DECISION

Fair Work Act 2009
s.739—Dispute resolution

Stephen Taylor

Kristen Tripp

Ueligitone Aiono

Nellanisiara Cambridge

Joseph Galea

V

Sydney Trains
(C2022/4039, 4049, 4061, 4094, 4095)

DEPUTY PRESIDENT CROSS SYDNEY, 9 NOVEMBER 2022

Alleged dispute about any matters arising under the enterprise agreement;[s186(6)]

[1] This decision concerns applications made by Mr Stephen Taylor, Ms Kristen Tripp, Mr Ueligitone Aiono, Ms Nellanisiara Cambridge and Mr Joseph Galea (the Applicants) for the Fair Work Commission (the Commission) to deal with a dispute arising under the *Sydney Trains Enterprise Agreement 2018* (the Agreement) pursuant to s.739 of the *Fair Work Act 2009* (Cth) (the Act).

[2] The Applicants filed their applications (the Applications) between 12 and 14 July 2022. The Respondent to the applications is Sydney Trains (the Respondent/Sydney Trains). I conducted conferences in the matters on 19 July and 8 August 2022.

[3] On 9 August 2022, each Applicant filed Submissions, many of which annexed various documents. On 11 August 2022, the Respondent filed an outline of submissions and a Statement of Mr Paul McKaysmith. On 17 August 2022, after the hearing of the matter, the Respondent filed a Further Outline of Submissions (the Respondent's Submission).

[4] The parties agreed that the questions to be arbitrated were:

(1) Does cl 33 of the Agreement apply (or has it applied) to any or all of the Applicants at any time from 6 December 2021 onwards?

(2) If the answer to the above question is 'yes', does cl 33. of the Agreement require the Respondent to make payments to any or all of the Applicants?

(3) If the answer to the above question is 'yes', how are those payments to be calculated and from what date?

[5] The Dispute Settlement Procedure is contained in Clause 8 of the Agreement. Clause 8.1, and 8.4 to 8.9, provide:

8. DISPUTE SETTLEMENT PROCEDURE (DSP)

8.1. The purpose of this procedure is to ensure that disputes are resolved as quickly and as close to the source of the issue as possible. This procedure requires that there is a resolution to disputes and that while the procedure is being followed, work continues normally.

…

8.4. Any dispute between the Employer and Employee(s) or the Employee's Representative shall be resolved according to the following steps:

STEP 1: Where a dispute arises it shall be raised in the first instance by the Employee(s) or their Union delegate directly with the local supervisor/manager. The local supervisor/manager shall provide a written response to the Employee(s) or their Union delegate concerning the dispute within 48 hours advising them of the action being taken. The status quo before the emergence of the dispute shall continue whilst the dispute settlement procedure is being followed. For this purpose "status quo" means the work procedures and practices in place immediately prior to the change that gave rise to the dispute.

STEP 2: If the dispute remains unresolved, or if the dispute involves matters other than local issues, the Director Workplace Relations, Policy and Transition Services or their nominee, a divisional management representative and the Employee(s) and/or the Employee(s) Representative, Union delegate or official shall confer and take appropriate action to arrive at a settlement of the matters in dispute within 72 hours of the completion of Step 1 or the Director Workplace Relations, Policy and Transition Services being notified of a dispute involving matters other than local issues.

STEP 3: If the dispute remains unresolved, each party to the dispute shall advise in writing of their respective positions and negotiations about the dispute will be held between the Employee Representative(s) or Union official, the Chief Executive of Sydney Trains or their nominee who will meet and conclude their discussions within 48 hours. The matter may be referred to Unions NSW for resolution of the dispute by any of the parties involved provided Unions NSW is chosen by the Employees as their representative.

STEP 4: If the dispute remains unresolved any party may refer the matter to the Fair Work Commission for conciliation. If conciliation does not resolve the dispute the matter shall be arbitrated by the Fair Work Commission provided that arbitration is limited to disputes that involve matters listed in sub-clause 8.2 of this procedure.

8.5. By mutual agreement confirmed in writing, Step 3 outlined above may be avoided, and the parties to the dispute may seek the assistance of the Fair Work Commission in the terms outlined at Step 4.

8.6. If it is decided to refer the matter to the Fair Work Commission, the referral must take place within 72 hours, excluding weekends and public holidays, of completing Step 3. A copy of the notification must be forwarded to all relevant parties to the dispute.

8.7. The parties to the dispute may extend the timeframe of Steps 2 - 4 by agreement. Such agreement shall be confirmed in writing.

8.8. The timeframes in Steps 1 to 4 above are exclusive of weekends and public holidays.

8.9. Safety Issues Matters which are based on a reasonable concern by an Employee about an imminent risk to an Employee's health or safety shall be excluded from the DSP. Where a matter is raised involving such an issue, the Employee shall agree to comply with a direction by the Employer to perform other available work which is safe and reasonable and within their skills and competence with no reduction in the rostered rate of pay of the Employee while the alternative work is being performed.

[6] Sub-clauses 33.1, and 33.5 to 33.7 of Clause 33 of the Agreement relevantly provide:

33. DISCIPLINARY MATTERS

33.1. Uncomplicated disciplinary investigations should generally be completed within 10 to 12 weeks from when an Employee is notified that an investigation is commencing. An uncomplicated disciplinary investigation is categorised as one where the timing is within management's control, including where management has engaged another person, another government agency or a third party to carry out the investigation.

…

33.5. At the beginning of the investigation, the Employer will determine if an Employee is to remain at work on normal duty, placed in alternative duties, suspended with pay, reassessed and returned to normal duties, or suspended without pay for serious misconduct.

Employees who are suspended with pay or placed in alternative duties will be a paid at least the amount set out in clause 33.6 unless they are alleged to have engaged in serious misconduct.

Serious misconduct is behaviour such as:

(a) Wilfully causing serious and imminent risk to the health and safety of another

(b) Theft, fraud or assault

(c) Being charged with a serious criminal offence punishable by 6 or more months imprisonment

33.6. Except in cases where there are specific circumstances, an Employee will be paid the following during the period of an investigation:

(a) Master Roster pay, for Employees who work to a Master Roster; or

(b) The average of their last 6 months worked including shift, weekend and public holiday penalties but excluding overtime, for infrastructure workers and other Employees who do not work to a Master Roster.

33.7. For the purpose of sub-clause 33.6, specific circumstances are where an Employee engages in unreasonable actions. Where unreasonable Employee actions are demonstrated, the Employee will be paid their base pay. For the purpose of this clause, unreasonable action may include:

(a) Failing to respond to disciplinary investigation in writing when requested with reasonable notice; or

(b) Not providing required information that would assist the prompt resolution of the investigation in a timely manner once they become aware of it.

[7] The matter was heard on 12 August 2022 (the Hearing). Each Applicant appeared on their own behalf, and Mr Watts of Counsel appeared, with permission and without objection from any Applicant, for the Respondent. The evidence of each Applicant was treated as their own evidence, and evidence in the case of each other Applicant. The evidence of Mr McKaysmith was received without objection, and he was not required for cross-examination.

Background Facts

[8] Arising from the evidence and agreed facts in the matter, the following background facts were apparent:

(a) Sydney Trains is a NSW Government Agency constituted under the *Transport Administration Act 1988* (NSW).

(b) On 13 October 2021, after a period of formal consultation, the *Transport COVIDSafe Measures Policy* (the Policy) implementation plan commenced. Employees were provided with a link to a website that was set up to provide access to relevant information relating to the draft Policy, including the reasons why the draft Policy was being considered. The formal consultation period on the Policy was from 13 October 2021 until

20 October 2021, although this period was extended until 25 October 2021 for employees, and until 29 October 2021 for unions, following requests made for extensions.

(c) On or around 8 November 2021, following the consideration of feedback provided during the consultation period, a decision was made to adopt the Policy across all Transport for NSW agencies, including Sydney Trains.

(d) On 9 November 2021, all staff of Sydney Trains including the Applicants received an email notification about the decision to implement the Policy, including the proposed additional risk control measures set out in the Policy. Regarding Compliance, the Policy provided:

> ***Compliance***
>
> *Workers are required to comply with COVID-19 safe work practices and control measures as set out in Schedule B to this Policy.*
>
> *Other than those with legitimate reasons such as a medical contraindication, workers are required to comply with lawful and reasonable directions issued by their principal/ employer. Lawful and reasonable directions can include a requirement for a worker to comply with any control measure, including being vaccinated against COVID-19 and a requirement to provide evidence of this.*
>
> *Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment or engagement may occur.*
>
> [Emphasis added]

(e) The Policy imposed a requirement that, unless the worker had an approved exemption (medical or otherwise), workers in roles identified in Schedule B of the Policy must:

(1) obtain a least one dose of an approved COVID-19 vaccination by 6 December 2021;

(2) obtain two doses of an approved COVID-19 vaccination by 7 February 2022; and

(3) provide evidence of their vaccination status by way of a declaration process (the Vaccination Requirement).

(f) The role of Train Driver is a Category 1 role in Schedule B to the Policy. Accordingly, the Policy and the Vaccination Requirement applied to the Applicants, all of whom are Train Drivers.

(g) Between November 2021 and 5 December 2021, approximately 475 exemption applications were submitted by Sydney Trains employees. Each of the Applicants sought

an exemption.[1] Employees who submitted exemption applications prior to 6 December 2021, were paid up until the date their exemption application was determined.

(h) Employees who were non-compliant with the Policy from 6 December 2021 were issued with a direction to comply with the Policy (the First Direction). The letter sent to Ms Tripp on 8 December 2021, which was in a form sent to all Applicants, was as follows:

Dear Kristen Tripp,

Transport COVIDSafe Measures Policy: Failure to complete declaration process

As you are aware, on 8 November 2021, Transport and its agencies introduced the additional COVIDSafe measure of vaccination for your role as set out in the Transport COVIDSafe Measures Policy (the Policy).

The introduction of this additional COVIDSafe measure is consistent with our ongoing commitment and obligation to provide and maintain a safe work environment to manage the risks to health and safety associated with COVID-19.

All workers are required to comply with the Policy. Under the Policy, on and from 6 December 2021, it is a requirement of your role that you have had at least the first dose of COVID-19 vaccination. You have not done so.

Given you have not complied with the requirement to submit the declaration form, nor have you complied with the Policy, you are not willing, ready and able to work. Accordingly, you are not permitted to attend or perform work and you are not entitled to salary or wages.

Until 7 February 2022, you can either:

- *use accrued but unused annual or long service leave (if applicable); or*
- *be placed on authorised absence without pay.*

If you wish to take leave, please advise the writer within 48 hours of receipt of this letter.

On 7 February 2022, if you remain non-compliant with the Policy, your situation will be reviewed and further discussed with you.

[For probationary employees] We write to formally direct you to comply with the Policy. You are directed to, within the next 72 hours:

- *submit a completed declaration status form (the form is available on Stayinformed and the employee portal);*
- *provide proof of your vaccination status; and*
- *have at least one dose of a TGA approved COVID-19 vaccination.*

[1] Transcript PN 325.

Given you have not complied with the requirement to submit the declaration form, nor have you complied with the Policy, you are not willing, ready and able to work. Accordingly, you are not permitted to attend or perform work and you are not entitled to salary or wages.

As set out in the Policy, workers are required to comply with lawful and reasonable directions issued by their employer. Lawful and reasonable directions can include a requirement for a worker to comply with any control measure, including being vaccinated against COVID-19 and a requirement to provide evidence of this. Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment may occur.

Support available to you

We understand this is a difficult time for people and not everyone will agree with this decision. If you require additional support through this time, we encourage you to seek out the necessary assistance you may need which may include your GP or other healthcare providers.

Please be reminded that the Employee Assistance Program provides individual support to you and your family. The contact details for this program are as follows:
• Sydney Trains: 1300 364 213

Other resources available to you include the Staywell Hub, your People & Culture Business Partner as well as resources and information on Stayinformed.

[Emphasis added]

(i) The exemption requests of each Applicant were denied, and they were advised of such denial by letters (the Exemption Denial Letters). That correspondence was received by each Applicant on the following dates:

Mr Taylor – 22 February 2022;
Ms Tripp – 22 December 2021;
Mr Aiono – 16 December 2021;
Mr Galea – 16 January 2022; and
Ms Cambridge – 23 March 2022.

(j) Mr Taylor's letter, received on 22 February 2022, advising his exemption request had been denied was written in the following terms:

Dear Stephen Taylor

I refer to my previous letter advising that your exemption request was being considered.

Your exemption request has now been considered by the review panel and the decision has been made to decline your request.

Considering you are unable to comply with having two doses of a TGA approved COVID 19 vaccination prior to the 7 February 2022 (to be fully compliant with the Transport COVIDSafe Measures Policy), you are now directed to submit a completed COVID 19 Vaccination Declaration Form verifying that you have had at least one dose of a TGA approved Covid 19 vaccination and evidence of your second appointment being within 1 month of the completion of your first vaccination.

Until you comply with the Policy (that is, having received your first and second vaccination), you are not willing, ready and able to work. Accordingly, you are not permitted to attend or perform work and you are not entitled to salary or wages.

Until you provide proof of your vaccination status and until your situation is reviewed further (whichever occurs first), you can either:

- *use accrued but unused annual or long service leave (if applicable); or*
- *be placed on authorised absence without pay.*

If you wish to take leave, please advise the writer within 48 hours of receipt of this letter.

If you remain you remain non-complaint with the Policy, your situation will be reviewed at a later date and further discussed with you. If you have not complied with the direction as set out in this letter, a disciplinary process will commence, and your employment may be terminated.

As set out in the Policy, workers are required to comply with lawful and reasonable directions issued by their employer. Lawful and reasonable directions can include a requirement for a worker to comply with any control measure, including being vaccinated against COVID-19 and a requirement to provide evidence of this. Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment may occur.

Support available to you
We understand this is a difficult time for people and not everyone will agree with this decision. If you require additional support through this time, we encourage you to seek out the necessary assistance you may need which may include your GP or other healthcare providers

Please be reminded that the Employee Assistance Program provides individual support to you and your family. The contact details for this program are as follows:
• Sydney Trains: 1300 364 213

Other resources available to you include the Staywell Hub, your People & Culture Business Partner as well as resources and information on Stayinformed.

I am also available should you require more information or wish to discuss this further.
[Emphasis added]

(k) On 7 January 2022, Deputy President Easton determined a dispute notification filed by two Unions, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)) against the Respondent, regarding the implementation of the Policy.

(l) Deputy President Easton determined that the dispute settlement procedure in the Agreement had been properly engaged by the AMWU and the CEPU, and that the status quo provision applied to the dispute regarding the Policy because the Policy implemented changes to work practices and procedures. A consequence of that decision was that members of the AMWU and CEPU employed in the Engineering and Maintenance Branch (the EMB Employees) who were not compliant with the Policy and the Vaccination Requirement continued to be paid.

(m) In early 2022, a dispute notification was also made by the Australian Rail, Tram and Bus Industry Union (the ARTBU). The Applicants believe, but have no definitive proof, that dispute was settled on 30 May 2022, on terms involving payment pursuant to the master roster for unvaccinated members of the ARTBU and back payment to 6 December 2021.

(n) Following 7 February 2022, the Respondent reviewed the general position of employees who remained non-compliant with the Policy and the Vaccination Requirement. At around that time, Sydney Trains was reviewing the Policy following further feedback after steps taken as part of the other dispute proceedings before Deputy President Easton regarding the EMB Employees. A decision was made, supported by the Sydney Trains Chief Executive, that no further action, including no investigative or disciplinary action, would be taken in respect of non-compliant employees at that time, and that non-compliant employees would remain out of the workplace on the basis they were still not ready, willing and able to work. Sydney Trains would review the position again in early April 2022.

(o) On or around 16 March 2022, an email was sent to all employees non-compliant with the Policy (the March Email), including each Applicant other than Mr Galea, who had an approved exemption at the time. That email provided:

Dear Kristen Tripp,

As you know, as of Monday 7 February 2022, all Transport people, including those in agencies within the Transport Cluster, were required to be compliant with Transport's COVIDSafe Measures Policy. To be compliant you need to be fully vaccinated or have an approved exemption in place.

Those who chose to not comply with Transport's COVIDSafe Measures Policy, without an approved exemption, have had the option of taking annual leave, long service leave, extended leave or be on authorised leave without pay.

As a Transport worker who is not compliant with the Transport COVIDSafe Measures Policy, we are writing today to advise that the current arrangements will remain in place until at least Tuesday 5 April 2022.

We are also writing to provide a further opportunity for you to comply with the Transport COVIDSafe Measures Policy. Therefore, between now and 5 April 2022 you can:

Submit a completed COVID-19 Vaccination Declaration Form;

Provide proof of your vaccination status; and

Have at least two doses of a TGA approved COVID-19 vaccination.

Following 5 April 2022, your compliance with the Transport COVIDSafe Measures Policy will be assessed. It is important to note that noncompliance may lead to the termination of your employment after that date.

We understand this may be a difficult time for some and we would like to advise of the following for anyone that has questions or needs further support;

Speak with your leader if you have questions or concerns about your specific circumstances.

Attend the COVID-19 vaccination Q&A session with Dr Casolin, where he will give an update on vaccines available today and you can ask any COVID-19 health and vaccination related questions.

[Emphasis added]

(p) On or around 5 April 2022, the Respondent again reviewed the general position of employees who remained non-compliant with the Policy and the Vaccination Requirement. The Sydney Trains Chief Executive decided that no further action, including no investigative or disciplinary action, would be taken in respect of non-compliant employees at that time, that non-compliant employees would remain out of the workplace on the basis they were still not ready, willing and able to work. Sydney Trains would re-assess the position once decisions were made about potential amendments to the Policy.

(q) On 3 June 2022, Sydney Trains sent an email to employees (the June Email), including the Applicants, regarding further consultation on the Policy, including a proposal to remove the Policy and the Vaccination Requirement, and move to a position of strongly recommending that employees keep up to date with COVID-19 vaccinations, but not mandating vaccination. That email was in the following terms:

Dear Stephen Taylor

I am writing to advise you that Transport and its agencies are reviewing the risks around managing COVID-19 in our business, including the risk framework that underpins the COVIDSafe Measures Policy.

Feedback will be sought on the measures we use to keep people safe from COVID-19 and the proposed COVID-19 Enterprise Risk Assessment Standard and Risk Assessment. To provide feedback, visit the COVIDSafe Measures safety consultation page and complete the survey. The survey shouldn't take more than 10 minutes to complete, however, we recommend allowing time to read through the Standard and risk assessment documents before you complete the survey.

Feedback is being sought from Friday 3 June 2022 to Sunday 19 June 2022. Following the feedback period, all feedback will be considered, and we will advise you of the outcome. If the review results in any proposed changes to the COVIDSafe Measures Policy, there will be further consultation.

From the commencement of consultation until a final decision is communicated, employees who are not compliant with the COVIDSafe Measures Policy and who are currently using annual leave, long service leave or are on authorised absence without pay, will be eligible to apply for special leave. Special leave is being granted on a discretionary basis and is not an entitlement. Where employees are on specific arrangements due to proceedings, these arrangements apply and special leave should not be applied for.

To apply for special leave, please complete the attached form. Please ensure to manually type "Spl - COVIDSafe Measures Policy" in the "Type of Leave" field, then send to your manager for approval. Leave forms should be submitted after 9 June 2022 for processing. At this stage, leave applications can be made for the period from 3 June 2022 to 30 June 2022. A further update will be provided towards the end of the month. Leave must also be noted on any timesheet submitted to Payroll. It is anticipated that there may be some delays with processing but retrospective adjustments will be made where this occurs.

As a reminder, employees who are not compliant with the current COVIDSafe Measures Policy are not permitted to attend work or work from home.

If you have questions about the Safety consultation process, please refer to the Stayinformed website for more information. If you have questions about leave arrangements, please contact your manager or P&C Business Partner.

We understand that this may be a difficult time. If you require additional support, we encourage you to seek out the necessary assistance which may include your GP or other healthcare providers. You may also access the Employee Assistance Program (EAP), which is a free and voluntary confidential service available to all Transport staff and their immediate family, on 1300 360 364.

Kind regards
Covid Health Information Team
People & Culture Transport for NSW

E YourCovidHealthInformation@transport.nsw.gov.au transport.nsw.gov.au

Thereafter at least Mr Taylor accessed such special leave.

(r) On or about 8 July 2022, Sydney Trains sent correspondence to employees, including the Applicants, regarding their exemption appeal outcomes. That correspondence was in the following terms:

Dear

Transport COVIDSafe Measures Policy: Exemption Appeal Outcome – 1028226 Appeal Outcome

Following the implementation of the COVIDSafe Measures Policy (Policy), you completed the COVID-19 Vaccination Declaration Form along with the COVID-19 Exemption Request Form. Your application for a COVID-19 Exemption was declined.

You have accessed the Exemption appeals process and your case has been reviewed and determined. A decision has been made to uphold the initial decline outcome.

Accordingly, you remain non-compliant with the Policy and are therefore not 'ready, willing and able' to work. Please let us know immediately if your circumstances have changed.

Potential next steps

As you are aware, consultation on the safety measures we use to manage the risk of COVID-19 in the workplace just closed. Sydney Trains is currently considering the feedback from this consultation and determining next steps, which may mean that we commence consultation on proposed changes to the Policy.

Depending on the decisions made by Sydney Trains, we may write to you further about your non-compliance with the Policy.

Support available to you

If you require support during this time, we encourage you to seek out the necessary assistance you may need which may include your GP or other healthcare providers.

Please be reminded that the Employee Assistance Program provides individual support to you and your family. The contact details for this program are as follows:
• TfNSW: 1300 360 364

Other resources available to you include the Staywell Hub, your People & Culture Business Partner as well as resources and information on Stayinformed.

I am also available should you wish to discuss this further.

(s) As at the date of the Hearing, the Respondent had not made any decision regarding possible changes to the Policy or the Vaccination requirement. The feedback period concluded around a week prior to the Hearing and the Respondent submitted it was *"currently cogitating upon the feedback that was provided".*[2]

(t) From early June 2022, each of the Applicants took steps to engage the dispute settlement procedure of the Agreement. Mr Taylor initiated his dispute by email to his Shift Manager at 1.24pm on 7 June 2022, in the following terms:

I am requesting that you, as my shift manager, raise a dispute on my behalf regarding the status quo clause in the EBA 33.5.

Under that clause I should have remained on master roster payment as part of the status quo while the issue of vaccine mandates and vaccination status was being resolved.

I am finishing my annual leave on June 11th and under clause 33.5 in the EBA I should then be paid master roster and not be forced to use my own leave or offered any other form of special payment.

I am also requesting the recrediting of the long service leave that I was forced unlawfully to use between February 27th 2022 and May 7th 2022. I should also be back paid the difference between long service leave and master roster for that period.

This entitlement was upheld at the Fair Work Commission, FWC 22 and then in subsequent submissions by the RTBU. But it does not exclude non members of any particular union, I am clearly covered under the umbrella of the current EBA and should not be discriminated against for any reason.

Anything you need from me in raising this dispute on my behalf please let me know.

(u) Ms Tripp initiated her dispute by email on 8 June 2022, in the following terms:

I submit this email in accordance with Sydney Trains Enterprise Agreement 2018, Dispute Settlement Procedures, clause 8, sub-clause 8.4, to bring to your attention the Transport COVIDMeasures policy currently being disputed.

I was stood down from 06/12/2021 because of the policy.

As an employee with Sydney Trains pursuant to Sydney Trains Enterprise Agreement 2018, clause 33, sub-clause 33.5, I request Status Quo be applied, which entails being paid Master Roster, also back pay and recredit all leave entitlements used, because of being stood down from 06/012/2021, until such time as the Transport COVIDSafe Measures policy dispute has been resolved.

I await your response and thankyou for your time.

(v) Mr Aiono initiated his dispute by email on 9 June 2022, in the following terms:

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[2] Transcript PN 71.

I am writing to place a stand down dispute in accordance with the Sydney Trains Enterprise Agreement 2018, clause 8 Dispute Settlement Procedures sub-clause 8.4, to bring to your attention the Transport COVIDsafe Measures Policy currently being disputed. I was stood down from the 06/12/2021 due to the policy being implemented.

As an employee with Sydney Trains in pursuant to Sydney Trains Enterprise Agreement 2018, clause 33 sub-clause 33.5, I request status quo must be applied which entails paid Master Roster, also back pay and recredit all leave entitlements used because of being stood down from 06/12/2021 until such time as the policy dispute has been resolved.

(w) On 14 June 2022, Ms Cambridge and Mr Galea raised a step 1 dispute by email in the following terms:

Dear Eric Gardener.

I am writing this email on behalf of myself Joseph Galea and Nellanisiara Cambridge. We are placing a stand down dispute in accordance with the Sydney Trains Enterprise Agreement 2018, clause 8 Dispute Settlement Procedures sub clause 8.4, to bring to your attention the Transport COVIDSafe Measures Policy currently being disputed. We were stood down from 06/12/2021 due to the policy being implemented.

As employees with Sydney Trains in pursuant to Sydney Trains Enterprise Agreement 2018, clause 33 sub clause 33.5, We request status quo must be applied which entails paid Master Roster, also back pay and recredit all leave entitlements used because of being stood down from 06/12/2021 until such time as the policy dispute has been resolved.

We await your response within 48 hours.

Thank you for your time

Joseph Galea employee #672471
Nellanisiara Cambridge employee #105760

Blacktown Depot
Sydney Trains

Applicants' Submissions

[9] The Applicants noted that the Exemption Denial Letters, stated:

If you remain non-compliant with the policy your situation will be reviewed at a later date and further discussed with you. If you have not complied with the direction, as set out in this letter, a disciplinary process will commence and your employment may be terminated.

[10] The Applicants submitted there is no ambiguity in those words, and Sydney Trains' position is stated clearly in that correspondence. If the Applicants remained non-compliant with the Policy, and the Vaccination Requirement, they would be disciplined and their employment may be terminated.

[11] The Exemption Denial Letters went on to further state:

> *As set out in the policy, workers are required to comply with the lawful and reasonable directions issued by their employer. Lawful and reasonable directions can include a requirement for the worker to comply with any control measure, including being vaccinated against COVID-19 and a requirement to provide evidence of this. Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment may occur.*

[12] The Applicants submitted that the Respondent intended to investigate the Applicants' non-compliance, and discipline them if it continued. While they did so they were obligated to pay the Applicants pursuant to the master roster, under clause 33.5 of the Sydney Trains Enterprise agreement 2018, and the status quo, as they would have for any non-compliance to any other Sydney Trains' policy.

[13] The Applicants noted that Sydney Trains continued to argue in defence against their claims that no disciplinary action had been taken against them and no investigation was happening. Mr Taylor, on behalf of all Applicants, submitted:[3]

> *Are they really going to use their own inaction to justify that defence? Are they really arguing that they did nothing for nine months, after removing us from the workplace for being non-compliant? I think that that argument is an indictment on Sydney Trains. Are they really saying that they did nothing for nine months, contradicting their own procedures and policies for non compliant employees and left us in limbo, with the threat of termination hanging over our heads.*

Respondent's Submissions

[14] The Respondent denied the Applicants had been subject to disciplinary action due to non-compliance with the Policy and they had not been stood down or subject to any disciplinary action that is contemplated by the Agreement. As such, cl 33.5 of the Agreement and any terms relating to payment, did not apply. Each Applicant can return to work once they are compliant with the Policy.

[15] The Respondent's position, further expanded in the Respondent's Submission, was that while the Applicants have not refused to perform work and appear willing to work, they are not ready, nor able, to perform work. That is because, consistent with the decision of the Full Bench of the Commission in *BHP Coal Pty Ltd t/a BHP Billiton v Construction, Forestry, Maritime, Mining and Energy Union,*[4] *(BHP Billiton)* the employer has a policy that obliges the employee

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[3] Transcript PN 97.

[4] [2018] FWCFB 4148; 280 IR 323

to meet a particular requirement to perform duties. The Respondent additionally submitted that the decision of the Full Court of the Federal Court (Marshall, Cowdroy and Buchanan JJ) in *Coal & Allied Mining Services Pty Ltd (ACN 104 081 290) v Allan MacPherson*[5] *(Coal & Allied)* was instructive.

[16] The Respondent submitted that as the Applicants have chosen not to be vaccinated against COVID-19, they have placed themselves in a position where they are not ready or able to perform work. It followed that they are not entitled to receive wages as a matter of common law.[6] The evidence before the Commission reveals the Applicants were told, once their exemption requests were declined, that they were not entitled to receive salary payments as the Respondent considered they were not ready, willing and able to work. That position was open to the Respondent to adopt, and indeed, that position was correct as a matter of law.

[17] The Respondent noted that no Applicant is a party to or covered by any other disputes before the Commission, involving EMB Employees or members of the ARTBU, and therefore Sydney Trains' position is that the Status Quo for the purposes of the Applicants' disputes are not the same and will not result in the same application. The Status Quo in every dispute is different depending on the facts and circumstances, as well as the timeline in which the dispute arose.

[18] The Respondent submitted that the dispute settlement procedure in the Agreement is clear in that it outlines a procedure where there is a resolution to disputes and that while the procedure is being followed, work continues normally. Accordingly, the dispute settlement procedure has a temporal element and has been consistently applied. It would be an absurd outcome if the Status Quo meant that months, or even years after a Policy was introduced, it could be seen as no longer having any application because of cl 8 of the Agreement.

[19] The Respondent submitted that neither cl 33.5 nor cl 33.6 is a 'status quo' provision. They are clauses that address the rates of pay that may, or may not, be paid to employees who are the subject of a disciplinary investigation conducted by the Respondent. The opening words in cl 33.5 make clear that the threshold question to determine as a matter of fact in whether that provision is enlivened is whether an investigation has begun. If the Respondent has commenced an investigation into an employee, then at the beginning of that process, the Respondent is required, subject to the terms of cl 33.5, to determine whether an employee is to remain at work while under investigation, and if not, whether they are to be suspended with or without pay. The latter can occur where serious misconduct is involved.

[20] The Respondent submitted that the evidence is clear that no investigation has commenced into any of the five Applicants from 6 December 2021 onwards, and the Respondent particularly relies on the Exemption Denial Letter. The Respondent noted that none of the Applicants led any evidence to establish that they are being investigated by the Respondent. They either believe they are being investigated or contend that they should be investigated for their non-compliance with the Policy.

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[5] [2010] FCAFC 83

[6] *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435; *Byrne v Australian Airlines Limited* (1995) 185 CLR 410; *Visscher v Giudice* (2009) 239 CLR 361.

[21] The Respondent submitted that further, and in the alternative, if a factual conclusion was reached that an investigation into the Applicants had commenced, cl 33.5 nonetheless makes it clear that the question of what an employee is to be paid during an investigation is a matter within the Respondent's discretion. It is for the Respondent to determine whether the employee under investigation is to remain at work, and if not, whether they should be suspended with or without pay.

[22] The Respondent noted that the Agreement contemplates suspension without pay being justified when serious misconduct is involved. Non-exhaustive examples of serious misconduct are set out in cl 33.5. The alleged failure to comply with the direction in the Policy amounts to an allegation of serious misconduct. If an employee deliberately and intentionally disobeys a lawful and reasonable order, they are refusing to be bound by the terms of their employment contract, and such a refusal is inconsistent with the continuance of the employment, it would be within the Respondent's discretion to have suspended the Applicants without pay regardless.

[23] Finally, the Respondent submitted that if the Commission concludes that clauses 33.5 and 33.6 of the Agreement apply to some or all of the Applicants, and that the non-payment of salary to the Applicants is not otherwise justified by their serious misconduct, then those payments are to be calculated from the date on which an entitlement is enlivened being the date on which the Commission decides, for each individual Applicant, that the Respondent has commenced its investigation.

Authorities Relied Upon by the Respondent

(a) BHP Billiton

[24] *BHP Billiton* involved a dispute concerning a period of three weeks during which a BHP employee, Mr Thomas Goldspring, was not permitted to attend work and was not paid because his driver's license was suspended. Mr Goldspring's terms and conditions of employment, contained in the original offer of employment to him, relevantly required him to:

- perform the duties in his job description as advised to him from time to time;
- comply with all lawful and reasonable instructions given to him in the course of his employment;
- comply with BHP's policies to perform duties in a manner which observed any legal requirements and which adhered to safe working practices and policies established by BHP;
- warrant that he held the qualifications and work experience advised by him to BHP prior to commencing employment;
- maintain all necessary qualifications, certificates, permits, licences and the like which enabled him to fulfil his duties, and to notify BHP if any such qualifications, certificates, permits, licences etc. were cancelled, revoked or were no longer valid, with failure to do so possibly resulting in the termination of his employment; and

- comply with all the Company's policies, standards and procedures as amended from time to time, with a failure to comply possibly resulting in disciplinary action including termination of his employment.

[25] Mr Goldspring's work duties primarily involved the on-site operation of vehicles and mobile equipment. At the Mine, BHP had adopted a standard operating procedure for the use of vehicles and mobile plant equipment (the SOP), pursuant to s 76 of the *Coal Mining Safety and Health Regulation 2001* (Qld). The SOP relevantly required:

> *All operators of vehicles and mobile equipment must hold a current Australian Driver license. Loss of license must be reported immediately to the Supervisor. Approval from the SSE or delegate is required for the Operator to continue to operate vehicles or mobile equipment on site.*

[26] Mr Goldspring had his licence suspended for one month due to his driving while suspended. Mr Goldspring was not rostered to work when the period of suspension commenced, but returned to work approximately one week into the licence suspension. The issue of the suspension of his licence was discussed with his supervisor, and Mr Goldspring was not permitted to start work. Mr Goldspring was not permitted to resume his duties and was sent home, and subsequently he did not attend work and was not paid until the period of his licence suspension ended. The total loss of pay involved was $6,713.33. Mr Goldspring decided to take annual leave for the two remaining shifts of his roster in the period of his licence suspension.

[27] In *BHP Billiton*, Clause 4, Employee Duties, of the relevant Agreement dealt with the various work requirements of employees under the Agreement. Clauses 4.1 and 4.4 provided:

> *4.1 Employees will perform such tasks as reasonably required by the Company without any demarcation of duties while complying with all legal and statutory obligations. In this regard, Employees accept that the Company can require the performance of any operational, mining, maintenance or technical tasks that Employees are trained, competent and/or authorised to perform. The Company will not allocate tasks in a manner which promotes deskilling.*
> *…*
>
> *4.4 Employees are required to attend for work in accordance with their roster and work as directed. An Employee will only be entitled to be paid for time worked, unless taking authorised leave.*

[28] The questions for determination in *BHP Billiton* were:[7]

> *1. In all of the circumstances, did the employer have an obligation to provide to Mr Goldspring work, other than work which involved the operation of vehicles, or mobile equipment on site consistent with the SOP (GRM SOP 0027), during the relevant period?*
>
> *2. In all of the circumstances, should Mr Goldspring have been paid for the*

[7] BHP Billiton at [13].

relevant period?

At first instance, the Deputy President answered "No" to the first question and "Yes" to the second question. On Appeal, the Full Bench answered "No" to the first question and "No" to the second question.

[29] BHP had communicated to Mr Goldspring that because he was unable to perform driving duties, it had no other duties for him to perform, and he was not to attend for work and would not be paid for the relevant period unless he had leave entitlements he could access.

[30] The Full Bench found:[8]

> *Mr Goldspring was not excused from his obligation under clause 4.1 to perform his usual duties simply because, due to his conduct in not paying fines and driving while suspended, his licence was again suspended, since the maintenance of that licence was a necessary incident of the performance of those duties (as well as a term of his contract of employment).*

And:[9]

> *In our view, if considered from the perspective of the parties' respective legal rights, the analysis required by the second question posed for determination is relatively straightforward. The contractual position was that, in order to earn wages, Mr Goldspring was required to perform the service he had contracted to perform. As the Deputy President found, Mr Goldspring was, relevantly, required by his contract of employment to have the ability to operate vehicles and mobile plant and equipment, and was required to hold and continue to hold the driving licence required by BHP under the SOP unless an exemption was granted. No such exemption was granted, meaning that Mr Goldspring was unable to perform the "duties … integral to his role". In short, although he might have been willing to do so, Mr Goldspring was not ready and able to perform the service required by his contract of employment for the period of the suspension of his driver licence and did not do so. In those circumstances, he had no contractual entitlement to the payment of wages, since actual service is required for wages to be earned.*
>
> [Footnotes omitted]

[31] Importantly, the Full Bench observed:[10]

> *It should be noted that this analysis does not require reference to the line of cases concerning the "no work as directed, no pay" principle. That line of authority, which has its origin in the common law's response to the phenomenon of industrial action in the form of partial work bans, is concerned with the consequence of a refusal by the employee to perform a part of the employee's contracted duties. There was no such refusal on the part of Mr Goldspring in this case. Nor does this analysis depend on any*

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[8] BHP Billiton at [32].

[9] BHP Billiton at [32].

[10] *BHP Billiton* at [35].

conclusion that BHP had the right, either under clause 3.8 of the Agreement or at common law, to suspend or stand down Mr Goldspring. It did not have that right, but for the reasons explained that does not mean Mr Goldspring had a right to payment.

(b) Coal & Allied

[32] Mr MacPherson was employed by Coal & Allied Mining Services Pty Ltd (Coal & Allied). In November 2008, Coal & Allied varied the roster that applied to his employment to increase average weekly hours from 40 to 44. On the day after the change was announced Mr MacPherson indicated that he would not complete his shift for undisclosed personal reasons. He was then told by his supervisor that he was being stood down in accordance with his contract of employment. Mr MacPherson left early and also did not attend work the following day.

[33] Mr MacPherson's supervisor mistakenly used the words "stand down" in dealing with Mr McPherson's position, however that error was found to be inconsequential. Marshall and Cowdroy JJ found[11] that better expressed, Mr MacPherson's supervisor may have told Mr MacPherson that he was refusing to pay him for any period of time during which Mr MacPherson was not prepared to work in accordance with his contract of employment. Mr MacPherson's supervisor might have said that he was "putting MacPherson off pay" until he was prepared to work in accordance with his roster.

[34] Marshall and Cowdroy JJ held:[12]

It follows that Mr MacPherson was not "stood down" as that expression is usually understood in an industrial context, which connotes an absence of work to be done, for whatever cause. There was work for him to perform but he was not ready and willing to perform it until such time as he chose to return to work.

In the circumstances, Coal and Allied acquiesced in Mr MacPherson's decision to withdraw his services. There is no basis to suggest that arising from this circumstance, Coal and Allied engaged in disciplinary conduct against Mr MacPherson nor in any conduct of the kind contemplated by the stand down provisions of the Act.

[35] Buchanan reached the same conclusion as Marshall and Cowdroy JJ, but delivered a separate judgment. After a detailed review of relevant authorities, Buchanan J observed:[13]

From the point of view of the common law, there is no reason, in my view, to make a distinction between unaccepted performance of selected duties without absence from work (Swieringa, Quality Education, Miles, Csomore, IEUA) and situations in which employees are directed not to work until they agree to perform all normal duties (Robinson, Illawarra CC, Cresswell, Spotless Catering, United Firefighters). If the present case turned solely on the common law principle recognised and applied in all those cases Coal and Allied would succeed without further discussion. However, the

[11] *Coal & Allied* at [17].

[12] *Coal & Allied* at [27] and [28].

[13] *Coal & Allied* at [95].

common law position must yield to the superior force of any statute or statutory instrument.

And:[14]

In order to identify which of these contentions should be accepted it is necessary first to return to common law concepts for a moment. As earlier indicated, there is no common law right to stand down an employee. However, what constitutes a stand down now requires further discussion because, as has been seen, there is an undoubted common law right for an employer to refuse selective performance of duties or attendance by an employee and, if necessary, to direct that no work be performed for as long as the refusal to perform ordinary duties persists. Exercise of that right of refusal is not to be equated with stand down, any more than it is with suspension.

…

I agree with counsel for Coal and Allied that the facts of the present case did not disclos that Mr MacPherson was suspended. It is well established that suspension of an employee at the discretion of an employer is not available at common law. It is also established, for the reasons given earlier, that at common law an employer has the right to refuse to accept partial or selective performance of duties by an employee. Such a refusal cannot be equated with a suspension, at least for the purposes of the common law. Nor, at common law at least, may it be equated with a stand down.

What is it, then, that gives a stand down a character that distinguishes it from a "no work as directed, no pay" situation or vice-versa?

In my view, it is an essential ingredient of a stand down, as commonly understood and as permitted by s 691A (or a provision in a contract of employment or industrial instrument to similar effect) that it is a unilateral decision taken by an employer to withhold work and payment even when an employee is prepared to perform all normal duties as directed. The unavailability of work to offer, for reasons beyond the control of an employer, is also important and distinguishes a stand down from a suspension but it is not, without the additional element I have identified, sufficient to distinguish a stand down (which is not available at common law) from "no work as directed, no pay" (which is permitted at common law). Concentrating, for the moment, on the operation of s 691A and the distinction between stand down and "no work as directed, no pay", it is important to bear in mind that s 691A gave a general right to stand down in situations where none previously existed. It had no impact of any kind on a "no work as directed, no pay" situation quite apart from the fact that the preconditions it imposed were quite different. It operated in circumstances affected by different common law principles providing quite different outcomes. <u>It is possible, therefore, to conclude with some confidence that a "no work as directed, no pay" situation, and specifically the directive to Mr MacPherson on 12 November 2008, is not within the ordinary (i.e. common law) meaning of "stand down".</u>

[Emphasis added]

[14] *Coal & Allied* at [101] and [102].

Consideration

(a) First limb - Not Ready, Willing and Able to Work?

[36] When the contractual basis to the assertion of *"no work as directed, no pay"* is considered,[15] it is extraordinary in these matters that no evidence was advanced by the Respondent as to the relevant contracts of employment of each Applicant. That failure results in the inability to:

(a) Accurately identify the contractual obligations with which the Applicants have allegedly failed to comply; and

(b) Allow an assessment of the effect of the Agreement on the contract of employment of each Applicant.

[37] In the Respondent's Submission, their contentions were put broadly as follows:

> *3. As elucidated at the hearing, and for the reasons that follow, the Applicants were not suspended from duty, nor were they stood down. They were not ready, willing or able to work. This conclusion is borne out as a matter of fact and law.*
>
> *4. As a matter of longstanding common law, the Applicants were therefore not entitled to receive any form of salary payments while they remained (and continue to remain) not ready and able to work. Cl 33 of the Agreement does not alter this conclusion, particularly as it is only engaged where an employee is suspended with pay, and the evidence reveals none of the Applicants were so suspended.*
> *…*
>
> *32. The Applicants have not refused to perform work and appear willing to work. However, they are not ready, nor able, to perform work. That is because, consistently with* BHP Billiton*, the employer has a policy that obliges the employee to meet a particular requirement to perform duties; in* BHP Billiton*, it was the holding of a valid driver's licence; in these cases, it is the Respondent's requirement that employees be 'double vaccinated' against COVID-19.*
>
> *33. As the Applicants have chosen not to be vaccinated against COVID-19, they have placed themselves in a position where they are not ready or able to perform work. It follows that they are not entitled to receive wages as a matter of common law.*
>
> [Footnotes omitted]

[38] In *BHP Billiton*, the employee's original offer of employment, that set out the terms and conditions of employment, were in evidence,[16] as was the Standard Operating Procedure that

[15] *BHP Billiton* at [33]; *Coal & Allied* at [71] to [77].

[16] *BHP Billiton* at [2].

required possession of a driver's licence.[17] The effect of the relevant Enterprise Agreement on the contractual terms was then assessed.[18] Thereafter, the determination of the matter based on contractual and enterprise agreement terms, and not pursuant to the *"no work as directed, no pay"* principle[19], occurred. The Full Bench held:

> *...Because of his failure to maintain his licence over the relevant period, Mr Goldspring put himself in a position where he was unable to perform the tasks that would normally be required of him "while complying with all legal and statutory obligations" under clause 4.1, and likewise was not in a position to "work as directed" in accordance with the first sentence of clause 4.4. The second sentence of clause 4.4 establishes in plain terms that the entitlement to payment only arises in respect of "time worked" unless authorised leave entitlements are accessed. Mr Goldspring did not spend any time performing the duties he would ordinarily have been required to perform over the relevant period, and did no work at all, and thus was not entitled to payment under the Agreement. ...*

[39] The Respondent submits that the Policy obliges each Applicant to meet a particular requirement to perform their duties, being that they be 'double vaccinated' against COVID-19. It is not, however, specified how the Policy was said to be reasonably and lawfully imposed on the Applicants.

[40] It is not unusual for the reasonableness and/or lawfulness of COVID Vaccination policies to be considered by the Commission, principally in Unfair Dismissal applications. Most of those matters, however, have involved mandates imposed by various Governments. For example, in a matter under *the Public Health and Wellbeing Act 2008 (Vic)*, where the Acting Victorian Chief Health Officer issued the *COVID-19 Mandatory Vaccination (Workers) Directions* (the Directions), Deputy President Anderson observed:

> *In this matter, the reason for dismissal advanced by Ventura is that Mr Bateson was unable to work as a bus driver given his failure to comply with the requirement imposed by the Victorian government direction that bus drivers be vaccinated (first dose) by 15 October 2021 (or have a booking by then and do so by 22 October) or produce evidence of a medical contraindication.*
>
> *The effect of the exercising emergency powers under the Directions was that Ventura was prohibited from allowing Mr Bateson to undertake work at the depot or drive its buses from 15 October 2021 unless he had been vaccinated or had a booking by then and had done so by 22 October. Mr Bateson decided not to be vaccinated by either date and did not produce a medical exemption. This meant that he was not able to fulfil his role as a bus driver, which could only be performed from the depot and on buses. Nor were there suitable alternative duties reasonably able to be provided.[20]*

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[17] *BHP Billiton* at [3].

[18] *BHP Billiton* at [11] to [13].

[19] *BHP Billiton* at [35].

[20] *Peter Bateson v Ventura Transit Pty Ltd* [2022] FWC 355. At [67] and [68].

[41] The Respondent does not apparently rely on any legislated compulsion for vaccination, and in the above outlined absence of identified contractual provisions I note that, while not specifically identified by or relied on by the Respondent, Clause 35 of the Agreement provides:

> *35. WORKPLACE HEALTH, SAFETY AND ENVIRONMENT*
>
> *35.1. The work health and safety of all Employees, contractors, visitors and customers is the primary concern of the Employer. The parties to this Agreement share an ongoing commitment to ensure and to promote the work health, safety and welfare of all Employees, contractors, customers and visitors, and nothing in this Agreement shall be designed or applied in ways that reduce or diminish this objective.*
>
> *35.2. The Employer must ensure the health, safety and welfare at work of all its Employees.*
>
> *35.3. The Employer will also monitor and seek to improve systems and processes to ensure that both its statutory obligations and objectives of this Agreement are met*
> .
> *35.4. Employees must, while at work, take reasonable care for the health and safety of people who are at the Employer's place of work and who may be affected by the Employee's acts or omissions at work.*
>
> *35.5. Employees must, while at work, co-operate with the Employer or other person(s) so far as is necessary to enable compliance with any requirement under relevant legislation and associated regulations and/or codes of practice that are imposed in the interests of health, safety and welfare on the Employer or any other person.*
>
> *35.6. Employees must bring to the notice of their supervisor or manager, any situation where they genuinely believe a risk of injury or damage exists.*
>
> *35.7. Subject to relevant legislation and associated regulations, the Employer will continue to consult Employees on matters concerning workplace health and safety in accordance with WorkCover NSW endorsed Codes of Practice on Consultation.*
>
> *35.8. The requirements under the Consultation Code of Practice will continue to apply where they are not inconsistent with, but additional to, the relevant legislation and associated regulations.*

[42] Sub clause 35.4 and 35.5 would appear to be the provisions that may have relevant application to the imposition of the Policy. While not addressed specifically by the Respondent,[21] it seems that the position of the Respondent was that in compliance with its obligations under the *Work, Health and Safety Act*, it imposed the policy pursuant to Clause 35.4 and/or 35.5 of the Agreement, and so the Policy constituted a reasonable and lawful instruction to the Applicants.

[43] In *BHP Billiton*, the Full Bench observed:

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[21] Other than in a submission in the alternative addressing clause 1.07 of the *Fair Work Regulation* and possible misconduct, at Transcript PN 413.

In the context of the interpretation and application of an award provision requiring compliance with the "reasonable instructions of the employer or his representative", Dixon J (as he then was) said in R v Darling Island Stevedoring & Lighterage Co Ltd:

> *"Naturally enough the award adopted the standard or test by which the common law determines the lawfulness of a command or direction given by a master to a servant. If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable. Accordingly, when the award was framed, the expression "reasonable instructions" was adopted in describing the employees' duty to obey. But what is reasonable is not to be determined, so to speak, in vacuo. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which the determination of what is reasonable must be controlled."*

[Footnote omitted]

[44] None of the above considerations of reasonableness have been addressed by any party, and so specific reasonableness of the Policy cannot be determined. I do note that each Applicant is a Train Driver, which I understand to be a relatively solitary vocation. Further the general provisions of the instrument, being the Agreement, are as outlined above.

[45] While I do not understand that the Respondent's industry has been the subject of NSW Public Health Orders mandating vaccinations, the reasonableness of an employer's policy proposing a vaccination requirement is to be objectively considered on its merits, and not be burdened by a presumption of unreasonableness simply because government authorities have not declared that worksite to be a high-risk setting. The Policy has a logical and understandable basis in that it deals with the management of a real and present risk to health and safety. Whether the Policy and the Vaccination Requirement was lawful and reasonable can only be assessed by reference to the time at which they were introduced.[22]

[46] However, I also give significant weight to the fact that a vaccination policy such as that included in the Policy intrudes on one's right to bodily integrity if it is complied with. The practical effect of the Policy is to place pressure on an employee to give up this fundamental right, given that non-compliance is accompanied by potential disciplinary consequences that include termination of employment. This weighs against the Policy being assessed as reasonable.

[47] I am not prepared, in the absence of appropriate evidence, to simply conclude that the Policy is reasonable and/or lawful or proportionate as a workplace health and safety response to the risks presented by COVID 19. I am fortified in the correctness of my reticence because

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[22] *Lyndon Clark v Port Authority of New South Wales* [2022] FWCFB 202, at [27] and [28].

it would appear that at least since 3 June 2022, or possibly as early as 5 April 2022, the Respondent has itself been considering removing the Policy and the Vaccination Requirement.

[48] I do note that, in the absence of any evidence or submissions regarding relevant contracts of employment, I have below focussed on the terms of the Agreement. That focus naturally leads to consideration of the whole of the Agreement, and clauses 8 and 33 in particular.

(b) Second limb – Was it discipline?

[49] In *Coal & Allied,* Buchanan J accepted the development at common law of a recognition of the right of an employer to refuse to accept the performance of any duties while the refusal to perform all ordinary duties continued, sometimes referred to as *"no work as directed, no pay"*.[23] However, that common law position "*must yield to the superior force of any statute or statutory instrument"*.[24] In this matter, the Agreement deals significantly with the right to suspend an employee as a disciplinary measure, with or without pay.

[50] Clause 33.5 of the Agreement requires a determination at the beginning of an investigation as to whether an employee will remain at work on normal duty, placed in alternative duties, suspended with pay, reassessed and returned to normal duties, or suspended without pay for serious misconduct.

[51] In his statement, Mr McKaysmith stated (at [75]):

> *At no stage since December 2021 has any disciplinary investigation or disciplinary process been initiated by Sydney Trains or TfNSW in relation to any of Mr Taylor, Ms Tripp, Mr Aiono, Ms Cambridge or Mr Galea in relation to their non-compliance with the Policy. I have explained earlier in this statement why no such investigations or process has yet commenced. I do not know whether such a process will commence in the future. Regardless, the Applicants continue to not be at work, and are not receiving salary payments (noting Mr Taylor is currently receiving special leave), as they are not ready, willing or able to attend work, having not been vaccinated against COVID-19 in compliance with the Vaccine Requirement in the Policy.*

[52] The reference to the earlier explanation in his statement was apparently to paragraph [20], where he stated:

> *Following 7 February 2022, TfNSW reviewed the general position of employees, including employees of Sydney Trains, who remained non-compliant with the Policy and Vaccination Requirement. At around that time, TfNSW including Sydney Trains were reviewing the Policy following further feedback after steps taken as part of other dispute proceedings before the Fair Work Commission. As a result, a decision was made by the Secretary (and supported by the Sydney Trains Chief Executive) that no further action, including no investigative or disciplinary action, would be taken in respect of non-compliant employees at that time, that non-compliant employees would remain out of*

[23] *Coal & Allied* at [67] to [71].

[24] *Coal & Allied* at [95].

> *the workplace on the basis they were still not ready, willing and able to work, and that TfNSW including Sydney Trains would review the position again in early April 2022.*

[53] While the Respondent, particularly relying on the evidence of Mr McKaysmith and the Exemption Denial Letter, submitted that no investigation had commenced into any of the five Applicants from 6 December 2021 onwards, I consider that submission unacceptable as it misconstrues the facts and the correspondence between the parties. The evidence of Mr McKaysmith, while untested, was mere submission.

[54] I particularly note that the Policy made no reference to the application of any *"no work as directed, no pay"* principle, and on the issue of *"Compliance"* extracted at paragraph [8(d)] above, referred only to what could only be understood to be the provisions of the Agreement regarding discipline.

[55] While the Exemption Denial Letter asserted "*Until you comply with the Policy (that is, having received your first and second vaccination), you are not willing, ready and able to work. Accordingly, you are not permitted to attend or perform work and you are not entitled to salary or wages"*, it also clearly invoked Clause 33 of the Agreement, *"Disciplinary Matters"*, by advising the Applicants:

> *If you remain you remain non-complaint with the Policy, your situation will be reviewed at a later date and further discussed with you. If you have not complied with the direction as set out in this letter, a disciplinary process will commence, and your employment may be terminated.*

And:

> *Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment may occur.*

[56] The submission and evidence that no investigation had commenced into any of the Applicants is disingenuous, and can be answered by the simple proposition that, if no investigations had commenced, how could the findings of non-compliance with Vaccination Requirement, and non-compliance with the Policy, be made?

[57] The Macquarie Dictionary defines "investigation" as:

> 1. *the act or process of investigating*
> 2. *a searching enquiry in order to ascertain facts; a detailed or careful examination*

[58] Clearly an investigation had commenced because the fact of the vaccination status of the Applicants, and their compliance or otherwise with the Vaccination Requirement, had been established by the Respondent.

[59] The Exemption Denial Letter was preceded by the First Direction in December 2021. The First Direction, while also asserting no entitlement to wages due to the Applicants not being ready, willing and able to work, also stated:

> *Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment may occur.*

[60] Clearly, termination of employment as foreshadowed in the First Direction would involve the application of Clause 33, Disciplinary Matters, of the Agreement. That threat was repeated in the March Email.

[61] The Respondent submitted that further, and in the alternative, if a factual conclusion was reached that an investigation into the Applicants had commenced, clause 33.5 provided the Applicants should be suspended without pay due to their misconduct. Clause 33.5 provides:

> *Serious misconduct is behaviour such as:*
>
> *(a) Wilfully causing serious and imminent risk to the health and safety of another*
>
> *(b) Theft, fraud or assault*
>
> *(c) Being charged with a serious criminal offence punishable by 6 or more months imprisonment.*

[62] While the conduct outlined in the above definition is, by use of the words *"such as"*, exemplary, it sets a standard of appropriate gravity for alleged conduct to constitute serious misconduct. Insofar as the definition specifies safety issues, it refers to conduct of considerably greater severity than non-compliance with the Policy and the Vaccination Direction. The conduct of the Applicants was not serious misconduct pursuant to Clause 33.5 of the Agreement.

[63] The Respondent also relied in the Hearing of the meaning of serious misconduct at regulation 1.07 of the *Fair Work Regulations 2009*, and in particular sub-regulation (3)(c) being "*the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment"*. While reliance on the terms of the regulation would appear unavailable where the Agreement itself provides a definition of serious misconduct, for the reasons outlined above, it is impossible to determine the contents of the Applicants' contracts, and whether the instructions to the Applicants were lawful and reasonable. The Respondent cannot rely on regulation 1.07 of the *Fair Work Regulations 2009*, in determining whether the Applicants' behaviour constitutes serious misconduct pursuant to the Agreement.

Conclusion

[64] In answer to the questions to be arbitrated:

(a) Does cl 33 of the Agreement apply (or has it applied) to any or all of the Applicants at any time from 6 December 2021 onwards?

[65] Yes. Clause 33 of the Agreement has applied to all Applicants since 6 December 2021, when the Applicants were determined by the Respondent to be non-compliant with the Policy and the Vaccination Requirement.

(b) If the answer to the above question is 'yes', does cl 33. of the Agreement require the Respondent to make payments to any or all of the Applicants?

[66] Yes. the Agreement requires the Respondent to make payments to all of the Applicants. The Respondent is required to pay the Applicants unless they have engaged in serious misconduct as defined in Clause 33.5. The Applicants' behaviour does not constitute serious misconduct pursuant to the Agreement.

(c) If the answer to the above question is 'yes', how are those payments to be calculated and from what date?

[67] Those payments are calculated in accordance with Clause 33.6 of the Agreement.

DEPUTY PRESIDENT

Appearances:

S. Taylor on their own behalf
K. Tripp on their own behalf
U. Aiono on their own behalf
N. Cambridge on their own behalf
J. Galea on their own behalf
M. Watts for the Respondent

Hearing details:

2022.
Sydney.
August 12.

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