DECISION

Fair Work Act 2009
s.604—Appeal of decision

Sydney Trains
v
Stephen Allan Taylor, Kristen Tripp, Ueligitone Aiono, Nellanisiara Cambridge, Joseph Galea
(C2022/7889)

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT O'NEILL
ACTING COMMISSIONER BISSETT

MELBOURNE, 15 MARCH 2023

Appeal against decision [2022] FWC 2758 of Deputy President Cross at Sydney on 9 November 2022 in matter numbers C2022/4039; C2022/4049; C2022/4061; C2022/4094; and C2022/4095

[1] The appellant, Sydney Trains, is a corporation and a NSW Government agency constituted under s 36 of the *Transport Administration Act 1988* (NSW) (TAA Act). Transport for NSW (TfNSW) is also a corporation and a NSW Government agency constituted under s 3C of the TAA Act. The affairs of TfNSW are managed and controlled by the Transport Secretary. Although TfNSW does not and cannot employ any staff, it has various objectives, functions and powers directed to planning, coordinating and implementing the efficient, safe and reliable public transport and freight services in NSW, including those delivered by the appellant. To this end, TfNSW may give directions to various of the transport bodies, including the appellant, and it may adopt or promulgate policies which apply to public transport bodies and their employees for the purposes of carrying out its statutory functions. Following a period of consultation during October 2021, TfNSW adopted a policy titled the "*Transport COVIDSafe Measures Policy*" on 7 November 2021.[1] The policy is signed by the Transport Secretary[2] and is expressed to apply to workers performing work for, and at, workplaces controlled or managed by several identified public transport bodies, including the appellant.[3]

[2] The respondents, Stephen Taylor, Kristen Tripp, Ueligitone Aiono, Nellanisiara Cambridge and Joseph Galea, are train drivers employed by the appellant. Train drivers are expressed to be caught by the policy.[4] Under the policy, from 6 December 2021, workers performing certain roles, including roles performed by the respondents, were required to have

[1] Appeal Book 499 [11]
[2] Appeal Book 640
[3] Ibid
[4] Appeal Book 645

had at least the first dose of a COVID-19 vaccination.[5] Thereafter, workers were required to be fully vaccinated in accordance with the recommended timeframe between vaccinations applicable to the brand of vaccine administered as the first dose.[6] These workers were also required to provide evidence of their vaccination status by no later than 6 December 2021.[7] The policy noted that a failure to comply "will be managed in accordance with applicable policies and procedures [and] [a]ction up to and including the termination of employment or engagement may occur".[8]

[3] All of the appellant's employees, including the respondents, were sent an email dated 9 November 2021 from the appellant's Chief Executive advising, *inter alia*, of the adoption of the policy mandating vaccination against COVID-19 for everyone within the Transport cluster, including at the appellant, as a condition of employment.[9] The email also advised staff that these new measures will come into effect from 6 December 2021 and from this date affected staff, including the respondents, will need to have completed an employee declaration stating their vaccination status and have provided evidence, including whether staff have had one or two doses, or submitted an exemption form. Each respondent applied for an exemption on or before 5 December 2021[10] and was paid for the period until the exemption application was determined and refused.[11]

[4] Employees who had not complied with the policy, including the respondents, were from 6 December 2021 issued with correspondence substantially in the following template form[12] (excluding paragraphs that did not apply or were not required):

> "Dear [employee]
>
> 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.
>
> {Remove the paragraph that is not required}

[5] Appeal Book 639

[6] Ibid

[7] Ibid

[8] Appeal Book 640

[9] Appeal Book 637

[10] Appeal Book 500

[11] Appeal Book 77-78 PN325-PN333

[12] Appeal Book 500 [19b], Appeal Book 656

[For non-probationary employees] We write to formally direct you to comply with the Policy. You are directed to:

- submit a completed COVID-19 Vaccination Declaration Form;
- provide proof of your vaccination status; and
- have at least one dose of a TGA approved COVID-19 vaccination and two doses by 7 February 2022.

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.

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.

Discussion

[Option to include where employee indicates will be vaccinated]. During our discussion, you advised me that you do intend on being vaccinated. Within the next 72 hours you are required to provide me with evidence of you having received your first dose of a TGA approved COVID-19 vaccination. This can be done by submitting a completed COVID-19 Vaccination Declaration Form. If this occurs, we can then discuss the applicable work arrangements to be applied.

[Option to include where employee indicates they will be seeking an exemption] During our discussion, you advised me that you intend on seeking an exemption. Within the next 48 hours you are required to submit a completed COVID-19 Vaccination Declaration Form along with an exemption application. Once that application is made, we can discuss any working arrangements pending the outcome of your exemption application.

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.

. . ." [Bold, colour and highlighting in original]

[5] The respondents' exemption applications were refused on various dates between 16 December 2021 and 23 March 2022.[13] Each was given correspondence advising that the application for an exemption had been refused substantially in the following template form:[14]

"Dear [insert name]

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.

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[13] *Taylor and Ors v Sydney Trains* [2022] FWC 2758 at [8(i)]

[14] Appeal Book 501 [19c], Appeal Book 659

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 (sic) 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.

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.

. . .” [Bold, colour and highlighting in original]

[6] On 16 March 2022, the appellant sent email correspondence[15] to employees who had not complied with the policy, including the respondents, in substantially the following terms:

> "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;
>
> . . ." [Coloured text in original]

[7] Following the appellant's rejection of the respondents' exemption applications the respondents remained employed by the appellant but were not permitted to work and were not paid because they had not complied with the policy. The respondents and other affected employees utilised an exemption refusal appeals process.

[8] On or around 5 April 2022, TfNSW, in conjunction with its transport agencies, reviewed the general position of employees, including the appellant's employees, who remained non-compliant with the policy and its vaccination requirement. At around that time, TfNSW, including the appellant, began considering whether the policy required further variation in view of the changing public health environment. As a result, the Transport Secretary (supported by

[15] Appeal Book 489 [13], Appeal Book 661

the appellant's Chief Executive) decided that no further action, including 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, and TfNSW (including the appellant) would reassess the position once decisions were made about any amendments to the policy.[16]

[9] On 3 June 2022, the appellant commenced further consultation on the policy, including a proposal to remove the vaccination requirement and replacing it with a strong recommendation that employees keep up to date with COVID-19 vaccinations, but not mandating vaccination. The proposal was that this would take effect from 1 September 2022.[17]

[10] On or about 8 July 2022, the appellant sent correspondence to various employees, including the respondents, advising of the exemption appeal outcomes – which in the case of the respondents was to "uphold the initial decline outcome".[18]

[11] The *Sydney Trains Enterprise Agreement 2018* (Agreement) applies to the appellant and to the respondents in their employment with the appellant. Clause 33 of the Agreement deals with disciplinary matters and provides, *inter alia*, that at the beginning of an investigation, the appellant 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. Clause 33 also provides that if an employee is suspended with pay, the employee will be paid, during the period of the investigation, a minimum of, relevantly the master roster pay, for employees who work to a master roster.

[12] At various dates in June and July 2022 the respondents each raised a dispute with the appellant asserting that they had been suspended and that, pursuant to clause 33 of the Agreement, they were entitled to be paid the master roster pay from 6 December 2021.[19] Between 12 and 13 July 2022 each respondent applied to the Commission under s 739 of the *Fair Work Act 2009* (FW Act) for it to deal with a dispute in accordance with the dispute settlement term (clause 8) in the Agreement. The applications were allocated to Deputy President Cross. In preparing the applications for arbitration the parties agreed that three questions were to be determined to resolve the disputes. The three questions and the answers given by the Deputy President are set out below:

> "(1) Does clause 33 of the Agreement apply (or has it applied) to any or all of the [respondents] at any time from 6 December 2021 onwards?
>
> **[65]** Yes. Clause 33 of the Agreement has applied to all [respondents] since 6 December 2021, when the [respondents] were determined by the [appellant] to be non-compliant with the Policy and the Vaccination Requirement.[20]

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[16] Appeal Book 501-502 [22]

[17] Appeal Book 502 [23]

[18] See for example Appeal Book 727-728

[19] Appeal Book 502-507

[20] *Taylor and Ors v Sydney Trains* [2022] FWC 2758 at [65]

(2) If the answer to the above question is 'yes', does clause 33 of the Agreement require the [appellant] to make payments to any or all of the [respondents]?

[66] Yes. the Agreement requires the [appellant] to make payments to all of the Applicants. The [appellant] is required to pay the [respondents]unless they have engaged in serious misconduct as defined in Clause 33.5. The [respondents'] behaviour does not constitute serious misconduct pursuant to the Agreement.[21]

(3) 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."[22]

[13] The reference to 6 December 2021 in the first question is to the date by which the appellant's employees, including the respondents, had to comply with the policy (to provide evidence they had received the first dose of a COVID-19 vaccination unless they had an approved exemption). It was not disputed that none of the respondents provided the appellant with the requisite evidence.

[14] As at the date of the hearing of the applications before the Deputy President, the appellant had not made any decision about possible changes to the policy or its vaccination requirement.[23]

[15] By its notice of appeal dated 30 November 2022, the appellant applies for permission to appeal the Deputy President's decision and if granted, appeals that decision. The appellant raises seven grounds of appeal. In short compass, the appellant contends the Deputy President erred in several ways. *First*, in finding clause 33 of the Agreement applied to the respondents. *Second*, in concluding that an investigation into each Respondent, for the purposes of clause 33 of the Agreement, had commenced. *Third*, in concluding an investigation, for the purposes of clause 33 of the Agreement, commenced when the appellant asked the respondents if they had complied with the policy. *Fourth*, in making factual findings the subject of the second and third grounds which were not open in view of the unchallenged and uncontroverted evidence led below. In other words, the factual findings made were wrong. *Fifth*, in concluding the appellant had not established the policy was lawful and reasonable. *Sixth*, in assessing the reasonableness of the policy at a point in time that fell after the date the policy was implemented. *Seventh*, in concluding the appellant had not established the respondents were not ready, willing and able to work.

[16] Grounds 1 through 4 of the notice of appeal may conveniently be considered together. Separately and together these grounds in substance seek to explain why the appellant contends that the answer given by the Deputy President to the first question was erroneous. As we earlier noted, as to the first question the Deputy President concluded that clause 33 of the Agreement has applied to all the respondents since 6 December 2021, when the respondents were

[21] Ibid at [66]

[22] Ibid at [67]

[23] Ibid at [8s]

determined by the appellant to be non-compliant with the policy and the vaccination requirement contained therein.

[17] The resolution of the first question required the Deputy President, *inter alia*, to consider the proper construction of clause 33 of the Agreement and its application to the circumstances of the respondents. In arriving at his answer, the Deputy President correctly identified at [50] of the decision that 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. From there the Deputy President recounts (at [51]-[52]) the evidence of Paul McKaysmith, the Director Professional Standards and Conduct at TfNSW, which was to the effect that 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 the respondents.

[18] At [52] of the decision, the Deputy President rejects the appellant's submission "that no investigation had commenced into any of the five [respondents] from 6 December 2021 onwards". The Deputy President considered the submission "unacceptable as it misconstrues the facts and the correspondence between the parties".[24] The Deputy President appears not to have accepted Mr McKaysmith's evidence, because it was "untested, [and so] was mere submission".[25]

[19] After referring to aspects of the policy (at [54]) and to the correspondence in which the appellant refused the respondents' exemption applications (at [55]), which we have earlier set out, the Deputy President reasoned:

> "[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:

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[24] Ibid at [53]

[25] ibid

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."

[20] It seems to us evident, that in reaching the conclusion that an investigation had commenced, the Deputy President was purporting to make an objective assessment – independently of any intention on the appellant's part to commence an investigation – as to whether an investigation had commenced under clause 33 of the Agreement. For the reasons we will explain below, this approach was erroneous as it misconstrues the operation of clause 33.

[21] The task of construing an industrial instrument begins with a consideration of the ordinary meaning of the words, read in context, and taking into account the evident purpose of the provisions or expressions being construed. Relevant context will include other provisions of the industrial instrument, read as a whole, and the disputed provision's place and arrangement in the instrument. The statutory framework under which the industrial instrument is made, or in which it operates, may also provide relevant context, as might an antecedent instrument or instruments from which a particular provision has been derived. Regard may be had to relevant context and surrounding circumstances to determine whether there is any ambiguity in a provision of an industrial instrument. The language of an industrial instrument is to be understood in the light of its industrial context and purpose, not in a vacuum or divorced from industrial realities. But context is not itself an end, and a consideration of the language contained in the text of the relevant parts of the instrument remains the starting point and the end point in the task of construction. A purposive approach to interpretation is appropriate, not a narrow or pedantic approach.[26]

[22] Clause 33 relevantly provides as follows:

"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

[26] *Australian Workers' Union v Orica Australia Pty Ltd* [2022] FWCFB 90 at [18] and the authorities referred to therein; See also *James Cook University v Ridd* [2020] FCAFC 123 at [65] and the authorities referred to therein

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.

33.8. Eight (8) weeks from the Employee being notified that an investigation has commenced, the Employee will be notified if there is a likelihood that the investigation will exceed 12 weeks and the extent to which this is as a result of the complexity of the investigation. If the investigation is flagged as being complex, the Employee will be notified of the grounds and details of the complexity.

33.9. Twelve (12) weeks from the Employee being notified that an investigation has commenced, the Director of Human Resources is to advise the Employee in writing if the process is to extend beyond the 12 week anticipated time for the current stage to conclude and the reasons for any delays or anticipated delays. Delays should only result from circumstances outlined in clause 33.12. Where the delay is a result of complexity, the Employee will be notified with appropriate details of that complexity. Similar advice is to be sent each subsequent 6 weeks after the first advice.

33.10. Should an investigation extend beyond 12 weeks, the following will be undertaken:

(a) An audit of the investigation process will be conducted;

(b) An assessment as to whether there are any unnecessary delays and then addressing these delays as a priority;

(c) An explanation will be provided on the grounds and details of the complexity, if this is an issue, and what will be done to address this;

(d) If a suspension is in place, determine whether it is warranted to continue and the reasons for such.

(e) If the employee requests in writing that a copy of the explanation be provided to the employee's union representative, it will be provided.

33.12. The circumstances that may justify delay are exceptional in nature and include:

(a) complex investigations (examples of this include where multiple jurisdictions are involved and a large number of witnesses that extend outside the rail entities);

(b) investigations being undertaken by external investigation bodies which do not include the bodies referred to in clause 33.1;

(c) the investigation of an alleged criminal offence by the police; or

(d) where delays result from the Employee's unavailability or own actions.

33.13. Sydney Trains Employees will have access to the specific discipline appeals process which is legislated in NSW.

33.14. Disciplinary measures that may be taken after an investigation concludes in a finding of fault include:

(a) caution or reprimand;

(b) a fine;

(c) reduction in position, rank or grade and pay;

(d) suspension from duty without pay; or

(e) dismissal.

33.15. Where the outcome of an investigation is that there is no case to answer or the allegations are withdrawn, a review will be undertaken within 4 weeks to ensure that no

> financial disadvantage occurs to the Employee when compared with the average pay over the 6 months before the investigation commenced (including overtime for all staff and mileage payments for train crew). Where the final outcome is deemed by management to be disproportionate to the financial disadvantage experienced by the employee, the relevant Level 2 Manager will determine whether any further consideration should be given. Any decisions made under clause 33.15 will not be the subject to Clause 8 of the Agreement."

[23] The Deputy President concluded that an investigation had commenced and so clause 33 was engaged. The Deputy President reasoned that this was so because the appellant had determined the respondents had not complied with the policy. At [56] of the decision, earlier extracted, the Deputy President asks rhetorically "if no investigations had commenced, how could the findings of non-compliance with the Vaccination Requirement, and non-compliance with the Policy, be made?". We agree with the appellant that this approach confuses a process of an investigation into conduct which occurs after the person being investigated is said to have engaged in the impugned conduct, with the conduct itself. The policy required the appellant's employees, including the respondents, to *inter alia*, provide evidence of their vaccination status by no later than 6 December 2021 (and in the case of the respondents, by a further date following consideration and rejection of their exemption applications). Establishing the fact of non-compliance did not require any investigation. Whether non-compliance results in any disciplinary action requires, as the correspondence to the respondents made clear, the non-compliance to be "*managed in accordance with applicable policies and procedures"* which would then plainly require the appellant to engage with the disciplinary investigation process in clause 33 of the Agreement. This is reinforced in the letter the respondents were given following the appellant's refusal of their respective exemption applications, which provided:

> "If 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."[27]

[24] The reference to "a disciplinary process" in the extracted paragraph is plainly a reference to the process under clause 33 of the Agreement.

[25] As should be apparent from its text, clause 33 of the Agreement is concerned with disciplinary matters and with a species of investigation. Clause 33 is not concerned with any factual inquiry or investigation. Rather it is concerned only with and confined to disciplinary investigations. Resort to a dictionary definition of "investigation" does not assist in properly construing clause 33 for two reasons. *First*, as we have pointed out the clause is not concerned with investigations *per se* but with disciplinary investigations. *Second*, clause 33 is engaged when the appellant decides to commence a disciplinary investigation not when the appellant advises employees that a failure to comply with its policy or to follow a lawful and reasonable directions will be managed in accordance with applicable policies, which may lead to some disciplinary action including dismissal.

[27] Appeal Book 659

[26] That this is so is evident from the structure of clause 33 and the obligations it imposes on the appellant once an investigation commences. Once the appellant decides to commence a disciplinary investigation several obligations arise. An employee must be notified that an investigation is commencing as is evident from the obligations imposed by clauses 33.1, 33.8 and 33.9. "During the investigation period" the appellant is required to provide the employee the object of the investigation with a written update about the status of the investigation at least every two weeks (clause 33.3). "At the beginning of the investigation", the appellant must determine whether the employee the object of the investigation:

- remains at work on normal duty;
- is placed in alternative duties;
- is suspended and whether that is to be with or without pay; or
- is reassessed and returned to normal duties (clause 33.5).

[27] Apart from the fortnightly written updates, the appellant has other notification obligations. Eight weeks after an employee is notified of the commencement of an investigation, the appellant is required to notify the employee whether:

- it is likely the investigation will exceed 12 weeks; and
- the extent to which this is the result of the complexity of the investigation (clause 33.8).

[28] If the investigation is "flagged" as being complex, the appellant must notify the employee of the grounds and details of the complexity (clause 33.8).

[29] Twelve weeks after an employee is notified of the commencement of an investigation, the appellant (through its Director of Human Resources) is required provide the employee with a written notice if "the process" is to extend beyond 12 weeks and the reasons for any delays or anticipated delays (clause 33.9).

[30] If an investigation's complexity causes a delay the appellant must provide the employee with "appropriate details of that complexity" and similar advice is to be sent each subsequent 6 weeks after the first advice (clause 33.9).

[31] The appellant is required to take particular steps if an investigation extends beyond 12 weeks, including conducting an audit of the investigation process, assessing whether there were unnecessary delays, providing the employee with an explanation of the complexity, if complexity is contributing to the delay, determining whether a continuation of any suspension is warranted and providing the employee with reasons for any decision to continue the suspension (clause 33.11).

[32] The obligations created by clause 33 described are inconsistent with any notion that a disciplinary investigation may be commenced independently of the appellant deciding to commence such a disciplinary investigation.

[33] In the context of clause 33 of the Agreement, read as a whole, a "disciplinary investigation" is a process invoked by the appellant which is predicated on a decision by the appellant to do so. The obligations imposed by clause 33, including those in clause 33.5, only arise when the appellant decides to commence a disciplinary investigation. Merely informing employees of the possible consequences of not complying or continuing not to comply with its policy, is not the commencement of, nor a decision to commence, a disciplinary investigation for the purposes of clause 33.

[34] The respondents' (Cambridge and Galea) submissions (supported by the other respondents) largely sought to support the Deputy President's reasoning and conclusions as to the operation of clause 33 of the Agreement. For the reasons given above those submissions must be rejected.

[35] It is sufficient to uphold the appeal on the basis that the Deputy President wrongly construed the operation of clause 33 of the Agreement and therefore erred in the answers given to the agreed questions. However, we consider that we should express our conclusions as to the other matters raised by the appeal grounds.

[36] We agree with the appellant that the factual findings made by the Deputy President in support of his conclusion that the appellant has commenced a disciplinary investigation *vis-à-vis* each respondent within the meaning of clause 33 were not open to the Deputy President. The relevant correspondence to which the Deputy President referred (and which we have earlier set out) does not disclose that a disciplinary investigation commenced or that any decision to commence such a disciplinary investigation had been made. At its highest the correspondence communicates to the respondents the possible disciplinary consequences of continuing not to comply with the appellant's policy. Moreover, an indication in the correspondence that "any failure to comply with the requirements of" the policy or with lawful and reasonable directions "will be managed in accordance with applicable policies and procedures" is an indication of a future intention. It does not communicate that a decision to undertake a disciplinary investigation had been made or that such an investigation has begun.

[37] The unchallenged evidence of Mr McKaysmith was that the appellant had not initiated nor begun any disciplinary investigation or process in relation to the respondents.[28] The Deputy President's rejection of that evidence as untested and a mere submission, was not open. Mr McKaysmith gave evidence in his statement which was tendered without objection.[29] He was available to be cross-examined, but none of the respondents took up the opportunity to ask questions when invited to do so[30] and so Mr McKaysmith was not required for cross-examination.[31] Moreover, although the Deputy President asked a question about [75] of Mr McKaysmith's statement,[32] which sets out the evidence to which we refer above, the Deputy President does not suggest the paragraph is a submission or that it should not be admitted into evidence because it is a submission. Paragraph [75] of Mr McKaysmith's statement is not a

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[28] Appeal Book 508, [75]

[29] Appeal Book 48, PN47-PN48

[30] Appeal Book 49, PN52-PN61

[31] Appeal Book 51, PN74

[32] Appeal Book 49-51, PN62-PN73

submission, it was evidence of the fact the appellant had not begun any disciplinary investigation. It is consistent with the statements in the documents to which the Deputy President referred and could on no measure be described as untested. It was uncontroverted.

[38] For these reasons the appellant has made good grounds 1 to 4 of its notice of appeal. Consequently, the Deputy President's decision reflected in the answers given to the questions is inconsistent with the Agreement and so is contrary to the prohibition in s 739(5) of the FW Act. For that reason, permission to appeal will be granted and the appeal will be upheld on these grounds. On a proper construction of the Agreement and taking into account the written material and the uncontroverted evidence of Mr McKaysmith, the Deputy President ought to have concluded that clause 33 of the Agreement did not apply to any of the respondents' circumstances.

[39] Grounds 5 through 7 concern the Deputy President's discussion at [36]-[48] of his decision, which the appellant contends was beyond the scope of the dispute as expressed in the agreed questions. We agree that the subject matter canvassed by the Deputy President in those paragraphs appears to be beyond the scope of the subject matter for arbitration. However, nothing turns on the discussion since the Deputy President made no final finding about those matters and he answered the questions posed, by reference to his (erroneous) construction of clause 33 of the Agreement. For these reasons permission to appeal on these grounds will be refused.

[40] On a rehearing for the reasons stated earlier we answer the agreed questions for arbitration as follows:

(a) Does cl 33 of the Agreement apply (or has it applied) to any or all of the [respondents] at any time from 6 December 2021 onwards? **Answer**: No.

(b) If the answer to the above question is 'yes', does cl 33. of the Agreement require the [appellant] to make payments to any or all of the [respondents]? **Answer**: Unnecessary to answer in light of the answer to question (a).

(c) If the answer to the above question [in (a)] is 'yes', how are those payments to be calculated and from what date? **Answer**: Unnecessary to answer in light of the answer to question (a).

Order

[41] We order:

1. Permission to appeal on grounds 1 to 4 of the notice of appeal dated 30 November 2022 is granted and is otherwise refused.

2. The appeal on grounds 1 to 4 of the notice of appeal dated 30 November 2022 is upheld.

3. The decision in *Taylor and Ors v Sydney Trains* [2022] FWC 2758 is quashed.

4. On a rehearing the answers to the agreed questions are:

(a) Does cl 33 of the Agreement apply (or has it applied) to any or all of the [respondents] at any time from 6 December 2021 onwards? **Answer**: No.

(b) If the answer to the above question is ‘yes’, does cl 33. of the Agreement require the [appellant] to make payments to any or all of the [respondents]? **Answer**: Unnecessary to answer in light of the answer to question (a).

(c) If the answer to the above question [in (a)] is ‘yes’, how are those payments to be calculated and from what date? **Answer**: Unnecessary to answer in light of the answer to question (a).

<u>DEPUTY PRESIDENT</u>

Appearances:

Mr C. O’Grady KC with *Mr M. Watts* of counsel for the appellant
Mr P. Fam as solicitor for respondents *Mr J. Galea* and *N. Cambridge*
Mr S. Taylor for himself as respondent
Mrs K. Tripp for herself as respondent
Mr U. Aiono for himself as respondent

Hearing details:

2023
Remote via Teams
20 February

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