

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *State of Queensland (Queensland Fire and Emergency Services) v United Firefighters' Union of Australia, Union of Employees, Queensland* [2014] QIRC 120

PARTIES: **State of Queensland (Queensland Fire and Emergency Services)**
(applicant)

v

United Firefighters' Union of Australia, Union of Employees, Queensland
(respondent)

CASE NO: B/2014/7

PROCEEDING: Application to dismiss; application for a stay

DELIVERED ON: 1 August 2014

HEARING DATE: 23 June 2014

MEMBERS: Deputy President O'Connor
Deputy President Kaufman
Industrial Commissioner Neate

ORDERS:

1. That, pursuant to s 331(b) of the *Industrial Relations Act 1999*, the Commission refrain from hearing further proceedings in matter A/2014/1.
2. That, pursuant to s 274(4)(a)(ii) of the *Industrial Relations Act 1999*, matter A/2014/1 is referred to Deputy President Bloomfield for his consideration pursuant to the Attorney-General's Award Modernisation Request under s 140C of the Act.

CATCHWORDS: INDUSTRIAL LAW - DECISIONS GENERALLY - APPLICATION TO DISMISS - APPLICATION FOR A STAY - AWARD MODERNISATION - Where the respondent had applied for the making of a new modern award in respect of auxiliary employees of the Queensland Fire and Emergency Services - Where the applicant applied for that application to be dismissed or, in the alternative, that proceedings in respect of that application be stayed - Whether further proceedings in the respondent's application for a new

modern award were necessary or desirable in the public interest, having regard to the objectives of the award modernisation process

Industrial Relations Act 1999, ss 125, 140BB, 140C, 140CC, 140CE, 274, 331

CASES:

O'Sullivan v Farrer (1989) 168 CLR 210
Queensland Fire and Rescue Service Auxiliary Employees Interim Award - State 2013
 (A/2013/2) - Decision <<http://www.qirc.qld.gov.au>>

APPEARANCES:

Mr A. K. Herbert for the applicant.
 Mr J. W. Merrell for the respondent.

Decision

- [1] This is an application pursuant to s 331 of the *Industrial Relations Act 1999* ("the Act") by the State of Queensland (Queensland Fire and Emergency Services) ("QFES") for the following:

- "1. Striking out of Matter number A1 of 2014 being an Application by the United Firefighters Union of Australia Union of Employees, Queensland (UFU) for a new modern award titled *Queensland Fire and Emergency Services Auxiliary Employees Modern Award – 2014* under Chapter 5A Section 140GA (5)(b) of the *Industrial Relations Act 1999* *or*
2. In the alternative that the Application for a new modern award titled *Queensland Fire and Emergency Services Auxiliary Employees Modern Award – 2014* by the UFU be stayed until after the award modernisation process for the public sector and in particular the Queensland Fire and Emergency Services has been completed."

- [2] On 4 July 2013, the United Firefighters' Union of Australia, Union of Employees, Queensland ("UFU") filed an application in the Commission pursuant to s 125 of the Act seeking the making of an interim award for Auxiliary firefighters. The application was made following a series of unsuccessful attempts by the UFU over a two year period using varying mechanisms to seek industrial regulation for this group of workers.

- [3] In the reasons for decision of Industrial Commissioner Fisher dated 19 September 2013, the following conclusions were reached:

"[9] The Commission has given consideration to the competing submissions of the parties. I have reached the view that an Interim Award should be made for this group of workers. This decision is consistent with the Principal Object of the Act which is to provide a framework for industrial relations that supports economic prosperity and social justice by, amongst other things, promoting and facilitating the regulation of employment by awards and agreements: s 3(j).

[10] Further, the employment of auxiliary firefighters is presently award free and they are the only group of employees engaged by the QFRS, industrial instrument. Their terms and conditions are governed by a Standing Order which can be varied at the discretion of the Commissioner of the QFRS. As such auxiliary firefighters have not had the capacity in a formal industrial relations setting to seek to influence their terms and conditions of employment.

[11] In deciding to make an Interim Award for auxiliary firefighters the Commission has also taken into account the submission of the UFU that employees in New South Wales and South Australia, who are engaged in a similar role to those in Queensland, have award coverage."¹

[4] By decision delivered orally on 12 November 2013 and released on 15 November 2013, Industrial Commissioner Fisher made the operative date for the certified agreement as 14 October 2013.²

[5] On 17 October 2013 the *Industrial Relations (Fair Work Harmonisation Bill No. 2) and Other Legislation Bill* was introduced in the Parliament. The legislation received the Royal assent on 27 November 2013. Some of the amendments commenced on that date, and the other amendments commenced on 1 December 2013. Section 821(2) of the Act, inserted by that legislation, rendered an award made under s 125 of the Act on or after the introduction day and before the commencement of the Act of no effect. This affected the award made by the Commissioner.

[6] We conclude that Auxiliary firefighters are not covered by an operative award. However, we note that they are employed by QFES as part-time firefighters whose conditions of employment are set out in administrative arrangements under the *Fire and Rescue Services Act 1990*.

[7] The issues to be addressed in determining whether to grant the strike out application or make some other orders are:

- whether the Auxiliary firefighters could be covered by a modern award that applies to other firefighters; and
- if so, whether the Commission should make orders under s 331 of the Act.

These issues must be considered in light of relevant sections of the Act dealing with the modernisation of awards.

[8] Chapter 5A of the Act establishes the Modern Award objectives:

"140D Modern awards objectives

- (1) In exercising its chapter 5A powers, the commission must ensure modern awards, together with the Queensland

¹ *Queensland Fire and Rescue Service Auxiliary Employees Interim Award - State 2013 (A/2013/2) - Decision* <<http://www.qirc.qld.gov.au>> [9]-[11].

² *Queensland Fire and Emergency Services Auxiliary Employees Interim Award - State (A/2013/2) - Report on Decision* <<http://www.qirc.qld.gov.au>>.

Employment Standards, provide a minimum safety net of employment conditions that is fair and relevant.

- (2) For subsection (1), the commission must have regard to the following—
- (a) relative living standards and the needs of low-paid employees;
 - (b) the need to promote social inclusion through increased workforce participation;
 - (c) the need to promote flexible modern work practices and the efficient and productive performance of work;
 - (d) the need to ensure equal remuneration for male and female employees for work of equal or comparable value;
 - (e) the need to provide penalty rates for employees who—
 - (i) work overtime; or
 - (ii) work unsocial, irregular or unpredictable hours; or
 - (iii) work on weekends or public holidays; or
 - (iv) perform shift work;
 - (f) the likely impact of the exercise of the chapter 5A powers on business, including on productivity, employment costs and the regulatory burden;
 - (g) the need to ensure the modern award system—
 - (i) ...
 - (ii) ...
 - (iii) avoids unnecessary overlap of modern awards;
 - (h) the financial position considerations, including the likely impact of the exercise of the chapter 5A powers on those considerations;
 - (i) the likely impact of the exercise of the chapter 5A powers on -
 - (i) employment growth and inflation; and

(ii) the sustainability, performance and competitiveness of the Queensland economy.

...

(5) In this section —

chapter 5A powers means powers or functions of the commission under this chapter.

financial position considerations means—

- (a) if the modern award or proposed modern award applies to, or will apply to, a public sector entity—
 - (i) the State's financial position and fiscal strategy; and
 - (ii) the financial position of the public sector entity;
 - ..."

[9] Section 140BB of the Act sets out the functions of the Commission in respect of the modernisation of awards made pursuant to s 125 of the Act that were in force immediately before 1 December 2013. One factor to which the Commission must have regard is the desirability of reducing the number of awards operating under the Act (see s 140BB(2)(i)).

[10] Section 140C allows the relevant Minister to make a written request that an award modernisation process be carried out. The Attorney-General's Award Modernisation Request sets out the award modernisation process as follows:

"Award modernisation process

4. In creating modern awards, and as indicated at paragraph 3(i) above, the Commission must have regard to the desirability of reducing the number of awards operating under the Act.
5. When modernising awards, the Commission is to create fewer modern awards which may be organised across industry and/or occupational lines as it considers appropriate, subject to the priority industries/occupations listed at paragraph 19 of this request.
6. Subject to this request, the Commission will identify the type of work, industry and/or occupations covered by a modern award and the application of each award.
7. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer.

8. In developing the content for modern awards, the Commission will have regard to the safety net community standards operating in respect of similar work throughout Australia, including properly fixed minimum rates and allowances."

- [11] The UFU argued, as a preliminary point, that, as there was no award in force immediately before 1 December 2013 that applied to or covered Auxiliary firefighters, it follows that there is no award modernisation process that can be carried out by the Commission in respect of those employees.
- [12] The UFU submitted that the express power conferred on the Commission in the award modernisation process under Chapter 5, Part 8 of the Act is to make a modern award and repeal the pre-modernisation award to which that process relates. Further, it submitted, the power of the Commission is constrained by making a modern award in respect of each relevant class of employees being those employees who were bound by a pre-modernisation award. Currently, Auxiliary firefighters do not fall within the definition of "relevant class of employees" as contained in s 140CE(4) of the Act.
- [13] We do not accept the submission of the UFU that by virtue of the provisions of Chapter 5, Part 8 of the Act there is no power conferred on the Commission to modernise the *Queensland Fire and Rescue Service Award 2012* by including the Auxiliary firefighters. Section 140CE provides:

"140CE Making of modern awards and repeal of pre-modernisation awards

- (1) To give effect to the outcome of an award modernisation process, the commission must—
- (a) make 1 or more modern awards; and
 - (b) under section 125, repeal the pre-modernisation awards to which the process relates.
- (2) The commission must ensure each relevant class of employees—
- (a) is covered by a modern award; or
 - (b) would be covered by a modern award but for the effect of section 140E(2).
- (3) Subject to chapter 2A, part 3 and chapter 5A, a modern award made for the purposes of subsection (1) must be consistent with the award modernisation request to which the modern award relates.
- (4) In this section—

relevant class of employees means a class of employees who were bound by a pre-modernisation award that is repealed to give effect to the outcome of the award modernisation process."

[14] Section 140CE(2)(b) modifies the operation of s 140CE(4). Accordingly, there is nothing within s 140CE which would preclude the Commission from including the Auxiliary firefighters in a coverage clause in a new award made by the Commission as a consequence of a modern award process.

[15] Section 331 of the Act provides:

"331 Decisions generally

The court or commission may, in an industrial cause—

- (a) make a decision it considers just, and include in the decision a provision it considers appropriate for preventing or settling the industrial dispute, or dealing with the industrial matter, the cause relates to, without being restricted to any specific relief claimed by the parties to the cause; or
- (b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the court or commission considers—
 - (i) the cause is trivial; or
 - (ii) further proceedings by the court or commission are not necessary or desirable in the public interest; or
- (c) order a party to the cause to pay another party the expenses, including witness expenses, it considers appropriate."

[16] Subsection (b) is relevant to these proceedings. Accordingly, we must consider whether:

- the cause is trivial; or
- further proceedings by the Commission are not necessary or desirable in the public interest.

[17] The proceedings before the Full Bench cannot be characterised as "trivial", that is, as being "of little importance, trifling or insignificant". The power to dismiss under s 331(b)(i) of the Act was not argued with any force by the QFES. We accept that the application made by the UFU cannot properly be categorised as trivial within the meaning of that section.

[18] The question then is whether further proceedings are not necessary or desirable in the public interest. In *O'Sullivan v Farrer* (1989) 168 CLR 210, Mason CJ, Brennan, Dawson and Gaudron JJ considered the expression "in the public interest". Their Honours wrote:

"Indeed, the expression, 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to

be [pronounced] definitely extraneous to any objects the legislature could have had in view."

[19] In exercising the discretion conferred under s 331(b)(ii) of the Act, we have considered the following:

1. The undesirability of the Commission conducting a parallel process in relation to Auxiliary firefighters simultaneously with an award modernisation process in relation to firefighters generally being conducted by the Commission in accordance with the Attorney-General's Award Modernisation Request under s 140C(1) of the Act;
2. To hear the application for a Modern Award for Auxiliary firefighters in isolation would deprive the Full Bench of the benefit of a fully informed debate;
3. The exercise of the Commission's power under s 331 would not deprive the UFU of a hearing on the merits as another, more appropriate, process is available to it through the Award Modernisation process;
4. Auxiliary firefighters will achieve coverage through the Award Modernisation process; and
5. The QFES has given an undertaking to the Full Bench that, pending the outcome of the award modernisation process, it will not take any steps to reduce existing terms and conditions of an Auxiliary firefighter whose conditions are currently set within administrative arrangements made under the *Fire and Rescue Service Act 1990*.

[20] It is our view that to proceed and determine an application for a modern award in respect of Auxiliary firefighters would pre-empt any view taken by Deputy President Bloomfield and the Award Modernisation Team about the desirability or otherwise of one or more award for firefighters. Irrespective of the view taken by the Award Modernisation Team, s 140G would operate to prevent the Commission, other than for the purposes of a periodic review, from varying or revoking any modern award that we might make.

[21] As noted earlier, s 140BB(2)(i) of the Act requires the Commission, in carrying out its functions, to have regard to "the desirability of reducing the number of awards operating under this Act." Further, under s 140G(2)(a) of the Act, the Commission may make a modern award only if it is satisfied that to make the award is necessary to achieve the modern award objectives. To hear the UFU's application (A/2014/1) would, in our view, be contrary to the statutory intent of the Award Modernisation process.

[22] Accordingly, we are of the view that, in order to meet the award modernisation objectives of seeking to consolidating modern awards, reducing the number of awards, avoiding unnecessary overlap and duplication of coverage and to ensure consistency of content and to give effect to the Attorney-General's Award Modernisation Request, it is not necessary or desirable in the public interest to hear this matter.

[23] We have considered how best to resolve these proceedings. In doing so, we have considered the application of s 274 of the Act, which gives the Commission a wide power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions. Sub-section (4) provides:

"The full bench may, to assist it in the appropriate resolution of proceedings—

- (a) refer the whole or part of a question or matter before it to the commission—
 - (i) for investigation and report to the full bench; or
 - (ii) for the other action it decides; or
- (b) direct 1 or more of its members to carry out a specified investigation or inspection and to report on it to the full bench."

[24] It seems to us that, pursuant to s 274(4)(a)(ii), the matter should be referred to Deputy President Bloomfield as the head of the Award Modernisation Team with a view to including auxiliary firefighters in a modern award. Ultimately, it will be for a Full Bench to make the award in accordance with the Act.

[25] The Full Bench makes the following orders:

1. That, pursuant to s 331(b) of the *Industrial Relations Act 1999*, the Commission refrain from hearing further proceedings in matter A/2014/1.
2. That, pursuant to s 274(4)(a)(ii) of the *Industrial Relations Act 1999*, matter A/2014/1 is referred to Deputy President Bloomfield for his consideration pursuant to the Attorney-General's Award Modernisation Request under s 140C of the Act.