DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Kuiper Australia Pty Ltd
v
The Australian Workers' Union
(C2024/6258)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT WRIGHT
COMMISSIONER MATHESON

SYDNEY, 17 SEPTEMBER 2024

Appeal against decision [2024] FWC 2376 of Deputy President O'Keeffe at Perth on 3 September 2024 in B2024/1087 – protected action ballot order – whether applicant had been and was genuinely trying to reach agreement for the purposes of s 443(1)(b) of the Fair Work Act 2009 (Cth) – whether requires objective assessment of steps taken or stage reached in the bargaining – whether the Act intended to guard against premature applications or an applicant "unduly rushing" to take protected industrial action – whether the Deputy President erred in forming state of satisfaction for the purposes of s 443(1)(b) – whether purpose of s 443(1)(b) to guard against ulterior motive – whether finding that AWU was genuinely trying to reach agreement was open on the evidence – whether the Deputy President mistook the facts in deciding to extend the notice period for protected industrial action from three working days to five working days – permission to appeal granted – appeal dismissed.

Introduction

[1] Kuiper Australia Pty Ltd (**Kuiper**) seeks permission to appeal from a decision of a Deputy President of the Fair Work Commission (the **Commission**) to make a protected action ballot order under s 443 of the *Fair Work Act* 2009 (Cth) (the **Act**).[1] The application for permission to appeal and submissions in relation to the appeal, if permission were to be granted, were heard by the Full Bench on an urgent basis given that the ballot has been conducted and notice of proposed protected industrial action authorised by the ballot has already been given.

[2] The background to the appeal is, in short, as follows. Kuiper's operations include the supply of onshore and offshore construction personnel to the petrochemical, power generation and oil and gas industries. Kuiper is currently engaged on the Scarborough ETL Coating and Installation Project. The project involves the construction and operation of offshore oil and gas facilities and the piping of hydrocarbons to onshore facilities. Kuiper has been contracted to provide supervision and offshore craft and trades labour services for construction onboard an offshore pipelaying vessel. The work is being conducted 300km off the Western Australian coast and there are presently approximately 560 employees working on the project.

[3] Employees of Kuiper who perform offshore construction work are currently covered by the *Kuiper Australia Pty Ltd - Western Australia and Northern Territory Offshore Construction Project Greenfields Agreement 2020–2024*. The Australian Workers' Union (the **AWU**) approached Kuiper from May 2024 seeking to commence bargaining for a replacement agreement. Kuiper did not agree and indicated it was not in a position to commence bargaining. The existing agreement passed its nominal expiry date on 16 August 2024. On 17 August 2024, the AWU made a formal request to commence bargaining for a replacement agreement under s 173(2A) of the Act.

[4] The decision of the Deputy President arose from an application for a protected action ballot order made by the AWU under s 437 of the Act. The AWU first made an application for a protected action ballot order on 18 August 2024. That application was dismissed by Commissioner Simpson on the basis that, at the time the application was made, the agreement the AWU proposed included employees who were covered by another enterprise agreement with a nominal expiry date in 2025.[2] The Commissioner did not need to deal with whether the AWU had been, and was, genuinely trying to reach agreement with the employer for the purposes of section 443(1)(b) of the Act.[3]

[5] The AWU filed a second application for a protected action ballot order on 24 August 2024. The application was heard by the Deputy President on 29 August 2024. Kuiper objected to the making of the order sought on the grounds that the AWU had not been and was not genuinely trying to reach agreement for the purposes of s 443(1)(b) of the Act and also sought an order that the notice period required under s 414(2)(a) be extended to seven working days pursuant to s 443(5) if an order was made.

[6] The Deputy President made a protected action ballot order on 30 August 2024 and published his reasons on 3 September 2024. The Deputy President was satisfied that a proper application had been made by the AWU and that the AWU had been and was genuinely trying to reach agreement for the purposes of s 443(1)(b).[4] As a result, the Deputy President was required to make an order. The Deputy President further ordered that the period of notice required under s 414(2)(a) be extended from three to five working days where the proposed industrial action involves a complete stoppage of work for four or more hours.[5]

[7] Kuiper lodged a notice of appeal on 6 September 2024 and sought an expedited hearing of the appeal. The appeal was heard by a Full Bench of the Commission on 12 September 2024 and the decision reserved. For the reasons which follow, permission to appeal should be granted but the appeal dismissed.

Statutory provisions

[8] Section 437(1) of the Act permits one or more bargaining representatives of an employee who will be covered by a proposed enterprise agreement to apply to the Commission for an order requiring a protected action ballot to be conducted. Such an application is required to be dealt with quickly. Section 440 requires an applicant to serve a copy of the application on the employer and any proposed ballot agent within 24 hours. Section 441(1) requires that the Commission must, as far as practicable, determine an application for a protected action ballot order within 2 working days after the application is made.

[9] The Commission is required to make a protected action ballot order in the circumstances set out in s 443 which provides as follows:

> **443 When the FWC must make a protected action ballot order**
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> (1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:
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> (a) an application has been made under section 437; and
> (b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.
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> (2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).
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> (3) A protected action ballot order must specify the following:
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> (a) the name of each applicant for the order;
> (b) the group or groups of employees who are to be balloted;
> (c) the date by which voting in the protected action ballot closes;
> (d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action;
> (e) the person or entity that the FWC decides, under subsection 444(1A), is to be the protected action ballot agent for the protected action ballot;
> (f) the person (if any) that the FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.
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> (3A) For the purposes of paragraph (3)(c), the FWC must specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable.
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> (5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days or 120 hours (whichever is applicable), the protected action ballot order may specify a longer period of up to 7 working days.
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> *Note: Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.*

[10] The requirements to be met before the Commission must make a protected action ballot order are straightforward. The terms of s 443(1) impose only two express statutory constraints upon the mandatory obligation otherwise imposed upon the Commission to make a protected action ballot order: there must be an application made under s 437 (s 443(1)(a)) and the Commission must be "… satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted" (s 443(1)(b)).

Grounds of appeal

[11] The notice of appeal filed by Kuiper contains five grounds although it subsequently abandoned ground 4. The remaining grounds are as follows:

> 1. The Deputy President erred (Decision at [32]) by misconstruing the statutory task and approaching the assessment of whether the AWU was, or had been, genuinely trying to reach agreement, by reference only to the "motive" (or subjective intention) of the AWU.
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> 2. The Deputy President erred (Decision at [30], [36] and [44]) by mischaracterising the steps taken by the AWU (as set out in Decision [7], [28], and [29]) as a basis for his finding that the AWU [was] genuinely trying to reach agreement, including in circumstances where at the time that the application was filed, the AWU had not attended any bargaining meetings and at the time the application was determined, the AWU had attended one bargaining meeting (the day of the hearing).
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> 3. The Deputy President erred (Decision at [40] and [44]) by mischaracterising the steps taken by the AWU (as set out in Decision [7], [28], and [29]) as a basis for his finding that the AWU [had] been genuinely trying to reach agreement, including in circumstances where at the time that the application was filed, the AWU had not attended any bargaining meetings and at the time the application was determined, the AWU had attended one bargaining meeting (the day of the hearing).
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> …
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> 5. … Deputy President's discretion to extend the notice period to only five (5) working days (instead of seven (7)) miscarried as the Deputy President failed to have regard to a relevant consideration, namely the relevantly unchallenged evidence that four and half days to safely detach from the undersea pipeline was the likely minimum period necessary, and that it could often take longer to safely detach

[12] In considering those grounds, it is important to bear in mind the nature of the decision being made by the Commission under s 443 of the Act. The consideration in s 443(1)(a) (namely, that an application has been made under s 437) is a matter of objective fact. Either such an application has been made under s 437 or it has not.

[13] The consideration in s 443(1)(b), however, turns upon the Commission being satisfied that the applicant has been, and is, genuinely trying to reach agreement. The making of that type of finding is discretionary in the broad sense.[6] That is because the requirement to make an order does not arise because, as a matter of objective fact, the applicant is genuinely trying to reach agreement, but rather if the Commission forms a state of satisfaction in relation to that matter on the material before it. It is also relevant that the matter about which the Commission must be satisfied is itself a matter involving a degree of subjectivity and value judgement.[7]

[14] The consequence is that the satisfaction of a member of the Commission as to whether the consideration in s 443(1)(b) has been met can only be disturbed on appeal if error of the type identified in *House v The King* (1936) 55 CLR 499 is demonstrated.[8] It must appear that some error has been made in the exercise of the discretion such as that the decision-maker acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him or her, mistook the facts or failed to take into account some material consideration.[9]

[15] In an appeal concerning the making of a protected action ballot order, the reasons of the member at first instance must also be considered with an understanding that the statute requires the decision to be made in a compressed time period. The finding of the Commission in case of an application under s 437 of the Act will be impressionistic and necessarily based on hastily prepared evidence and an expedited hearing. By requiring that such an application be

determined, so far as is practicable, within two days, the Parliament must be taken to have intended that to be the case.

Permission to appeal

[16] Kuiper requires permission to appeal as is required under s 604(1) of the Act. The Full Bench is required to grant permission to appeal if it considers it is in the public interest to do so.[10] Otherwise, the Full Bench has a general discretion as to whether to grant permission to appeal. We consider it is in the public interest to grant permission to appeal given the nature of the submissions advanced by Kuiper. The grounds of appeal, particularly ground 1, raise questions in relation to the proper interpretation and application of s 443(1)(b) of the Act in dealing with applications for a protected action ballot order. That is a frequently used and important part of the jurisdiction of the Commission. Similar submissions to those advanced by Kuiper have been made in several recent first instance proceedings.[11] It is appropriate for permission to appeal to be granted to allow those contentions to be considered.

Genuinely trying to reach agreement (Grounds 1 to 3)

[17] Grounds 1 to 3 in the notice of appeal contend that the Deputy President erred in finding that he was satisfied that the AWU had been and was genuinely trying to reach agreement. Ground 1 alleges that the Deputy President erred by misunderstanding the statutory task posed by s 443(1)(b). Grounds 2 and 3 allege that the Deputy President misconstrued the evidence. In oral submissions, Mr Bourke KC, who appeared with Mr McLean for Kuiper, indicated that grounds 2 and 3 are intended to embody a contention that it was not open to the Deputy President to be satisfied that the AWU had been and was genuinely trying to reach agreement if what it contends is the correct statutory test was applied.

[18] It is appropriate to first address ground 1. Ground 1 alleges that the Deputy President's decision discloses an error of approach. In short, it is contended that the Deputy President formed a state of satisfaction that the AWU had been and was genuinely trying to reach agreement with Kuiper by reference only to the subjective "motive" of the AWU and that he failed to have regard to, or undertake, an objective assessment of the steps (or alleged lack thereof) taken by the AWU in order to determine whether those steps, in all the circumstances, demonstrate it was "trying" to reach agreement rather than engaging in simply "preliminary steps in the bargaining process".

[19] Underlying ground 1 is a question as to the construction of s 443(1)(b). Kuiper contended that s 443(1)(b) requires not just an inquiry into the subjective intention of an applicant, but also the steps it had taken, or not taken, and all the circumstances. The words "trying to reach agreement" require an objective characterisation of all the circumstances and that it must be able to be said that bargaining has advanced beyond a preparatory stage to a point where it can be said that the applicant is and has been "trying" to reach agreement. If an objective characterisation of the circumstances is undertaken in this matter, Kuiper submitted that it was "premature" to conclude that bargaining had reached the stage where the AWU was trying to reach agreement. In oral submissions, Kuiper submitted that the requirement in s 443(1)(b) guards against a bargaining representative "unduly rushing" to taking protected industrial action.

[20] Kuiper relied on the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth). When referring to the requirement that a bargaining representative is "genuinely trying to reach agreement" in s 413 of the Act, the Explanatory Memorandum states:[12]

> The question whether a person is genuinely trying to reach an agreement requires a subjective assessment of the actual intention of the person and the overall circumstances.

[21] It was submitted that the reference to "the overall circumstances" in addition to the actual intention of the applicant supported the conclusion that an objective assessment of the stage which bargaining had reached is required.

[22] Kuiper referred to a number of authorities. It relied on *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368; (2009) 189 IR 407 (*Total Marine Services*) where the Full Bench said:[13]

> [31] In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations. It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied. In the course of examining all of the circumstances it may be relevant to consider related matters but ultimately the test in s 443 must be applied.
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> [32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted.

[23] Kuiper submitted that paragraph [31] and the first three sentences of paragraph [32] remain good law even though the remainder of paragraph [32] had been overtaken by later authorities. The reference to "all the relevant circumstances" and "the extent of progress in negotiations and the steps taken in order to try and reach an agreement" was submitted to support the view that an objective assessment is required.

[24] The operation of s 443 was considered in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; (2012) 201 FCR 297 (*JJ Richards (FC)*). Kuiper emphasised that the question decided in *JJ Richards (FC)* was narrow and is no longer of significance given subsequent legislative amendment. The contention advanced by the applicant in that case was simply that protected industrial action could not be taken prior to the commencement of bargaining. However, Kuiper relied on the following passage from the judgment of Flick J (with which Tracey J agreed):[14]

> [57] The difficulty presented is to interpret the phrase employed in s 443(1)(b). Even in the absence of such further difficulties of construction as may be occasioned by the terms of ss 412 and 413, the content of s 443(1)(b) is perhaps not self-evident.
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> [58] It is ultimately concluded that s 443(1)(b) is to be construed such that Fair Work Australia cannot reach a state of satisfaction that an "applicant … is … genuinely trying to reach an agreement with the employer" unless:

> - an applicant has approached the employer and informed the employer of the general ambit of that for which agreement is sought; and
> - the employer has foreshadowed – even in the most general of terms – its attitude as to the proposed agreement.
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> More may be required. Much may well depend upon the factual scenario in which the terms of s 443(1)(b) are to be applied. But such a minimum statement of that which is required is sufficient to dispose of the present Application. Contrary to the submissions advanced on behalf of the Applicants, the terms of s 443(1)(b) do not require:
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> - bargaining to have commenced within the meaning of and for the purposes of s 173, found within Part 2-4, of the Fair Work Act.

[25] Kuiper submitted that the reasoning of Flick J, particularly at paragraph [58], assumed an objective assessment of the circumstances is required to determine whether the applicant is genuinely trying to reach agreement.

[26] The AWU, for its part, submitted that the true purpose of s 443(1)(b) is to guard against ulterior motive, that is, persons seeking to take industrial action for reasons other than in the ultimate pursuit of an agreement with the employer. It submitted that the subsection is "directed at the authenticity of the applicant's efforts to reach that goal', which will "turn on its motivation – the intention, object or purpose".[15] The AWU submitted that the assessment does not involve consideration of the behaviour of others and that the defect in reliance on the concept of prematurity is that it is inherently hinged on the idea that mutual participation in some level of bargaining must have occurred. That was said to be inconsistent with the judgment of the Full Court in *JJ Richards (FC)*. The other unions largely supported the submissions of the AWU.

[27] The focus of the parties' submissions on whether the assessment to be made for the purposes of s 443(1)(b) of the Act is objective or purely subjective is, in our opinion, a distraction from the true task. The matter about which the Commission must be satisfied is whether the applicant has been, and is, genuinely trying to reach agreement with the employer. The authorities (with respect sensibly) have eschewed attempts to establish rigid or generally applicable rules as to what must have occurred in bargaining before the Commission is likely to be satisfied that an applicant is genuinely trying to reach agreement. The Commission is required to make an impressionistic assessment of whether an applicant is genuinely trying to reach agreement in light of the particular circumstances of each application.

[28] It is possible to say that the assessment is not purely subjective in that it is not sufficient to simply ask whether the applicant sincerely wants an agreement to be made. The concept of trying will, at least in some instances, require more. Simply desiring that an agreement be made without taking any step to seek to achieve that outcome may fall short of "genuinely trying to reach agreement". To "try", as a matter of ordinary language, means "to attempt to do or accomplish".[16] If a party has taken no steps to further the objective of making an agreement, the Commission may not be satisfied it is genuinely trying to reach agreement because it has not attempted to do so. That is, in our opinion, the effect of the observations of Flick J in *JJ Richards (FC)*. Among other things, his Honour said:[17]

> So much, it is concluded, follows from the natural and ordinary meaning of the phrase "trying to reach an agreement …". It is difficult to conclude that any person can try to reach an agreement with another in the absence of a disclosure of that for which consensus is sought. One person may wish to reach an agreement with another. But, until the general content of the proposed agreement is disclosed, it cannot be said that he has even attempted to reach an

> agreement. Until disclosed, it is not known whether the other person will readily embrace the proposed agreement or shun it or (perhaps) embrace the concept of an agreement but wish to vary one or other of its terms. Until disclosed, the person seeking agreement has not even tried to solicit the response of the other. Unless the disclosure is genuinely with a view to reaching agreement, it could well be said that the attempt to reach an agreement falls short of a person even trying to reach agreement. The addition of the word "genuine" – on one approach to construction – perhaps adds little. But the addition of that term serves to emphasise the importance of a person actually trying to solicit agreement. Until a proposed agreement has been disclosed to the prospective parties, and a response solicited, an applicant has not even tried to reach agreement – let alone genuinely tried to reach agreement.

[29] To that extent, we do not agree with the submission of the AWU that the purpose of s 443(1)(b) is solely to guard against ulterior motive. If it appears to the Commission that a bargaining representative is seeking to take industrial action for reasons other than the ultimate pursuit of an agreement, that will likely support a conclusion that it is not genuinely trying to reach agreement. In that sense, motivation is significant. There may, however, be other circumstances in which the Commission might not be satisfied that an applicant is genuinely trying to reach agreement because it has not taken active steps to advance the achievement of that goal.

[30] The Full Bench in *JJ Richards (FWAFB)* suggested that, in circumstances where an applicant calls acceptable evidence that their intention, object or purpose is to reach an enterprise agreement, a finding that the applicant was not genuinely trying to reach an agreement will "necessarily involve accepting evidence establishing that the applicant had some other, extraneous purpose in seeking the ballot".[18] In our opinion, that observation must be moderated in light of the judgments of the Full Court in the same case. The circumstances in which the Commission might not be satisfied that an applicant for a protected action ballot order has been, or is, genuinely trying to reach agreement are not so narrow. Nonetheless, the assessment required by s 443(1)(b) is concerned with what the applicant is and has been doing. It must concentrate on whether the Commission is satisfied that the applicant, having regard to evidence of its intentions and actions considered in the context of the overall circumstances, is genuinely trying to reach agreement.

[31] That is not to suggest that whether a bargaining representative has been, and is, genuinely trying to reach agreement involves an assessment of whether the bargaining representative is "unduly rushing" to take protected industrial action. The Act expressly deals with when protected industrial action can be taken. Application for a protected action ballot order must not be made unless there has been a "notification time" (s 437(2A)) and cannot be made earlier than 30 days before the nominal expiry of an existing enterprise agreement (s 438(1)). Protected industrial action must not actually be organised or engaged in before the nominal expiry date of an existing agreement (s 413(6)) or if a suspension or termination order, Ministerial declaration or intractable bargaining declaration is in operation (s 413(7)). Otherwise, the Act does not dictate when a bargaining representative should seek a protected action ballot order.

[32] The Act contemplates that an application for a protected action ballot order can be made as soon as there has been a "notification time" so long as that date is not more than 30 days before the nominal expiry of an existing agreement. The requirement, in s 443(1)(b), that an applicant has been, and is, genuinely trying to reach agreement does not impose a further *de facto* time constraint on when protected industrial action can be taken by prescribing that

bargaining must have developed to some minimum stage or level. The Act does not countenance such an approach.

[33] The steps that a bargaining representative might be expected to have taken to demonstrate it has been, and is, genuinely trying to reach agreement will depend on the circumstances. Those circumstances are likely to include the stage that the bargaining has reached and the behaviour of the employer and other bargaining representatives. At early stages in bargaining, the claims of a bargaining representative and the agreement it proposes may reasonably be "inchoate"[19] and might consist of no more than issues or topics that have been raised for discussion and not documented in any way.[20] That fact will not necessarily or even commonly be indicative of a bargaining representative not genuinely trying to reach an agreement for the purposes of s 443(1)(b).[21] If the employer refuses, or is reticent, to engage in bargaining, there may be limited actions available to other bargaining representatives to progress the goal of reaching agreement. Again, of itself, that is unlikely to suggest that other bargaining representatives are not genuinely trying to reach agreement. Its efforts will have been stymied by the employer.

[34] An allegation that an application for a protected action ballot order is premature does not, of itself, provide a basis for concluding that the applicant for the order has not been, or is not, genuinely trying to reach agreement. The Act envisages that protected action might be taken early in bargaining. The Commission must simply consider whether, in light of the circumstances operating at the time of its decision, the applicant has been, and is, genuinely seeking agreement. The reference to "premature applications" in *Total Marine Services* has been doubted or not followed in subsequent decisions, particularly *JJ Richards (FWAFB)*, *Farstad Shipping* and *Esso Australia Pty Ltd v Australian Manufacturing Workers' Union* [2015] FWCFB 210; (2015) 247 IR 5.[22] Kuiper did not suggest we should follow the reasoning in the fourth and fifth sentences of paragraph [32] of *Total Marine Services*.

[35] In light of this discussion of s 443(1)(b), we do not accept that the Deputy President misconstrued the statutory task by approaching the question of whether the AWU had been, and was, genuinely trying to reach agreement by reference only to its motive or subjective intention. The Deputy President did observe that "the link between genuineness and motivation must be taken into account" and that the notion of genuineness "goes to the motive of the applicant". The passage from the decision said to demonstrate the error is as follows:[23]

> I am also of the view that the notion found in TWUA about the link between genuineness and motivation must be taken into account. Clearly, on its plain English meaning, the notion of genuineness in the context of s.443(1)(b) goes to the motive of the applicant. I accept the submission of Kuiper that in assessing motivation and intent the FWC cannot simply rely on a statement of such intent. It is easy to conceive of cases where the actual intent of an applicant may be not to reach agreement but rather to prolong the bargaining process. It may be that the applicant wants another of the employer's agreements to expire such that it will have two separate groups of employees who can take industrial action simultaneously to increase pressure on the employer. In such circumstances, the union might engage in a form of surface bargaining.

[36] A fair reading of the decision, however, demonstrates that the Deputy President considered what the AWU had actually been doing and the overall circumstances in order to reach the state of satisfaction that it had been, and was, genuinely trying to reach agreement. His consideration was not limited to the subjective state of mind or motives of the AWU or its officials.

[37] The Deputy President accepted Kuiper's submission that, in assessing motivation and intent, the Commission cannot simply rely on a statement of intent and concluded that the statements of intent made in evidence were "supported by the AWU's actions thus far in the bargaining process".[24] The Deputy President expressly turned to consider "what the AWU has been doing", including referring to the fact that it had made repeated requests to commence bargaining, set out its log of claims on two occasions, exercised the right under s 173(2A) of the Act to formally request bargaining commence as soon as the opportunity to do so became available and attended a bargaining meeting and engaged in discussions in relation to its claims.[25] The Deputy President separately considered whether the AWU was then, and had been up to that point, genuinely trying to reach agreement. There was no error in the manner in which the Deputy President formed the state of satisfaction required by s 443(1)(b).

[38] For those reasons, ground 1 must fail. Grounds 2 and 3 can be dealt with briefly. The gist of grounds 2 and 3 is that it was not open for the Deputy President to be satisfied that the AWU had been, and was, genuinely trying to reach agreement. The basis of the submission was that the AWU had first applied for a protected action ballot order soon after bargaining commenced, that the second application was made prior to a substantive bargaining meeting taking place and only one bargaining meeting had occurred by the time of the hearing before the Deputy President. Kuiper submitted that the earlier actions of the AWU were not sufficient because they constituted merely "preparatory steps".

[39] Those circumstances do not demonstrate that the Deputy President's conclusion was not open. To say that only one substantive bargaining meeting had taken place was merely a function of the timing of the application and the refusal of Kuiper to engage with the AWU at an earlier time. The AWU was entitled to apply for a protected action ballot order when it did. The Deputy President's task was then to consider whether its conduct up to that point, and at the time of the hearing, met the threshold in s 443(1)(b). The actions of the AWU which are described in the decision provided an ample basis for the conclusion that it had been, and was, genuinely trying to reach agreement. We reject the submission that it was not open for the Deputy President to be satisfied that the AWU had been, and was, genuinely trying to reach agreement.

[40] The distinction sought to be drawn by Kuiper between preparatory steps and substantive bargaining is not helpful and distracts attention from an examination of what the applicant has actually done, considered in light of the overall circumstances. The AWU had corresponded with Kuiper since May 2024 requesting that bargaining commence, it had communicated its log of claims and participated in a meeting to discuss the process and timing of the negotiations. All those steps are consistent with a conclusion that the AWU had been, and was, genuinely trying to reach agreement. The Deputy President was correct to consider that history of the attempts by the AWU to have bargaining commence. Characterising the actions of the AWU prior to its formal request to commence bargaining under s 173(2A) as preparatory does not render that evidence irrelevant to the "genuinely trying to reach agreement" test.

[41] It was also appropriate, in this case, for the Deputy President to have regard to evidence of the industrial strategy of the AWU. The Deputy President referred to the evidence of Mr Heath to the effect that the AWU and its members want to apply pressure to improve terms and conditions and establish an industry standard prior to the end of the construction phase of the project while there is a large cohort of AWU members who can use their collective power to achieve that outcome.[26] That evidence was, in our opinion, relevant. The evidence explained why the AWU was seeking to engage in protected industrial action early in the bargaining. It

was doing so because it regards that strategy as most likely to result in the making of an agreement. The evidence supported the conclusion that the AWU was genuinely trying to reach agreement, and no error arose from the Deputy President taking that evidence into account.

[42] Grounds 1 to 3 must fail. No error has been demonstrated in the conclusion of the Deputy President that he was satisfied that the AWU had been, and was, genuinely trying to reach agreement with Kuiper for the purposes of s 443(1)(b).

Extension of notice period (Ground 5)

[43] Ground 5 alleges that the Deputy President erred in exercising the discretion in s 443(5) of the Act to extend the notice period for protected action involving a stoppage of work for 4 hours or more only to five working days. The Deputy President was satisfied that there were exceptional circumstances justifying a notice period of longer than three working days and exercised his discretion to stipulate a period of five days. Kuiper submitted that the Deputy President should have extended the notice period to seven days given the evidence.

[44] In the notice of appeal, ground 5 is described as an allegation that the Deputy President failed to have regard to a relevant consideration (said to be evidence that four and a half days was the minimum period likely to be necessary to safely detach from the undersea pipeline). In oral submissions, it was alleged that the Deputy President erred in that he mistook the facts by inferring from the evidence that five days was a sufficient period for the vessel to safely detach from the undersea pipeline. We do not accept that Kuiper has established that there was any error in the exercise of the discretion under s 443(5).

[45] The Deputy President noted that Kuiper sought orders extending the notice period set out in s 414(2)(a) of the Act from three working days to seven working days. In considering that submission, the Deputy President noted that Kuiper called evidence from a project manager, Mr Shameer Shroff. Mr Shroff's evidence included reference to the "abandonment", being the process where the company needs to shut down the pipe-laying work due to predicted adverse sea conditions. The Deputy President then set out the evidence as follows:[27]

> In his statement, Mr Shroff details the usual practice for abandonment as follows:
>
> > "…Saipem seeks to avoid abandoning the pipeline in adverse sea states. Saipem accordingly attempts to identify (through modelling) the most favourable sea state in which to undertake the abandonment work, in order to reduce the safety risks for the vessel and its crew. This modelling is most accurately undertaken by Saipem's engineering team in Italy. Undertaking that modelling can take up to 2 days (depending on the availability of engineers), and it can then take a further 48 hours to communicate the outcome of that modelling to relevant stakeholders, and achieve the requisite sign-offs from, the client, the Marine Warranty Surveyor, and finally the Castorone. The Castorone then requires 12 hours to perform the necessary preparatory steps before it can start the abandonment work."
>
> Based on this evidence, it could take four and a half days to get to a state where the ship and crew are safely detached from the undersea pipeline.

[46] The reasoning of the Deputy President was then as follows:[28]

> Given the nature of the operation being undertaken, I am satisfied that there are exceptional circumstances to the case. The operation is a major and complex capital work being undertaken in difficult conditions where there appears to be potential for risks to safety and to equipment if activities such as abandonment are not carried out according to protocols. Again, given the circumstances, I am satisfied that there is justification for an extension of the notice time. As conceded by Kuiper, the mere fact of economic loss for an employer will not justify an extension. Industrial action by its nature involves inconvenience, loss of production and economic impact for the employer. However, caution needs to be exercised where there is also potential for serious safety risks to employees and damage to equipment, which I accept is the case here.
>
> Given this, and given the evidence of Mr Shroff, I will exercise my discretion to order that where industrial action will involve the stoppage of work for four or more hours - be that a single action or a number of consecutive actions – then the AWU must give Kuiper five working days' notice of such action. Such an order takes into account Mr Shroff's evidence as set out in paragraphs 46 and 47 above. Where industrial action will not involve a stoppage of work for four or more hours, then the usual notice period of three working days will apply.

[47] Kuiper suggested that this reasoning misapprehended the evidence. It submitted that, whilst the ship may be ready to detach in four and a half days, the evidence was to the effect that a longer window was necessary to afford the ship the ability to assess the forecast sea state and select the window to undertake the abandonment work that posed no risk (or at least a lower risk) to the safety of the crew on board.

[48] We do not accept this submission. Mr Shroff's evidence did not specify a precise period that would be needed to complete the abandonment task. At most, Mr Shroff's evidence indicated that the company used a 10-day planning window to identify the ideal time to undertake the abandonment work having regard to weather conditions and to liaise with clients and stakeholders. The Deputy President questioned Mr Shroff closely. There is no reason to infer that the Deputy President did not have regard to and carefully consider Mr Shroff's evidence. Having regard to our review of the evidence, it was open to the Deputy President to exercise his discretion under s 443(5) in the manner that he did. There is no foundation for the allegation that the Deputy President misapprehended the evidence.

Conclusion

[49] For these reasons, permission to appeal should be granted but the appeal dismissed. Accordingly, the Full Bench orders:

(a) Permission to appeal is granted; and
(b) The appeal is dismissed.

VICE PRESIDENT

Appearances:

J Bourke KC and *J McLean*, counsel, instructed by Hall & Wilcox for the Appellant.
L Saunders, counsel, appearing for the AWU instructed by Z Duncalfe, National Legal Officer for the AWU.
C Fogliani, solicitor, Fogliani Lawyers, appearing for the AMWU.
J Fox, National Industrial Officer appearing for the CEPU.

Hearing details:

13 September.
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[1] *Australian Workers' Union v Kuiper Australia Pty Ltd* [2024] FWC 2376.

[2] *Australian Workers' Union v Kuiper Australia Pty Ltd* [2024] FWC 2265 at [87]-[88].

[3] [2024] FWC 2265 at [89].

[4] [2024] FWC 2376 at [44].

[5] [2024] FWC 2376 at [50]-[51].

[6] *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 49; (2000) 203 CLR 194 at [20] (Gleeson CJ, Gaudron and Hayne JJ) (*Coal & Allied*); *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [152] (Edelman J).

[7] *Coal & Allied* at [20] (Gleeson CJ, Gaudron and Hayne JJ).

[8] *Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia* [2011] FWAFB 1686; (2011) 208 IR 13 at [11] (*Farstad Shipping*).

[9] *House v The King* (1936) 55 CLR 499 at 504-505 (Dixon J); *Coal & Allied* at [28] (Gleeson CJ, Gaudron and Hayne JJ).

[10] *Fair Work Act* 2009 (Cth), s 604(2).

[11] *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd* [2024] FWC 1938*; Applications by the Construction, Forestry and Maritime Employees Union* [2024] FWC 2049; *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd T/A Qube Ports* [2024] FWC 2303.

[12] Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at [1664].

[13] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368; (2009) 189 IR 407 at [31]-[32].

[14] *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; (2012) 201 FCR 297 at [57]-[58] (Flick J) (*JJ Richards (FC)*).

[15] By reference to *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963; (2010) 202 IR 180 at [58] (Lawler VP and Bisset C) (*JJ Richards (FWAFB)*).

[16] Macquarie Dictionary.

[17] *JJ Richards (FC)* at [59] (Flick J).

[18] *JJ Richards (FWAFB)* at [62].

[19] *JJ Richards (FWAFB)* at [89] referring to *Wesfarmers Premier Coal Limited v The Automotive Food Metals Engineering, Printing and Kindred Industries Union (No 2)* (2004) 138 IR 362 at [70] (French J).

[20] *Qube Ports Pty Ltd T/A Qube Ports v Construction, Forestry and Maritime Employees Union* [2024] FWCFB 370 at [22].

[21] *JJ Richards (FWAFB)* at [89]; *Farstad Shipping* at [9]-[10] (where it was concluded that the failure of a bargaining representative to identify its wages claim did not prevent a finding it had been, and was, genuinely trying to reach agreement).

[22] *Esso Australia Pty Ltd v Australian Manufacturing Workers' Union* [2015] FWCFB 210; (2015) 247 IR 5 at [35].

[23] [2024] FWC 2376 at [32].

[24] [2024] FWC 2376 at [32]-[33].

[25] [2024] FWC 2376 at [28]-[30].

[26] [2024] FWC 2376 at [26].

[27] [2024] FWC 2376 at [47].

[28] [2024] FWC 2376 at [49]-[50].