[2021] FWCFB 844

FairWork Commission

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

The Peninsula School t/a Peninsula Grammar School

v

Independent Education Union of Australia
(C2020/7361)

VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
COMMISSIONER LEE

SYDNEY, 19 FEBRUARY 2021

Appeal against decision [2020] FWC 5180 of Commissioner Bissett at Melbourne on 29 September 2020 in matter number C2020/6311.

Introduction

[1] The Peninsula School, which operates a private school named "Peninsula Grammar School" in Victoria (School), has lodged an appeal pursuant to s 604 of the *Fair Work Act 2009* (FW Act), for which permission is required, against a decision of Commissioner Bissett issued on 29 September 2020[1] (decision). The decision concerned an application made by the Independent Education Union of Australia (IEU) pursuant to s 526 of the FW Act to deal with a dispute concerning the stand down by the School of three of its employees. The stand downs occurred in the context of the closure of the physical operation of the School and a move to remote learning from 5 August 2020 after the imposition of Stage 4 restrictions by the Victorian Government in response to a significant outbreak of COVID-19 infections. The IEU contended on the employees' behalf that the stand downs were not authorised under s 524 of the FW Act. In her decision, the Commissioner concluded that the three employees had not been stood down in accordance with s 524 and that fairness as between the parties did not support the maintenance of the stand downs. The Commissioner issued an order in resolution of the dispute[2] as follows:

> "The Peninsula School, as soon as is practicable but within 24 hours of the making of the order, is to notify each affected employee that:

[1] [2020] FWC 5180

[2] PR723186

- the stand down notified to the employee on 14 August 2020, extended on 11 September 2020 and further varied on 28 September 2020 is withdrawn;

- the employee is permitted to return to work as directed by The Peninsular School on their next scheduled working day.

This order will come into effect at 9.00am on 30 September 2020."

[2] In its appeal, the School contends that the decision was in error in a number of respects.

Factual background

[3] The principal facts upon which the matter before the Commissioner proceeded were largely not in dispute, and may be summarised as follows. On 2 August 2020, the Premier of Victoria announced the introduction of Stage 4 restrictions in Melbourne in response to a surge in COVID-19 infections. These restrictions, subject to limited exceptions, required schools in Melbourne to cease teaching students on-site after 3 August 2020 and to commence remote learning from 5 August 2020.

[4] On 4 August 2020, the School advised its non-teaching staff that they were required to work from home for the foreseeable future and, where work could not be performed at home, they would be placed on paid leave for the short term. Staff were also advised that it would be necessary for the School to consider standing down some employees as a result of the closure of most of the School's operations in accordance with the Victorian Government's directions, and that a consultation process concerning this would be engaged in over the next week.

[5] Two of the three employees the subject of the IEU's application were part-time Library Technicians who normally work in the School's Junior Years library (library) performing duties which include assisting students and staff to locate suitable library resources, issuing and returning library materials, and maintaining the general environment in the library including shelving books. Following the move to remote learning, the library was closed and the physical borrowing of books ceased. On 14 August 2020, they were advised that the School had been unable to identify any useful work for them to perform and, accordingly, they would be stood down from 17 August 2020 until 13 September 2020.

[6] The third employee was engaged as a classroom assistant to assist classroom teachers in the classrooms in the Junior School. The School decided not to involve classroom assistants in the provision of remote learning. The third employee was advised on 14 August 2020 that the School could not identify any useful work for her to do as a result of the closure of the school campus, the move to remote learning, and the suspension of the necessity for classroom assistance. She was likewise stood down effective from 17 August 2020 until 13 September 2020.

[7] All three employees were advised on 11 September 2020 that their stand downs would be extended until 25 October 2020.

[8] The IEU lodged its s 526 application on 17 August 2020. In its application, it contended that:

- there was no stoppage of work within the meaning of s 524(1)(c) of the FW Act, the School continued to conduct its business in a modified form and, while it might suffer a reduction in revenue from parents' fees, a downturn in trade was not a stoppage of work in the relevant sense;

- the employees could be usefully employed performing various duties notwithstanding the move to remote learning; and

- if there was a stoppage of work, the School could reasonably be held responsible because it was its decision not to explore or offer alternative work opportunities for affected employees, and both Federal and State Governments had required schools to remain open and to continue to deliver both remote and attendance learning.

Statutory framework

[9] Part 3-5 of the FW Act contains a scheme of provisions concerning the standing down of employees. Within that scheme, section 524 provides:

> **524 Employer may stand down employees in certain circumstances**
>
> (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
>
> > (a) industrial action (other than industrial action organised or engaged in by the employer);
> >
> > (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
> >
> > (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.
>
> (2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:
>
> > (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and
> >
> > (b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.
>
> Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

> Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).
>
> (3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

[10] Section 526 relevantly provides that, on application, the Commission may deal with a dispute about the operation of Pt 3-5, including by arbitration, and that in doing so it must take into account fairness between the parties.

The decision

[11] In her decision, the Commissioner characterised the dispute before her as concerning each aspect of s 524(1) of the FW Act.[3] The Commissioner also noted, before considering the substance of the dispute, that she had been advised that, following the lifting of most of the Stage 4 restrictions by the Victorian Government, that the three employees had been advised by the School that their stand down would cease on 9 October 2020 and they would return to work on 12 October 2020.[4]

[12] The Commissioner referred to the decision of the Commission (Anderson DP) in *Stelzer v Ideal Acrylics*[5] as authority for the proposition that there were two jurisdictional facts that had to be satisfied for a stand down to be consistent with s 524, namely that an employee could not be usefully employed and that this was because of a stoppage of work for which the employer could not reasonably be held responsible.[6] The Commissioner then said:

> "[32] The first matter to be determined therefore is if there has been a stoppage of work and, if there has, if this is for any cause beyond the reasonable control of the employer. This much is clear from the wording of s.524(1) of the FW Act. A consideration of whether an employee can be usefully employed can only be considered if the circumstances in ss.524(1) (a), (b) or (c) exist. That is, the first consideration is not if there is any useful work for the employee."

[13] The Commissioner later reiterated this approach as follows:

> "[37] In summary, the decision-making process in dealing with a dispute under s.526 of the FW Act is clear once the provisions of s.524 are properly understood. The first question the Commission must ask itself (in dealing with the current dispute) is if there was a stoppage of work. If the answer is no, no further enquiry is necessary. Without a stoppage of work no stand down under s.524 is possible. If the answer is yes, the next question is if the cause of the stoppage was for a reason for which the employer could not reasonably be held responsible. Again, if the answer is no (that is,

[3] [2020] FWC 5180 at [23]

[4] Ibid at [26]

[5] [2020] FWC 4129, 298 IR 333

[6] [2020] FWC 5180 at [29]

> the employer could be reasonably held responsible for the stoppage) then the inquiry ends. If the answer is yes, the third inquiry is whether the employee could be usefully employed because of that stoppage. Of course, in dealing with the dispute the provisions of s.526 of the FW Act, including fairness as expressed in s.526(4) must be taken into account."

[14] In accordance with this approach, the Commissioner then considered whether there had been a stoppage of work. In this respect, the Commissioner rejected a contention advanced by the School that the degree of disruption of work required for a circumstance to come within a stoppage of work in s 524(1)(c) did not need to be greater than the disruption encompassed by a strike (s 524(1)(a)) or a breakdown in machinery (s 524(1)(b)), and said that a disruption which did not constitute an actual stoppage of work was not sufficient.[7]

[15] The Commissioner also endorsed and adopted the approach taken in *Stelzer* that a stoppage of work did not require every aspect of the business to close,[8] and considered it necessary at the outset to properly define the "work" that is carried on in the business such that the stoppage is considered in a sound context.[9] The Commissioner did not accept in this connection that the business of the School was to provide onsite education, since this would imply that the School was no longer meeting its core responsibilities as a school because the students are not onsite.[10] The Commissioner found that during the period of the remote learning, the business activity or work of the School continued, and therefore she was not satisfied that the work of the School had stopped as contemplated by s 524(1)(c).[11]

[16] The Commissioner then considered what she described as the "residual question" of whether a business activity which was a defined and identifiable part of the activity of the school had stopped such that it might be considered to constitute a stoppage of work.[12] In respect of the third employee who was a classroom assistant, the Commissioner found that the business activity in which she was engaged, namely classroom teaching, had not ceased but was being conducted online and that it was the decision of the School to remove the classroom assistant from online learning as a means of managing workload.[13] The Commissioner also rejected the proposition that the role of a classroom assistant was attached to the physical space they worked in, and any specification of the classroom in their key responsibilities was not a limitation on those responsibilities.[14]

[17] In respect of the library technicians, the Commissioner accepted that some of the work of the library had ceased, but not all of it, and that the teacher/librarian had not been stood down and some teachers and students were able to access the online library.[15] The Commissioner then said:

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[7] Ibid at [45]-[46]

[8] Ibid at [47]

[9] Ibid at [48]

[10] Ibid at [52]

[11] Ibid at [53]-[54]

[12] Ibid at [55]

[13] Ibid at [56]-[62]

[14] Ibid at [63]

[15] Ibid at [65]-[66]

> "[67] Whilst it is abundantly clear that there has been a reduction in demand on the library and that the physical space is not being used, on the evidence before me I cannot conclude that the business activity of the library has stopped. Again to narrow the focus of the activity down to the specific duties of one position it seems to me is to so broadly define the 'activity' of the business to the activity of the individual employee such that any stand down to be justified by consideration as a 'stoppage of work'."

[18] The Commissioner went on to find that the fact that the School did not wish any updating or maintenance of the library catalogue or book labelling to be done during the relevant period of time did not support a finding that the work of the library had ceased.[16] The Commissioner concluded:

> "[72] PGS encourages me in this case to first determine if there is useful work on which the stood down employees could be usefully employed. It submits that the "correct approach" is to have regard to the nature of the work performed by the employee which, prior to the event (COVID-19 and a requirement for students to learn remotely), was scheduled to be performed but has stopped. As I have set out above I do not consider that to be the first enquiry at all. The failure to find useful work must be caused by the stoppage of work. Whether there was a stoppage of work must be determined in the first instance.
>
> [73] There is, in this case, no stoppage of work of the requisite kind. The business of the school in educating students has not stopped although some aspects of what is delivered onsite might not be occurring or is occurring in a way different to that if the students and staff were physically present at the school. On consideration of distinct parts of the business, teaching continues, the library continues (albeit in a reduced and online fashion). The first precondition for enabling a stand down is not met.
>
> [74] I therefore reject the proposition of PGS that the work of PGS has stopped because of students learning remotely caused by COVID-19.
>
> [75] Having found that the work has not stopped it is not necessary to consider if the stoppage is for a cause for which the school cannot be held responsible. It is therefore not necessary to consider if the employer cannot usefully employ the employees concerned because of that circumstance.
>
> [76] I am therefore satisfied that the necessary pre-requisites for a stand down have not been met. The stand down of the employees was therefore not in accordance with the FW Act."

[19] The Commissioner then dealt with the issue of fairness pursuant to s 526(4), and rejected the submission made by the School that the financial impact of the required move to remote learning meant that, as a matter of fairness, the stand downs should be allowed to

[16] Ibid at [68]-[69]

remain in place notwithstanding that they were not effected in accordance with s 524(1).[17] The Commissioner then proceeded to award the remedy which we have earlier set out.[18]

Appeal grounds and submissions

[20] The School's notice of appeal contains five grounds of appeal but, as explained in the School's appeal submissions, these may be reduced to two propositions:

(1) A "*stoppage of work*" in s 524(1)(c) refers to all circumstances, other than a strike or breakdown in machinery, where the usual work or duties performed by employees cannot be performed. The Commissioner erred by focusing unduly upon the work of the employer, being the business or part of the business, as opposed to the work of the employees in question.

(2) The fact that the employer might potentially have allocated duties or work to employees other than their ordinary or usual duties has no bearing on the issue of "*stoppage of work*" but is rather a matter going to whether an employee can be usefully employed.

[21] Having regard to these propositions, the School contended that the Commissioner erred in the following respects:

- The Commissioner erred in considering whether there was a stoppage of work for the purpose of s 524(1)(c) in isolation of whether the employee could usefully be employed. The Commissioner should have considered whether the employees could be usefully employed and, if not, whether that was because of a stoppage of work for a cause for which the employer could not reasonably be held responsible.

- The Commissioner erred by considering the issue of stoppage of work by reference to whether some work was ongoing, without paying regard to the differences between the work that was ongoing during the stand down period and the work previously performed. The uncontested evidence was that the work of maintaining the physical library, attending the physical classrooms and assisting, caring for and supervising students on site had stopped, and the Commissioner erred in finding that this did not constitute a stoppage of work.

- The Commissioner erred in finding that, because the School made decisions to manage teacher workload in moving to remote learning and because not all of the duties of library technicians were required to cease, any stoppage of work was not for a cause for which the School could not reasonably be held responsible.

- The Commissioner erred by failing to give any or sufficient weight to the structure of s 524(1), including the precondition that "*the employee cannot usefully be employed because of*" one of the circumstances described in subsections 524(1)(a) – 524(1)(c); the need to read the circumstances in s 524(1)(c) in the context of the chapeau in s

[17] Ibid at [78]-[94]

[18] Ibid at [95]-[99]

524(1) and the circumstances described in s 524(1)(a) and (b), and the decisions in *Coal & Allied Mining Services Pty Ltd v MacPherson*[19] at [13]-[15] and *CFMMEU v Ta Ann Tasmania Pty Ltd*[20] at [12]-[14] and [16].

[22] The School submitted that Pt 3-5 of the FW Act is focused on the relationship between the employee and employer and whether the employees can usefully be employed, and its provisions are not cast in terms of "business activities". Section 524 serves two purposes: first, to financially relieve employers from paying wages where, through no fault of its own, the employer has no work that the employees can usefully perform and, second, to protect employees from what would otherwise flow from the termination of their services. It was submitted that a stoppage of work in s 524(1)(c) is designed to pick up the wide variety of circumstances where, for reasons for which the employer cannot reasonably be held responsible, employees cannot be usefully employed, and a cessation of the business or part of the business is not required. In the present case, it was submitted, the move away from in-class teaching and on-site library attendance constituted such a stoppage for the three employees the subject of the IEU's application. Those employees were employed to prepare and operate the on-site facilities of classrooms and the library at the School, and that work stopped because attendance at, and use of, those facilities was prohibited by restrictions imposed by the Victorian government that were beyond the School's control.

[23] It was further submitted that, by treating the question of whether there had been a stoppage of work as the first matter to be determined, the Commissioner relegated the chapeau in s 524(1) to a secondary consideration and adopted an "*upside-down reading of s 524(1)*" with the result that employees who could not usefully be employed could not be stood down, even where this was for a cause for which the employer could not reasonably be held responsible. This approach, it was said, manifested in the Commissioner taking an impermissibly narrow approach to the phrase "*stoppage of work*" by considering the so-called "*business activity*" of the School, and resulted in the Commissioner paying too little attention to what "*work*" the affected employees were actually required to perform. Further, the School submitted, the Commissioner failed to take into account the true circumstances of the move to remote learning, which was not undertaken by the School out of convenience or for workload management, but was mandated by the Victorian Government and was hence a cause for which the School could not reasonably be held responsible.

[24] The School submitted that permission to appeal should be granted because:

- the decision is attended with sufficient doubt to warrant its reconsideration;

- the impact of the COVID-19 pandemic, and the governmental responses thereto, have had a notoriously profound impact on employers and employees across all industries, particularly in Victoria, which has resulted in employers across all manner of industries standing down employees pursuant to s 524(1)(c) of the FW Act and a sharp increase in disputes being brought to the Commission under s 526 of the FW Act; and

[19] [2010] FCAFC 83, 185 FCR 383, 197 IR 95

[20] [2019] FWCFB 5300

- it is in the public interest that the Full Bench provide guidance as to how the decision-making process in disputes under s 526 of the FW Act operates, particularly in light of the COVID-19 pandemic.

[25] The IEU submitted, as to the proper construction of s 524(1), that while one of the preconditions for a valid stand down is that the employee cannot usefully be employed, and that as a drafting device this has been included in the chapeau to the subsection, this does not mean that this concept has primacy. It submitted that the reason *why* an employee cannot be usefully employed is equally as important as the fact that the employee cannot usefully be employed and, when this is understood, there is no reason to consider the requirements of the section in any particular order. Because all of the requirements have to be met, it was open to the Commissioner to consider one of them first. If there is no stoppage of work, it was submitted, the question of whether or not an employee can usefully be employed is otiose.

[26] The IEU also submitted that the words "*cannot be usefully employed*" indicate that the focus is not only on the work an employee does, but on any work which could be offered to the employee. An employer cannot stand down an employee if there is useful work they can be given, even if that work is not the employee's normal work. In the present case, it was submitted, the matter was determined at an earlier stage of the enquiry, but it is reading more into the provision than is there to say that those words point to a requirement to look at the normal duties of the individual employees.

[27] In relation to the meaning of the expression "*stoppage of work*", the IEU submitted that the Commissioner had taken the correct approach on the facts of this case by identifying that the work of the School in the areas in which the stood down employees worked was continuing and thereby concluding that there was no stoppage. In response to the School's submissions, the IEU said that its submission that the work the employees usually perform has stopped was founded on an unjustified assumption that the work necessarily had to be done *in situ*. The IEU further submitted that the School's submissions invited the circumstances of the individual employee to be the starting point of the inquiry and effectively rendered nugatory the requirement for a stoppage of work (or a strike or breakdown in machinery). This requirement was an important part of the statutory scheme as it protects the position of employees from being stood down because of a mere downturn in trade.

[28] The IEU submitted that the School's attack on the purported finding that the stand down was for a cause which the School could not reasonably be held responsible was misconceived because the Commissioner, having found there was no stoppage, concluded that it was not necessary to consider if the stoppage was for a cause for which the School could not be held responsible nor to consider if the School could usefully employ the employees because of that circumstance. This meant that even if the appeal was successful, it would be necessary to remit to the Commissioner the consideration of the other elements of s 524(1) or for the Full Bench to determine this itself.

[29] Finally, the IEU submitted that no real error had been identified in the decision, the appeal did not enliven the public interest and, accordingly, permission to appeal should be refused.

Consideration

[30] The form in which s 524(1) of the FW Act is drafted has a long industrial history. Award clauses in similar form have appeared in federal awards since the earliest days of industrial arbitration. In 1924, the High Court in *Pickard v John Heine & Sons Pty Ltd*[21] considered the meaning of an award clause which provided that the requirement for employment to be terminated only by a week's notice did not affect, relevantly, "…*the right of management… to deduct payment for any day the employee cannot usefully be employed because of any strike by the Union or any other union or through any breakdown of machinery or any stoppage of work by any such cause which the employer cannot reasonably prevent*."[22] There was further evolution of the wording of provisions of this nature in federal awards and, by 1952, the most common form of the clause, as expressed in clause 19(b) of the *Metal Trades Award*, was that the employer had the right "…*to deduct payment for any day the employee cannot usefully be employed because of any strike or through any breakdown of machinery or any stoppage of work by any cause which the employer cannot reasonably be held responsible*".[23] This later became a stand-alone clause under the heading "*Standing Down Employees*" (see clause 4.6 of the *Metal, Engineering and Associated Industries Award 1998*). In 2006, the *Workplace Relations Act 1996* was amended (by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*) to provide for a statutory right for employers to stand down employees. Paragraphs 691A(1)(a) and (b) of the *Workplace Relations Act*, which were introduced by the amendment, were to the same effect as the current s 524(1). The context provided by this industrial history, including decisions concerning the proper interpretation and application of the previous award and statutory provisions, informs the proper construction of s 524(1).

[31] In order for a stand down of an employee to be authorised by s 524(1), two conditions must be satisfied:

(1) the employee cannot be usefully employed during the period of the stand down; and

(2) this must be because of one of the circumstances in paragraphs (a), (b) or (c) of s 524(1).

[32] Where s 524(1)(c) is the relevant circumstance relied upon, two elements must be satisfied:

(a) there must have been a stoppage of work; and

(b) the employer cannot reasonably be held responsible for the stoppage.

[33] We agree with the School that, in an assessment of whether a particular employee may be stood down pursuant to s 524(1), the logical process of analysis is to begin with the question of whether the employee can usefully be employed over the relevant period. If the employee can be usefully employed, the stand down will not be authorised by s 524(1) and no

[21] [1924] HCA 38, 35 CLR 1

[22] Ibid at 2

[23] (1963) 103 CAR 498

further inquiry as to causation is needed. The priority of this consideration is, we think, confirmed by paragraph 2077 of the Explanatory Memorandum for the Fair Work Bill 2008, which stated that "*An employer can only stand down an employee if they cannot be usefully employed. If the employer is able to obtain some benefit or value for the work that could be performed by an employee then the employer would not be able to stand down an employee*." An employee may be usefully employed, notwithstanding that the employee cannot perform their normal duties, if alternative duties of benefit to the employer are available to be performed. In *Re Carpenters and Joiners Award*,[24] the plurality of the Commonwealth Industrial Court (Spicer CJ and Smithers J) said:

> "An employee cannot be said to be one who cannot be usefully employed if there is useful work available the performance of which is within the terms of his contract of employment, although work of the class upon which he is usually employed or was last employed is not available."[25]

[34] Spicer CJ and Smithers J went on to qualify the above by saying:

> "…The expression 'usefully employed' necessarily connotes that by the employment in contemplation there will be a net benefit to the employer's business by reason of the performance of the particular work done. If the performance of the work done will prejudice the conduct of the employer's business then it is not useful to him although the work in itself would probably, to some extent, contribute to production".[26]

[35] As we have set out, the Commissioner took a different approach to the priority of analysis whereby she considered, in the first instance, whether there had been any stoppage of work within the meaning of s 524(1)(c). The Commissioner concluded that there had been no such stoppage of work and therefore found it unnecessary to determine whether the three employees in question could be usefully employed over the period of the stand down.

[36] While it is not impossible that the process of reverse analysis preferred by the Commissioner might still lead to the right result in a given case, it is highly problematic. It seems to us that there is some logical difficulty involved in searching for the cause of a given event or circumstance without first establishing that the event or circumstance has actually occurred. In the decision, this logical difficulty is manifested in paragraph [37] where the Commissioner said that, after determining whether there had been a stoppage and, if so, whether the employer was reasonably responsible for it, "…the third inquiry is whether the employee could be usefully employed because of that stoppage". This is plainly an "inquiry" which does not properly arise under s 524(1), since the causal analysis required by s 524(1) is premised on the employee being unable to be usefully employed, and this conceptual error is a result of the causal analysis being approached from the wrong direction.

[37] We also broadly agree with the submission advanced by the School concerning the approach taken in the decision as to whether there was a "*stoppage of work*" within the meaning of s 524(1)(c). We consider that the Commissioner's focus on the "business

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[24] (1971) 17 FLR 330

[25] Ibid at 333

[26] Ibid at 334

activities" of the school was, with respect, not founded on the text of the provision and unduly narrowed the ordinary meaning of the expression. On its ordinary meaning, "*stoppage of work*" simply means a cessation of working activity, and the circumstances in which this may occur are diverse. The case authorities and the Explanatory Memorandum make it clear that, in respect of strikes and breakdowns of machinery, it is not necessary that they occur in the employer's own business, so that where a strike or a breakdown of machinery at the business of a third party (for example, a supplier) results in employees of the relevant employer not having useful work to perform, the right to stand down may become available.[27] Treating stoppages of work as *eiusdem generis* as strikes and breakdowns in machinery,[28] there is no reason therefore to assume that a stoppage of work which causes some or all of the employees of an employer to have no useful work to perform need arise in the employer's business at all. Even where the relevant stoppage of work occurs in the employer's business, it need not be in the same part of the business as the employees who are to be stood down, provided that the employer is not reasonably responsible for the stoppage and it causes the employees to have no useful work to perform.

[38] In this case, the normal operations of the School involved the performance of work in the physical locations of the School's library and its classrooms. That work stopped as a direct consequence of the Stage 4 restrictions announced by the Victorian Government on 2 August 2020. In the circumstances, we cannot see how the conclusion that there were stoppages of work for a cause for which the School cannot reasonably be held responsible can be avoided. We consider that the Commissioner's approach to analysing the "*stoppage of work*" issue by reference to the business activities of the School was, with respect, distracted by a consideration as to how the School chose to conduct its alternative remote learning activities consequent upon the stoppage of work at the school campus.

[39] However, it does not necessarily follow that the principal conclusion reached by the Commissioner upon which the order she made was founded, namely that the stand down of the three employees in question was not authorised by s 524(1), was in error, or that permission to appeal should be granted and the appeal upheld as a consequence. The IEU's case before the Commissioner included the proposition that the three employees could usefully be employed in the conduct of the School's remote learning activities. That contention, which in our view of s 524(1) should have been considered first, was not considered at all by the Commissioner because of her conclusion that the "*stoppage of work*" issue had priority. If that contention had been considered and determined in favour of the IEU, then the conclusion could not have been reached that the stand downs were authorised by s 524(1). The IEU case, as we comprehend it, also involved the alternative proposition that, if the employees could not be usefully employed, this was a result of a decision made by the School as to how it wished to conduct its remote learning operations and was not caused by any stoppages of work. Again, that contention was not considered by the Commissioner but its determination in the IEU's favour would necessarily have resulted in the conclusion that the stand downs were not authorised by 524(1).

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[27] See *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83, 185 FCR 383, 197 IR 95 at [15] per Marshall and Cowdroy JJ; *Re Bacon Manufacturing and Meat Preserving Award - South Eastern Division* (1962) AIRL Rep 259; *Fair Work Bill 2008 - Explanatory Memorandum* at [2079]

[28] *CFMMEU v Ta Ann Tasmania Pty Ltd* [2019] FWCFB 5300 at [16]

[40] If we were to grant permission to appeal and uphold the appeal, it would be necessary for these issues to be considered (either by us or by the Commissioner or another single member on remittal). We do not consider that this would have any practical utility. The three employees in question returned to work pursuant to the Commissioner's order. We cannot identify any practical consequence which could flow from a reconsideration of the order. It is not suggested that, if the order were ultimately to be quashed, this would lead to any consequence for the pay received by the three employees for the period from when they returned to work pursuant to the order to the scheduled end of the stand down period on 25 October 2020. In short, we are not satisfied that the grant of permission to appeal would serve any useful purpose. The fact that the decision here may have been attended by error is not a sufficient basis to justify the grant of permission to appeal.[29]

[41] Accordingly, for the reasons given, permission to appeal is refused.

VICE PRESIDENT

Appearances:
C O'Grady QC with *A Denton* of counsel on behalf of the appellant.
W Friend QC on behalf of the respondent.

Hearing details:

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[29] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089, 202 IR 388 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, 192 FCR 78, 207 IR 177; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28]