



April 3, 2019

Federal Court: What did the judge say?

(Subtitle: Is SM2019058 the Strangest Staff Minute in ACT Fire Brigade History?)

Spin: There have been some great exponents of it in Australian Sporting History: Terry Jenner, Ashley Mallett, Dutchie Holland, Shane Warne, even the bookworm Stuart Macgill. In more recent times Ashton Agar hasn't quite enjoyed that success.

In PR terms, none of them can match the verbal wizardry of ACT Fire and Rescue Chief Officer Mark Brown. Faced with the embarrassing defeat of Federal Court Orders after 2 failed applications to the Fair Work Commission to try to stop the UFU from exercising well established workplace rights, the Chief produced an absolute cherry of a wrong un in the form of SM2019058.

In an earlier spell, on March 26th, The Chief gave a hint of what was coming by serving up this particular delivery to the Canberra Times:

"Mr Brown said the Emergency Services Agency, which oversees ACT Fire and Rescue, was pleased to learn that the Federal Court had ruled on the matter on Tuesday.

"The decision allows the government to release the information on personal payroll data that would have been otherwise in conflict government legislation on payroll data," Mr Brown said in a statement.

"The ACT government doesn't automatically release personal payroll data and information on overtime to third parties.

"We protect our employees' rights to privacy and manage employees' personal data in accordance with legislation and government policy."

This effort was eclipsed by an absolute doosra when play resumed the following day. In SM2019058 on 27 March 2019, this gem was produced:

"Why did the ACT government query the request for the documents?

The FWA provisions that govern the right of entry and access to documents require that the documents cannot be provided where a law of the Territory prevents it. The Information Privacy Act ('IP Act') provides the Territory cannot disclose personal information unless there is consent of the individual concerned, or it is required or authorised under a law or a court order. Mere membership of a union does not equate to an individual union member's consent to release the information."

And

“There were doubts concerning whether the release and content of the information sought by the UFUA would be legally authorised and the Territory sought the Fair Work Commission’s assistance to determine how the information could be released.”

And

“Was the government concerned about handing over the documents?

No. The primary concern of the Territory was compliance with its obligations under both the FWA and IP Act in relation to privacy.”

Well there you go! It had nothing at all to do with trying to stop the UFU from obtaining evidence of suspected breaches of the Enterprise Agreement. It was all about protecting you from the possibility that the nasty UFU might do something with personal information such as the names of employees who are its members.

For an expert assessment of the argument advanced by the ACT Government, the Transcript of the Federal Court on 26 March casts this effort at spin in the cold light of day, from the viewpoint of an experience adjudicator Justice Murphy of the Federal Court:

“HIS HONOUR: Well, what concerns me, Mr Friend (Senior Counsel for the UFU), is this: the – the debate that is being had about de-identification looks to me to be - - -

HIS HONOUR: - - - expressing a preliminary view, arid.

HIS HONOUR: I don’t see how it’s sensitive – how it’s sensitive information for a union member to have their pay disclosed to the union for the purpose of investigating award breaches.

HIS HONOUR: But I will – of course I will hear Mr Pollock (counsel for the ACT Government) about that but, having read his submissions and yours, that’s my present view. But the – and, if it be the case that – that you had to de-identify pay records to comply with a right of entry dispute seeking – to comply with the right of entry which is entitled to get records, I don’t know how employees would ever enforce their rights in relation to underpayments because you wouldn’t know who they were.

HIS HONOUR: So there – it doesn’t – doesn’t sound right.” (page 10 of transcript)

Ouch. Arid! According to the Cambridge Dictionary:

“arid

adjective UK /'æɪr.ɪd/ US /'er.ɪd/

specialized environment very dry and without enough rain for plants:

“The desert is so arid that nothing can grow there.”

formal unsuccessful:

“After several arid years, the company has started to become successful.”

formal not interesting and showing no imagination:

“I found his writing extremely arid.”

Turning to the issue of whether privacy was the only issue at hand, or in The Chief's language, "whether government (was) concerned about handing over the documents", page 18 of transcript shows that another concern was raised: whether the notice given by the union was somehow defective in a manner that would mean that the ESA didn't know what the Union was seeking. Justice Murphy dealt with that argument in this manner:

"HIS HONOUR: But there's an air of unreality in that submission, Mr Pollock. And the unreality is that your client seems to well understand what this dispute is about.

MR POLLOCK: Well

HIS HONOUR: And, until you came along, hadn't articulated this problem."

And His Honour continued at page 20:

"HIS HONOUR: It's not a very attractive proposition in the industrial arena, is it, that there is no – and the proposition, cut away, boiled down, is there is no real dispute but the form is wrong.

MR POLLOCK: Well, your Honour, that, perhaps, takes us neatly to our

HIS HONOUR: But – but – no, address that. That's what you're really saying, boiled down, "We didn't really have a dispute about what documents. We understood what they were. We've identified some here –" and if you want to call your instructor you can – "We've – but we say they weren't adequately specified in the notice." If that's what it is then you ought to confront it."

His Honour returns to the "privacy issue" at pages 22 and 23 of Transcript:

"MR POLLOCK: The – the basis upon which the challenge is pressed, of course, is that my client finds itself on the horns of a dilemma. In compliance with the notice – in strict compliance with the notice, it would walk squarely into, on its view, a contravention of the Information Privacy Act.

HIS HONOUR: Not if I order it.

MR POLLOCK: Not if you order it. That's exactly right.

HIS HONOUR: So it's not really a dilemma, is it?

MR POLLOCK: Well, your Honour, if – I – perhaps this really cuts to the quick.

HIS HONOUR: Let me deal with that. So you're – you're a responsible employer, you're a fire bridge in – in the ACT. The – we're not talking here about a clothing trades manufacturer, know, putting – running a bunch of outworkers and trying to dodge your obligations. I – so

MR POLLOCK: Of course, your Honour.

HIS HONOUR: the – the correspondence is replete with acceptance that if – if there is a reasonable suspicion, which you say you don't challenge, that you're in – that you're in breach of the award, that the – that the union is entitled to come in and inspect the wages books. And what – I'm not sure whether, these days, they're called wages books but the records. The reason that you proffer and have consistently proffered through – throughout this dispute is that you've got a concern about your privacy obligations.

MR POLLOCK: Yes.

HIS HONOUR: I can deal with that.

MR POLLOCK: You can.

HIS HONOUR: Yes. So is it really a dilemma?

MR POLLOCK: Well, it – it is on – it is on a couple of bases although I suspect there may well be a

HIS HONOUR: Because – because

MR POLLOCK: road through it

HIS HONOUR: You know what the – the terrible outflow of this would be, if I had to rule on this? You will have to produce the wage records for the members of the union, not for anyone else. It doesn't look like there's any great harm going to be suffered by the ACT fire brigade."

The transcript is attached.

Before we leave the topic of the staff minute, 2 more things need to be said.

First, the staff minute states:

"Why have overtime hours increased dramatically from 2016 to the present? This is because there has been a higher than expected number of ACTF&R staff retiring recently, as well as a number of staff who have taken long-term leave or are medically unfit for front-line duties."

This is nonsense. We have been consistently pointing out that around a third of firefighters are over 50. Every day that the sun comes up is a day that a firefighter gets older, and hence closer to retirement. This is to be expected.

Second, the staff minute states:

"The service is also currently reviewing its stand-up arrangements for days with elevated fire danger to determine if the level of bushfire risk is outweighed by the risk of fatigue for firefighters recalled to duty to staff tankers and CAFS units."

In other words, the intention is to reduce the level of fire cover on stand-up days. The UFU remains opposed to this.

Is SM2019058 the Strangest Staff Minute in ACT Fire Brigade History? We will let you be the judge of that! What's more, the whole community can join you in that endeavour, as the Staff Minute has been published on the ESA website.

Authorised by Greg McConville, Secretary, UFU, A.C.T. Branch.

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