



DECISION

Fair Work Act 2009

s.615A(2)—Application for the President to direct a Full Bench to perform a function

Murdoch University

v

National Tertiary Education Union

(AG2016/7598)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 21 MARCH 2017

Referral to a Full Bench - Fair Work Act 2009 (Cth) - ss 582, 615 and 615A. Application refused.

[1] On 8 December 2016 Murdoch University made an application (the substantive application) pursuant to s.225 of the *Fair Work Act 2009* (Cth) (the FW Act) to terminate the Murdoch University Enterprise Agreement 2014 (the Agreement). The National Tertiary Education Union (NTEU) opposes the termination of the Agreement.

[2] The substantive application was listed for conference before Commissioner Williams on 16 December 2016 and for directions hearing on 17 February 2017. The matter has been listed for hearing in May 2017.

[3] On 21 February 2017 the NTEU made an application seeking a direction that the substantive application be dealt with by a Full Bench pursuant to ss. 615 and 615A(2). A short hearing in respect of the referral application took place on 17 March 2017.

[4] Section 615 of the FW Act states:

‘The President may direct a Full Bench to perform function etc.

(1) A function or power of the FWC may be performed or exercised by a Full Bench if the President so directs.

Note: The President gives directions under section 582.

(2) The President may direct that the function or power be exercised by a Full Bench generally, or in relation to a particular matter or class of matters.

(3) To avoid doubt, a reference in this section to a Full Bench includes a reference to more than one Full Bench.

Note: For the constitution of a Full Bench, see section 618.

[5] Section 615A of the FW Act states:

‘615A When the President must direct a Full Bench to perform function etc.

(1) The President must direct a Full Bench to perform a function or exercise a power in relation to a matter if:

- (a) an application is made under subsection (2); and
- (b) the President is satisfied that it is in the public interest to do so.

Note: The President gives directions under section 582.

(2) The following persons may apply to the FWC to have a Full Bench perform a function or exercise a power in relation to a matter:

- (a) a person who has made, or will make, submissions for consideration in the matter;
- (b) the Minister.’

[6] The proper interpretation of these provisions is well settled. Section 615 confers a broad discretion upon the President to direct that a function or power be exercised by a Full Bench. In relation to the s.615A application, the issue for determination is whether I am satisfied that it is in the public interest to refer the matter to a Full Bench. The expression ‘in the public interest’, when used in a statute, imports a discretionary value judgment to be made by reference to undefined factual matters and confined only by the subject matter, scope and purpose of the relevant statute.¹

[7] Sections 577 and 578 of the FW Act are relevant to the exercise of the President’s powers under ss.615 and 615A.

[8] Section 577 of the FW Act provides as follows:

‘The FWC must perform its functions and exercise its powers in a manner that:

- (a) is fair and just; and
- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).’

[9] Section 578 directs the Commission to take into account, among other things, the objects of the FW Act and ‘equity, good conscience and the merits of the matter’. Section 581 is also apposite. It provides, relevantly, that the President is responsible for ensuring that the Commission performs its functions and exercises its powers in an efficient manner.

[10] The NTEU's application is supported by a written submission and the witness statement of Ms Gabrielle Gooding of 24 February 2017. Murdoch University opposes the application as outlined in its submission of 8 March 2017 and filed a witness statement of Ms Michelle Narustrong in support of its position. Neither witness was required for cross-examination.

[11] The NTEU submits that the substantive application should be referred to a Full Bench as it is in the public interest to do so. In the alternative, the NTEU submits that in the event that I am not satisfied that it is in the public interest that a Full Bench determine the matter, it is submitted that I should nonetheless use my discretionary powers under s.582 to direct a Full Bench to hear the substantive application. The NTEU submissions are supported by the CPSU and United Voice.

[12] The NTEU submits that the substantive application is a 'test case' in the higher education industry which warrants the application being referred to a Full Bench. Central to the NTEU's submission in support of the referral application is the proposition that the substantive application is in respect of a public sector employer and accordingly different 'public interest' considerations arise for determination under s.226(a) than would arise in the context of an agreement covering a private sector employer. As such, it is contended that the substantive application will raise some 'novel' issues such as to enliven the public interest under s.615A.

[13] It is also contended that the potential number of employees affected by a decision in respect of the substantive application enlivens the public interest. The NTEU submits the termination of the Agreement will affect some 3,200 employees at Murdoch University and that it has the potential to affect another 18,000 employees throughout the higher education sector in Western Australia.

[14] The NTEU also submits that it would be more efficient for a Full Bench to determine the substantive application as it would limit further litigation that may arise from a decision by a single Member.

[15] I do not propose to grant the application sought. I am not persuaded that the matters raised by the NTEU enliven the public interest.

[16] This is not the first occasion on which the Commission has considered the application of s.226 in the context of public sector employment² and it is not contended that there are inconsistent first instance decisions such that would warrant consideration by a Full Bench. Nor does there appear to be any contest about the interpretation of the relevant statutory provisions or about the connection between the quality of our higher education institutions and national economic prosperity. The contest between the parties concerns the application of the relevant statutory provisions, not the proper interpretation of the provisions themselves.

[17] It may be accepted that there are a significant number of employees (3,200) affected by the application. But that fact does not, of itself, enliven the public interest. The proposition that the application has the potential to affect another 18,000 employees in the higher education sector in Western Australia is merely conjecture, unsupported by any evidence.

[18] The duration and nature of the substantive proceeding is also relevant. It is likely that 20 to 30 witnesses (including expert witnesses) will be called by the parties and that the

proceeding will give rise to significant factual disputes and a protracted hearing process. It will be a more efficient allocation of the Commission's resources to have the matter determined by a single Member. Any subsequent appeal will have the benefit of the Commission's findings in respect of the various factual disputes.

[19] As I am *not* satisfied that it is in the public interest to direct a Full Bench to hear and determine the substantive application, the NTEU's s.615A application must be dismissed.

[20] Nor am I persuaded that it is appropriate to exercise my discretion, under s.582, to transfer the application to a Full Bench. Considerations of fairness, efficiency and expedition lead me to conclude that the appropriate course is to have the substantive application determined by a single Member.

[21] The application to refer the substantive application to a Full Bench is dismissed.

PRESIDENT

Appearances:

A Manos for Murdoch University

J Fetter for the National Tertiary Education Union

J Moore for the Community and Public Sector Union

J Robb for United Voice

Hearing details

2017.

Melbourne, Perth (telephone hearing)

17 March.

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¹ *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ

² *Application by the Metropolitan Fire & Emergency Services Board* [2014] FWC 2498