DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Swickers Kingaroy Bacon Factory Pty Ltd
v
The Bacon Factories' Union of Employees, Queensland
(C2018/218)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER HUNT SYDNEY, 4 APRIL 2018

Appeal against decision [2017] FWC 7049 of Deputy President Asbury at Brisbane on 22 December 2017 in matter number C2017/235.

Introduction

[1] Swickers Kingaroy Bacon Factory Pty Ltd (Swickers) has lodged a notice of appeal in which it seeks permission to appeal and appeals against a decision of Deputy President Asbury issued on 22 December 2017[1] (Decision). The Decision determined three questions concerning the interpretation of identified provisions of the *Swickers Kingaroy Bacon and B.F.U.E Collective Workplace Agreement 2012* (Agreement). These questions were posed for the Commission's determination jointly by Swickers and the Queensland Bacon Factories' Union of Employees (BFUE) pursuant to the dispute resolution procedure in clause 8 of the Agreement. The notice of appeal, as amended, challenges only the Deputy President's determination of the first question, which was as follows:

> 1. On the proper application of clauses 10.4.6, 13.2.1 and 13.2.4, are casual employees who are not shift workers and who are working outside the spread of ordinary hours entitled to the loading in clause 13.2.4 in addition to their casual loading?[2]

[2] The Deputy President's answer to the above question was:

> Yes. Casual employees who are not cleaners employed to work shifts are entitled to the loading in clause 13.2.4 for work outside the ordinary spread of hours in addition to their casual loading.[3]

[3] The Deputy President gave provisional answers to the remaining two questions, and invited further submission with respect to those answers.[4]

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[1] [2017] FWC 7049

[2] Decision at [3]

[3] Decision at [93]

Relevant provisions of the Agreement

[4] The Agreement applies to employees of Swickers (clause 4), and is expressed to cover Swickers, its employees engaged in the classifications in the Agreement, and the BFUE (clause 3). Clause 10.4 of the Agreement concerns casual employees. Clauses 10.4.2 and 10.4.3 provide for the base rate of pay and casual loading for casual employees in the following terms:

> 10.4.2 Subject to clause 10.4.3, a casual Employee shall be paid a base rate per hour of 1/38th of the weekly rate prescribed in clauses 16.1 or 16.2, whichever is relevant, for the class of work performed, plus a casual loading of 24%.
>
> 10.4.3 On the 1st July 2014, the casual loading in clause 10.4.2 will be increased to 25%.

[5] Clauses 10.4.4-10.4.6 then provide for specified payments to casual employees as follows:

> 10.4.4 Notwithstanding clause 10.4.2, where a casual employee works ordinary hours on a Saturday they shall receive the appropriate loadings set out in clause 13.2.3, and not the loading in clause 10.4.2.
>
> 10.4.5 A casual employee who works authorised overtime shall receive the applicable overtime penalty set out in clauses 10.4.13 and 10.4.14, and not the loading in clause 10.4.2.
>
> 10.4.6 A casual Employee who works on shift work in accordance with clause 13.4 shall, in addition to the casual loading set out in clause 10.4.2, be paid the appropriate shift penalty based on the ordinary hourly rate excluding casual loading.

[6] Clause 13.2, *Spread of ordinary hours*, provides:

> **13.2 Spread of ordinary hours**
>
> 13.2.1 The ordinary hours of work prescribed herein shall be worked continuously, except for meal breaks and rest pauses, between 5.00 am and 9.00 pm.
>
> 13.2.2 Ordinary hours shall be worked, Monday to Saturday inclusive.
>
> 13.2.3 Ordinary hours worked on a Saturday shall be paid an additional loading of 50% of the ordinary hourly rate of pay.
>
> 13.2.4 Subject to clause 13.2.1, hours worked outside the ordinary spread of ordinary hours, shall be paid an additional loading of 30% of the ordinary hourly rate of pay.

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[4] Decision at [93]-[94]

13.2.5 The maximum ordinary hours to be worked on any one day shall be ten (10).

[7] Clause 6, *Definitions*, contains the following definition:

"Ordinary rate of pay" means either the salary or wages applicable to the classification level to which the Employee is appointed (exclusive of performance bonus and casual loading).

[8] The pay rates for each classification level are set out in clause 16.1 as weekly amounts.

The Decision

[9] The reasoning by which the Deputy President reached the answer that she did to the first question may be summarised as follows:

- The plain meaning of the expression of the loading in clause 13.2.4 as an "*additional loading of 30% of the ordinary rate of pay*" was that the method of calculating the loading was by applying 30% to the ordinary rate of pay as defined in clause 6 – that is, excluding the casual loading. The terms of clause 13.2.4 did not require the casual loading to be subsumed into or replaced by the 30% loading provided for. It was simply a means of expressing that the casual loading was not compounded by the 30% loading.[5]

- Clauses 10.4.4 and 10.4.5 contained specific statements that the casual loading was subsumed into other loadings. There was no such provision in clause 10.4 relating to work outside the ordinary spread of hours. The fact that there were specific clauses stating that the casual loading was not payable in addition to overtime payments or the additional loading for ordinary hours worked on Saturdays was a strong indication that where the framers of the Agreement intended that the casual loading would be subsumed into another payment, they expressly stated that this is the case.[6]

- The terms of the award which would apply to Swickers' employees if the Agreement did not, namely the *Meat Industry Award 2010* (Award), constituted a significant contextual matter relevant to the construction of the Agreement, because the Agreement had to pass the better off overall test (BOOT) in s 193 of the *Fair Work Act 2009* (FW Act) in order to be approved. A construction of the Agreement which would have resulted in the Agreement passing the BOOT would be preferred over one which was not. Under the Award, casual employees working outside the span of hours were entitled to be paid at overtime penalty rates (at time and a half for the first three hours and double time thereafter), but did not receive the casual loading. This supported the proposition that that the 30% loading in the Agreement was payable in addition to the 25% loading.[7]

- The rationale for the casual loading was also relevant: it was well-established that it was paid in awards based on the incidents of casual employment including exclusion

[5] Decision at [60]

[6] Decision at [61]-[62]

[7] Decision at [63]-[68]

> from the operation of notice of termination entitlements, severance payments, annual leave entitlements and personal leave entitlements. The Agreement also excluded casual employees from these entitlements. The breadth of matters encompassed by the casual loading, the lack of guaranteed hours in relation to rostering under the Agreement and the fact that the Agreement specifically stated that the casual loading was absorbed into a number of penalties such as overtime and ordinary hours worked on weekends and the lack of a specified spread on ordinary hours for the purposes of differentiating ordinary time from overtime weighed against a construction where the value of the casual loading would be further reduced by absorbing it into a penalty payment for work outside the ordinary spread of hours.[8]

[10] The Deputy President separately considered a submission advanced by Swickers concerning the Form F17 *Employer's Declaration in Support of Application for Approval of Enterprise Agreement* (Employer's Declaration) and the Form F18 *Declaration of Employee Organisation in Relation to an Application for Approval of an Enterprise Agreement* (Union Declaration) which had been filed in respect of Swickers' application for approval of the Agreement in 2012. The Employer's Declaration, which was made by Rebecca Richmond, Swickers' Human Resources Manager, included an attachment which contained a pay comparison between the Award and the Agreement for a casual employee working 38 hours per week on a shift which commenced at 3.00am and finished at 11.00am. The comparison showed that under the Award the casual would earn $868.25, but under the Agreement would earn $881.48. The Agreement calculation showed the casual loading being paid only for hours within the span prescribed by clause 13.2.1, and not for hours when the 30% loading prescribed by clause 13.2.4 hours outside the span was payable.

[11] In the Union Declaration, which was made by Thomas Schulz, the then General Secretary of the BFUE, Mr Schulz responded to the proposition "*I have read the employer's Form F17 statutory declaration in support of the Application. In so far as the matters contained in that statutory declaration are within my knowledge:...*" by crossing the box next to the statement "*I agree with the statutory declaration*". Swickers submitted that, in the event the relevant provisions of the Agreement were considered to be ambiguous, the declarations could be taken into account as extraneous material to interpret to the Agreement, they established that the objective intention of the parties at the time the Agreement was negotiated and approved, they were consistent with the interpretation advanced by Swickers, and the BFUE should not be permitted to resile from its previous agreement as to the interpretation of clause 13.2.4 as set out in the Union Declaration.[9] The Deputy President dealt with this submission in the Decision as follows:

> "[92] I do not accept that the Form F17 Employer Declaration are a basis to prefer the construction advanced by Swickers. It is regrettable that Mr Schulz did not consider that attachment before he signed the Form F18 supporting it. However, that is not sufficient to override the other considerations relevant to the proper construction of the Agreement. The Form F17 is a document prepared by Swickers. The attached calculations were prepared for the purpose of establishing that the Agreement passed the BOOT. There is no evidence that they were put to employees before they voted for the Agreement. Accordingly the documents are not sufficient to establish mutual

[8] Decision at [69]-[70]

[9] Decision at [44], [46]-[47], [49]

intention so that the terms of the Agreement and other admissible contextual evidence or evidence of surrounding circumstances is disregarded."

Appeal submissions

[12] In the appeal, Swickers submitted that the Deputy President's answer to the first question was erroneous, because:

- clause 10.4 was a prescriptive "code" for casual employees which dealt with a range of matters concerning such employees;

- the only matter which clause 10.4 did not deal with was the loading to be paid when a casual employee worked outside ordinary hours;

- clause 10.4.6 did not apply to casual workers who are not shift workers, and shift workers could only be employed as cleaners, so clause 10.4.6 had no work to do in the resolution of the first question for arbitration;

- the disputed provision, clause 13.2.4, was stated to be subject only to clause 13.2.1, and not clause 10.4;

- when clauses 13.2.1 and 13.2.4 were read together, it was clear that the Agreement provided for a loading of 30% for all employees, full-time, part-time and casual, for work performed outside of ordinary hours;

- the outcome determined by the Deputy President involved the erroneous importation of words into clause 13.2.4 which were not there;

- the Deputy President's conclusion that because the parties included clauses 10.4.4 and 10.4.5, they must have intended to add the casual loading to the 30% loading in clause 13.2.4, involved erroneous speculation as to the subjective intentions of the parties;

- The Deputy President erred by failing to accord appropriate or any weight to the Employer's Declaration and the Union Declaration, and the past conduct of the parties concerning the interpretation and application of the Agreement, which represented the consensus and a meeting of the minds of the parties;

- in respect of the Union Declaration, it was necessary that "*Parties must be held to their oaths and their bargains*", and it was not in the public interest if a decision of the Commission could be read as sanctioning non-compliance with statutory obligations and requirements concerning approval of enterprise agreements; and

- the Deputy President placed excessive weight upon the terms of the Award in interpreting the Agreement, in circumstances where there was no requirement for conformity between the Agreement and the Award, so that to construe the Agreement in terms that were essentially consistent with the Agreement was in error.

[13] Swickers submitted that permission to appeal should be granted because the approach to the interpretation of enterprise agreements would almost always be a matter of public

interest, the merits of the grounds of appeal meant that it was appropriate for permission to be granted, the Decision manifested an injustice and the relevant legal principles had been misapplied.

[14] The BFUE submitted that the Deputy President's answer to the first question was correct, for the reasons set out in the Decision, and that permission to appeal should not be granted or, in the alternative, that the appeal should be dismissed.

Consideration

[15] We consider that the answer given by the Deputy President to question 1 was plainly correct. Clauses 10.4.2 and 10.4.3 establish, in respect of casual employees, a general requirement that they be paid a base hourly rate of 1/38th of the weekly rate for the applicable classification and in addition a casual loading of 24% up until 1 July 2014 and 25% on and from that date. Other provisions in clause 10 provide for additional payments to be made in specified circumstances. Where those additional payments are to be made in substitution for and not in addition to the casual loading, as in clauses 10.4.4 and 10.4.5, the provision expressly states this by providing that the casual employee will receive the additional payment "*and not the loading in clause 10.4.2*". Where the additional payment is a percentage amount which is not to be compounded upon the casual loading, as in clause 10.4.6, the amount is described to be "*based on the ordinary hourly rate excluding casual loading*", but this is also stated to be payable "*in addition to the casual loading set out in clause 10.4.2*". It was not in dispute that there was no case in clause 10 of an additional payment for casual employees being in substitution for the casual loading without the use of express language providing for this.

[16] Clause 13.2.4 provides for an additional payment to be made when any employee works "... *outside the spread of ordinary hours* ...". It was not in dispute, and we accept, that the provision was applicable to all categories of employees – full-time, part-time and casual. The provision expresses itself as being "*Subject to clause 13.2.1...*". The Deputy President raised the possibility in the Decision that the clause number might be a typographical error and that the intention was to refer to clause 13.3.1, which deals with overtime.[10] It is not necessary to reach that conclusion, since we consider that these words can be read as, perhaps inelegantly, making clear that the spread of ordinary hours referred to in clause 13.2.4 is the period from 5.00am to 9.00pm specified in clause 13.2.1. The additional payment required to be made in respect of hours work outside of the 5.00am to 9.00pm is described as being "*an additional loading of 30% of the ordinary hourly rate of pay*".

[17] There is no definition of the expression "*ordinary hourly rate of pay*" in the Agreement. However, it was not in dispute, and we accept, that this expression refers to the "*Ordinary rate of pay*" as defined in clause 6, but calculated on an hourly and not a weekly basis (by dividing the weekly rates prescribed in clause 16.1 by 38). As the definition in clause 6 makes expressly clear, the ordinary rate of pay does not include the casual loading. Therefore the additional loading prescribed in clause 13.2.4 is to be quantified, in the case of casual employees, as being 30% of the employee's hourly rate exclusive of the casual loading.

[18] The ordinary and natural way to read clause 13.2.4 is that it provides for the loading for out-of-hours work to be paid in addition to the hourly rate of pay that would otherwise be

[10] Decision at [58]

payable to the employee. In the case of a casual employee, that would be the hourly rate prescribed by clauses 10.4.2 and 10.4.3 - that is, the base hourly rate plus the casual loading. There is nothing in the language of clause 13.2.4 which qualifies the description of the payment as being "*additional*". Swickers' submissions sought to treat to the exclusion of the casual loading in the definition of "*Ordinary rate of pay*" in clause 6 as somehow having the effect that the clause 13.2.4 loading was payable in substitution for rather than additional to the casual loading, but that is plainly incorrect. The definition allows the amount of the additional loading to be properly quantified, so that in the case of a casual employee the 30% additional loading does not compound upon the 25% casual loading, but there is simply no basis to read the language of the definition together with clause 13.2.4 as excluding payment of the casual loading altogether. In this respect, the provision may properly be contrasted to clauses 10.4.4 and 10.4.5 which, as earlier stated, exclude the payment of the casual loading by the use of express language.

[19] We do not consider that there is any ambiguity in the way in which clauses 10.4.2. 10.4.3 and 13.2.4 are to be read together which requires resort to be had to extrinsic material as an aid to interpretation. In any event, we do not consider that the extrinsic matters relied upon by Swickers provide any permissible assistance in answering the first question.

[20] Swickers relied upon the fact that it had previously paid casuals employees for work outside the span of ordinary hours on the basis of its interpretation of clause 13.2.4. The evidence demonstrated that for a long time prior to November 2016, there were some casual employees (not cleaners) who worked an afternoon shift and were paid the clause 13.2.4 loading in substitution for the casual loading without objection from the BFUE. In November 2016 there was a fire at the boning room at Swickers' premises in Kingaroy, which required the boning work to be moved to another location at Wulkuraka. Because the new boning room was smaller, it was necessary to put in place an afternoon shift with the result that a much larger number of casual employees began to perform work outside the span of hours. It was at this point that the method of payment to the casual employees was disputed by the BFUE, and resort was had to the dispute resolution procedure in the Agreement. We do not consider that this demonstrates any past common understanding or consensus about the interpretation of clause 13.2.4. As was made clear by the Full Bench in *Australian Manufacturing Workers' Union v Berri Pty Limited*[11], a mere absence of complaint or inadvertence concerning the past application of a provision in an enterprise agreement is not sufficient to establish any such common understanding or consensus.

[21] In relation to the Employer's Declaration and the Union Declaration, we agree with the Deputy President's analysis and conclusion that these do not constitute post-agreement evidence of mutual intention that is admissible in aid of interpretation of the Agreement. A single-enterprise non-greenfields enterprise agreement under the FW Act, although it may be negotiated between an employer and a union acting as bargaining representative of employees, is not "made" until a majority of employees asked to approve the agreement cast a valid vote to approve the agreement in accordance with s 182(1). Any common understanding on the part of by the employer and the union about the meaning of the terms of an agreement may not have been shared with some or all of the employees who voted upon it, and indeed the employees may have been entirely ignorant of the common understanding.[12] In those

[11] [2017] FWCFB 3005 at [108]

[12] See *Health Services Union v Ballarat Health Services* [2011] FCA 1256 at [79]; *AMWU v Berri* [2017] FWCFB 3005; 268 IR 285 at [88], [96]

circumstances, assuming for present purposes that the Employer's Declaration and the Union Declaration constitute evidence of a consensus between Swickers and the BFUE about the meaning of clause 13.2.4, it cannot in the absence of evidence that its contents or effect were communicated to the employees at or before the time of the vote be taken as evidence of mutual intention on the part of the employees who voted to make the Agreement with Swickers.

[22] In any event, the Employer's Declaration and the Union Declaration are deeply problematic for a number of reasons. First, the Deputy President appears to have accepted Mr Schulz's evidence that he did not properly consider the pay comparison attachment to the Employer's Declaration when he made the Union Declaration. Although that may mean that Mr Schulz was negligent or reckless in declaring that he agreed with the contents of the Employer's Declaration, it makes it difficult to conclude that there was in actuality a consensus about the meaning of clause 13.2.4.

[23] Second, the pay comparison is itself problematic, because the calculation of remuneration under the Award relies upon a highly dubious assumption about the span of hours (it assumes there is an employer right under clause 31.2(f)(iv) to expand the span of hours by one hour at either side of the spread, when the provision is clearly facilitative in nature) and appears to incorrectly calculate superannuation by declaring superannuation only payable on hours of work within the span of hours, and not the ordinary hours of work performed outside the span of hours. If the calculation is adjusted for these matters, the Agreement would likely fail the BOOT for casual employees working the roster pattern upon which the pay comparison is based.

[24] Third, even if the pay comparison is correct based upon the particular roster pattern identified, a different roster pattern which had a higher proportion of hours worked outside the span of hours would almost inevitably fail the BOOT if casual employees were not paid the casual loading in addition to the 30% out-of-hours loading. It would not readily be inferred that there was a consensus as between Swickers and the BFUE that clause 13.2.4 of the Agreement would be interpreted in a way which would mean that the Agreement would not pass the BOOT.

Conclusion

[25] The BFUE did not contest that the dispute resolution procedure in clause 8 of the Agreement conferred upon Swickers the capacity to appeal the Decision, subject to the grant of permission to appeal. We consider that permission to appeal should be granted because the Deputy President's answer to the first question requires Swickers to depart from its previous longstanding payment practice and may give rise to a significant monetary liability. In those circumstances, we consider that appellate review of the Decision is appropriate. However, for the reasons given, we consider that the conclusion reached in the Decision in relation to the first question was correct.

[26] The appeal is therefore dismissed. The matter will be remitted to the Deputy President to finalise the outcome with respect to the second and third questions and to deal with any consequential issues which may arise from her answer to the first question.

VICE PRESIDENT

Appearances:
M. Healy of Counsel on behalf of Swickers Kingaroy Bacon Factory Pty Ltd.
W. Ash solicitor on behalf of The Bacon Factories' Union of Employees, Queensland.

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