



DECISION

Fair Work Act 2009
s.604—Appeal of decision
s.606—Stay of decision

United Firefighters’ Union of Australia

v

Fire Rescue Victoria
(C2024/7078)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 11 OCTOBER 2024

Appeal against decision [\[2024\] FWC 2619](#) of Commissioner Wilson at Melbourne on 24 September 2024 in matter number C2024/5387 – stay application – stay refused.

[1] The United Firefighters’ Union of Australia (**UFU**) has appealed against a decision¹ and order² (**Order**) made by Commissioner Wilson on 24 September 2024 requiring the UFU to produce to the Commission the ‘trust deed ... for the discretionary trust established by or on behalf of the [UFU] Victorian Branch, of which Alternative Risk Management Services Pty Ltd (ABN 70 649 963 191) is trustee’ (**Trust Deed**). In its original form, the Order required the Trust Deed to be produced to the Commission by 10:00 am on 1 October 2024. On 26 September 2024, the Commissioner amended the Order to extend the time for production of the Trust Deed to 10:00 am on 8 October 2024.³

[2] The UFU’s notice of appeal includes an application for the Order to be stayed pending the hearing and determination of its appeal. This decision deals with that stay application.

[3] For the reasons which follow, the stay application is refused.

Background

[4] The Order was made in relation to an application by the UFU lodged on 7 August 2024 for the Commission to deal with a dispute with Fire Rescue Victoria (**FRV**) pursuant to s 739 of the *Fair Work Act 2009* (Cth) (**FW Act**) and the dispute resolution procedures in the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020* (**Agreement**). The UFU’s application identified the subject matter of the dispute as being that there is or may be a proposal on the part of FRV to reduce the amount reimbursed to employees in relation to expenses incurred for income protection insurance.

[5] The dispute arises in the context of clauses 48 of Division A and clause 56 of Division B of the Agreement,⁴ which provide:

FRV and UFU will consult and implement an agreed income protection policy/scheme for all employees covered under this Division. This income protection policy/scheme will commence

from July 2017.

[6] Disputes about the implementation of the above provisions have previously been dealt with by the Commission, which has led to the making of orders specifying the reimbursement amount to be paid by FRV for contributions to the cost of the premiums for the agreed income protection insurance. The most recent order was made by the Commission on 8 September 2023⁵ and provided for reimbursement of premiums for the agreed insurance policy to the amount of \$55.22 per employee per week.

[7] The UFU's dispute application stated that its apprehension that FRV might seek to reduce the reimbursement amount for income protection insurance arose from correspondence which the FRV Commissioner sent to the UFU on 1 May 2024. It is useful to set out pertinent extracts from this correspondence. The FRV Commissioner first relayed the history of the agreed income protection policy as follows:

As you know, the FRV EA provides for FRV and the UFU to consult and implement an agreed income protection policy/scheme.

On 21 December 2022, the FRV and UFU Consultative Committee agreed to implement a new income protection policy/scheme for employees covered by the FRV EA, with the provider being Howden Insurance Brokers (Australia) Pty Ltd (**Howden**) with insurance underwritten by Arch Underwriting at Lloyd's (Australia) Pty Ltd (**Arch**).

Unlike previous arrangements with Protect, the arrangements implemented effective 1 January 2023 involve payment to a discretionary trust established by the UFU (**Discretionary Trust**). The indication is that the Discretionary Trust pools the funds received and applies them to meet member claims, purchase insurance cover and meet the costs of running the Discretionary Trust.

Currently the reimbursement payments amount to \$50.43 per employee per week, commensurate with the adjusted amount that was reimbursed through the previous income protection arrangement.

Based on information recently provided to FRV and/or its advisors to date, FRV relevantly understands that:

- the Trustee of the Discretionary Trust is Alternative Risk Management Services Pty Ltd;
- the Discretionary Trust provides both 'insurance cover' (being external insurance purchased by the trustee for the Discretionary Trust and its members) and 'trust cover' (a discretionary cover component);
- in relation to the 'insurance cover', the Discretionary Trust has taken out insurance policies underwritten by Arch to cover the following risks:
 - loss of income;
 - lump sum; and
 - additional benefits;
- in relation to the 'trust cover', payments made by the Discretionary Trust to members are entirely at the discretion of the Trustee;
- of the member contributions of \$50.43 per week, approximately \$4.06 per week is used to secure income protection insurance with Arch;
- the remaining member contributions are used to secure other insurance cover and to contribute to the trust cover; and
- the trust cover may also be utilised to meet claims relating to income protection.

[8] The correspondence then stated that ‘FRV’s preliminary assessment is that a significant portion of these reimbursements is likely to be subject to Fringe Benefits Tax’ and gave reasons for this assessment. The gravamen of these reasons was that only that proportion of the reimbursement amount which was attributable to securing income protection insurance, said to be \$4.06 per week, was likely to fall within the ‘otherwise deductible rule’ and be exempt from Fringe Benefits Tax (**FBT**). The FRV then expressed his concern about this situation as follows:

This assessment has significant implications for FRV and its operational employees. From an organisational perspective, FRV’s FBT liability in relation to the taxable component of the reimbursements may amount to approximately \$7,000,000 per year (which has not previously been accounted for).

From the individual operational staff perspective, FRV will be required to include the \$46.37 per week as a reportable fringe benefit amount on employee income statements, which will increase their adjusted taxable income by approximately \$4,550 per annum. This may have implications for employees’ ability to access various means tested government benefits and certain payment obligations including child maintenance payments.

Additionally, as a Victorian public entity, it is critical that FRV has visibility over the beneficiaries of payments of public funds, and the purposes of those payments. Currently, FRV does not have adequate visibility over the application of the reimbursements made to operational employees for their member contributions to the Discretionary Trust.

[9] The FRV Commissioner then requested the UFU’s cooperation with the FRV obtaining a private tax ruling which might resolve the identified concerns. In that respect the FRV Commissioner sought additional information from the UFU including a copy of the Trust Deed. The correspondence then stated:

Without the above information, the ATO is unlikely to have sufficient relevant information upon which to make a decision and the current FBT treatment would need to be maintained. This would disadvantage FRV in relation to the FBT expense and its employees in relation to the quantum of reportable fringe benefit amounts. As FRV cannot support the continuation of the significant implications for FRV or its employees outlined above, in these circumstances it will likely be necessary for FRV to propose steps to reduce the reimbursements paid to employees to reflect the amount which it can assess (based on the information provided) to be referable to income protection insurance and therefore falling within the ‘otherwise deductible rule’.

(underlining added)

[10] It is the last sentence in the extract above which evidently gave rise to the UFU’s dispute application. In its application, the UFU seeks that the Commission make an order that FRV continue to pay the full amount of the income protection allowance as fixed by the order previously made by the Commission.

[11] On 14 August 2024, FRV filed a response to the UFU’s application which substantially reflected the terms of the FRV Commissioner’s 1 May 2024 correspondence and noted that the UFU had not responded to that correspondence before initiating the dispute the subject of the proceedings. The Commissioner conducted an initial conciliation conference on 15 August 2024. On 27 August 2024, shortly before the listed date for a further conference on 29 August

2024, FRV lodged a Form F52 application for an order for the production of the Trust Deed. FRV's grounds for the application included the following statement:

FRV is committed to continuing to ensure operational employees have comprehensive income protection insurance, a commitment which is reflected in the inclusion of this entitlement in the Agreement and FRV's consent to various orders of the FWC with respect to reimbursement of employees for the cost of such insurance. However, FRV currently does not have the information it requires in order to determine its ability to continue to reimburse income protection insurance through the Discretionary Trust.

[12] The grounds identified the relevance of the Trust Deed to the dispute as follows:

The Trust Deed and other documents and information which have been requested are of fundamental relevance to the issues in dispute, as they will provide clarity to the FWC and FRV in relation to

- a. the employee benefits reimbursed by FRV by payment of the reimbursement as a member contribution to the Discretionary Trust;
- b. the taxation implications of the payment of a reimbursement for those benefits via the Discretionary Trust; and
- c. the beneficiaries of the member contributions to the Discretionary Trust.

[13] Accompanying this application was a copy of a letter sent by FRV to the UFU the same day which contained undertakings to the effect that FRV would continue to comply with its obligations in relation to income protection insurance under the Agreement and, in connection with the provision of the Trust Deed, FRV would take into account, in its consultations with the UFU, the tax implications of the current arrangements and 'how to most effectively ensure operational staff have access to high quality income protection insurance at no cost to them and in a manner which is consistent with FRV's financial management obligations as a Victorian public entity'.

[14] After this application was lodged, the Commissioner vacated the conciliation conference listed for 29 August 2024 and conducted a hearing concerning the FRV's application, which was opposed by the UFU, on 16 September 2024. As earlier stated, the Commissioner issued his decision granting the FRV's application and the Order on 24 September 2024.

The decision and the appeal

[15] In his decision, the Commissioner characterised the subject matter of the dispute before him in the following terms:

[15] The UFU's proposed order is 'that FRV continue to pay the full amount of the income protection allowance' as presently fixed by the Commission. However, the dispute as it manifests itself before me appears to not be focused around whether FRV continue to pay the full amount of the income protection allowance, which it is obliged to do anyway, and is instead now an apprehension on the part of the UFU that FRV will seek to reduce income protection payment. In comparison FRV's view of the dispute likely concerns whether the current changed design of the Trust Deed and ancillary arrangements leaves FRV open to an unanticipated and substantial fringe benefits tax liability.

[16] The UFU argues that the core of the dispute is a construction issue. FRV takes a different tack, arguing that the 'arrangements agreed' have changed, without it having an understanding of the scope of the change. It seeks the trust deed in order to understand the extent and meaning of the changes.

[17] Failing agreement between the parties, the Commission may be asked to arbitrate the dispute, however characterised.

[18] While not clear, it appears reasonably likely that FRV will press for a reduction in the amount of its reimbursement, including through determination of the subject by the Commission. It appears driven in this possibility through advice given to it by its tax advisers that the actual cost of income protection insurance is but just a fraction of the weekly payment of \$55.22, with a substantial part of the balance being used for matters other than the provision of income protection insurance. The possibility has two implications; first, that FRV is being overcharged for a benefit provided to employees for a specified purpose and/or second, that the situation attracts a significant and unanticipated high fringe benefits tax liability, which it has no desire to assume and which it may need to seek to avoid through private tax ruling.

[16] The Commissioner determined that an order should issue requiring the UFU to produce the Trust Deed for the following reasons:

[21] After considering the submissions of each party and the limited material before me at this time, I am satisfied that a case has been made for the provision of the Trust Deed directly to FRV. The document plainly has relevance to the course of proceedings before me. I am concerned that without production of the document, further conciliation will be ineffective, with a key party perhaps not being as aware of its situation as it should be, and being unable to respond with appropriate concessions or responses to the UFU. I am then concerned that, without production of the document, arbitration, if necessary, may be similarly ineffective, or that the Commission as arbitrator is inadvertently misdirected.

[17] However, the Commissioner determined that access to the Trust Deed, once produced, should be controlled and limited. In respect of FRV, the Order provided for access only to 'a nominated senior executive of Fire Rescue Victoria and lawyers acting for Fire Rescue Victoria in relation to the proceedings before the Fair Work Commission in matter number C2024/5387', with FRV being required to nominate the name and position of the 'nominated senior executive' by 10.00 am on 30 September 2024.⁶

[18] On 25 September 2024, the UFU wrote to the Commission indicating that it intended to appeal the decision and the Order, and requested that the date for the production of the Trust Deed be extended from 1 October 2024 to 15 October 2024 because 'Counsel for the UFU is away until mid-next week'. This was opposed by FRV. The Commissioner, as earlier stated, varied the Order to require production by 10.00 am on 8 October 2024.

[19] The UFU's notice of appeal, which was lodged at 4:54 pm on 7 October 2024 states the following grounds of appeal:

1. The Commissioner erred in finding that the document ordered to be produced has relevance to the issues to be determined in the proceeding before the Commission.
2. The Commissioner erred in the exercise of his discretion by ordering the production of the document which is a confidential commercial document.

[20] At 5:45 pm on 7 October 2024, the UFU sent an email to the chambers of the Commissioner requesting that he stay the Order until its appeal was heard and determined. This was opposed by FRV, and no such stay has been granted by the Commissioner (who is currently on leave). The UFU did not produce the Trust Deed to the Commission by 10.00 am on 8 October 2024, as required by the Order. Nor has it done so since. On 8 October 2024, the stay application in the UFU's notice of appeal was listed for hearing on 10 October 2024.

Applicable principles

[21] Section 606(1) of the FW Act confers a discretionary power to order the stay of the operation of the whole or part of a decision under appeal, on such terms and conditions as the Commission considers appropriate, until the appeal is determined or the Commission makes a further order. The principles usually applied in the exercise of the discretionary power are those detailed *Kellow-Falkiner Motors Pty Ltd v Edghill Pty Ltd*:⁷

In determining whether to grant a stay application the Commission must be satisfied that there is an arguable case, with some reasonable prospect 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.⁸

(citations omitted)

[22] I apply those principles to this application on the basis that they are not necessarily exhaustive of the considerations which might arise in determining a stay application. It must also be noted that, in this case, the parties agree that by virtue of the terms of the disputes resolutions procedures in the Agreement, there is a *right* to appeal any arbitral decision of the Commission made pursuant to those procedures. Accordingly, consideration of prospects of success in relation to obtaining the grant of permission to appeal does not arise here.

[23] When assessing whether, for the purpose of a stay application, the appeal has the requisite prospects of success, it is to be kept in mind that the Commission is engaging in an assessment of the merits that is preliminary in nature. This is because the Commission will not have had the benefit of hearing the appellant's arguments in full and usually will not have had the opportunity to properly peruse the materials filed.⁹

Arguable case with reasonable prospects

[24] The UFU submitted that its first appeal ground, by which it contends that the Commissioner erred in concluding that the Trust Deed had relevance to the dispute, is arguable with reasonable prospects of success. It submitted that the determination of the dispute called for the interpretation of the relevant clauses of the Agreement and the terms of the orders made by the Commission setting the amounts required to be paid by FRV to reimburse employees for the cost of income protection insurance, and the Trust Deed did not bear upon this interpretive exercise. The Commissioner's characterisation of the dispute was, the UFU submitted, incorrect because it relied on FRV's concerns about FBT liability for the reimbursement, which was a distraction from the proper function of the Commissioner in the dispute and irrelevant. As to the second appeal ground, the UFU relatedly submitted that the decision was 'unreasonable or plainly unjust' insofar as it required the production of a 'private commercial document' which

had no apparent relevance to the determination of the obligations under the clauses of the enterprise agreement or the Commission's orders.

[25] While I am not prepared to say that the UFU's appeal is inarguable, its prospects of success appear to me to be less than reasonable. The issue of an order for the production of documents must be for a legitimate forensic purpose, which usually involves consideration of whether the documents have apparent relevance to the issues in the proceedings. Apparent relevance may be established if it is likely that the documents will assist a party's case, or give rise to a line of enquiry which is relevant to the issue before the Commission, or can plausibly be seen to relate to an issue in the proceedings or to cast light on such an issue. This consideration involves an overall assessment as to whether requiring the production of the documents represents an appropriate way for the Commission to inform itself.¹⁰

[26] The UFU's submissions on relevance cast the position far too narrowly, in that the UFU seeks to assess relevance only by reference to the case it intends to advance in respect of the dispute. The fact that the UFU seeks to resolve the dispute by having the Commission simply apply the provisions of the Agreement and the order determining the reimbursement amount does not mean that any documents sought must be relevant to that putative case. The UFU's dispute application which initiated the proceedings below plainly identified the dispute as being concerned with an apprehension that FRV might seek to reduce the reimbursement amounts it is currently required to pay, with that apprehension being founded upon the FRV Commissioner's correspondence of 1 May 2024. That correspondence makes clear that FRV's position is that the altered arrangements for obtaining income protection insurance, of which the Trust Deed is a keystone feature, have likely resulted in a position whereby the reimbursement amounts FRV is currently paying far exceed the actual cost of the insurance and are buying other benefits which will attract FBT liability. FRV seeks access to the document at least for the purposes of confirming what benefits it is reimbursing employees for and attempting to resolve the FBT liability issue. The Trust Deed appears to me to be plainly of apparent relevance to, first, the conciliation of the dispute since the resolution of the FBT liability issue may dispose of any need for the FRV to consider a reduction in the reimbursement amounts it pays and thus resolve the dispute and, second, the arbitration of the dispute insofar as that would likely require consideration of whether the current quantum of the reimbursement amounts should be maintained if it exceeds the cost of the income protection insurance being purchased.

[27] The UFU's contention that it should not be required to produce a 'private commercial document' lacks any apparent merit if the document has apparent relevance. The characterisation of a document as 'commercial' in nature is not a bar to production if appropriate provisions protecting confidentiality are put in place. The Commissioner addressed this issue in the terms of the Order which he made restricting access to the Trust Deed on production. As to the Trust Deed being 'private', it was left unexplained why a document intended to facilitate a scheme *agreed with FRV* for the provision of income protection insurance *at FRV's expense* should be private to the UFU and not accessible to FRV. No reasonably arguable *House v The King*¹¹ error is identifiable.

[28] I finally note that the UFU's appeal is against an interlocutory decision of a discretionary nature. Appeals of this nature are not usually encouraged, and appellate intervention with respect to such a decision prior to the final hearing of the relevant matter would rarely occur.

Balance of convenience

[29] The UFU submits that the balance of convenience favours the grant of a stay because the appeal would be rendered nugatory if a stay is not granted, and the production of the Trust Deed to FRV will not be able to be undone if the UFU is successful in its appeal.

[30] This submission may be accepted only in the narrow sense that the Trust Deed will have to be produced (to the Commission, not FRV) and disclosed to the single person nominated by FRV if a stay is not granted. However, the ultimate purpose of orders for production of documents is the use of the documents in the proceedings in question. The Commissioner has made no determination as to whether the Trust Deed should be admitted into evidence or otherwise used in the proceedings, and the UFU's rights in this respect are maintained if a stay is not granted. The UFU did not otherwise identify any substantive prejudice which will arise if a stay is not granted. Its assertion that the Trust Deed is confidential lacked content in that it was not explained what about it is actually confidential or what prejudice to the UFU might flow from its production in accordance with the Order.

[31] I also consider that there are balance of convenience considerations weighing against the grant of a stay. There are strong public interest considerations in the FRV resolving, as soon as possible, the issue of its potential ongoing FBT liability and in obtaining transparency as to the income protection insurance scheme it has entered into.

[32] For the above reasons, I am not satisfied that the balance of convenience weighs in favour of the grant of a stay.

UFU's failure to comply with the Order

[33] I consider that the UFU's failure to comply with the Order is also a matter relevant to the exercise of the discretion under s 606(1), whether as an element of the balance of convenience or as a separate consideration. I have earlier set out the chronology of events leading to the filing of the appeal in this matter. It is apparent that the UFU formed an intention to appeal not later than 25 September 2024, the day after the decision and Order were issued. That it then waited until just before close of business on 7 October 2024 to file what must be characterised as a straightforward and simple notice of appeal is inexplicable. The time at which it filed the appeal meant that there was no practical possibility that its stay application could be heard before the amended time and date for production of the Trust Deed, namely 10.00 am on 8 October 2024. Having placed itself in this position, the UFU then elected to simply disregard the requirement imposed by the Order to produce the Trust Deed.

[34] A contravention of an order of the Commission is an offence: s 675(1) of the FW Act. I do not consider that a stay should be granted to retroactively validate the UFU's failure to comply with the Order in the absence of an otherwise persuasive case for a stay.

[35] The relevant considerations do not weigh in favour of the UFU's stay application, and therefore I will not exercise the discretion to grant a stay.

Conclusion

[36] The UFU's application for a stay is dismissed.



PRESIDENT

Appearances:

H Borenstein KC, instructed by Davies Lawyers, for the United Firefighters' Union of Australia.

R Sweet KC with *B Avallone*, counsel, instructed by Lander & Rogers, for Fire Rescue Victoria.

Hearing details:

2024.

Sydney by video link using Microsoft Teams:
10 October.

Final written submissions:

United Firefighters' Union of Australia: 10 October 2024.

Fire Rescue Victoria: 9 October 2024.

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<PR780168>

¹ [\[2024\] FWC 2619](#).

² [PR779526](#).

³ The Commissioner amended the Order by way of email on 26 September 2024 and an amended order was formally published by the Commission on 30 September 2024: [PR779768](#).

⁴ Division A of the Agreement applies to employees of FRV who were formerly employed by the Metropolitan Fire and Emergency Services Board, while Division B applies to those formerly employed by the Country Fire Authority.

⁵ [PR765587](#).

⁶ In accordance with this aspect of the Order, FRV advised on 30 September 2024 that its 'nominated senior executive' was Mr Tony Matthews, Acting Deputy Secretary and Executive Director, Corporate Services.

⁷ [2000] AIRC 785, Print S2639.

⁸ *Ibid* [5].

⁹ *Supreme Caravans Pty Ltd v Pham* [\[2013\] FWC 4766](#) [9].

¹⁰ *Lawrence v United Workers' Union* [\[2024\] FWC 2040](#) at [9]–[16].

¹¹ (1936) 55 CLR 499.