1-1-1996

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Genuine Industrial Dispute: *Victoria v Australian Industrial Relations Commission & ALHMU; Attorney General for Queensland v Riordan & Ors.*

Commentary on an appeal to be heard by the High Court against a judgment of the Full Court of the Industrial Relations Court of Australia

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Industrial law - jurisdiction - application for prerogative relief against AIRC - dispute finding based on non-compliance with log of claims - amended finding after second log of claims - whether claims made in logs were "plainly fanciful" so as to be incapable of giving rise to industrial dispute - authorisation of log of claims - whether service of second log terminated dispute arising out of non-compliance with first log - whether claim for career path capable of creating industrial dispute

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Headings in this case note:

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1. Essentials for an industrial dispute

{1} It is trite that an arbitrated award made by the Australian Industrial Relations Commission in settlement of an inter-state industrial dispute must be within the "ambit" of the matters in dispute between the parties. It is equally well established that an award, once made, can be varied without the need to create a fresh industrial dispute, provided that the variation remains within the ambit of the original dispute (see *R v Kelly; Ex parte Australian Railways Union* (1953) 89 CLR 461 at 474 per Dixon CJ).

{2} Where a first or new award is sought by a registered organisation (i.e. a union), a dispute is commonly created by service of a comprehensive set of written demands (a "log of claims")

on employers and their associations in various states. This is accompanied by a letter that the demands be acceded to within a specified time. Employers ritually decline to accede. Since disagreement is of the essence of an industrial dispute, this process normally results in the creation of an inter-state industrial dispute. If the steps are carried out correctly, the legal efficacy of the so-called "paper dispute" is well established (see *Re State Public Services Federation; Ex parte Attorney General for Western Australia* (1993) 178 CLR 249 ("SPSF") at 267-268 per Mason CJ, Deane & Gaudron JJ, at 286 ff per Toohey J and at 305 per McHugh J, where the numerous earlier authorities for these propositions are gathered and discussed).

{3} Traditionally, demands of this kind have been framed in wide, even extravagant, terms ("ambit claims"). The reasons for doing this are first, and in the short term, to allow plenty of space for flexibility in negotiating or arbitrating a settlement of the dispute; secondly, and perhaps more importantly, to create a wide ambit to ensure that the hoped-for award will have reasonable longevity and scope for future variations without the need for a new dispute.

2. The SPSF limitations

{4} But there are limits to how wide the net may be cast in framing demands. They were exposed in SPSF where, apparently for the first time, a log was held, on various grounds, to have been drawn in terms too wide to create an industrial dispute. The decision was unanimous, although there is some variation in approach between the justices.

{5} The demands in question in SPSF were contained in a very brief log. They sought a minimum weekly wage of $5000, a minimum weekly allowance of $2500 and a claim that rates of pay and allowances be indexed quarterly for employees in the service of various states.

{6} Mason CJ, Deane & Gaudron JJ asked whether the demands were "genuine" or "fanciful". This question was to be "answered in the light of general industrial standards and general patterns of industrial regulation". There were features of the demands here indicating that the demand was fanciful. A wage of $7500 for all regardless of skill or work was at odds with established wage fixing principles, and at odds with the theories and concepts which have fashioned those principles. Moreover, their Honours said, the claim could not be explained as an ambit claim to allow for inflation, given that there was also a claim for indexation. The claim should be read as a claim for increased wages and allowances as determined by the Commission. A claim of this kind cannot give rise to an industrial dispute as defined in the *Industrial Relations Act* 1988 (Cth) (see SPSF at 268 - 270). Brennan J agreed with them on this aspect of the case (see SPSF at 272). So too did Dawson J (see SPSF at 277).

{7} Toohey J described the SPSF log as "startling in its simplicity" (see SPSF at 282). He thought that the issue was more accurately posed as whether the demands made by the union were genuine rather than whether the dispute was genuine, notwithstanding that "genuine dispute" had "crept into the language on industrial law". The phrase "genuine dispute" was tautologous. A demand will lack genuineness if it is "so far-fetched, so lacking in industrial reality that it cannot possibly be treated seriously" (see SPSF at 288 - 291).

{8} The main features which persuaded Toohey J that the log in SPSF was not genuine were as follows. The wages and allowances claimed lacked "all industrial reality"; they had no relationship with prevailing rates; they "cannot be within the contemplation of those whom the log seeks to embrace"; there was no attempt to distinguish between categories of employees; the presence of a claim for indexation meant that the wage rates in the log "can only be seen as current rates for which demand is made"; everything in the log pointed to the figures having been "plucked out of the air" (see SPSF at 291 - 292).

{9} McHugh J in SPSF said that the union was genuinely seeking to increase salary and allowances of its members. But the log could not "reasonably be understood as meaning that either now or in the foreseeable future employers should pay" the rates claimed to all employees. Thus the correct inference was that the union had served the log to attract federal jurisdiction (see SPSF at 301).

"...[I]f the demand is so extravagant that it cannot reasonably be understood as intended to provide for changes in the terms and conditions of employment, either now, or in the foreseeable future, ordinarily the proper inference to be drawn is that the organisation making the demand does not really want what it demands."

{10} Here the underlying purpose of the demand was to obtain an award for such wages and allowances as the Commission thought reasonable. This could not create an industrial dispute (see SPSF at 307). But extravagance by itself does not destroy genuineness. If a claim, "although extravagant by current standards, can be seen as intending to cover potential disagreements in the foreseeable future, it will and ought to be regarded as genuine" (see SPSF at 306).

{11} As McHugh J pointed out in SPSF at 304, the question whether an industrial dispute is real and genuine is a question of fact. Given that the existence of a dispute is a question of fact and therefore evidence, the question of onus of proving the dispute can be important. McHugh J regarded it as settled that "a 'paper dispute' constitutes prima facie evidence of a dispute and the onus of proving lack of genuineness falls upon the party who denies...genuineness..." (see SPSF at 304). But Toohey J in SPSF (at 208) said that when the Commission is faced with a challenge to the existence of a dispute, the onus does not shift to the respondent to demonstrate absence of a dispute. The applicant must show jurisdiction exists, but will be assisted by the evidentiary weight to be attached to service and refusal of a log.

{12} The log in SPSF may be regarded as exceptional. The decision, with its variant judicial expositions, leaves it uncertain how evidence about genuineness is to be evaluated where logs may indeed be extravagant, but yet are not as singular as that in SPSF.

3. *Victoria v AIRC & ALHMU*

{13} Some further guidance on this may emerge from the forthcoming hearing by the High Court of the appeal in this case.

{14} The matter comes to the Court by way of leave to appeal from a decision of the Full Court of the Industrial Relations Court of Australia in proceedings for prerogative relief remitted to that court from the High Court. The applications for prerogative relief were

refused by the Industrial Relations Court. They had been sought against the Australian Industrial Relations Commission. They arose out of lengthy proceedings before the Commission which included two decisions about dispute findings by Riordan SDP and two appeals to a Full Bench of the Commission. The alleged disputes which gave rise to this forensic activity arose from service of two extensive logs on different dates by what were initially separate organisations of employees. Later they amalgamated as part of the Australian Liquor, Hospitality and Miscellaneous Workers Union (the "Union"). The employers upon whom these logs were served were certain states and their agencies which provided ambulance services in those states. Service of the second log was apparently motivated by the decision of the High Court in SPSF, which was given after the first log had been served. In some respects the demands in the second log were more modest than those in the first. But the second log was served on more parties than the first.

{15} The Full Bench of the Commission and the Full Court identified five main issues arising from these events. They included whether service of the second log constituted an abandonment of the first or was merely a refinement of it; whether the demands contained in the second log were genuine and capable of giving rise to an industrial dispute; and whether the dispute finding was impermissible because any award made in relation thereto would offend implied prohibitions in the Constitution concerning intrusion by Commonwealth laws on the functions of a State.

{16} It would appear to the present writer that the "genuineness" issue is the one most likely to prove of general significance in the appeal. This comment will be confined to that matter.

4. The salient evidence

{17} The second log, instead of demanding $2000 per week for all employees as had the first, sought $800 per week with higher rates of up to $2500 per week for special skills and experience. There were claims for a 30 hour week to be worked between 9 am and 4 pm and for treble overtime. The claim for automatic cost of living adjustments (indexation) of wages which had been made in the first log was omitted from the second. This seems a significant difference, although not much is made of it in the judgments of the Full Court. The second log was extensive and, like the first, contained many other demands as well. In this respect it differed from that which was found defective in SPSF.

{18} Evidence on behalf of the Queensland employers indicated that, without allowing for additional staff needed to maintain services in the face of reduced working hours, the second log would increase the wages and salaries budget of the Queensland Ambulance Service from $70.523 million to $766.925 million. The earnings of a full-time qualified ambulance officer with eight years' service would rise from the present level of $28,699 per annum to $171,200.

{19} There was disputed evidence that a union official had informed an officer of the Queensland employers that the union had no intention of creating a federal award in Queensland, and that Queensland was only intended to be listed as a "leave reserved" matter.

{20} There was also some evidence that the claims were framed as they were because the log was intended to remain useful for a long time, up to 20 years, although there does not seem to have been much in the way of detail in the calculations.

5. Some criteria of genuineness

(i) Indexation

{21} The High Court in SPSF had regard to the presence of an indexation clause to allow for inflation in evaluating whether the ambit set by the log was "genuine" or capable of creating a genuine dispute. Care needs to be taken here. It depends on what is actually sought to be indexed. If the claim is to index the actual wages paid from time to time over the foreseeable life of the award, rather than to index the ambit wage claimed, the indexation clause should be irrelevant in assessing genuineness. The ambit set by an "extravagant" (but unindexed) wages claim could quickly be exhausted by wage rises by way of variation during the life of the award in times of high inflation. But of course a claim to index only wages payable from time to time rather than to index the ambit wage claimed strengthens the argument that the ambit claimed is not really sought; it implies that something less is genuinely sought provided it is indexed until the ambit level is reached some time in the future. The union counter to this would be that demands can be genuine without being required "forthwith" (see R v Ludeke; Ex parte Queensland Electricity Commission (1985) 159 CLR 178.) If this principle from Ludeke holds good, it should mean that a claim to index wages paid from time to time, as distinct from indexation of the ambit itself, casts no doubt on genuineness.

{22} The union in Victoria v AIRC appears to have been alert to this point. The earlier log claimed indexation in terms which could be read as seeking indexation of the ambit amount itself rather than wages payable from time to time. The second and more moderate log, perhaps erring on the side of excessive caution, seems to have no claim for indexation at all. The complete absence of a claim for indexation will, of course, make it easier for the union to justify the generous (but less extravagant) ambit in the second log on the basis that the demand now must be wide enough to cope with inflation over the intended life of the award. So it may not be necessary for the High Court to deal with the indexation issue unless it finds that the second log fails in its aims and it becomes necessary to analyse the first one.

{23} Nevertheless indexation claims are common in logs and demands. Some clarification of their significance in evaluating genuineness would be welcome.

(ii) The time frame

{24} Awards of the "traditional" kind must specify a period for which they are to continue in force, but, after the expiration of that period, they are continued in force by statute until other provision is made (see the Act s147, s148). Slightly more complex provision is made for certified agreements and enterprise flexibility agreements but, in the absence of supervening circumstances, they too are continued automatically by statute after expiration (see the Act s170MI (3) and s170NJ (3)). The agreed or awarded period for many of these instruments is as short as one year. To the best of the author's knowledge a designated period of greater than three years is rare. Many awards are continued beyond the initial nominal period by operation of the statute. Awards are varied from time to time. Certified agreements can be varied but in limited circumstances (see the Act, s170MA, s170ME, s170MK (3), s170ML)). How long an award can continue to be effective in this way depends in large measure on whether there is still "ambit" in the original log to accommodate changes over time.

{25} As indicated above, there is some evidence in Victoria v AIRC that the log was drafted with up to twenty years in mind. If accepted, this does seem a long time to the outsider.

However, it is no doubt open to an award seeker to demonstrate that, in the circumstances pertaining in a particular industry, a period as long as that is the "foreseeable future", to use McHugh J's phrase in SPSF. If it be legitimate to look a long way ahead in framing demands, at least in some industries, the wage rates claimed might indeed appear to have no relationship to current wage rates. But they may seem much more defensible if projected ahead to the hoped for (or "foreseeable") life of the award, especially if there is no indexation claim (as here) or if any claim for indexation is confined to the wages payable from time to time and does not seek to index the ambit itself.

{26} In short, the issues of "genuineness" and "industrial reality" need to be related to a time period, not an instant in time. The appropriate time period should be the expected or foreseeable life of the award which is sought, not the period inserted initially. Assessment of demands by reference to a time frame is not a matter which required attention in SPSF. Victoria v AIRC may provide an opportunity to consider the significance of time in evaluating "genuineness" and "reality".

{27} One would not wish to see a practice emerge whereby needlessly inflated indications of time are built into demands. That would only pose the issue of genuineness in a different form. Nor would one wish to see hearings about dispute findings lengthened by the need to call "expert" evidence from assorted futurologists about likely developments in an industry and in society over the next 5, 10 or 20 years.

{28} It is here that the specialised knowledge of the Commission comes to the fore. It can make use of that knowledge in its non-judicial role. Without the need for too much evidence, the members of the Commission's various industry panels are almost uniquely well-placed to evaluate whether an asserted time period is foreseeable in that industry, and whether it accords with general standards and patterns of industrial regulation.

{29} One way or another, it is clear that in addressing the issue whether an industrial dispute exists, more attention, and possibly evidence, may need to be given about the anticipated or foreseeable life of the award which is sought.

(iii) The quantum of the claims

{30} The employer's evidence about the increased cost of complying with the demands of the unions has been summarised. In the Full Court of the Industrial Relations Court, Wilcox CJ and Spender J said "it is not helpful to calculate the cumulative cost of acceding to each separate demand and to compare the result to the costs currently borne by the employer. Nobody would expect any demand to be granted in full. The notion of ambit requires a union framing its log of claims to exceed its most optimistic expectations" (see Application Book, p 125.)

{31} One infers from this that the evidence about increased cost to the employer was based on the assumption that all claims would be granted in full. Apart from the considerations just quoted from the judgment, a calculation on that basis suffers from the more serious defect, just mentioned in another connection, that it does not project the increase in costs over a time frame referable to the anticipated or foreseeable life of the log and the award. In this case there was some evidence that this was intended to be 20 years. Even if the appropriate period was found to be shorter, say 10 years, the impact on employer wage costs will be vastly less

when spread over that time than if calculated on the basis which appears to have been used in this case.

{32} Moreover, it is submitted that tribunals should be slow to use the sheer amount of a claimed wage increase as a criterion of genuineness, because under wage fixing principles applied by the Commission it is open to an employer to seek relief from an award if the employer can show "incapacity to pay" the amount *awarded*.

(iv) The modification of the claims

{33} The first log was served before the decision in SPSF. The second set of demands was served after that decision and as a response to it. The demands were more moderate and more specific than those in the first log. And, as pointed out earlier, they abandoned any claim for indexation, perhaps unnecessarily. All this makes it difficult to see how it could be said that the union was not genuinely seeking the increases and improvements specified in the second log. Otherwise why make such an overt and conscious attempt to keep the demands within the newly explained legal limits? The genuineness of the union attempt is further evidenced by the reduction in the ambit cast by the second log. It was significant and not mere cheeseparing.

6. Concluding remarks

{34} The limitations on genuineness in SPSF are expressed in quite general terms, difficult of appreciation and application in the abstract. Victoria v AIRC gives an opportunity to the High Court to elaborate and clarify the principles and factors in assessing the genuineness of a demand or dispute.

{35} In particular this note has suggested that it is irrelevant to have regard to an indexation claim in evaluating genuineness when the claim is to index wages paid under the award from time to time rather than to index the claim itself. While the first log by the union seemed to claim indexation of the ambit, the second makes no claim for indexation at all, even of wages payable from time to time. This will make the claimed ambit more defensible. It will also mean that the Court will not need to consider indexation in any detail unless the second log is found to be ineffective and it becomes necessary to analyse the first. Nevertheless even some obiter would be welcome.

{36} Secondly, some development of doctrine is desirable about the significance of the time frame over which the log and the award are hoped to remain serviceable. This might be a question of fact and evidence but the specialist nature of the Commission's jurisdiction and knowledge should prove helpful in assessing the "foreseeable" life expectancy of an award or log. This is particularly relevant in calculating increased wages costs. The calculations in evidence in the present case seem to have been done on the footing that all claims would be granted in full at once. Evidence of anticipated cost increases can only be useful if related to the time over which costs are expected to increase. Moreover, they must be judged (so far as genuineness is concerned) against the ability of an employer to seek relief from an award on the ground of incapacity to pay.

{37} The above matters are of importance generally in industrial law. A feature peculiar to the case before the court is that the second log was a deliberate and significant attempt to comply with the then recent decision in SPSF. Not only were the wages demands moderated and particularised but the claim for an indexation clause was dropped.

{38} If the factors mentioned are evaluated along the lines suggested in this note, the appeal may not succeed on the genuineness point. But irrespective of the decision, it is to be hoped that the Court finds it desirable to clarify the criteria by which genuineness is to be assessed.