DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

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

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT SLEVIN

SYDNEY, 16 OCTOBER 2024

Appeal against a decision of Deputy President O'Keeffe at Perth on 26 June 2024 in matter numbers C2024/1934; C2024/1992 and C2024/1993 – decision at first instance to refuse the appellant permission to be represented by a lawyer – powers of the Commission in dealing with a dispute under the dispute settlement procedure in an enterprise agreement – where the enterprise agreement expressly permits the initiator of a dispute to appoint and be represented by another person, organisation or association – whether agreement should be construed as precluding any other party from being represented – permission to appeal not required – appeal upheld – the enterprise agreement does not prevent the Commission from granting permission for a party, other than the initiator of the dispute, to be represented if satisfied it is appropriate to do so having regard to s 596(2) of the Fair Work Act 2009 (Cth).

Introduction and background

[1] PHI (International) Australia Pty Ltd T/A HNZ Australia Pty Ltd (**PHI** or the **appellant**) has lodged a notice of appeal under s 604 of the *Fair Work Act 2009* (Cth) (the **Act**) from a decision of Deputy President O'Keeffe. The decision concerns whether PHI can be granted permission to be represented by a lawyer in proceedings in which the Commission is dealing with a dispute referred to it under the *Karatha Helicopter Pilots MPT Operations Enterprise Agreement 2017* (the **Agreement**).

[2] The proceedings before the Deputy President arise from applications made pursuant to s 739 of the Act by Mr Martin Nash, Mr Paul Micheletti and Mr Gregory McAllister (the **respondents)**. By their applications, the respondents sought that the Commission deal with a dispute in accordance with the 'Disputes and Grievance Procedure' in clause 22 of the Agreement. The underlying dispute concerns the entitlements of casual employees and remains to be determined by the Commission.

[3] On 18 April 2024, PHI filed its response to the applications. It raised a jurisdictional objection that the Commission did not have jurisdiction to deal with the dispute because, it alleged, the steps set out in clause 22 that precede reference of a dispute to the Commission had

not been followed. Concurrently, the legal representatives of PHI, Corrs Chambers Westgarth, filed a Form F53 – Notice of Representation.

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

[5] On 7 June 2024, PHI filed its submissions in support of its request to be represented pursuant to s 596 of the Act and, on 17 June 2024, the respondents filed submissions opposing permission being granted for PHI to be legally represented. The respondents contended that the Agreement prohibited PHI from being legally represented before the Commission.

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

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

[7] Further written submissions in reply were then made by both parties on the issue of legal representation. These submissions addressed the capacity of the Commission to grant permission for representation and the interaction between s 596 of the Act and clause 22 of the Agreement.

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

> Dear Parties,

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

> Deputy President O'Keeffe is mindful that the above matters are due to be heard next week. As such, he feels it is important to advise the parties of his decision regarding representation for the Respondent as early as possible. Parties are advised that representation for the Respondent will not be allowed. Detailed reasons will be provided, however, the Respondent should be aware that the Deputy President's decision is not based on s596(2) of the Act but rather the particular terms of the dispute resolution procedure and how those provisions operate based on previous case findings.

[9] On the evening of Sunday 30 June 2024, PHI filed a notice of appeal. The decision appealed against was described as the decision to refuse to permit the appellant to be represented. In the notice of appeal, the appellant sought a stay under s 606(1) to the effect that the jurisdictional hearing be vacated. The application for a stay was refused.[2]

[10] PHI subsequently abandoned its jurisdictional objection. The Deputy President nonetheless published more detailed reasons for his decision that the Commission did not have a discretion to allow PHI to be represented by a lawyer.[3] The underlying dispute remains to be dealt with by the Deputy President and is listed for hearing on 22 October 2024.

[11] The appeal is confined to the question of whether the Deputy President erred in deciding that the 'Disputes and Grievance Procedure' in clause 22 of the Agreement precluded PHI from being legally represented and prevented the Commission from granting permission for it to be represented by a lawyer under s 596 of the Act. The parties both filed written submissions but agreed that the Full Bench should determine the appeal on the papers.

The appeal

[12] In the reasons for decision, the Deputy President concluded that the dispute resolution procedure in the Agreement, particularly at clause 22.1.4, only permits a party initiating a dispute to be represented. The Deputy President further found that the limitation on representation ousted the power in s 596 the Act for the Commission to grant parties permission to be represented.

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

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

[14] Accordingly, the single question raised by the notice of appeal turns upon the proper construction of clause 22 of the Agreement. Clause 22 of the Agreement provides as follows:

> **22. DISPUTES AND GRIEVANCE PROCEDURE**
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> 22.1. Preamble and Principles of the Disputes Resolution Process (DRP)
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> 22.1.1. In the event of a disagreement regarding the interpretation or application of the terms of this agreement, the NES or any other matter

[2] *PHI (International) Australia Pty Ltd v Nash & Ors* [2024] FWC 1735.

[3] *Nash & Ors v PHI (International) Australia Pty Ltd* [2024] FWC 1795.

pertaining to the employer-employee relationship that the following Disputes Resolution Process (DRP) be followed.

22.1 .2. The parties agree to participate in the DRP in good faith and in recognition that the satisfactory resolution of any dispute is in the interests of all parties to this agreement.

22.1.3. A person subject to this agreement may initiate a dispute concerning the interpretation or application of this agreement at any time.

22.1.4. A person(s) initiating a dispute may appoint and be accompanied and represented at any stage by another person, organisation or association, including a Union representative or Company association in relation to the dispute. Ready access to Pilots shall be provided to the Pilot's nominated representative so that relevant information and instructions can be provided. However not at a time such that it will impact with the Company's normal contracted operations.

22.1 .5. Unless otherwise agreed, in the first instance a dispute will be dealt with at a workplace level. If the dispute remains unresolved conciliation may occur and in the event that the dispute remains unresolved, a party may seek arbitration as a means of resolving the dispute.

22.2. Disputes Resolution Process

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

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

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

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

22.3. Appeal rights of the parties

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

22.4. Powers of FWC

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

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

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

22.5. Alteration of Rights

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

[15] As the appeal concerns the construction of an enterprise agreement, the appeal is one to which the correctness standard applies.[4] An enterprise agreement is a legal instrument given effect by the Act. The proper construction of a legal instrument is a question of law to which there is only one true answer.[5] The question on appeal is simply whether the answer given by the Deputy President is correct. If the answer given at first instance to a question of construction is wrong, the appeal will be upheld and the Full Bench must substitute the correct answer.[6]

Permission to appeal

[16] In their written submissions, both parties assumed that PHI requires permission to appeal. The ordinary position under s 604 of the Act is that a person aggrieved by a decision of the Commission may only appeal with permission. However, as is well known, when dealing with a dispute pursuant to a dispute settlement procedure in an enterprise agreement, the Commission is acting as a private arbitrator. The nature and extent of the function to be undertaken by the Commission is dictated by the agreement of the parties, including the availability and nature of any appeal. The parties may agree that there will be a right of appeal or remove or modify the requirements ordinarily applicable to an appeal under s 604 of the Act, including the need for permission to appeal to be obtained.[7]

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[4] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [46] and [48]-[49] (Gageler J); *FreshFood Management Services Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2023] FWCFB 97 at [29].

[5] *Onesteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd* [2013] NSWCA 27; (2013) 85 NSWLR 1 at [61] (Allsop P).

[6] *Rail Commissioner v Rogers* [2021] FWCFB 371 at [61].

[7] See, for example, *Victoria Police Force v Police Federation of Australia* [2009] AIRCFB 146; (2009) 178 IR 275 at [13].

[17] Whether permission to appeal is required depends on the proper construction of the provision conferring jurisdiction on the Commission. In this matter, clause 22.3.1 of the Agreement provides that the decision of the Commission will bind the parties "subject to either party exercising *a right of appeal* against the decision to a Full Bench of FWC". The clause employs wording similar to that found in dispute resolution provisions considered in earlier decisions of the Commission.

[18] Most notably, in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Silcar Pty Ltd* [2011] FWAFB 2555; (2011) 208 IR 33, the Full Bench dealt with an appeal in relation to a dispute under a dispute resolution procedure contained in an enterprise agreement which provided [emphasis added]:

> (h) The decision of FWA will bind the parties, subject to either party exercising *a right of appeal* against the decision to a Full Bench.

[19] The Full Bench concluded that the language of the clause created an independent right of appeal for which permission to appeal was not required and, in that way, modified the appeal procedures which are ordinarily applicable to an appeal from a decision of a member of the Commission.[8] Provisions adopting identical, or equivalent, wording have been construed in the same manner in a range of other decisions of the Full Bench.[9] There is no reason why clause 22.3.1 of the Agreement should not also be construed as conferring an independent right of appeal which is not constrained by the requirement to seek permission to appeal. As such, PHI does not require permission to appeal.

[20] In any event, if it were necessary to do so, we would grant permission to appeal. For reasons which will become apparent below, there is an arguable case that the Deputy President's decision is inconsistent with the proper construction of clause 22 of the Agreement. In our opinion, PHI's arguments should be considered by the Full Bench. Further, although PHI did not ultimately press its jurisdictional objection, the same question as to whether permission is able to granted for it to be represented by a lawyer remains a live issue for the purposes of the hearing of the underlying dispute. The Deputy President has indicated that, if he had the discretion to do so, he would have been inclined to permit PHI to be represented. In those circumstances, unfairness might be caused to PHI if its submissions on appeal are not considered in that it might be denied representation in circumstances in which permission to be represented could have been granted.

Consideration of the appeal

[21] The question of whether PHI can be given permission to be represented by a lawyer turns on the proper construction of clause 22 of the Agreement. As has been mentioned, when dealing with a dispute under a dispute settlement procedure in an enterprise agreement the

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[8] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Silcar Pty Ltd* [2011] FWAFB 2555; (2011) 208 IR 33 at [28].

[9] *University of Western Sydney v Fletcher* [2009] AIRCFB368; (2009) 183 IR 256 at [8]; *Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees v Woolworths Limited T/A Woolworths* [2013] FWCFB 2814; (2013) 232 IR 255 at [22]; *Vendrig v Ausgrid Pty Ltd* [2021] FWCFB 370 at [24]; *Ricegrowers Ltd (t/as SunRice, CopRice Feeds and Australian Grain Storage Pty Ltd) v United Workers' Union* [2022] FWCFB 205 at [46]-[47]. .

Commission acts as a private arbitrator.[10] The procedures required to be applied in dealing with such a dispute, and the powers the Commission is able to exercise, depend on the terms of the agreement which requires or allows the Commission to deal with the dispute. The Full Federal Court in *United Firefighters' Union of Australia v Fire Rescue Victoria* [2024] FCAFC 84; (2024) 304 FCR 219 (*Fire Rescue Victoria)* recently described powers exercised in a private arbitration in this way:

> [10] The Commission exercises private arbitral powers when arbitrating disputes under a dispute resolution clause in an enterprise agreement: *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; 203 CLR 645 at [31] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; 235 FCR 305 at [31]–[58] per Dowsett, Tracey and Katzmann JJ. The scope of powers it may exercise in the performance of its arbitral function are primarily defined by the terms of reference given to it (*TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 at [45] per Hayne, Crennan, Kiefel and Bell JJ), and supplemented by the powers conferred on it by Parliament (s 739 of the FW Act; see also ALS at [85]).

[22] The nature and extent of the function to be undertaken by the Commission, and the procedure to be adopted, is determined by the terms of the relevant agreement. An agreement could provide that the parties have an unconstrained right to be legally represented or that the parties are not entitled to be represented. If the agreement is silent, it is generally assumed that the parties intended to take the Commission as they find it,[11] such that the default position in s 596 of the Act will apply and representation is possible albeit only with the permission of the Commission.

[23] The Deputy President was correct to conclude that the Agreement could set limits on the powers ordinarily available to the Commission in dealing with matters within its jurisdiction, including by removing the capacity for the Commission to give permission to a party to be represented by a lawyer.[12] That proposition was not disputed by PHI. The question raised by the appeal is whether the Agreement, properly construed, does prevent the Commission from granting permission for a party other than the initiator of a dispute to be represented by a lawyer in the event that a dispute is referred to the Commission.

[24] The Deputy President concluded that the effect of clause 22.1.4 is that only a party who initiates a dispute may appoint a representative and that those are the only circumstances in which representation may be allowed under the terms of the dispute resolution procedure.[13]

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

[11] *DP World Brisbane Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8557; (2013) 237 IR 180 at [47]-[48]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305 at [58]; *Clinical Laboratories Pty Ltd T/A Australian Clinical Labs v Health Services Union* [2024] FWCFB 296 at [15]-[16].

[12] [2024] FWC 1795 at [21]-[23].

[13] [2024] FWC 1795 at [11].

That is, the Deputy President formed the view that, because clause 22.1.4 permits the initiating party to a dispute to appoint and be accompanied and represented by another person, organisation or association and does not expressly provide for any other party to be represented, the Agreement otherwise precludes a person being represented. We do not agree. Clause 22.1.4 does not preclude representation of parties other than the party initiating a dispute.

[25] The starting point in construing clause 22.1.4 is the text. On its face, clause 22.1.4 ensures that the initiating party to a dispute may be represented "at any stage", that is, from the time the dispute is initiated. It confers a right on the initiating party to appoint and be accompanied and represented by any other person, organisation or association. The apparent purpose of clause 22.1.4, when read within clause 22 as a whole, is to ensure that from the inception of the dispute the initiator of the dispute has access to representation. Where the initiator is a pilot, the clause has further work to do to ensure that the appointed representative has access to the pilot for the purpose of gathering information and seeking instructions. The express wording of clause 22.1.4 does not prohibit any other party being granted permission to be represented. It simply does not confer other parties with a right to representation.

[26] Clause 22.1.4 must also be read in context. Clause 22.2 sets out the steps which must be followed to resolve a dispute. The parties must attempt to resolve any dispute at the workplace level in the first instance. If the parties are unsuccessful, then the dispute may be referred to the Commission to be resolved by mediation and/or conciliation or, where the matter in dispute remains unresolved, arbitration. Clause 22.4 then makes provision for the procedures to be followed and the powers to be exercised by the Commission in the event that a dispute is referred to the Commission. Three aspects of clauses 22.2 and 22.4 are significant for present purposes and are inconsistent with the conclusion that clause 22.1.4 was intended to prevent permission being granted for a party to be represented in proceedings before the Commission.

[27] Clause 22.2.3 expressly provides that, if arbitration is necessary, the Commission "may exercise the procedural powers in relation to hearings, witnesses. evidence and submissions which are necessary to make the arbitration effective". The usual procedural powers available to the Commission in relation to hearings include the power under s 596(2) of the Act to grant permission to a party to be represented. Clause 22.4.1 provides that the Commission "shall have the power to do all such things as are necessary for the just resolution of the dispute" and clause 22.4.3 provides that the Commission "may give all such directions and do all such things as are necessary for the just resolution and determination of the dispute". Both those subclauses indicate an intention to confer the broadest possible powers on the Commission to do such things as are necessary for the just resolution of a dispute.

[28] Those aspects of clause 22 are inconsistent with construing clause 22.1.4 as preventing the Commission permitting a party, other than the initiating party for the dispute, to be represented if the Commission considers that it appropriate to do so. Given that the framers of the Agreement evidently wished the Commission to have broad powers to ensure the just resolution of a dispute and the effective conduct of an arbitration, it would be surprising if it was intended that the Commission could not allow representation even if it is satisfied that representation would allow a dispute to be dealt with more efficiently or that it would be unfair not to allow the person to be represented because the person is unable to represent themselves

effectively or having regard to fairness between the parties.[14] The text of clause 22.1.4 does not dictate that conclusion.

[29] The respondents submitted that the capacity of the Commission to do "all such things as are necessary for the just resolution of the dispute" does not permit it to create, or imply, rights that do not exist in the dispute procedure under the auspices of the "just resolution of the dispute". The respondents submitted that clause 22.4 was drawn from an earlier agreement, the *Helicopters (Australia) Pty Ltd (Helicopter Pilots – West Australia Operations) Collective Agreement 2006*, and the language was taken from s 111 of the *Industrial Relations Act 1988* (Cth), which dealt with the particular powers of the Commission at that time. The respondents suggested that the reference to the Commission being able to do "all such things" relates only to procedural powers to facilitate a hearing.

[30] That submission misunderstands the significance of clauses 22.1.3, 22.4.1 and 22.4.3. It may be accepted that a general reference to the Commission having the capacity to do "all such things" as it considers appropriate to revolve a dispute might not be sufficient to overcome an express limitation on the powers of the Commission imposed elsewhere in clause 22. However, clauses 22.1.3, 22.4.1 and 22.4.3 are indicative of an intention by the framers of the Agreement that the Commission have the broadest possible powers. That is significant in construing other aspects of clause 22, including clause 22.1.4. Those clauses support the conclusion that clause 22.1.4 should not be construed as intended to constrain the Commission from permitting a party other than the initiator of the dispute to be represented if it is satisfied that it is appropriate to do so.

[31] We consider that the correct reading of these provisions is that, although clause 22 could confine the discretion of the Commission to permit representation, it does not do so. Clause 22.1.4 is, on its face, concerned with ensuring the initiating party is entitled to be represented at all stages of the dispute process and that, where that person is a pilot, the representative has access to the pilot to obtain information and instructions. We do not consider that the clause prevents other parties from being represented should the dispute be unable to be resolved and is referred to the Commission. Other parties may be granted permission to be represented if the Commission is satisfied such permission should be granted in light of the matters referred to in s 596(2) of the Act.

[32] As the Full Court made clear in *Fire Rescue Victoria*, the scope of powers the Commission may exercise in performing its arbitral function are defined by the terms of reference given to it in the relevant instrument which confers it with jurisdiction. We consider that the provisions of clause 22, read as a whole, do not preclude parties to a dispute other than the initiator of the dispute from being granted permission to be represented in proceedings before the Commission. The clause permits the Commission to exercise its power to grant permission for representation if satisfied it is appropriate to do so in accordance with s 596 of the Act.

Conclusion

[14] *Fair Work Act 2009* (Cth), s 596(2).

[33] For the reasons outlined above permission to appeal is granted, the appeal is upheld, the decision of the Deputy President is quashed and the question of whether the appellant may be legally represented in the proceedings is referred back to the Deputy President to be determined under s 596(2) in accordance with the reasons of the Full Bench.

[34] We order as follows:

(1) Permission to appeal is granted;
(2) The appeal is upheld;
(3) The decision of Deputy President O'Keeffe in [2024] FWC1795 is quashed;
(4) The question of whether PHI should be granted permission to be represented in the arbitration over the dispute raised by the respondents is referred to the Deputy President to be determined in accordance with s 596 of the *Fair Work Act 1996* (Cth).

VICE PRESIDENT

Appearances:

L Howard, counsel, instructed by Corrs Chambers Westgarth for the Appellant.
J Marks and *D Stephens*, of the Australian Federation of Air Pilots, for the Respondents.

Hearing details:

Determined on the papers.

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