

Industrial Relations Commission Decision 514/1992 [1992] AIRC 465 (29 May 1992)

Industrial Relations Commission Decision 514/1992;

T140 Dec 514/92 M Print K3140

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

[Industrial Relations Act 1988](#)
[s.113](#) application for variation

Transport Workers' Union of Australia
(C No. 33389

of 1991)

TRANSPORT WORKERS AWARD, 1983(1)
(ODN C No. 01520 of 1982)

Transport
workers

Private transport industry

COMMISSIONER MAHER
MELBOURNE, 29 MAY 1992

Labour - costs - superannuation - choice of fund - TWU fund was well established, is an approved fund, is jointly controlled - union fund to be designated fund - exemptions available for employees contributing to existing fund.

DECISION

This matter concerns an application to vary the Transport Workers Award, 1983 (Award) to include a new clause dealing with superannuation.

The application (as amended) by the Transport Workers' Union of Australia

(Union) sought a provision in these terms:

"(a) Every employer shall make contributions into the nominated

Superannuation Fund on behalf of each eligible employee as follows:-

(i) Contribution shall be at the rate prescribed from time to time by the Transport Workers (Superannuation) Consolidated

Award 1987.

(ii) The nominated Fund for the purpose of this clause shall be the T.W.U. Superannuation Fund.

(iii) Notwithstanding anything elsewhere contained in this clause, an employee who is able to demonstrate to the employer his/her bona fide membership of the religious fellowship known as Exclusive Brethren, shall have the contributions defined in paragraphs (i) and (ii) herein paid into a Fund acceptable to the employee and being a scheme approved by the Insurance and Superannuation Commission.

(b) Exemptions may be sought on the following basis:-

(i) An employer:- who at the date of effect of this variation is providing Occupational Superannuation at not less than the rate specified from time to time by the T.W.U. Superannuation Fund and who is making such contributions into an 'approved Superannuation

(1)Print F2076 [T140]

Fund' other than the 'Nominated Fund' in subclause (a)(ii) above, may seek the authorisation of the Australian Industrial Relations Commission to continue to utilise such Fund in lieu of the 'Nominated Fund'.

(ii) All applications for exemption shall be submitted to the Australian Industrial Relations Commission pursuant to [Section 99](#) of the [Industrial Relations Act 1988](#).

(c) (i) 'Approved Fund' shall mean a Superannuation Fund approved in accordance with the Commonwealth Operational Standards for Occupational Superannuation Funds.

(ii) 'Eligible Employee' shall mean every employee engaged under the terms of the Award."

The application also sought to add a new Schedule B to the Award which

sets out the form of the employees application for participating membership of the Fund.

The application seeks to provide that employers respondent to the Award contribute to the nominated Fund - that is, the TWU Superannuation Fund.
The proposed new clause enables members of the religious fellowship known as the Exclusive Brethren to have payments for superannuation paid into an approved fund of their choice and employers, who at the date of the proposed variation are making payments into approved funds other than the nominated Fund, may continue to do so following application to the Commission.

The object of the Union's application therefore is to require all employers respondent to the Transport Workers Award, 1983 to contribute to the Fund with the exception of the two categories specifically mentioned above.

The general attitudes of employer interests appearing in this matter were identified by the Australian Road Transport Industrial Organization (ARTIO) which indicated it was not prepared to consent to an obligation being imposed on employers to contribute for all employees who refuse to complete an application to join the Fund.

Brambles Australia consented to the TWU application ". . . and notes it is a positive step in re-enforcing occupational superannuation entitlements of employees engaged under the Transport Workers 1983 Award by establishing an explicit link to the separate Superannuation Award".

ARTIO also suggested an alternative provision which would have this effect:

. Require all employers to contribute in respect of each "eligible employee" (i.e. every employed engaged under the Award) to the Fund (i.e. the TWU Fund).

. Exemptions would apply to any employers who contribute to an approved

fund other than the TWU Fund in respect of employees who are not members of the TWU Fund.

The competing positions therefore come down to either the TWU claim for all employers to contribute to the TWU Fund with the only exceptions limited to;

- (a) specific religious grounds and
- (b) for those already paying into alternate approved funds where the Commission authorises continued utilisation of such funds or the ARTIO approach with all employers paying to the TWU Fund but with exemptions available to employers who contribute to alternate approved funds.

When this matter came before the Commission on 19 December 1991, there was a measure of agreement and a general expectation that given an opportunity for further discussion a number of the employer concerns could be dealt with satisfactorily. Accordingly, the parties were advised that I expected that the matter might be concluded at the next day of sitting. Mr Gaynor, for the National Transport Federation, then set forward a list of concerns including these:

- . Whether the application was within ambit.
- . The possible confusion that might arise by including the proposed claim
 - in the Transport Workers Award, 1983 rather than amending the Superannuation Award;
- . Whether it was appropriate to have to seek exemptions by making application under [Section 99](#);
- . The proposed definition of "eligible employee" meant that every employee under the Award would be included whereas the existing requirement involved employees who made application to become a member of the Fund;
 - and
- . The proposed exemption provisions were exercisable only by those employers who at the time the Award was varied were making appropriate contributions to other funds.

On the further hearing date on 5 March 1992 Mr McGrath, for the TWU, indicated that an agreed position had not been reached and he proceeded with submissions in support of the application. In doing so he described the Transport Workers Superannuation Fund as the predominant industry superannuation fund, jointly controlled by employee and employer representatives and with a fund membership of 85,000 transport workers. He then traced the decisions of the Commission over the last six years dealing with superannuation in the transport industry to demonstrate that there had been a constant and widening influence of the Fund in the industry. He pointed out that recently the Tasmanian Industrial Relations Commission had endorsed precisely the same approach now sought by the TWU application.

The Union also addressed various areas of concern previously raised by the National Transport Federation; demonstrating that ambit did exist; arguing that there need be no confusion as between the Superannuation Award and the General Award - each would stand on its own; and that the method of seeking exemptions through [s.99](#) notifications was in the Union's view proper and appropriate.

I am satisfied that the concern about ambit was satisfactorily settled and of themselves the concerns about possible confusion and the manner of seeking exemptions are not of sufficient consequence to warrant rejection of the Union's approach.

The major argument of the employer interests opposing the application was carried by ARTIO. Mr Kimberley supported the ARTIO proposal outlined earlier which had the effect of exempting all employers who paid appropriate amounts to a recognised fund. He indicated that employers were concerned about the proposed legislation associated with the Superannuation Guarantee Levy and its likely impact on the industry. While the employers generally were not opposed to the wide application of superannuation, they were not prepared to consent to an obligation being imposed on employers to contribute in respect of an employee refusing to join the Fund until there was greater knowledge of the

intended legislative changes.

The Union supported its application on the basis that the Fund was a properly established fund which had assumed pre-eminence in the industry; that the proposed variation would make it clear beyond doubt that employees' entitlements to superannuation would be met; that it would clarify employer obligations and reduce disputes and that those employers who had, over the years, taken the course of contributing to other funds could have the opportunity to seek to continue to do so; and further that those with objections based on certain religious grounds could be exempted.

In my consideration of the competing positions put by the parties I have examined the history of superannuation in this industry and I have taken into account, in respect to the choice of funds, the view contained in the March 1987 National Wage Case decision:(2)

"Without wishing to prejudge the issue there are a number of comments we consider desirable to make. The first is that any fund which complies with the Commonwealth's Operational Standards for Occupational Superannuation Funds and which has received the appropriate preliminary listing for taxation purposes from the Commissioner for Occupational Superannuation, could be determined as an appropriate fund by the Commission. The second is that it seems reasonable that no employer should be forced to make contributions for its employees to a multiplicity of superannuation funds. The third is that, given the mobility of labour, multi-employer funds controlled jointly by employers and unions may be preferable to individual funds and more likely to fulfil the basic purpose of superannuation for the majority of employees in particular situations. A number of such funds have been developed."

That decision also indicated that the Commission would arbitrate as to the appropriate fund in particular cases.

While all of the authorities cited by the Union have been noted there are some of particular relevance.

Firstly in a decision
by Commissioner Donaldson dated 7 November 1988(3)
in which he granted a claim by the Union in respect of superannuation
for
employees
in the freight forwarding section of the transport industry, he
noted:

"The Australian Road Transport Industrial Organisation
(ARTIO) submitted
that the TWU application was consistent with the Commission's
principles
and that the TWU Superannuation
Fund is appropriate for this industry;
accordingly, ARTIO did not object to the application."

He further stated:

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(2)Print G6800

(3)Print H5579

"The Union's lengthy submissions went to the detail of the Trust
Deed etc
of its Fund, the number of contributing employers,
and the number of
employee members. These Union submissions are not new to the
Commission
as constituted; the fact
is that the TWU Union Fund has been examined
critically by a Full Bench of this Commission and by individual
members

subsequently and have been endorsed as acceptable in terms of its
Awards."

Further in his decision Commissioner Donaldson
indicated:

"Employer submissions sought recognition of other funds as a
matter of
principle and there were indications,
unsubstantiated by evidence, that
some employer respondents may already have made alternative
arrangements.

Having regard to the fact that the Union's claim was initiated in
1987, and the incidence of the superannuation debate in
the community
since that time, the Commission considers that any employer
respondent
concerned to cater for the interests
of his employees in this matter has
had sufficient time to make the necessary alternative
arrangements.

Furthermore,
the Union has made out its case that the employees concerned

are accommodated appropriately in the Transport Workers Superannuation

Fund and recognition of this fund would meet all tests canvassed in the comments of the Full Bench quoted above."

Again in a decision dated 20 November 1990(4) Commissioner Lear provided that superannuation payments arising under the Transport Workers (Passenger Vehicles) Award should be made to the Fund. He indicated:

"For some years, the TWU has consistently sought to introduce superannuation benefits through the Federal award in an orderly way to create uniform national standards throughout the transport industry and I accept the TWU proposals in this matter to provide for superannuation

contributions to be made to the TWU Superannuation Fund in the Passenger Vehicles award."

More recently the Tasmanian Industrial Relations Commission by a decision of Commissioner P A Imlach on 23 September 1991 introduced to the Transport

Workers General Award an occupational superannuation provision which was supported by the Tasmanian Confederation of Industry in as much as the requirement for employers to pay to the TWU Fund and in respect of exemptions it provides:

"(I) Exemptions may be granted to employers already contributing to an approved fund for all of their employees covered by this Award prior to 1 December 1991 and provided that the contribution rate is at least 3% of ordinary time earnings.

(II)
An employer who at 1 October 1991 is providing occupational superannuation at the rate specified in (I) into an 'approved fund' other than the nominated fund may seek the endorsement of the Tasmanian Industrial Commission to continue to utilise such fund in lieu of the nominated fund."

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(4)Print J5599

From my consideration of the range of Commission decisions dealing with superannuation in this industry, I have formed the view that the TWU Fund is well established; it is an approved fund; it is jointly controlled; and it has been endorsed by the Commission as acceptable in terms of its awards. There has also been endorsement by the Commission of the Union's constant attempts to introduce superannuation benefits through awards to create uniform national standards throughout the transport industry. In the light of the history and these developments I have formed the view that I should accept the TWU proposals to provide for the TWU Superannuation Fund to be the designated fund for the Transport Workers Award, 1983. This approach is not novel and as indicated it was adopted in respect of the Transport Workers (Passenger Vehicles) Award and in respect of the Transport Workers Award, 1983 there has already been considerable opportunity for employers to involve themselves in alternate arrangements (which they may now seek to continue).

I have also considered the problem raised by employer interests associated with the current terms of the Trust Deed whereby an employee is required to become a member of the Fund. That is an employer is required to make payments to the Fund in respect of an employee who has become a member of the Fund. It was argued that where an employee chooses not to become a member of the Fund the employer would be inhibited in carrying out award obligations.

Reference was made during this matter to earlier proceedings involving attempts by the Union to ensure that all employers were required to take specific steps to make their employees aware of superannuation entitlements so that employees did in fact apply to join the Fund and this was the subject of a decision by me dated 1 October 1991.(5) The question of employers' difficulties in complying with award obligations in respect of superannuation was also the subject of a further decision by me on 16 October 1991.(6) In this matter the Company sought the certification of an agreement under [s.115](#) of the Act as a

method of accommodating its employees who had all declined to join the TWU Fund. Clearly then there are evident difficulties associated with employers endeavouring to comply with award obligations.

This problem of a gap in the process associated with an employer carrying out obligations to make superannuation contributions was raised again in recent proceedings involving the Union and Tasmanian Red Line Coaches (C No. 30215 of 1992).(7) In that matter the Company found itself in a position where it was said that it's employees did not wish to become members of the Transport Workers Superannuation Fund.

The Company, a respondent to the Transport Workers (Passenger Vehicles) Award(8) was required by the award to make contributions to the Fund in respect of each "employee" ("employee being defined as having the same meaning as contained in the Award). It was argued that while the employees chose not to make application to join the Fund the contribution process could not be completed.

(5)Print J9787
(7)Print K2150

(6)Print K0119
(8)Print F7434 [T091]

In my decision in that matter dated 23 March 1992(9) I took the view that the Company's obligation under the award was to make contributions to the Fund and if there existed within the Fund's operational arrangements any technical impediments to the receipt of contributions in respect of Company employees then it was for the Trustees to consider ways of overcoming such difficulties.

In the current matter the Commission was advised that discussion's have been taking place at the level of the Board of Trustees concerning changes to the way in which employees become members of the Fund. As with the decision of Commissioner Lear in respect of the Transport Workers (Passenger Vehicles) Award where in he required contributions to be paid to the Fund the same now applies to the Transport Workers Award, 1983 and the Fund should be made to operate in such a way as to accommodate the receipt of such

contributions.

The concerns raised by ARTIO relating to proposed legislation dealing with the intended Superannuation Guarantee Levy have been noted but I have not been persuaded that this should prevent me dealing with the application.

Overall I have concluded that I should grant the Union's application to vary the award. I consider that to do so will clear away uncertainty concerning employer obligations and assist to overcome a number of actual and potential disputes. The effect of this decision will therefore be:

. That all employers covered by the Transport Workers Award, 1983 will be required to make contributions in respect of their employees to the Fund;

. The rates of contribution will be set, as they are now, by the Transport

Workers (Superannuation) Consolidated Award 1987.

. That exemptions may be sought by employers who, at the time of this

decision, were paying into an alternative approved fund in an appropriate manner; and

. Exemptions will be available in respect of employers and employees who are bona fide members of the religious fellowship known as the Exclusive

Brethren where superannuation payments are made to an alternative approved scheme.

An order giving effect to this decision will be issued shortly and will have effect on and from the beginning of the first pay period commencing on or after today's date.

The Union is to provide a draft order within seven days.

(9)Print K2150
Appearances:

K. McGrath with G. Smith for the Transport Workers' Union of Australia.

P. Rochfort for Air
Express and other companies.

P. Gaynor for the National Transport Federation.

D. Hornsey for Bowden and Sons of Bundaberg.

K. Wilson for Brambles Australia.

R. Ironmonger for respondent members of the Victorian Employers'
Chamber of
Commerce and
Industry.

N. Kimberley for the Australian Road Transport Industrial
Organization.

Dates and place of hearing:

1991.
Melbourne:

December 19.

1992.
Melbourne:
March 5.

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