

To the Membership of the Cumberland Zone.

I am seeking your support in the up coming Health and Safety Representative (HSR) Election. Brigade secretaries please circulate

You will soon have delivered by mail voting material which you have a choice of 5 nominees for the election.

HSRs play an important role in the safety of both volunteers and staff in the RFS. I requested the election of HSRs under Section 50 of the WHS Act in 2013 and have been perusing the matter both with Safework and in the Industrial Relations Commission since then. The RFS has shown the lack of commitment to the Work Health Act and the requirement to elect Health Safety Representatives by taking five years to get to this stage.

HSRs are to represent workgroups within an organisation that do different tasks, so in the RFS paid staff do differing role and therefore should have their own HSR. Other areas that should have HSR would be RAFT, brigades, airbase operators, flight operators, etc. A requirement not met or consulted on.

But this election is moving forward and the elected HSR can deal with matters as they arise in the future.

My background in the RFS is that I joined the RFS in 1975 in the Blue Mountains at Winmalee and experienced major fire activity in the 1977 & 78 fires.

I was employed in the department of Bush Fire Services now RFS, in the engineering section and made many modifications to vehicles to ensure compliance with lifting heavy items were low on vehicles, the half white cab and additional striping for higher visibility, air conditioning for heat stress management, additional emergency lighting and work lights to name a few. I also complete design of appliances and ensured quality control of contractor's work. Other duties included PPE design, testing and tendering.

I joined the Penrith district at Regentville in 1996 and have been a member since. I held roles of Senior Deputy Captain, President on two district committees, Treasurer for the Training Group, Acting Deputy Group Captain, logistics and operations at State HQ and other districts.

In our district, I request the supply of rain apparel. This was met with a definite NO from the previous manager and so I perused the matter with the Persons Conducting a Business Unit (PCBU) senior management and today these items are supplied. **WHS Act states: 273 Person not to levy workers: A person conducting a business or undertaking must not impose a levy or charge on a worker, or permit a levy or charge to be imposed on a worker, for anything done, or provided, in relation to work health and safety.** <https://www.legislation.nsw.gov.au/#/view/act/2011/10/part14/div1/sec273>

In my working life, I have held roles in Safety Management and Safety Consultation holding numerous qualifications in safety, management and fire.

Safety in any work place is of high importance. In our sometimes-dangerous workplace, safety is a necessity and someone with superior knowledge of safety should represent your workgroup.

If elected, I will endeavour to seek solutions to your safety concerns in a timely matter.

Thank you for your time and effort in the RFS & if you have any questions please give me a call 0423 150204.

Shane Bryant JP

WHS Partner

Fire Investigator

Vocational Educator

M. Eburn

Australian Emergency Law

RFS volunteer exercising rights as a 'worker'

In Fire, OHS on August 27, 2016 at 7:58 pm

Readers of this blog will be familiar with changes to the law that came with the *Work Health and Safety Act 2011* (NSW) (the 'WHS Act'). The earlier Act, the *Occupational Health and Safety Act 2000* (NSW) governed the relationship between employees and employers. The *WHS Act* deals with a 'Person Conducting a Business or Undertaking' (a PCBU) and 'workers'. The concept of 'worker' is much broader than 'employee' and today a worker, includes volunteers. The NSW Rural Fire Service, for example, has 824 employees but, with a volunteer workforce of 74516, there are over 75000 workers! (NSW Rural Fire Service 'Facts: About the NSW Rural Fire Service', accessed 27 August 2016).

The *WHS Act* imposes obligations upon a PCBU to 'consult' with workers (*WHS Act*, Part 5). To facilitate consultation, the Act provides for the election of Health and Safety Representatives (ss 60-74) and for the establishment of Health and Safety Committees (ss 75-79). A worker may request a PCBU to conduct elections for Health and Safety Representatives (s 50). If a request is made the PCBU must consider how to divide the workforce into work groups. Where agreement cannot be reached on the establishment of a work group, a worker can or the PCBU can ask the regulator (formerly WorkCover and now SafeWork

NSW) to appoint an inspector. The inspector can determine the establishment of workgroups or they may decide 'that work groups should not be determined or that the agreement should not be varied (as the case requires)' (s 54). A person unhappy with the inspector's decision can apply for an 'internal review' (s 224(1)). A person is appointed as the reviewer and he or she may confirm, vary or set aside the original decision and substitute whatever decision the reviewer considers appropriate (s 224(2)). A person dissatisfied with the outcome of an 'internal review' can apply to the Industrial Relations Commission for an 'external review' (s 229).

Shane Bryant, a volunteer with the NSW RFS has exercised his rights as a worker under the *WHS Act*. On 4 April 2013 he made a request for the election of Health and Safety Representatives. On 6 May 2013 he asked the regulator to appoint an inspector. 'The Inspector determined that no changes were required to the extant consultative arrangements' (*NSW Rural Fire Service v SafeWork NSW* [2016] NSWIRComm 4, [6]). On 2 July 2014 Mr Bryant sought an internal review of the inspector's decision. That review set aside the Inspector's decision – 'SafeWork then required RFS to consult and implement work groups and facilitate the appointment of health and safety representatives' ([8]).

The RFS then applied to the Industrial Commission for an external review. The RFS then took steps to enter negotiations with the relevant union representing paid staff, and the Rural Fires Service Association (the RFSA) representing volunteers. The RFS, with the support of SafeWork, sought adjournments of the external review whilst those negotiations took place.

Mr Bryant opposed those adjournments and asked the Commission to hear and determine the matter. This raised the question of Mr Bryant's 'standing' and who was the other 'party' to the case. The Commission noted that it 'is, generally speaking, an arbitral tribunal' ([68]). That means the Commission is used to resolving an issue where there are two parties present their claims, which the Commission rules on. In this case the RFS was the 'applicant' but the legislation did not provide for who was to be the 'respondent'.

SafeWork argued that they were not the respondent. They had made the decision that was the subject of the review but their job was to be impartial. SafeWork's 'role in the review was to make submissions on interpretation of the legislation and provide assistance to the Commission in respect of the questions for determination by it' ([41]). It was not their job to 'defend' the decision made on internal review and argue that the Commission should confirm that decision.

The fact that Mr Bryant had made all the initial applications did not make it axiomatic that he was the appropriate 'respondent'. Although he had made all the applications the law did not require that he do so, the person who made the application for the election of health and safety representatives, did not have to be the person who applied for an inspector to be appointed and that did not have to be the same person who then applied for an internal review. Any one of the RFS' 70 000 workers could have made any of those applications.

The RFS submitted that Mr Bryant does not have sufficient interest, over and above other workers, to be joined as a party to an external review ... His interests, and those of other workers, are protected by their authorised representatives, the PSA and the RFSA ([34]).

The problem was that the RFS was not before the Commission that is the RFS was not there claiming to represent the volunteers.

SafeWork did not object to Mr Bryant being permitted to 'intervene' in the proceedings ([42]). In the absence of any other respondent, the Commission said it should have regard to the fact that 'It would be incongruous for RFS to be able to call evidence and make submissions in relation to the substantive issues but exclude the initial mover in the underlying application' ([42](6)).

The question then was whether Mr Bryant should be considered an 'intervener' or a 'party' to the proceedings. An intervener has only a limited interest in the proceedings and their involvement is subject to direction by the tribunal. Without going into the differences, the Commission allowed Mr Bryant to 'intervene'. In coming to this decision, the Commission said that Mr Bryant

... has a sufficient interest to be recognised at least as an intervener. In particular because:

- (1) Mr Bryant was:
 - (a) the person who made the initial request under s 50;
 - (b) the person who made the request under s 54 for the appointment of an inspector; and
 - (c) the applicant for an internal review under s 224.
- (2) RFS workers would be potentially adversely affected should the application succeed and it follows that Mr Bryant would be potentially adversely affected.
- (3) There is no party presently representing the interests of workers or to advance material contrary to the RFS contentions or material.
- (4) In the circumstances it would be an appropriate protective step to grant Mr Bryant leave to intervene.

In what might be perceived as a 'dig' at the RFS, Judge Kite said (at [78]):

I have given particular weight to the absence of a party representing the interests of workers. Should that position change, and an organisation or person with authority to represent the class of workers involved seek to participate, it may be appropriate to review Mr Bryant's position.

The result of the Commission's ruling is that Mr Bryant is allowed to:

... call evidence, cross-examine witnesses and make submissions. The extent to which these matters can be undertaken continues, of course, to be under the control of the Commission's discretion ([79]).

Discussion

This case raises some interesting issues about the *WHS Act*. The fact that the Act provides for various reviews but fails to indicate who is to be considered a 'party' before a tribunal is problematic. It is also problematic that each of the RFS' 70 000 workers could be making those applications. The RFS said (at [27]):

If Mr Bryant was given a right to participate as a party or intervenor then every other worker affected in the same way as a worker should be given the same right.

Permitting every single worker, the right to participate in either capacity is not consistent with the proper functioning of the Industrial Relations Commission nor with the provisions of s163 of the Industrial Relations Act.

Whether or not it is 'consistent' with the Act, it would certainly be problematic if every worker sought to intervene in proceedings. Of course the commission collective workforce.

Conclusion

The decision here is certainly giving effect to the principle that a volunteer is a worker and enjoys the rights and privileges once only given to employees. Regardless of the merits of Mr Bryant's claims, he is certainly committed and dedicated and willing to put his money and his effort into what he must see as the best interest of the RFS and its workforce.