

BHP Billiton Iron Ore Pty Ltd v Walls [2015] WADC 113

Key Points

- BHP's application for interlocutory directions was dismissed by an arbitrator on the basis that he had no jurisdiction to make orders unless they were necessary for the 'speedy and fair' conduct of the proceedings. The directions sought by BHP were fair but the arbitrator found they were not required for the 'speedy' conduct of the proceedings.
- The Court held that the intention of the Act is that the words speedy and fair direct that a balanced approach should be taken when making directions and do not speak in any way to the arbitrator's jurisdiction to make directions.

Background

Mr Walls made a workers' compensation claim against BHP Billiton Iron Ore Pty Ltd (BHP) in respect of an alleged psychiatric injury allegedly sustained in the course of his employment with BHP.

BHP denied liability for the claim and Mr Walls commenced arbitration proceedings seeking a determination of liability in his favour.

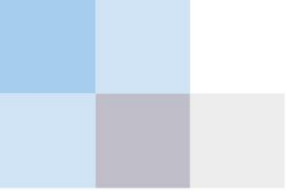
On 16 October 2013 Arbitrator Sharp made orders that Mr Walls:

1. Cease and immediately desist from communicating with and/or contacting the appellant's witnesses without the leave of the arbitrator;
2. Immediately cease and desist from interfering with or attempting to influence the evidence to be given by the appellant's witnesses at the hearing;
3. Not contact or communicate in any way with the family or friends of the appellant's witnesses without the leave of the arbitrator.

Subsequently BHP became aware of two further witnesses whose evidence could support their defence, namely Mr and Mrs Waldron. However, Mr and Mrs Waldron raised concerns about becoming involved in the arbitration proceedings due to receiving threats and abuse from Mr Walls.

BHP therefore sought the following further directions:

1. The respondent cease and immediately desist from communicating and/or contacting Ms Felicity Waldron and/or Mr Barry Waldron of East Coast Pipelines, without leave of the arbitrator;

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2. The respondent immediately cease and desist from interfering with or attempting to influence the evidence to be given by the appellant's witnesses at the hearing;
 3. The respondent do not contact or communicate in any way with the colleagues, family or friends of the respondent's witnesses without leave of the arbitrator; and
 4. Any further orders which the arbitrator deems appropriate in the circumstances.

On 18 June 2015, the arbitrator dismissed BHPs application on the ground that, having regard to s 190(1) of the Act, BHP had failed to satisfy him that the making of the directions were required for the 'speedy' conduct of the proceedings.

BHP sought leave to appeal from the arbitrators decision as it believed it had been denied procedural fairness and the arbitrator had misconstrued the phrase 'speedy and fair' and overlooked evidence that supports the making of the directions.

The Law

Section 190(1) of the Act provides that:

"An arbitrator may give directions at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding."

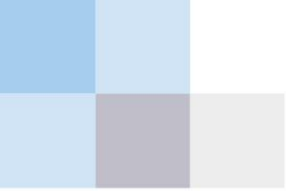
The arbitrator considered whether the phrase 'speedy and fair' was a hendiadys in that only one type of conduct was being referred to by the use of two phrases. He considered whether the word and was to be given its plain and grammatical meaning or whether the phrase should be considered a hendadys as it had in *Inghams Enterprises Pty Ltd v Gashaw Beyene*, *Antonio Suero v Georgious Group Pty Ltd* and *Dawood Aziz v Tempo Services Ltd*.

In these cases the arbitrator stated that the words 'speedy and fair' had been used 'as almost shorthand for the overall object of the Act'. The arbitrator concluded that the directions proposed by BHP did not address the issues of speed and as such he could not use his discretion to issue BHPs directions.

Conclusion

BHP submitted that the arbitrator's construction of s 190(1) was literal and pedantic leading to absurd results. The Judge accepted this submission and stated that having regard to the Act as a whole and its history of implementation it cannot be the intention of the legislature that an arbitrator is required to always be satisfied that some 'speediness' will be achieved by proposed directions (in addition to fairness).

The Judge commented that if no direction could ever be made which did not directly promote speedy conduct of proceedings this would result in a complete inability to make programming orders deferring the hearing of a matter. He stated further that the legislative intention is that the words speedy and fair direct that a balanced approach should be taken when making directions.



The Judge found that the arbitrator had misdirected himself by finding that he only had jurisdiction to make directions if it could be found as a fact that the directions would contribute to making the proceedings 'speedy'.

The Judge commented further that the words speedy and fair are adjectival in nature and do not speak in any way to the arbitrator's jurisdiction to make directions.

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