFAP says that it is open to parties to limit representation in a dispute to the initiator of the dispute only, which the parties did in this instance.

[7] The AFAP says that there is no basis for the FWC to imply a term into the dispute resolution procedure that would allow the non-initiating party to be represented. It says this because consistent with previous findings of the FWC and other courts, such a term is not reasonably necessary for the operation of the clause, not so obvious that it goes without saying and such a term would contradict the express terms of clause 22.1.4.

Submissions from the Respondent

[8] The Respondent says that while it concedes that there is no express term permitting the non-initiating party to be represented, it does not agree that this restricts the FWC's powers to allow representation. It says that the AFAP's submission that the parties agreed to limit representation to the initiating party is wrong as there is no such express or implied limitation

to be found in the Agreement. The Respondent drew my attention to the finding in *ING Administration Pty Ltd v Jajoo (**Jajoo**)*[1] that a court or tribunal should by cautious in reading into a source of power a limitation in the absence of the words bearing a clear meaning. The Respondent also took issue with the AFAP's comparison of the terms of the Agreement with the terms of another agreement to which the Respondent is party. It submitted that such comparisons could not be used to interpret the provisions of an agreement.

Consideration

[9] The interpretation of agreements has been considered at length in numerous decisions of the FWC and other bodies. The principles of interpretation were set out at some length by the Full Bench in *AMWU v Berri Pty Limited 2017 (**Berri**)*[2]. In interpreting an agreement, the first step is to consider the ordinary meaning of the words used by the parties and decide if those words then provide a plain meaning for the clause, or whether they create ambiguity. The FWC's task is not to re-write the agreement to achieve what it might regard as a fair and just outcome, but rather to interpret what the parties have agreed. If what the parties have agreed is clear and unambiguous, then the FWC does not need to look to the surrounding circumstances but should accept that clear and unambiguous interpretation as being the operative one.

[10] In the Agreement, the parties have specified in what I regard as plain and unambiguous language that a party initiating a dispute may be represented. As such, there is no doubt that the Applicants in this matter may be represented, as they initiated the dispute. It is also clear there is no specific right for a non-initiating party to be represented. The Respondent says that this is not fatal to its case as there is no specific or implied limitation on the non-initiating party being represented. I cannot accept that this is the case.

[11] I note the following from the decision in *Berri* at [44]:

> *"…as a general principle, all words in an enterprise agreement must prima facie be given some meaning and effect."*[3]

Given this principle, I must look at the words of 22.1.4 and conclude that they have work to do. If it were the case that any party could be represented, these words would be superfluous. There would be no need to specify that one party could be represented in certain circumstances if all parties could be represented. As such, I find that the meaning and effect of the unambiguous words in clause 22.1.4 is that only a party who initiates a dispute may appoint a representative. Those are the only circumstances in which representation may be allowed under the terms of the disputes resolution procedure.

[12] It is important that I make comment about the logical extension of this finding. It seems clear that under clause 22.1.4 if the employer was to initiate a dispute, then employees could not be represented in that dispute. In that case the dispute resolution clause would fall foul of the requirements of s.186(6) of the Act. However, in my decision in *Australian Federation of Air Pilots v PHI (International) Australia Pty Ltd*[4] I concurred with the Respondent in that matter, being the same Respondent as in this matter, that if a dispute resolution procedure does not meet the requirements of the Act, the response to that issue is not to re-interpret the provision. This is particularly so where the provision is clear and unambiguous. The resolution may well be that the Agreement was not capable of approval but that is not a matter before the FWC at this time.

[13] In summary, I find that the dispute resolution procedure in the agreement is clear and unambiguous in providing that only a party initiating a dispute may be represented. As it is

clear, the admonition in *Jajoo* is not relevant in this matter. I also note that in making this decision there are two other issues that require clarification.

[14] Firstly, I agree with the submission of the Respondent that when interpreting an agreement, the FWC should not look to the wording of other agreements to impute a meaning. As such, I gave no weight to the proposition that the wording of another of the Respondent's agreements should be compared to the wording of the Agreement to assist in interpreting its meaning.

[15] Secondly, I note that the dispute resolution procedure provides at clauses 22.4.1 and 22.4.3 that the FWC may do all things as are necessary for the just resolution of the dispute. Given these provisions, it might be argued that the FWC could permit representation for the party who did not initiate the dispute if it would be necessary for a just resolution. I do not agree with this proposition. Clause 22.1.4 is specific in nature, whereas clauses 22.4.1 and 22.4.3 are general in nature. Given this the specific provision should, consistent with established principles, over-ride the general.

[16] Having determined the meaning of the dispute resolution procedure I must now turn to the implications of this for s.596(2) of the Act.

Interaction of the Dispute Resolution Procedure and the Act

Submissions from the Respondent

[17] The Respondent drew my attention to the finding of Deputy President Asbury (as her Honour then was) in *Ungerer v APT Management Services (**Ungerer**)*[5]. In that matter, the Deputy President permitted the Respondent to be represented pursuant to s596(2) of the Act in circumstances where the disputes clause in the relevant agreement did not provide a right to be represented. The Respondent also relied on the position espoused by the Full Bench in *DP World Brisbane Pty Ltd v Maritime Union of Australia (**DP World**)*[6] that absent any clear contrary intention, when parties confer a private arbitration power on the FWC, then they take the FWC "as they find it." The Respondent also provided a list of ten cases[7] where the FWC had permitted a respondent to be represented in circumstances where there was no express right to be represented in the relevant agreement.

Submissions from the Applicants

[18] The Applicants submitted that consistent with the finding of the Full Bench in *Australian Workers' Union v MC Labour Services Pty Ltd (**MC Labour**)*[8] parties can impose limitations on the role afforded to the FWC and once imposed, the FWC has no discretion to over-ride these limitations. The Applicants also disagreed with the Respondent's contentions about the relevance of *Ungerer*. Specifically, the Applicant claimed the Respondent had misconstrued the substance and implications of the statements of the Deputy President in that case. Finally, the Applicants took issue with the Respondent's ten cases where the FWC gave permission for a respondent to be represented in the circumstances where the dispute resolution procedure did not allow such representation. It was the Applicants' submission that I should not give these cases any weight as the specific issue in contention is this matter was not canvassed in any of those cases.

Consideration

[19] In the first instance, I will deal with the ten cases cited by the Respondent where permission for the Respondent to be represented was granted in circumstances where the dispute resolution procedure did not allow such representation. I have considered each of those

ten cases. Consistent with the submissions of the Applicants I cannot find consideration of the terms of the relevant dispute resolution procedure in any of them. Instead, the cases involve arguments between the parties over the issues raised in s.596(2) of the Act and the decisions on representation reflect this. As a result, the FWC has not considered the implications of the disputes resolution procedure not allowing representation to a respondent. I therefore find that those cases do not assist me in making a decision.

[20] With respect to the decision in *Ungerer,* the parties' submissions are in dispute as to the principle to be drawn from that case. I do not intend to make a finding as to which party's interpretation is to be preferred. Instead, I find that if indeed the case is proposition for the principle that irrespective of what a dispute resolution procedure says about representation, the issue of representation is to be decided by the FWC consistent with the provisions of s.596(2), I do not accept the proposition. I am instead persuaded by the findings in *MC Labour* and *DP World* and the finding of Commissioner Hampton (as he then was) in *Shop, Distributive and Allied Employees Association (006N) v Woolworths (South Australia) Pty Ltd & Woolworths Group Ltd (Woolworths).*[9]

[21] *MC Labour* makes it clear that parties can set limits – via the express terms of a dispute resolution procedure - on the powers of the FWC when it is undertaking its private arbitral role. Consistent with the provisions of s.739(3) of the Act, the FWC is then constrained by these limits. *DP World* then makes it clear – via the words "absent any clear contrary intention" – that the parties take the FWC "as they find it" but subject to any limits they have imposed. Put another way, if parties impose no limitations on the FWC they take it as they find it. If they do impose limitations however, then those limitations – contrary intentions – apply and the parties take the FWC as they find it save for the limitations. That the limitations imposed by the parties can in effect over-ride the way the Act would otherwise require the FWC to deal with matters is supported by the findings in both *DP World* and *Woolworths*.

[22] In *DP World* the Full Bench notes the provisions of two agreements wherein the dispute resolution procedure grants the parties an automatic right of appeal. The Full Bench accepts that in doing so, the provisions of s.604(1) of the Act, whereby parties must usually be given permission to appeal, are modified. In *Woolworths*, the Commissioner was required to consider a dispute resolution procedure that granted automatic representation rights to the company. The Commissioner found that the guarantee of representation provided in the disputes procedure limited the operation of s.596(2) and thereby the FWC's discretion regarding representation.

[23] In summary, I find that where the parties impose limitations or grant themselves rights in a dispute resolution procedure, then the FWC is bound to observe those limtations and rights, even where to do so would be contrary to how the FWC would normally operate under the provisions of the Act. Clearly, there would be some limitations on this but in circumstances such as granting automatic rights to appeal or to be represented, or imposing limits on representation, the expressed will of the parties should prevail when the FWC is exercising its private arbitration role.[10]

Conclusion

[24] For the reasons set out above, I find that the provisions of the dispute resolution procedure in the Agreement are clear and that they limit representation to the party initiating a dispute. I further find that given the dispute resolution procedure has imposed this restriction, the FWC does not have discretion under s.596(2) of the Act to allow the non-initiating party to be represented. Accordingly, permission to be represented cannot be granted.

DEPUTY PRESIDENT

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[1] *ING Administration Pty Ltd v Jajoo* (2006) 158 IR 239 at [40].

[2] *AMWU v Berri Pty Limited* [2017] FWCFB 3005 at [114].

[3] Ibid at [44].

[4] *Australian Federation of Air Pilots v PHI (International) Australia Pty Ltd* [2024] FWC 1007 at [55].

[5] *Ungerer v APT Management Services (Ungerer)* [2021] FWC 1470.

[6] *DP World Brisbane Pty Ltd v Maritime Union of Australia (**DP World**)* (2013) 237 IR 180 at [48].

[7] Respondent Reply Submissions [12].

[8] *Australian Workers' Union v MC Labour Services Pty Ltd (MC Labour)* [2017] FWCFB 5032 at [39].

[9] *Shop, Distributive and Allied Employees Association (006N) v Woolworths (South Australia) Pty Ltd & Woolworths Group Ltd (**Woolworths**)* [2021] FWC 617.

[10] *DP World* (n 6) at [42]-[43]; *Woolworths* (n 9) at [12].