DECISION

Fair Work Act 2009
s.604 - Appeal of decision

Loram Pty Ltd
v
Australian Rail, Tram and Bus Industry Union
(C2024/6794)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT COLMAN
DEPUTY PRESIDENT O'NEILL

BRISBANE, 18 NOVEMBER 2024

Appeal from decision of Commissioner Tran on 5 September 2024 in B2024/931 – majority support determination – fairly chosen requirement – whether small number of employees relevant – whether evidence of other employees' view necessary – no error – appeal dismissed

[1] Loram Pty Ltd (Loram) has lodged an appeal under s 604 of the *Fair Work Act 2009* (Act) against a decision[1] of Commissioner Tran on 5 September 2024 to issue a majority support determination under s 237 of the Act. The application for the determination was made by the Australian Rail, Tram and Bus Industry Union (RTBU) in its capacity as a bargaining representative for employees employed by Loram in the state of Victoria who operate and maintain a grinder and perform general labour.

[2] Section 237(1) of the Act provides that the Commission must make a majority support determination in relation to a proposed single-enterprise agreement if an application for a determination has been made, and the Commission is satisfied of the matters in s 237(2) in relation to the agreement. Relevantly for this appeal, the Commission must be satisfied that the group of employees who will be covered by the agreement was 'fairly chosen' (s 237(2)(c)). The Commissioner was satisfied that this was the case. Loram contends in its appeal that this conclusion was affected by various errors. It asks the Full Bench to grant permission to appeal in the public interest or otherwise and to quash the decision.

[3] We will not rehearse the Commissioner's decision. The relevant dimensions of it will be apparent from the arguments raised in the appeal and our disposition of them below.

[4] The notice of appeal advanced seven grounds. First, Loram contended that the Commissioner erred in reaching a state of satisfaction that the group of employees was fairly chosen because there were only 6 employees who would be covered by the proposed agreement,

[1] [2024] FWC 2414.

who represented just 4.29% of its 140 employees around Australia who perform track maintenance work. Secondly, it submitted that the Commissioner erred in concluding that the group was fairly chosen in circumstances where there was no evidence before the Commission as to the views of the employees who were excluded from the agreement's proposed coverage. Thirdly, Loram submitted that the Commissioner made an error of fact in finding that the national mobility of its workforce was correlated to the relevant client. Fourthly, it said that the Commissioner took into account an irrelevant matter in noting that it was possible under the Act for an enterprise agreement to be made with only two employees. The fifth ground of appeal contended that the Commissioner erred in finding that the group of employees was not chosen arbitrarily, because the evidence showed that the group was chosen at the discretion of the RTBU. The sixth ground contended that the Commissioner erred in finding that the group was fairly chosen given the unchallenged evidence adduced by Loram about the negative impact that the determination would have on the company. The seventh ground of appeal stated that the decision was unreasonable and plainly unjust in the sense described in *House v The King*.[2]

[5] In its written submissions, Loram elaborated upon these appeal grounds, but also added to them. It contended that the Commissioner was wrong to conclude that the group of employees was organisationally or operationally distinct, that the Commissioner erred in reaching a state of satisfaction that it was reasonable in all the circumstances to make the determination, and that various additional factual and other errors were evident in the Commissioner's decision. The RTBU objected to the new grounds of appeal, noting that no application had been made for leave to amend the notice. This objection is well-founded. These matters travel beyond the grounds set out in the notice of appeal. No application was made for leave to amend it. The additional grounds therefore do not form part of the appeal. We will nevertheless address them briefly in our reasons below.

Consideration

[6] A person who is aggrieved by a decision of the Commission may appeal from it under s 604 of the Act, with the permission of the Commission. Permission to appeal must be granted if the Commission is satisfied that it is in the public interest to do so and may otherwise be granted on discretionary grounds. Loram's appeal was listed for hearing before us both in respect of permission to appeal and the merits. We have decided to consider the question of permission to appeal concurrently with the merits of the grounds of appeal, rather than as a preliminary matter.

[7] An appeal cannot succeed in the absence of error on the part of the primary decision-maker. The nature of the decision below affects the standard that applies to an appeal from that decision. In this case, the Commissioner's task was to decide whether she was required by s 237(1) to issue a determination, which in turn required her to consider whether she was *satisfied* of the matters in s 237(2). This involved the exercise of discretion in the sense that there was no categorically correct response to any of these considerations. In deciding whether the group of employees was fairly chosen within the meaning of s 237(2)(c), the Commissioner was required by s 237(3A) to consider and make a finding as to whether the group was geographically, operationally or organisationally distinct. The standard of appellate review in this case is that described by the High Court in *House v The King* at 504-505.

[2] (1936) 55 CLR 499.

[8] Appeal ground 1 asserts that the Commissioner erred in finding that the group was fairly chosen because the group comprised only 6 employees who constituted a small percentage of the track maintenance workforce. The company's contention is that in an application under s 236, size matters. But no rationale has been identified for this proposition. We do not exclude the possibility that in a particular case, the size of the relevant group might be contextually relevant or have some significance in conjunction with other considerations. In some cases it might be relevant to the question of whether it is reasonable in all the circumstances to make a determination. However in and of itself, the fact that the chosen group comprises few members, either in absolute or percentage terms, is not a matter that tells against a conclusion that the relevant group has been fairly chosen. There is no reason why this should be so. There is nothing inherently unfair about a small group. Further, the Act countenances the possibility of enterprise agreements being made with as few as two employees, because s 172(6) states that an agreement cannot be made with only one employee. This was the point of the Commissioner's reference to this provision at [33] of her decision. Contrary to appeal ground 4, which we reject, this was not an irrelevant consideration. It was a logical observation about an element of the statutory framework that was antithetical to the company's argument that the small size of the group was indicative of unfairness in the choice of the group. Finally, as the RTBU pointed out, to the extent that the size of the group might have been relevant to the argument that it was unfairly chosen, the contention would have needed to engage with the whole class of employees to whom the agreement might apply in the future, not just the number of individuals who currently comprise the group (see *Construction Forestry Mining and Energy Union v John Holland Pty Ltd*[3] (*John Holland*). As the Full Court noted in *John Holland*, the group is not fixed at any point in time and it may be difficult to state with precision or certainty what the coverage might entail. This is another reason why it is not correct to say that a chosen group with a small number of present members of itself entails unfairness.

[9] As to the second ground of appeal, we reject the contention that the Commissioner's decision is impugned by the absence of evidence about the views of employees outside the chosen group. Loram submitted that the views of these other employees were relevant and that the RTBU bore the onus of adducing evidence about them. It relied on a decision of Vice President Hatcher, now President Hatcher, in *Australian Workers' Union v BlueScope Steel Limited*,[4] in which his Honour stated that the notion of legal onus applies in the Commission in the limited sense that if the Commission is not able to make a necessary finding, the party that requires such a finding to be made will need to lead evidence to make that possible.[5] Loram argued that the union had invoked the Commission's jurisdiction and therefore bore the onus of leading evidence that could sustain the decision that it asked the Commission to make. But no such evidence was necessary. The Act did not require, directly or indirectly, any consideration of the views of employees outside the group. By contrast, the Act does require the Commission to consider whether a group that does not comprise of all the employees is geographically, operationally or organisationally distinct. This is a mandatory consideration because s 237(3A) says so. In this case, the RTBU's success did not depend on the Commissioner making a finding about the views of excluded employees. We reject Loram's submission that the Commissioner reversed the onus of proof. There was no onus at all.

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[3] [2015] FCAFC 16 at [34]-[41].

[4] [2016] FWC 3848.

[5] Ibid at [36].

[10] Loram relied on the decision of the Full Bench in *Cimeco Pty Ltd v CFMEU*[6] in which the Full Bench stated that, in evaluating whether the group was fairly chosen, it was appropriate to have regard to the employees that are excluded.[7] But the Full Bench in this passage was concerned with rejecting a contention that the interests of excluded employees were irrelevant. The Full Bench did not say that these interests were a mandatory consideration. If Loram thought that the views of employees outside of the chosen group were relevant and would assist its contention that the group was not fairly chosen, it bore the practical burden of adducing that evidence. It chose not to do so.

[11] The third ground of appeal submitted that the Commissioner made an error of fact in finding that the national mobility of the workforce was correlated to the relevant client. Loram contended that this finding was not open on the evidence, and that the proposition ought to have been put to Mr Worth before any finding to this effect was made. We reject these arguments. Mr Worth's evidence was that teams across Australia are generally organised according to Loram's specific customer, not according to state, and that there was one primary customer in Victoria, just as there was one team (at [15] of his statement). Mr Worth also said that Loram had a regular practice of moving employees across different operating environments and across states (at [17]); that rail network operations were not always confined to particular states (at [16]); and that there had been minimal transfers from or to the Victorian operations recently due to staff turnover and resulting inexperience (at [22]). In our view, the Commissioner's statement that mobility appeared to be correlated with the relevant client was consistent with Mr Worth's evidence. There was no reason for this to be put to him.

[12] The question of employees' mobility was the subject of elaboration in Loram's written submissions that went beyond the notice of appeal, and to that extent it does not properly form part of this appeal. We nevertheless make the following observations. It was submitted that the Commissioner had erred in finding that there were minimal transfers in Victoria and that she had not given due weight to the mobility of employees. We would reject these submissions. First, Mr Worth clearly did say that there had been minimal transfers. Secondly, the Commissioner was not required to give the dimension of mobility any greater weight, nor is there any good reason why she ought reasonably to have done so. Before the Commissioner, Loram had emphasised the transferability of employees across its workforce and relied on this as a factor telling against a conclusion that the group of employees to be covered by the proposed agreement was fairly chosen. However, it is clear that the Commissioner was not persuaded by this, including because Mr Worth had acknowledged in his statement that there had been minimal transfers from or to the Victorian operations. We reject the suggestion that the Commissioner took this out of context, because although Mr Worth's evidence was that this was due to staff turnover and other factors, and therefore on one view unusual, there was no positive evidence about the likelihood of transfers into and out of Victoria in the near future.

[13] Further and in any event, a conclusion that Victorian employees were in fact mobile would not preclude or necessarily tell against a finding that the chosen group was distinct, irrespective of whether mobility was correlated with the client. The fact that an employee might be transferred outside the group has no logical bearing on the distinctiveness of the group itself.

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[6] (2012) 219 IR 139.

[7] at [22].

The position might be different if there was a very high degree of mobility such that one could not say that employees were based in any particular location at all, but that is not the case here. It is not uncommon for employees to work in different operational or geographical areas of an employer's business and to be subject to different enterprise agreements at different times, or to be subject to one agreement but only sporadically, depending on the type of work that the employee is undertaking at any one time. Loram evidently does not want such a situation. But that is not relevant to the question of distinctiveness, or whether the group was fairly chosen.

[14] The fifth ground of appeal contended that the Commissioner erred in not concluding that the group of employees was chosen arbitrarily when the evidence showed that the group was selected at the discretion of the RTBU. We reject this. First, what the evidence in fact showed was that the employees contacted the union about the proposed bargaining, rather than the other way around. Secondly, it would not matter if the group had been chosen at the discretion of the RTBU. In most cases, the union is the organisational agent in the process of obtaining a majority support determination. This is consistent with the scheme of Part 2-4 of the Act. More fundamentally, discretion does not signify arbitrariness. The former connotes a measure of freedom of choice to make a decision. The latter entails random choice or personal whim. Of course, there can be overlap between these concepts, because discretion can be exercised in an arbitrary way. But typically a union's decision to choose a particular group to be covered by a proposed enterprise agreement is the result of a deliberative process that has concluded that there are employees who want to bargain and would benefit from bargaining, that some of these employees are members or eligible members of the union, that there is a reasonable hypothesis that within a relevant group there will be majority support for bargaining, that the group is distinctive or otherwise fairly chosen, and that there is a reasonable prospect that the Commission will grant a determination under s 237. The delineation of the group may well be tailored with an eye to the success of a s 237 application, but there is nothing arbitrary or otherwise wrong with this.

[15] By its sixth ground of appeal Loram contended that the Commissioner erred in finding the group fairly chosen because of the evidence it led regarding the impact of bargaining on the company, particularly in respect of its national employment conditions, consistency of position descriptions, cross-skilling, mobility, payroll systems and systemic efficiencies. Arguments concerning prejudice to the employer are usually raised in connection with the question of whether it would be reasonable in all the circumstances to make the declaration (see s 237(2)(d)), but we accept that they may also be relevant to the question of whether the group of employees has been fairly chosen. Commonly, the concern about unfairness relates to the position of employees outside the cohort, and whether they too might wish to bargain as part of the relevant group. But there is no reason why unfairness to the employer should not also be taken into account when considering s 237(2)(c). In this case however, the evidence does not rise higher than a concern about a possible state of affairs that might exist after the bargaining has concluded. As the Commissioner rightly observed at [37], what may arise from bargaining is unknown, and all bargaining representatives can make claims, including employers. We agree with the RTBU that Mr Worth's evidence going to prejudice was about hypothetical consequences, ones that could in principle be mitigated or even avoided, depending on the outcome of the bargaining process. The Commissioner considered Loram's arguments about alleged detriment to the company in the part of her decision that deals with s 237(2)(d), but they are also applicable to and dispositive of the company's 'prejudice' arguments in connection with s 237(2)(c).

[16] The seventh appeal ground contends that the Commissioner's decision is unreasonable or plainly unjust. It invokes the second limb of discretionary error in *House v The King*.[8] We reject it. The Commissioner's decision is neither unreasonable nor unjust, and there is no basis for us to infer, as contemplated by the second limb of error in *House v The King*, that in some way there has been a failure to properly exercise the discretion reposed in the decision-maker. There has been no substantial wrong. In our view, the decision reflects the ordinary application of law to fact.

[17] As to the other new grounds of appeal raised in the written submissions, we have determined that these do not form part of the appeal but would in any event reject them.

[18] Loram submitted that the Commissioner had erred in reaching a state of satisfaction, under s 237(2)(d), that it was reasonable in all the circumstances to make a determination. It said that it was unreasonable to make a determination in respect of such a small group of employees, given the resulting unreasonable administrative burden and other forms of prejudice referred to above. We repeat here our observations about the employer's evidence concerning the anticipated prejudice. Further, just as there is nothing inherently unfair about a group of employees whose present members are small in number, there is nothing inherently unreasonable about this circumstance either. The Commissioners' conclusion that it was reasonable to issue the determination was plainly one that was open to her.

[19] Loram submitted that the Commissioner erred in stating at [37] that commencing bargaining for an agreement constrains and affects nothing else in the bargaining process. It contended that this statement did not take into account recent changes to the Act that now provide for compulsory arbitration in cases of intractable bargaining. It said that, contrary to the Commissioner's statement, a declaration under s 237 does affect other things because the new provisions have the effect of 'ensuring' that if no agreement is made, the company could be the subject of an intractable bargaining workplace determination. But in fact, the new provisions do not ensure anything. In the absence of a new agreement resulting from bargaining, an intractable bargaining workplace determination is a possibility, not a certainty. And in any event, on a fair reading of the decision, the Commissioner was not saying that the making of a declaration has no legal implications. Plainly it does. For one thing, there is a notification time for an agreement. For another, bargaining representatives must meet the good faith bargaining requirements. What the Commissioner was saying was that a declaration is only the start of the bargaining process; the outcome remains entirely open, including as to coverage, and also as to the content of any agreement, which might contain provisions favourable to the employer. To the extent that there was any suggestion by Loram that the Commissioner ought to have considered the possibility that an intractable workplace determination could be made, we would reject it. The Act does not require the Commission to take account of this when deciding whether it is satisfied of the matters in s 237(2). The intractable bargaining provisions were enacted in the context of the pre-existing framework in respect of majority support determinations and Parliament chose not to create any link between the two. This is hardly surprising because it is difficult to see how the mere possibility of an intractable bargaining workplace determination being made at some point could logically bear on whether the

[8] Op. cit. at 505 per Dixon, Evatt and McTiernan JJ.

Commission could be satisfied of the matters in s 237(2), particularly because it is a possibility of universal application.

[20] In its written submissions, Loram contended that the Commissioner erred in concluding that the chosen group was operationally or organisationally distinct. It said that Mr Worth's evidence had demonstrated that the company's productive activity was rail maintenance and that this work was performed by its employees as part of a national operational structure, and that the manner in which it organised its enterprise to conduct those operations was as a national organisation. It had nationally consistent position descriptions and working conditions, and there was frequent mobility of employees across the states. Loram said that this uncontested relevant evidence was not afforded due weight by the Commissioner. But this submission does not speak to any discretionary error. It is simply a statement of opinion that an alternative weighting was to be preferred. It was for the Commissioner to weigh the evidence in reaching her overall evaluative conclusion as to whether the group of employees was geographically, operationally or organisationally distinct. If the point that is sought to be made is that it was not available to the Commissioner on the evidence to conclude that the chosen group was operationally or organisationally distinct, we would reject it. The conclusion was clearly open to the Commissioner. At [29], the Commissioner stated that the group was at least geographically distinct, and that Mr Worth's evidence about the organisational and operational allocation of work to teams servicing a particular client indicated that the company's Victorian employees were also operationally and organisationally distinct. She stated that organisationally, the employees worked together as a team, separate from other teams, and that operationally the Victorian employees served Loram's Victorian client. Loram's contention appears to assume that there cannot be operational or organisational distinctiveness in a subset of workers who are part of a broader national employment structure, but there is no reason why this cannot be the case. More generally, Loram submitted that the Commissioner was wrong to conclude that the chosen group was distinctive because the work they perform was not materially different to that performed by other employees around the country, but the nature of the work performed by a group of employees is only one of a myriad of dimensions that can be distinctive about that group and hence of potential relevance to the question of whether the group was fairly chosen, alongside the mandatory 'distinctiveness' considerations in s 237(3A). The fact that the work that employees perform is the same as work performed by others does not preclude or necessarily tell against a conclusion that the group is operationally, organisationally or otherwise distinct, or fairly chosen.

Conclusion

[21] The Commissioner considered and determined the application in accordance with the Act, and in an orthodox way. That a majority support determination was made in respect of this particular group in the circumstances before the Commissioner is unsurprising. We grant permission to appeal because of the novelty of some of the contentions advanced by Loram in its appeal. However, the Commissioner's decision contains no error. The appeal is therefore dismissed.

VICE PRESIDENT

Appearances:
T. Spence of counsel for Loram Pty Ltd
D. Murphy of counsel for the RTBU

Hearing details:
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