



DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Surveillance Australia Pty Ltd

v

Australian Federation of Air Pilots (C2023/6948)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT BELL

MELBOURNE, 3 MAY 2024

Appeal against decision [\[2023\] FWC 2427](#) of Commissioner Connolly at Melbourne on 24 October 2023 in matter number C2023/4181

Background

[1] The appellant, Surveillance Australia Pty Ltd, which trades as Leidos Airborne Solutions, seeks permission under s 604 of the *Fair Work Act 2009* (Cth) (Act) to appeal, and, if granted, appeals a decision of Commissioner Connolly in *Australian Federation of Air Pilots v Surveillance Australia Pty Ltd* (Decision).¹ The Decision deals with a dispute between the appellant and the respondent, the Australian Federation of Air Pilots, about agreements made between the appellant and some of its employed pilots in relation to fly in fly out (FIFO) arrangements,² under which it was agreed that, over each 28-day period, the employee would ordinarily:

- have an “on swing” of 16 days, of 14 work days and 2 transit days to/from work;
- have a 12 day “off swing” at home in which they were not required to work; and
- acquit annual leave during their off-duty periods, so they may have 12 days off swing rather than the 8 “days off” they were entitled to under clause 4.3.1 of the *Surveillance Australia Pilot and Observer Agreement 2016* (Agreement).³

[2] The appellant introduced FIFO pilot employment and sought to implement a 28-day rostering schedule described above for those employees through individual flexibility arrangements (IFAs) and employment contracts.⁴ The AFAP objected to the rostering schedule as being inconsistent with the Act and the Agreement. Consequently, the respondent applied under s 739 of the Act for the Commission to deal with a dispute in accordance with the dispute resolution procedure contained in clause 1.12 of the Agreement. By the time the dispute came to the Commissioner for determination, the appellant told the Commissioner that it had removed from any proposed IFA any agreement that leave would be acquitted during off-swing periods.⁵ Therefore, at the time of the dispute being determined, the dispute concerned only contractual

agreements with FIFO employees which were not IFAs relating to rostering and leave arrangements of the kind summarised in the dot points in [1] above.

[3] The Commissioner determined that annual leave arrangements (hereafter referred to as the rostering terms) described above vary or seek to vary an employee's annual leave entitlements as provided for by the Agreement and the National Employment Standards (NES) and that this is not permissible by either an IFA or any other instrument purporting to have the same effect of an IFA.⁶ In substance, the Commissioner determined that the arrangements were inconsistent with s 88(1) of the Act and clause 6.1.3 of the Agreement.

Appeal grounds and the nature of the appeal

[4] By its notice of appeal, the appellant sets forth nine appeal grounds, although, by the time the hearing of the appeal commenced, grounds 6 and 7 were no longer pressed.⁷

[5] By ground one, the appellant contends the Commissioner erred in the proper construction of s 88(1) of the Act and clause 6.1 of the Agreement, finding that agreements between an employer and employee, planning to take multiple future periods of time as annual leave over an extended period were not consistent with the NES and the Agreement.

[6] Ground two contends that the Commissioner erred in the proper construction of the Agreement, equating off-swing days as part of a FIFO roster with "rostered days off" under the Agreement.

[7] Grounds three and four attack the Commissioner's reasoning process, contending he erred in finding that the agreements made between the appellant and individual employees required those employees to take annual leave on their rostered days off; and that off-swing days as part of a FIFO roster cannot include a period of annual leave "whether that is by agreement or not" (Decision at [98]).

[8] By ground five, the appellant contends that the Commissioner erred in the construction of clause 1.14 of the Agreement and/or s 202 of the Act, and further or in the alternative that he mistook the facts, finding that the common law agreements under which employees agreed to take annual leave during their off-swing days as part of a FIFO roster were either an IFA or an "instrument purporting to have the same effect of an IFA" (Decision at [120]).

[9] Ground 8 contends that the Commissioner mistook the facts in finding that an effect of the agreements made between the appellant and individual employees was to prevent an employee from taking an extended period of annual leave by agreement.

[10] Ground 9 is a derivative of the other grounds and in many respects encompassed by the first appeal ground.

[11] The principles set out in *House v the King*⁸ apply to appellate review of a "discretionary" decision. A discretionary decision is one where the legal criterion to be applied tolerates a range of outcomes.⁹ This is in contrast to a decision which permits only one correct outcome, even if that outcome is to be reached by an evaluative process as to the application of a value-laden criterion.¹⁰ The ultimate decision the subject of this appeal is that the annual leave arrangements

found in the rostering terms made between the appellant and its FIFO employees were not consistent with annual leave provisions of the NES and the Agreement. That decision tolerates only one correct answer, and no discretion is here involved. The decision is therefore governed by the correctness standard. In that respect, appeal grounds directed to errors in the Commissioner's reasoning process might explain why his decision was incorrect, but if the decision was correct, errors in the reasoning process will not mean the appeal will succeed. For that reason, it is unnecessary to traverse in any detail the Commissioner's reasons.

Consideration

Permission to appeal

[12] For the reasons which will shortly become clear, we consider the appellant has advanced an arguable case of appealable error. Additionally, as the appeal raises for consideration the interaction of employment contractual terms with an enterprise agreement and the NES, we consider that it is in the public interest to grant permission to appeal, and we do so.

Appeal

[13] Resolving the central issue raised by the appeal – whether the rostering terms the subject of an agreement between the appellant and some of its FIFO employees are inconsistent with the annual leave provisions of NES or the Agreement – requires us to properly construe and apply the relevant provisions of the NES and, more broadly, the Act and the Agreement. The principles of statutory construction and those pertaining to the construction of enterprise agreements are well-settled and need not be rehearsed.¹¹

[14] Before turning to the relevant provisions of the Act and the Agreement, it is necessary to set out some detail about the rostering and annual leave arrangements in the rostering terms the subject of the dispute.

[15] The rostering terms at issue are set out in employment contracts between the appellant and some of the FIFO employees.¹² Relevantly, the contract comprised a letter confirming the terms of employment which provided:

Core Terms of Employment

I confirm that your annual base salary is AUD [insert], plus superannuation.

The terms and conditions of your employment are underpinned by the *Surveillance Australia Pilot & Observer Enterprise Agreement 2016* (Enterprise Agreement), a copy of which is enclosed for your reference.

FIFO terms and conditions

Your offer of employment with us was made on the common understanding that you will work on a fly in/ fly out (FIFO) working arrangement, and Brisbane will remain your home base.

The Airborne Solutions FIFO program is designed as a long-term solution to maintaining a sustainable Dash 8 pilot workforce. We know that most of our pilots thoroughly enjoy the nature of our flying and the service we provide to the community, but that living in our operational bases does not meet the long term needs of everyone.

The purpose of this letter and its enclosures is accordingly to confirm the terms of your FIFO working arrangement. The matters set out below do not vary how the *Surveillance Australia Pilot & Observer Enterprise Agreement 2016 (Enterprise Agreement)* applies to your employment. Rather, it clarifies how these provisions apply while you are working your FIFO working arrangement and also outlines some other incidental matters about these arrangements.¹³

[16] Attached to the letter was a document containing details of, *inter alia*, the rostering and annual leave arrangement comprising the rostering terms that apply as contractual terms. It relevantly provides:

1. Rosters

FIFO Arrangement	Relevant Agreement Clause	Interpretation and Application of Enterprise Agreement under FIFO
Your roster will ordinarily consist of 28-day cycles made up of 14 days of duty, 2 days of travel (one day to fly into base and one day to fly home) and 12 days off at home.	4.1 Ordinary Hours	The roster arrangement complies with the obligations of clause 4.1 to average ordinary hours to 40 hours a week over a period not exceeding 12 months
Once a year to allow the roster to slip a week, the period of 14 days duty will become 21 days. The 21-day duty period will occur annually, 12 months after the beginning of your FIFO roster.	4.2 Rosters	The roster arrangement is set in advance with the pilot such that the provisions of clause 4.2 to provide 14 days’ notice of the roster for a period of at least 14 days are met.
At the Company’s discretion to meet operational requirements, the first FIFO roster period may vary from the	4.3.1 Days Off	The extended periods of days off at home as described meet the requirements to provide a pilot with 8 days off in a 28-day roster period and to provide blocks of sequential RDOs and

<p>ordinary 28-day cycle, provided it does not result in you being rostered for more than 14 days duty during that cycle.</p>		<p>weekends as described in the Agreement.</p> <p>Any RDOs for the purposes of clause 4.3.1 will be taken as taken while you're off swing.</p>
	<p>4.3.6 Where 8 RDOs are not provided in a 28-day period.</p>	<p>There is one roster period per year during which the on-duty cycle becomes 21 days to enable the roster to slip. In that period, you will have two travel days and 5 days off at home to complete the 28-day cycle.</p> <p>This results in your receiving five (5) days off in that 28-day period, not eight (8) as required under the Agreement. This results in you otherwise having an entitlement to three (3) additional days under clause 4.3.6 if the Agreement. These three (3) additional days will accrue to you to be taken as days of extra paid leave (see how these days can be taken as described in the annual leave section below).</p> <p>Note: The off-duty cycles that precede and follow this 21-day on-duty period remain at 14 days (including the two travel days).</p>
	<p>4.3.9 Days off at Home Base</p>	<p>The FIFO roster will provide on average at least 24 days off in each static</p>

		84-day period. (See provisions below for duty extensions)
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2 Annual Leave and Leave

FIFO Arrangement	Relevant Agreement Clause	Interpretation and Application of Agreement
Your annual entitlement to annual leave will be acquitted during the off-duty periods.	6.1 Annual Leave	<p>The Agreement provides for an annual entitlement to six weeks (42 calendar days) of paid annual leave per completed year of service.</p> <p>A pilot employed under a non-FIFO arrangement is normally entitled to 92 rostered days off (46 weeks) and 42 days of annual leave per annum, for a total of 134 calendar days off.</p> <p>The FIFO roster provides for 175 off duty days (accounting for one 21-day duty period), less 26 travel days, resulting in 149 days off with no work-related activity.</p> <p>This will accordingly be taken to discharge the Company’s obligation under clause 6.1.</p>
You may request an extension to an off rotation for the purposes of having an extended holiday once per calendar year, such you are for a	<p>6.1 Annual Leave</p> <p>6.6 Leave Without Pay</p> <p>4.3.6 Days off in a 28-day period</p>	This arrangement recognises that you may wish to enjoy extended periods of absence beyond the periods of 6 weeks of paid annual leave that are

<p>total of six consecutive weeks (42 calendar days).</p> <p>The request must be made six months in advance and is subject to company approval. Requests will not be unreasonably withheld.</p> <p>In order to be eligible to make such a request, you must accrue 14 additional 'on' days in advance through duty extensions where you wish to extend period of absence to be paid or enter into an agreement to take 14 days unpaid leave (or a combination of both paid and unpaid days).</p> <p>FIFO pilots should not expect to have leave requests that encompass all or part of the Easter long weekend or the period between Christmas and New Year. The roster's sleep provisions of 3.1 should ensure that each FIFO pilot has access to these days during their off swing every second year.</p>	<p>4.3.9 Days off in a static 84-day period</p>	<p>acquitted during the off – period days.</p> <p>This arrangement allows you to take up to 6 weeks in a row off duty.</p> <p>Where you work additional on days as set out in section 2 above, you may elect to accrue the payment of the additional day so that it is held over and paid out when this extended period of leave is taken. This will be taken as satisfying the obligation to pay you for the additional day payment under clauses 4.3.6 and 4.3.9 and the arrangement prescribed at section 2 above.</p>
<p>RDOs and Annual Leave</p>	<p>6.1.8 Roster of RDOs</p>	<p>As each period of annual leave on a stand-alone basis does not exceed 14 days, the provision of clause 6.1.8 will not apply to you while working the FIFO roster.</p>

<p>The taking and debiting of leave</p> <p>The leave entitlement under the Agreement is described in calendar days. Although the 6 weeks of leave will be acquitted through the pre-determined off periods as described above, there may be circumstances where you have other accrued leave (for example leave accrued during the period of being checked to line for a new employee, or an existing leave balance for a pilot who has elected to transfer to FIFO).</p> <p>As it is effectively an equal time roster, this extra <u>leave must be applied for and taken in blocks of equal on time and off time to allow the roster to work. In practice, this means that leave must be taken in blocks of 28 calendar days commencing on the travel day prior to the first day of a 14 day on duty period. This provides a period of 40 days free of either on duty or travel commitments.</u></p> <p>** The same would apply to requests for LSL</p>	<p>6.1.1 Annual Leave which defines the annual leave entitlement in calendar days (42) not, work days.</p> <p>6.1.2 Defines a week's leave seven calendar days paid as 40 hours</p>	<p>Clause 6.1.1 will be taken to operate with the effect that 42 calendar days (240 hours) include off swing days.</p>
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[Underlining and bolding in original]

[17] As is evident from the above, the rostering terms envisage that a FIFO employee will work away from home for 16 days (including two days of travel), after which the employee will spend 12 days at home. Eight of those days at home are intended to be RDOs, with the remainder being made up of annual leave and days that the FIFO employee is not required to work.¹⁴ Once a year the rostering schedule changes by which a FIFO employee is required to work 21 days away from home after which they spend only five days at home on RDOs. This allows the roster to slip a week. A FIFO employee's entitlement to annual leave is used on the four days in each rostering cycle that the FIFO employee spends at home after using eight RDOs.

[18] A FIFO employee may request, but only once per calendar year, an extension to an off rotation for the purposes of having an extended holiday. The request must be made six months in advance. If the FIFO employee wants to take a period of leave outside the roster cycle, there appears a requirement to perform extra work equal to the duration of the leave during rostered RDOs. There is no capacity in the rostering terms for a FIFO employee to use annual leave accrued other than in four-day blocks each 28-day rostering cycle.

[19] Division 6 of Part 2 – 2 of Chapter 2 of the Act deals with the NES entitlement to annual leave. Section 87 deals with the amount and accrual of paid annual leave. Section 88 deals with taking paid annual leave and provides:

“88 Taking paid annual leave

- (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
- (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.”

[20] Several observations may be made about s 88 of the Act. Section 88(1) provides an entitlement for employees to take paid annual leave for the purpose, *inter alia*, of “access to rest and recreation”¹⁵ relevantly, “at a time of the employee’s choosing, so long as the request for leave is not unreasonable.”¹⁶ Put another way, s 88 of the Act provides for agreement between an employer and an employee about when annual leave is to be taken by the employee and the duration of that leave and an employer must not unreasonably refuse to agree to a request by an employee to take paid annual leave. So much seems clear when reading “agreed” in s 88(1) in the context of the qualification in s 88(2) and the significance of annual leave.

[21] Section 88 of the Act permits an employee to make a single request for more than one period of paid annual leave. But the words “a period” and “a request” in s 88(1) and (2) show that employees are entitled also to make several requests for annual leave and for periods of different durations.

[22] The NES provisions permitting employees to take paid annual leave recognise that employees are not a homogeneous group. Employees will need to use annual leave differently over the course of their employment, and the entitlement to take annual leave under the NES accommodates that difference through its machinery of request and approval and by proscribing the unreasonable refusal of leave requests. It also accommodates the business, operational and organisational needs of the employer by permitting reasonable refusals.

[23] The rostering terms of the employment contracts between the appellant and some FIFO employees, as is evident from the provisions earlier reproduced, require FIFO employees to comply with a rigid pattern of annual leave accrual and use. Relevantly, under the rostering terms, a FIFO employee cannot take any more than four days annual leave at any one time and, conversely, cannot accrue longer periods of leave because leave progressively accrued is taken at short intervals. The rostering terms have the effect of limiting the days on which annual leave may be taken and there appears no scope under the rostering terms to reach agreement to take annual leave during any of the 16 or 21 days on-duty period.

[24] However, central to the operation of s 88 of the Act is the notion that paid annual leave is to be taken for a period agreed between an employee and his or her employer. The agreement to a period, which may include one agreement for several or multiple or ongoing periods and may be facilitated by an employee request, which must not be unreasonably refused, or requests by the employer. Agreements to periods of paid annual leave to be taken may be initiated by an employer proposing one or more leave periods and the employee agreeing to same.

[25] We agree with the appellant that the rostering terms so far as they concern taking paid annual leave are consistent with s 88(1) of the Act. The nature of the rostering terms is that they involve an agreement between the FIFO employee and the appellant about how and when annual leave would be taken (either during the employee's off-swing period or during an agreed extended holiday). We do not consider that making an agreement through an employment contract about when leave is to be taken is inconsistent with or contradictory to s 88(1) of the Act.

[26] Although s 88(1) of the Act provides that paid annual leave may be taken for "a period agreed", as we note above, the section does not require a singular agreement for each singular period of leave. We do not consider that the language, purpose and context of s 88(1) supports such a narrow construction. Plainly, unless the contrary intention appears in the Act, words in the singular number will include the plural number.¹⁷ No contrary intention appears in the Act.

[27] For these reasons, the Commissioner erred in concluding that the annual leave proposal, as is evident in the rostering term, varied or sought to vary an employee's annual leave entitlements as provided for in the NES.

[28] We accept that under the rostering terms, a FIFO employee may request, though only once per calendar year, an extension to an off rotation for the purposes of having an extended holiday. That request must be made six months in advance. And if a FIFO employee wants to take a period of leave outside the roster cycle, there appears a requirement to perform extra work equal to the duration of the leave during rostered RDOs.

[29] At first blush, this might appear to be inconsistent with the right to request paid annual leave under s 88 of the Act. However, these provisions are concerned with extra leave not that which is conferred by the NES and the rostering term provides a mechanism for accruing such extra leave.

[30] We accept that the continued operation of the rostering terms has the result of a loss of flexibility to choose the time, duration, or banking of annual leave that would pertain if the FIFO employees had not agreed with the appellant to take annual leave in the manner specified

in the rostering term. But that does not mean that the full benefit of the NES is lost or diminished. The right of an employee under s 88 of the Act to request a period of paid annual leave other than during a period for which the rostering term provides remains. Nothing in the rostering term prevents an employee from exercising that right and the appellant is prohibited from unreasonably refusing the request. Although it is not necessary to here decide, a refusal of a request to take paid annual leave during a period other than and instead of that prescribed in the rostering terms, solely on the basis that there is already an agreement based on the rostering terms, would in our view likely be unreasonable.

[31] We turn next to the Agreement.

[32] Section 93(3) of the Act relevantly permits an enterprise agreement to include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

[33] Clause 6.1 of the Agreement deals with annual leave and provides:

“6.1 ANNUAL LEAVE

6.1.1 A permanent employee is entitled to six weeks (42 calendar days) of paid annual leave (inclusive of Saturday, Sundays and Public Holidays) for each completed year of service. Annual leave will accrue and be credit on a pro-rata basis in accordance with legislative requirements. Normally annual leave must be taken in the year in which it accrues.

6.1.2 For rostering purposes, a weeks (sic) annual leave will be 7 calendar days paid at 40 hours.

6.1.3 Annual leave will be taken at times agreed between the Employee and the Employer.

6.1.4 In recognition that the company has a right to manage leave balances, the following approach will be followed:

6.1.4.1 The company may remind employees of leave balances at 42 days (6 weeks) accrual and advise that a leave request should be submitted by the accrual of 63 (9 weeks) to reduce the balance to or below 42 days.

6.1.4.2 At 63 days (9 weeks) balance, and in the absence of receipt of a Leave Application, the company will follow up the employee and seek a leave application to reduce the employees balance to 42 days as a minimum, however, where no application is subsequently received the company may roster the employee leave (to suit operational requirements) back to a balance of 42 days.

6.1.5 An Employee employed on the Furgo LADS contract will take annual leave during the Christmas stand down period and as promulgated by the Client.

- 6.1.6 Any annual leave accrued but not taken will be paid out on termination.
- 6.1.7 If an Employee is recalled to duty whilst on annual leave, the Employee will be credited two days annual leave for each day recalled duty.
- 6.1.8 Where requested by an employee, the Employer will endeavour to roster Employees two RDO's either immediately before or after, or one day immediately before and immediately after, a period of annual leave greater than 14 consecutive days. However, where an Employee applies for and is approved leave that is equal to or greater than a full year entitlement, the Employee shall have a right to take two rostered days free of duty immediately before or after, or one day immediately before and one day immediately after the leave period if the Employee so requests.
- 6.1.9 The Employer will respond by approving or rejecting an Employees application for annual leave within 14 calendar days or receiving such an application from the Employee. If the application is neither approved nor rejected, the Employee will be contacted with 14 days and the application held pending clarification within 28 days.
- 6.1.10 An Employee may cash out annual leave with Employer approval. However, annual leave must not be cashed out if it results in the Employees remaining accrued entitlement to paid annual leave being less than 4 weeks (28 days). The Employer's request to cash out annual leave must be in writing.
- 6.1.11 Where an Employee becomes seriously ill or injured during annual leave for a period of not less than 7 consecutive days the duration of such illness/injury will be counted as personal/carers leave. Providing that firstly the Employee will advise the Employer as soon as practicable after the commencement of the illness and secondly produces proof of illness to the Employer within 7 days of return to duty.
Every consideration will be given to granting equivalent substitute recreation leave in the manner requested by the Employee."

[34] Clauses 6.1.4 and 6.1.5 of the Agreement appear to engage with the permission in s 93(3) of the Act but are not material to the resolution of the dispute.

[35] Clause 6.1.3 of the Agreement provides for annual leave to be taken at times agreed between the employee and the employer and does not appear to be conditioned with a term that corresponds with s 88(2) of the Act. It may therefore contravene s 55 of the Act and be of no effect.¹⁸ The Agreement does not contain an NES precedence clause. This is ultimately of no great moment because as the Agreement was approved, we can assume that all of the approval requirements were met to the satisfaction of the Member approving it. In that event, any request made by an employee covered by the Agreement to take a period of paid annual leave must not unreasonably be refused. If the provision is of no effect because it contravenes s 55 of the Act, annual leave is in any event to be taken for a period agreed between the employee and the appellant pursuant to s 88(1). And pursuant to s 88(2), the appellant must not unreasonably refuse to agree to a request by an employee to take paid annual leave.

[36] Nevertheless, clause 6.1 of the Agreement replicates key aspects of the annual leave entitlement under the NES. Plainly, clause 6.1 has also been designed to engage with the nature of work of the appellant's employee pilots and its operational requirements but not with its engagement of FIFO pilots.

[37] The annual leave entitlement under the Agreement proceeds on the basis that an employee may, at any time during their employment, "apply", that is to request a period of annual leave. An employee is entitled to have that request considered by the appellant and the application is either approved or rejected. As noted above, annual leave is taken at a time agreed. Annual leave accrues "in accordance with legislative requirements".

[38] The respondent says whether the rostering terms are consistent with the entitlement to annual leave under the Agreement can be tested by asking: when can a FIFO employee subject to the rostering terms make a successful application for annual leave? The answer, according to the respondent, is that such an employee could never do so because the employee could never accrue the leave to be taken. The respondent contends that the fact the rostering terms also create an alternate method for accessing extended leave demonstrates the rigid absence of choice, the deprivation of the full benefit of extended annual leave and neutralising of the terms in the Agreement. That may be partly correct, but it does not follow that the rostering terms are inconsistent with clause 6.1 of the Agreement.

[39] At its foundation, clause 6.1 of the Agreement operates upon the basis that paid annual leave will be taken at times agreed between an employee and the appellant. The rostering terms which provide for the times when an employee will take annual leave are consistent with the Agreement because the parties to it have agreed that annual leave will be taken at the times specified in the rostering terms. The rostering terms do not preclude an employee and the appellant reaching an agreement about times other than those specified in the rostering terms when the employee will take annual leave. If the rostering terms are applied in that way, it would be inconsistent with the employee's right to take paid leave in the manner prescribed in s 88 of the Act and contrary to the annual leave provisions of the Agreement. But this appeal is not about a dispute about the rigid application of the rostering terms in the face of a request by an employee to take annual leave at a time or for a period that is different to that which the employee agreed in the rostering terms. Rather, this appeal concerns a dispute about whether, relevantly, the rostering terms of the employment contracts into which some FIFO employees have entered, are inconsistent with the annual leave provisions of the Agreement. We do not consider the rostering terms to be inconsistent with the annual leave provisions of the Agreement for the reasons we have explained. As the Deputy President concluded to the contrary, he was in error.

[40] As we earlier noted in our discussion of the rostering terms and the NES, the rostering terms contain provisions for taking extra leave. These might also appear to be inconsistent with the right to apply for paid annual leave under the Agreement. But the provisions are concerned with extra leave, not annual leave which accrues under the Agreement, and the rostering term provides a mechanism for a FIFO to accrue such extra leave.

[41] As we earlier noted, by ground one of the appellant's notice of appeal the appellant contends the Commissioner erred in the proper construction of s 88(1) of the Act and clause 6.1

of the Agreement, finding that agreements between an employer and employee, planning to take multiple future periods of time as annual leave over an extended period were not consistent with the annual leave provisions of the NES and the Agreement. For the reasons we have given above, the appellant has made good this ground.

[42] Upholding this ground of appeal is sufficient to dispose of the appeal. We also do not need to deal with the issues raised by the short notes filed by the parties in respect of the question raised during the hearing about ordinary hours of work. Ultimately that issue was not the subject of the dispute determined by the Commissioner.

Rehearing

[43] On a rehearing we conclude for the reasons given above that the rostering terms constitute an agreement between some of the FIFO employees and the appellant to take annual leave at particular periods or times and are not inconsistent with the annual leave provisions of the Agreement nor those of the NES. The dispute is determined accordingly, and the application notified by the respondent will be dismissed.

Order

[44] We order:

1. Permission to appeal is granted.
2. Ground one of the appellant's notice of appeal dated 13 November 2023 is upheld.
3. The decision in *Australian Federation of Air Pilots v Surveillance Australia Pty Ltd* at [\[2023\] FWC 2427](#) is quashed.
4. The respondent's application in C2023/6948 is dismissed.



DEPUTY PRESIDENT

Appearances:

B. Avallone of counsel for the appellant

H. Crosthwaite of counsel for the respondent

Hearing details:

Melbourne

13 February

2024

Final written submissions:

Appellant, 19 January 2024

Respondent, 9 February 2024

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¹ [\[2023\] FWC 2427](#)

² Ibid at [39]

³ Appeal Book (AB)151-AB152.

⁴ AB149-AB155

⁵ *Australian Federation of Air Pilots v Surveillance Australia Pty Ltd* at [\[2023\] FWC 2427](#) at [77]

⁶ [\[2023\] FWC 2427](#) at [119]-[120]

⁷ Appellant's outline of submissions at p 8

⁸ (1936) 55 CLR 499, [1936] HCA 40

⁹ *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, [2018] HCA 30 at [47]-[49] (Gageler J); *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124, [2008] HCA 13 at [37]-[40]

¹⁰ *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124, [2008] HCA 13 at [40]; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, [2018] HCA 30 at [49] (Gageler J); *Scenic Tours Pty Ltd v Moore* [2018] NSWCA 238, (2018) 339 FLR 244 at [254]; *Murakami v Wiriyadi* [2010] NSWCA 7, (2010) 109 NSWLR 39 at [33]-[34]

¹¹ As to statutory construction principles see *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [2017] HCA 34 (per Kiefel CJ, Nettle and Gordon JJ) at [14] and (per Gageler J) at [37]-[39]; as to the construction of enterprise agreements see *Australian Workers' Union v Orica Australia Pty Ltd* [\[2022\] FWCFB 90](#) at [18] and the authorities cited therein; *James Cook University v Ridd* [2020] FCAFC 123, (2020) 278 FCR 566 at [65] and the authorities cited therein; *Workpac Pty Ltd v Skene* (2018) 264 FCR 536, [2018] FCAFC 131 at [197] and the authorities cited therein

¹² An example is founded AB149 – AB155

¹³ AB149

¹⁴ See also AB179-AB180

¹⁵ *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [125]

¹⁶ *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179 at [228]

¹⁷ *Acts Interpretation Act 1901* (Cth) (as in force at 25 June 2009 - *Fair Work Act 2009* (Cth), s 40A), s 23(b)

¹⁸ *Fair Work Act 2009*, s 56