



Industrial Relations Commission New South Wales

Case Name: **Crown Employees (Fire and Rescue NSW Firefighting Staff Death and Disability) Award 2017**

Medium Neutral Citation: [2018] NSWIRComm 1040

Hearing Date(s): 5 and 29 February, 4, 16, 17, 22 and 30 March, 6 April, 6 June 2016, 16, 18 and 31 May, 7 July, 4 and 17 August, 11 and 27 September, 3 and 4 October, 24 and 27 November, 20 December 2017, 19 January, 15 and 29 March, 13, 17 and 27 April, 3, 10, 22 and 31 May 2018.

Date of Statement 31 May 2018

Before: Chief Commissioner Kite SC, Commissioner Newall and Commissioner Murphy

Decision: Award made

Catchwords: INDUSTRIAL DISPUTE – AWARD APPLICATION – Health and Fitness Program – Nominated Medical Practitioner – Independent Occupational Physician – Health Check Pack – award made

Cases Cited: Notification under section 130 by the Minister for Industrial Relations of a Dispute between BHP Billiton and the Australian Workers' Union NSW and others re proposed strike action [2002] NSWIRComm 378

Category: Principal judgment

Parties: Fire Brigade Employees' Union of New South Wales (FBEU) (Notifier/Respondent)
Fire and Rescue NSW (FRNSW) (Applicant/Respondent)

Representation: Counsel:
Mr J Nolan (FBEU)
Mr R Reitano (FRNSW)

STATEMENT

- 1 On 20 December 2017, the Full Bench made an award entitled Crown Employees (Fire and Rescue NSW Firefighting Staff Death and Disability) Award 2017. This Statement briefly outlines the matters which were the subject of the proceedings that led to the making of the award.
- 2 On 3 February 2016, the Fire Brigade Employees' Union of New South Wales ("FBEU") notified the Industrial Registrar of an industrial dispute. The matter was initially allocated to Tabbaa C and subsequently to Murphy C. A number of conciliation conferences were held throughout 2016 and 2017.
- 3 On 27 April 2017, Fire and Rescue NSW ("FRNSW") made an application for a new award entitled Crown Employees (Fire and Rescue NSW Firefighting Staff Death and Disability) Award 2017. This matter was allocated to Murphy C and was dealt with concurrently with the dispute matter. On 31 May 2017, the FBEU filed its own application for a new award.
- 4 The main issue which divided the parties was the manner in which the proposed Firefighters' Health and Fitness Program ("the Program") would be implemented. Despite significant progress having been made in conciliation, it emerged that a number of seemingly intractable issues prevented ultimate agreement being reached by the parties.
- 5 The Program envisaged that firefighters would undergo regular health checks. The initial health check was to be conducted by the firefighter's Nominated Medical Practitioner ("NMP") with a subsequent review to be conducted by an Independent Occupational Physician ("IOP") nominated by FRNSW. The parties were in dispute about the amount of information which would be provided by the IOP to FRNSW about the health status of individual firefighters following the regular health checks.
- 6 During a conciliation conference before Murphy C on 11 September 2017, the parties agreed that the outstanding issues should be resolved by way of a binding conciliation process in which the parties undertook to accept the

recommendation of the Commissioner. This process has become known as the “Bluescope Model” (*Re Notification under section 130 by the Minister for Industrial Relations of a Dispute between BHP Billiton and the Australian Workers’ Union NSW and others re proposed strike action* [2002] NSWIRComm 378).

- 7 A timetable was set for the filing and serving of evidence and submissions. In its written submissions dated 25 September 2017, concern was expressed by FRNSW “*that not being apprised of the medical ‘condition’ of a firefighter (who has requirements or restrictions, or is permanently unfit) by the IOP may result in Fire & Rescue NSW failing to meet the statutory requirements of the ‘Work, Health and Safety Act’ and also that the identification of appropriate safe duties or work settings would not be able to occur... it appears a matter of law arises in that a possible outcome under the auspices of one statute (the Industrial Relations Act) might be inconsistent with the requirements of another (the Work Health and Safety Act)*”.
- 8 In response to this submission, the FBEU forwarded correspondence to the Industrial Registrar seeking that the matters be relisted. On 3 October 2017 Murphy C convened a further compulsory conference and made directions for the filing and serving of submissions concerning the “*legal issue*” that had been raised and indicated that he would consult the Chief Commissioner with a view to referring that issue to a Full Bench of the Commission.
- 9 The parties formulated questions concerning the jurisdiction of the Commission to make an award provision which potentially conflicted with the obligations of an employer under the *Work Health and Safety Act 2011*. Murphy C referred the questions to the Full Bench.
- 10 The Full Bench convened on 27 November 2017. During those proceedings the Chief Commissioner, having observed the degree of success achieved before Commissioner Murphy, raised with the parties the prospect of having the issues determined by the Full Bench by way of the Bluescope process. The parties agreed to that proposal and that occurred on 20 December 2017.

11 As stated above, the fundamental issue that divided the parties revolved around the amount of information about an individual firefighter's health status that would be provided to FRNSW following the regular health checks.

12 The Crown Employees (Fire and Rescue NSW Firefighting Staff Death and Disability) Award 2015 ("the 2015 Award") contained Annexure A, "Principles and Procedures of the Firefighters' Health and Fitness Program". However, no Health and Fitness Program was ever commenced under the terms of the 2015 Award. Annexure A to the 2015 Award contained the following provision:

The firefighter's nominated medical practitioner will forward their report on the firefighter's health and fitness check, together with the results, to both the firefighter and the independent occupational physician nominated by FRNSW. The independent occupational physician will in turn review the firefighter's health and fitness check results against the firefighters' health and fitness standard and the nominated medical practitioner's report and advise FRNSW that the firefighter is:

fit to perform the firefighter's ordinary duties without any requirements or restrictions; or

fit to perform the firefighter's ordinary duties with specified requirements or restrictions; or

temporarily unfit to perform the firefighter's ordinary duties but fit to perform alternative duties, either with or without specified requirements or restrictions; or

temporarily unfit to perform any FRNSW duties; or

permanently unfit to perform the firefighter's ordinary duties.

The independent occupational physician will provide no other information or advice to FRNSW concerning the firefighter's health and fitness without the firefighter's consent. If the firefighter disagrees with the independent occupational physician's advice to FRNSW, then it will be open to the firefighter to seek a determination of their fitness for duty under Clause 8.

13 The position of FRNSW was that where a firefighter is notified as unfit by the IOP, either temporarily or permanently, the IOP is to also supply FRNSW with all related medical information.

14 The position adopted by the FBEU was that the firefighter's nominated medical practitioner would review and discuss the firefighter's health and fitness check, together with the results, with the firefighter and advise FRNSW

that the firefighter had attended and completed the required health check. No other information would be provided to FRNSW.

- 15 The Full Bench considered the evidence of Dr Reem Mina, an occupational physician employed by FRNSW, as to the need for management of FRNSW to have as much information as possible about an individual firefighter's fitness for duty in order to properly manage any risks to that firefighter, his or her colleagues and the public generally.
- 16 In support of its position, the FBEU relied upon the "Ethical Guidelines for Occupational and Environmental Physicians" prepared by the Royal Australasian College of Physicians which emphasised the need to protect the confidentiality of information about the health status of employees.
- 17 The Full Bench determined to resolve these competing considerations by the insertion of the underlined words in the relevant paragraph of the provision of Annexure A cited at paragraph 12 above:

The independent occupational physician will provide no other information or advice to FRNSW concerning the firefighter's health and fitness without the firefighter's consent apart from such information regarding the specified requirements or restrictions as, in the professional opinion of the independent occupational physician, is necessary for the safe management of the firefighter. If the firefighter disagrees with the independent occupational physician's advice to FRNSW, then it will be open to the firefighter to seek a determination of their fitness for duty under Clause 8.

- 18 Following this determination by the Full Bench, all other outstanding issues as to the terms of the proposed award were resolved with the consent of the parties and the award was made in terms of Exhibit 1 in the proceedings.
- 19 There remained some associated issues to be resolved concerning the content of the health check pack and health check report. These matters were referred by the Full Bench to Murphy C to exercise the powers of the Full Bench to resolve all outstanding issues. To this end, further conferences were convened before Murphy C on 13, 17 and 27 April, 3, 10, 22 and 31 May 2018.

20 Ultimately, on the final day of the proceedings, 31 May 2018, all outstanding issues were resolved. The final version of the health check pack and health check report became Exhibit 2 in the proceedings and the award made by the Full Bench on 20 December 2017 (Exhibit 1) was varied by consent of the parties in terms of Exhibit 3.
