Federal Court of Australia

Australian Rail, Tram and Bus Industry Union v Metro Trains Melbourne Pty Ltd [2021] FCA 458

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| File number(s): |  |
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| Judgment of: | **WHEELAHAN J** |
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| Date of judgment: | 4 May 2021 |
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| Catchwords: | **INDUSTRIAL LAW** – where applicant seeks an interlocutory injunction restraining the respondent from engaging in certain conduct as part of a proposed restructure of the respondent, pending the resolution of an underlying dispute – where underlying dispute concerns alleged contravention of enterprise agreement – where the underlying dispute is proposed to be promptly submitted to Fair Work Commission for resolution – where parties gave certain undertakings as to conduct pending resolution of the underlying dispute – undertakings found to sufficiently address potential prejudice to the applicant – claim for interlocutory relief dismissed. |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 50, 545(2) |
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| Cases cited: | *Australian Broadcasting Corporation v O’Neill* [2006] HCA 46; 227 CLR 57  *Bradto Pty Ltd v State of Victoria* [2006] VSCA 89; 15 VR 65  *Fegan v Jackson* [2009] FCA 338; 183 IR 306  *McGee v Sanders (No 2)* (1991) 32 FCR 397  *Workpac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 |
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| Division: | Fair Work Division |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 17 |
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| Date of hearing: | 30 April 2021 |
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| Counsel for the Applicant: | Ms K Burke |
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| Solicitors for the Applicant: | Gordon Legal |
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| Counsel for the Respondent: | Mr A Pollock |
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| Solicitors for the Respondent: | Herbert Smith Freehills |

ORDERS

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|  | | VID 207 of 2021 |
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| BETWEEN: | AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION  Applicant | |
| AND: | METRO TRAINS MELBOURNE PTY LTD  Respondent | |

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| order made by: | WHEELAHAN J |
| DATE OF ORDER: | 4 May 2021 |

OTHER MATTERS:

Upon the applicant, by its counsel, undertaking:

* to file and serve, by 12.00pm on Tuesday 4 May 2021, an application that the Fair Work Commission deal with the dispute it notified to the respondent by letter dated 16 April 2021 concerning the implementation of the proposed station grades restructure, and to seek to have the Fair Work Commission deal with the dispute on an urgent basis,

and upon the respondent, by its counsel, undertaking:

* that, until the Fair Work Commission resolves or determines the dispute referred to in the applicant’s undertaking, it will not as part of its proposed station grades restructure:
  1. redeploy any station grade employees to other roles; or
  2. make any station grade employee roles redundant,

the court makes the following order.

THE COURT ORDERS THAT:

The applicant’s claim for interlocutory relief, claimed at page seven of its originating application dated 28 April 2021, be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(ex tempore, revised)

WHEELAHAN J:

1. The applicant brought an urgent application before me as general duty judge seeking an interlocutory *quia timet* injunction pending hearing in relation to an alleged contravention of the *Metro Trains Melbourne Pty Ltd Rail Operations Enterprise Agreement 2019*. The enterprise agreement was approved on 21 May 2020, and covers (*inter alios*) the respondent, certain employees of the respondent, and the applicant. The employees of the respondent who are covered by the agreement include station masters, and passenger service leaders employed in the respondent’s suburban railway system.
2. Clause 3.14 of the enterprise agreement provides for a joint review for roles and responsibilities and classification structure for customer service employees, including a simplified station master structure, and is in the following terms –

**3.14 Classifications**

3.14.1 A joint review of the roles and responsibilities and classification structure for Customer service (station grades) Employees including a simplified Station Master structure as set out in Schedule B shall be undertaken.

3.14.2 Current Stationmaster level 5 and 7 classifications shall be removed from Schedule B and those impacted employees will be reclassified to the next level upon approval of the agreement.

The joint review of the new levels of Assistant Stationmaster, Stationmaster and Senior Stationmaster and Station Manager (Flinders Street) will be implemented within 12 months of the certification of the agreement.

3.14.3 A review of the roles and responsibilities for Signallers, Train Controllers, AO Team leaders, AO Crew leaders and D.A.O’s are a priority for the review process.

3.14.4 Other grades may make application for a review of their roles and responsibilities during the lifetime of the agreement.

3.14.5 Any review leading to a reduction in grade/level shall see the impacted Employee subject to Salary Maintenance provisions at clause 2.21 Salary Maintenance – Appointment of Redeployed Employee.

3.14.6 New station Employees will commence at level Station Assistant 2 (SA2). Progression will then occur to LSA 1 after 6 months.

1. An understanding of the above clause is informed by Schedule B to the enterprise agreement, which sets out a number of classifications and rates of pay for employees, including station officers, station masters, station assistants, and leading station assistants. The respondent claimed that there were in excess of 30 classifications that might be captured by the joint review.
2. In April 2021, the respondent proposed some changes to its stations structure, to be effective from 24 May 2021. In summary, those changes would involve –
   1. an overall reduction in the number of station masters across the respondent’s network;
   2. an increase in station master positions in some classification levels at some railway stations;
   3. the reduction in station master positions in some classification levels at other railway stations; and
   4. the effective removal of one level of employees, namely passenger service leaders.
3. During April 2021, the respondent communicated these proposed changes to the applicant and to relevant employees through the distribution of PowerPoint slides, and in meetings, including meetings held via online platforms. The content of the communications to the relevant employees included seeking expressions of interest for voluntary redundancies, communications proposing redeployment, and a lengthy “FAQ” document. The respondent stated in its communications that consultation would occur from Wednesday 14 April to Tuesday 11 May 2021 and, in a set of PowerPoint slides dated 14 April 2021, proposed a timetable as follows –

14th April, 2021 Consultation commences

11th May, 2021 Consultation Concludes

12th – 19th May, 2021 Interview and Assessment process

24th May, 2021 Effective Date of new structure\*

Up to 4 weeks from 21st May 2021 Redeployment period\*

\*Pending consultation outcomes

1. On Friday 16 April 2021, the applicant wrote to the respondent to invoke the dispute resolution provisions of the enterprise agreement. The applicant claimed that the restructure that the respondent had announced in relation to the passenger service leader and station master roles, including the removal of a number of positions, was in breach of clause 3.14 of the enterprise agreement. In substance, the applicant claims that a joint review is required under clause 3.14, and that the respondent has commenced a consultation process without any joint review having taken place.
2. The enterprise agreement contains terms relating to dispute resolution (inter alia) –

**1.11 Dispute Resolution**

1.11.1 If a dispute relates to:

(a) a matter arising under the Agreement; or

(b) the National Employment Standards; or

(c) a matter pertaining to the employment relationship;

this clause sets out procedures to settle the dispute. For the avoidance of doubt, and notwithstanding cl.1.11.5(b), matters relating to occupational health and safety cannot be dealt with by arbitration and will not be subject to the status quo provision at cl.1.11.7.

…

1.11.3 In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the Employee or Employees and relevant supervisors and/or management, in good faith.

1.11.4 If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Fair Work Commission.

1.11.5 The Fair Work Commission may deal with the dispute in two (2) stages:

(a) The Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) For matters arising under 1.11.1 (a) and (b), if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

Note: if the Fair Work Commission arbitrates the dispute, it may also use the powers that are available to it under the *Fair Work Act 2009* (Cth).

A decision that the Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the *Fair Work Act 2009* (Cth). Therefore, an appeal may be made against the decision.

1.11.6 The parties to the dispute and their representatives must genuinely attempt to resolve the dispute through the processes set out in this clause and must cooperate to ensure these processes are carried out expeditiously.

1.11.7 In the event of a clause 1.11.1 (a) or (b) dispute, while the parties are trying the resolve the dispute using the procedure in this clause, work must continue in accordance with the usual practice existing prior to the matter that is the subject of the dispute (status quo), pending the resolution of the dispute unless:

(a) there is a reasonable concern about an imminent risk to health and safety associated with the status quo (in which case status quo will not apply); or

(b) the status quo has a direct impact on service delivery or Government related initiatives (in which case the status quo will only apply up to the conclusion of the steps in clause 1.11.5 (a)).

For the avoidance of doubt, the state of affairs as it existed prior to the matter that is the subject of the dispute will remain in place. For example, if the dispute is about a change to work, the *status quo* represents the position before the change.

…

1.11.9 The parties to the dispute agree to be bound by a decision made by the Fair Work Commission in accordance with this clause. For the avoidance of doubt, this excludes matters arising under 1.11.1 (c).

…

1. Of particular relevance to the present application is clause 1.11.7, set out above. The applicant claimed that having commenced a dispute resolution process, the respondent was now precluded from taking any further steps to implement its reorganisation of the station master positions pending the resolution of the dispute, which would be the subject of arbitration by the Fair Work Commission failing agreement between the parties.
2. In correspondence, the respondent by its solicitors claimed that it had not made any definite decision in relation to the redundancies, but nevertheless wished to continue its “expressions of interest” process relating to voluntary redundancies and possible “job swaps”. The respondent denied that it was making any changes to the roles or responsibilities of the existing station master positions, or the classification structure for any station grades under the enterprise agreement, but was making adjustments to the number of employees in those positions. The respondent claimed that clause 1.11.7 of the enterprise agreement did not preclude it from communicating with its employees about potential voluntary redundancies and job swaps in the event that the proposed reductions were implemented. The respondent proposed that it would not make any definite decisions without providing the applicant with 72 hours written notice, and in any event would not make a definite decision prior to 19 May 2021.
3. The applicant’s claim that the respondent is engaging in, or proposes to engage in, conduct in breach of clause 3.14 of the enterprise agreement is not the claim that is before the court on this application for interlocutory relief, but is the underlying claim about which the applicant has given notification of a dispute. The claim before the court is that, having given notice of a dispute, while the dispute resolution process contemplated by the enterprise agreement remains on foot, the respondent is precluded by clause 1.11.7 of the enterprise agreement from taking the further steps to which I referred at [8] above. The applicant seeks interlocutory relief to restrain the respondent from –
4. redeploying any station grade employees;
5. making any station grade employees redundant; and
6. seeking or accepting any expressions of interest from station grade employees for redeployment, redundancy, or job swaps.
7. During the course of the hearing, and as the issues in dispute gained better form, the parties proposed complementary undertakings that would address (a) and (b) above, but (c) remained in dispute. The undertakings proposed were as follows –

By the applicant –

The applicant by its counsel undertakes to file and serve, by 12.00pm on Tuesday 4 May 2021 an application that the Fair Work Commission deal with the disputeit notified to the respondent by letter dated 16 April 2021concerning the implementation of theproposedstation grades restructure, and to seek to have the Fair Work Commission deal with thedispute on an urgent basis.

By the respondent –

The respondent by its counsel undertakes that until the Fair Work Commission resolves or determines the dispute referred to in the applicant’s undertaking, it will not as part of its proposed station grades restructure –

(a) redeploy any station grade employees to other roles; or

(b) make any station grade employee roles redundant.

1. The court has power under s 545(2) of the *Fair Work Act 2009* (Cth)to make an order granting an injunction, or interim injunction, to prevent, stop, or remedy the effects of a contravention of a civil remedy provision of the Act. Section 50 of the Act, which provides that a person must not contravene an enterprise agreement, is a civil remedy provision. Section 545(2) uses the term “injunction”, thereby attracting the principles that attach to such relief: *cf,* *McGee v Sanders (No 2)* (1991) 32 FCR 397 at 402-403 (Gray J). The principles relating to the grant of an interlocutory injunction are well known. “[I]n all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff’s entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction”: *Australian Broadcasting Corporation v O’Neill* [2006] HCA 46; 227 CLR 57 at [19] (Gleeson CJ and Crennan J). See also, Gummow and Hayne JJ at [65]-[72] and [85]. The organising principles are to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed. The question whether there is a serious question to be tried, and the balance of convenience are not necessarily independent, and may in an appropriate case be considered together, because the strength of a *prima facie* case may bear upon where the balance of convenience lies. An application for an interlocutory injunction that in a practical sense gives final relief is accommodated by these principles, and there is no separate test to be applied in those circumstances: *Fegan v Jackson* [2009] FCA 338; 183 IR 306 at [35] (Kenny J, noting that the application was for interim orders under s 164(3) of the *Workplace Relations Act 1996* (Cth)), citing *Conquo v Jackson* [2009] FCA 45 at [30]-[33] (Sundberg J), which in turn cited *Bradto Pty Ltd v State of Victoria* [2006] VSCA 89; 15 VR 65 at [33] (Maxwell P and Charles JA).
2. The question whether the applicant has shown a *prima facie* case must start with the text of clause 1.11.7 of the enterprise agreement, which is to be construed in its context having regard to the established principles of construction that were referred to by the Full Court in *Workpac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 at [197] (Tracey, Bromberg and Rangiah JJ).
3. Clause 1.11.7 provides that “work must continue in accordance with the usual practice” pending resolution of the dispute. The word “work” is capable of having a range of meanings, dependent upon context, as an examination of dictionary meanings demonstrates. In the context of clause 1.11.7 the term is used to include the fact of work, and the way that it is organised. That is made clear by the reference to “usual practice”, and the reference to a “change to work” in the concluding words of the clause.
4. In my view, the undertaking offered by the respondent, which complements the undertaking offered by the applicant, goes a sufficient distance to protect the applicant and the employees of the respondent, whom it is entitled to represent, so that pending resolution of the dispute which is to be referred by the applicant to the Fair Work Commission, work will continue as it had before the notification of the dispute. In light of the undertaking that the respondent proposes to give, I am not satisfied that the respondent should also be enjoined from seeking or accepting expressions of interest from station grade employees for redeployment, redundancy, or job swaps. This is for two interdependent reasons. The first is that I am not satisfied that there is a sufficiently strong *prima facie* case that seeking or accepting expressions of interest, when the respondent proposes to undertake to the court not to give effect to any such proposals pending resolution of the dispute, would constitute a contravention of clause 1.11.7. The second reason is that, in light of the proposed undertaking, I am not persuaded that there is a real risk of irremediable damage to the applicant, or the relevant employees, which supports the making of the interlocutory order sought. I am not satisfied that the balance of convenience favours anything more to preserve the position of the applicant and relevant employees, other than the combination of undertakings that the parties propose.
5. Had the respondent not offered the undertaking to which I have referred, I would likely have made some order against it of the type that is the subject of its undertaking. That is because of my estimation that there was a likelihood that the respondent would proceed to implement its proposal to change its stations structure, as it had foreshadowed in the detailed documents that it had published as part of the consultation process. I was not attracted by the respondent’s initial response that there was no risk of this occurring because no definite decision had been made. Ultimately, I did not understand counsel for the respondent to maintain this position, and in any event it was overtaken by the undertaking that was offered. As to the respondent’s claim that the applicant’s application was premature, it was certainly prompt, and brought at very short notice. Possibly, it need not have been brought with such urgency, but I do not consider that it was premature. There was no prejudice to any party, because the application was capably argued by both counsel, who were able to narrow the issues in dispute, and assist in the efficient disposition of the application.
6. For the foregoing reasons, upon the parties’ undertakings referred to at [11] above, I will order that the claim for interlocutory relief made in the originating application otherwise be dismissed. The proceeding will now be allocated to a docket judge in the usual course.

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan. |

Associate:

Dated: 4 May 2021