TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT DEAN

C2023/892

s.739 - Application to deal with a dispute

United Firefighters' Union of Australia
and
CT Fire & Rescue
(C2023/892)

Canberra

12.30 PM, WEDNESDAY, 17 MAY 2023

PN1

THE DEPUTY PRESIDENT: Ms Bingham, can you hear me?

PN2

MS S BINGHAM: I certainly can.

PN3

THE DEPUTY PRESIDENT: Thank you. Mr Chilcott, can you hear me?

PN4

MR M CHILCOTT: I can, thank you, Deputy President.

PN5

THE DEPUTY PRESIDENT: Thank you. Ms Bingham, over to you.

PN6

MS BINGHAM: Thank you, Deputy President. First of all, thank you for the indulgence from last Friday. I appreciate the respondent and the Commission's accommodation of my illness.

PN7

The second issue, if I may confirm that you have got a copy of the 2020-2024 enterprise agreement in front of you, or access to the ACT Public Sector Fire & Rescue Enterprise Agreement?

PN8

THE DEPUTY PRESIDENT: I'll get it. Just a moment. I've got the court book, unless there's references to - - -

PN9

MS BINGHAM: It certainly is not in the court book. It's a meaty document that none of the parties filed.

PN10

THE DEPUTY PRESIDENT: All right. It will come through to me in a moment, so I'll have it shortly. No problem at all.

PN11

MS BINGHAM: With respect to the matter today, it's dealing with the preliminary issue of status quo. For the purpose of these proceedings, the union seeks to have read into evidence, figuratively speaking, the witness statements of Mr McConville, which is document 3 in the court book, pages 20 to 160, and the witness statement of Mr Hakkinen, which is document 4, pages 161 to 179 of the court book. We have been informed by the respondent's lawyers that there's no intention to cross-examine either of those deponents. Does the Commission wish to have the two deponents adopt their statements formally or are you content to have them considered read and for me to tender both of them?

PN12

THE DEPUTY PRESIDENT: Mr Chilcott, is there any objection to the tender of those two statements?

PN13

MR CHILCOTT: No, not in the broader sense. There is one textual objection, one objection to one paragraph in Mr McConville's statement.

PN14

THE DEPUTY PRESIDENT: All right, let's deal with that first. What paragraph is that?

PN15

MR CHILCOTT: It's paragraph 34.

PN16

THE DEPUTY PRESIDENT: Okay, I've got that.

PN17

MR CHILCOTT: The objection is simply on the basis that that is something to which Mr McConville just cannot give evidence about.

PN18

THE DEPUTY PRESIDENT: Ms Bingham, do you press that paragraph?

PN19

MS BINGHAM: No, your Honour, except it's a matter of fact that Superintendent Weston at that time was actually on leave with half pay.

PN20

MR CHILCOTT: That's not what the paragraph quite says, but I hear it's not pressed, so I don't take it any further.

PN21

THE DEPUTY PRESIDENT: All right. Minus paragraph 34, I will mark that statement exhibit 1.

EXHIBIT #1 WITNESS STATEMENT OF GREGORY McCONVILLE OMITTING PARAGRAPH 34

PN22

MR CHILCOTT: The other objection is in relation to a phrase that has been used throughout the documentation that has been presented by the applicant, including in Mr McConville's statement, so I will voice it here.

PN23

THE DEPUTY PRESIDENT: Discriminated members?

PN24

MR CHILCOTT: Yes, that's exactly right. That's a conclusion of fact, firstly; secondly, it's objectionable in the sense that it's inflammatory and, thirdly, it impugns, without any evidential basis, the respondent.

PN25

THE DEPUTY PRESIDENT: Ms Bingham, I have to say I was surprised that that was the descriptor that was used. Has any court or tribunal made a finding that those people were in fact discriminated against?

PN26

MS BINGHAM: No, Deputy President, it was a matter of keeping consistent the definition that was used in the letter to the Fire Service dated 16 December 2022. They were defined as the 'discriminated members' in that correspondence and it was a matter of consistency.

PN27

THE DEPUTY PRESIDENT: Is there any reason we can't refer to them as the 'relevant members'?

PN28

MS BINGHAM: Relevant members? I have no objection to that. As I said, the purpose of the definition was to keep the consistency with the language that was used in the 16 December correspondence.

PN29

THE DEPUTY PRESIDENT: Mr Chilcott, if the reference, wherever it appears in either of those two statements, is read as 'relevant members' rather than 'discriminated members', will that (audio malfunction)?

PN30

MR CHILCOTT: That's neutral. No problems with that at all.

PN31

THE DEPUTY PRESIDENT: All right. I am not going to go through both of those statements now.

PN32

MR CHILCOTT: No.

PN33

THE DEPUTY PRESIDENT: But to the extent that there's a reference to 'discriminated members' in either of the two statements, they will be read as 'relevant members'.

PN34

MS BINGHAM: Thank you, Deputy President.

PN35

THE DEPUTY PRESIDENT: Mr Chilcott, was there any other objections to Mr Hakkinen's statement?

PN36

MR CHILCOTT: No, there wasn't.

PN37

THE DEPUTY PRESIDENT: All right, I will mark that exhibit 2.

EXHIBIT #2 WITNESS STATEMENT OF MR HAKKINEN

PN38

MS BINGHAM: I tender those. (Audio malfunction.)

PN39

THE DEPUTY PRESIDENT: Mr McConville will be exhibit 1, but minus 34 and with the amendment, as I said, to 'relevant members' and Mr Hakkinen is exhibit 2, again 'relevant members' rather than 'discriminated members'.

PN40

MS BINGHAM: Thank you, Deputy President. You also should have in the court book the submissions of the applicant union dated 21 April 2023 and the reply submissions dated 10 May 2023. Is it the Commission's practice to mark those for identification?

PN41

THE DEPUTY PRESIDENT: No, but they're in the court book and I have read the submissions.

PN42

MS BINGHAM: Thank you, Deputy President. On the basis that you have read the submissions, and I'm assuming also the affidavit material filed, are you content for me just to press on with an oral submission, which I hope won't go too long, and will just highlight the points in the submissions that have already been filed? Are you content with that approach, Deputy President?

PN43

THE DEPUTY PRESIDENT: Yes, I am, thank you. Can I ask a couple of questions that I'm sure you will address in the submission, but just so you can, I suppose, be clear about what I am focusing on, in part at least.

PN44

MS BINGHAM: Yes.

PN45

THE DEPUTY PRESIDENT: It would seem that there needs to be a decision made as to a date that I might just refer to as the 'dispute date' because we need to understand what the pre-dispute work arrangements and patterns are to determine a status quo. Would you agree with that?

PN46

MS BINGHAM: I agree with that.

PN47

THE DEPUTY PRESIDENT: Okay. And the two dates that seem to be proposed is either 16 December 2022 or 30 January 2023?

PN48

MS BINGHAM: I would agree that that is the position that is proposed by the parties, 16 December being the point in time drawn by the respondent and 30 January being the point in time drawn by the applicant.

PN49

THE DEPUTY PRESIDENT: All right. I recognise that this might not work for each of the relevant members, but, broadly speaking, is it the case - and, Mr Chilcott, I will ask you the same question in due course, so you might want to have a think about the answer - but if 16 December is the relevant date, then half pay is not applicable, and if 30 January is the relevant date, then half pay is applicable? Can we simplify it to that level or not, in your view?

PN50

MS BINGHAM: In our submission, that's exactly the case and the position of each of the members is set out in Mr Hakkinen's witness statement at paragraph 58, 'Leave Status of Members'. You should note that Mr Weston was on leave at half pay as at 15 December.

PN51

THE DEPUTY PRESIDENT: Yes.

PN52

MS BINGHAM: Whereas - - -

PN53

THE DEPUTY PRESIDENT: I think the others - - -

PN54

MS BINGHAM: - - - were on leave at full pay, swapping over to leave on half pay from 16 December.

PN55

THE DEPUTY PRESIDENT: All right. So, with the exception of Mr Weston then - - -

PN56

MS BINGHAM: Yes.

PN57

THE DEPUTY PRESIDENT: - - - that simplified version of events would be accurate from your perspective?

PN58

MS BINGHAM: Yes, Deputy President.

PN59

THE DEPUTY PRESIDENT: Effectively then, the only thing I need to decide really from your perspective is which date is applicable?

PN60

MS BINGHAM: Yes, and by way of clarification, I have got instructions that the union does not take the view that each of the members are on continuing leave at half pay or leave at full pay until the determination of the dispute, for example. The status quo clause cannot provide those members with an entitlement that they wouldn't have had. Naturally, if leave on half pay - if their entitlements run out during the course of this dispute, their entitlements run out.

PN61

THE DEPUTY PRESIDENT: Sure.

PN62

MS BINGHAM: Additional entitlements cannot be created by reason of the application of the status quo provision 3.16.

PN63

THE DEPUTY PRESIDENT: All right. Just before you go on, Mr Chilcott, I understand from your submissions, you may not agree it's quite that simple, but we will obviously come to that in due course. I just want to acknowledge it might not be the same position from your perspective.

PN64

MR CHILCOTT: Yes, I've got two questions I was going to open up with. One is the date question, as I will call it, and the second one was whether there was an applicable work arrangement in place, and obviously that's where, for us, it gets a little bit more complicated.

PN65

THE DEPUTY PRESIDENT: Yes, all right. I'm just trying to make sure I'm clear about the parties' positions and, in terms of dealing with this issue as efficiently as possible, if it can be as simple as a determination by the Commission as to - as I said, we might call it and might just refer to it as the 'dispute date'.

PN66

MS BINGHAM: Yes.

PN67

THE DEPUTY PRESIDENT: Then that matter can be dealt with relatively expeditiously as opposed to a potentially much longer decision on a preliminary issue.

PN68

MS BINGHAM: Thank you, Deputy President. I'm sure the members would be pleased that you have taken that into account.

PN69

THE DEPUTY PRESIDENT: They were my questions, Ms Bingham. Over to you, thank you.

PN70

MS BINGHAM: Thank you. Deputy President, on 21 February 2023, the applicant union filed an application to the Commission to deal with a dispute in accordance with the dispute settlement procedure. The applicant union identified, at paragraph 4.1 of the application, the clauses in the 2020-2024 agreement to which the dispute relates.

PN71

The dispute the subject of the application is predominantly about a failure to grant leave at half pay to employees of the ACT Fire & Rescue, who are also members of the union, on half pay pursuant to clause H2, Flexible Working Arrangements, of that enterprise agreement.

PN72

The merits of the primary dispute do not need to concern the Commission on this occasion and, if the Commission is searching on an authority on that point, I can direct the Commission to the decision in *Rail Bus & Transport Union v Transport Union v Sydney Trains* [2021] FWC 3468 at paragraph 57.

PN73

This preliminary application has been brought before the Commission to resolve what has been described by both parties as the preliminary issue, namely, how clause P3.16 of the dispute avoidance settlement procedure, the status quo provision, should be applied to the facts and circumstances of this case.

PN74

Clause 3.16 was listed by the union in the application as a clause to which the dispute relates. Clause 3.16 relevantly provides:

PN75

> *Pre-dispute work arrangements and patterns will apply during the dispute resolution process unless there is reasonable concern by the employee about an imminent risk to his or her health or safety.*

PN76

The remainder of the clause is not relevant to these proceedings as it goes to work that will not proceed in an unsafe environment.

PN77

The subclause itself cannot be read in isolation, applying the well-settled principles of industrial instruments which have been set out, for the ease of the Commission, in paragraphs 6 and 7 of the applicant's submissions, which is document 1 in the court book, and also in paragraph 5 of the reply submissions, which is document 2, at paragraph CB 13 of the court book. Paragraph 5 of the reply submission, Deputy President, contains an extract from the decision of the Federal Court in the *Licensed Airline Mechanical Engineers v Qantas* case regarding the application of these principles to enterprise agreements.

PN78

The application of those principles is such that there is a recognition that the principles associated with the interpretation of awards apply to the interpretation of enterprise agreements, but also that enterprise agreements are legislative in nature on the basis of the fact that you cannot treat them as agreements in name only and that their construction should not proceed on the premise they are a form of bargain between the agreeing parties. They are legislative. That extract is extracted at paragraph 28 from the decision of Besanko J in the *Licensed Aircraft Engineers Association v Qantas*.

PN79

Section 186(6) provides that an enterprise agreement must - excuse me, your Honour, my screen has just gone blank. Section 186(6) of the Fair Work Act provides that:

PN80

The FWC must be satisfied that an agreement includes a term that provides for a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered
- - -

PN81

MS JUNAKOVIC: Ms Bingham, I'm so sorry, it's Georgia Junakovic from the ACT Government Solicitor. Mr Chilcott and Ms Sydney have just dropped out of the call. I am just getting them to log back in. Sorry to interrupt. Thank you.

PN82

MS BINGHAM: Thank you.

PN83

MS JUNAKOVIC: They are just attempting to log back in now.

PN84

THE DEPUTY PRESIDENT: Thank you. Mr Chilcott, can you hear me?

PN85

MR CHILCOTT: I can, thank you.

PN86

THE DEPUTY PRESIDENT: Do you know when you dropped out?

PN87

MS BINGHAM: At the stage where there was a discussion about the Qantas decision.

PN88

THE DEPUTY PRESIDENT: Thank you.

PN89

MS BINGHAM: Rather than repeat myself, if I can just take the Commission to the extract at paragraph 5 of the reply submission where paragraph 28 of the decision of Besanko J has been extracted saying that enterprise agreements are agreements in name only and that a construction should not proceed on the premise that they are a form of bargain between the parties and that the nature of the enterprise agreement is that they are legislative in nature.

PN90

This is reflected in section 186 of the Fair Work Act, which requires an enterprise agreement to have a dispute resolution clause in it to deal with disputes about matters arising under the agreement in relation to the National Employment Standards.

PN91

Section 186 sets minimum requirements in relation to dispute resolution agreements, and this has been held to be the case in the *United Firefighters' Union of Australia v Country Fire Authority* [2014] 218 FCR 210 at 177, and His Honour Murphy J's decision was upheld on appeal in *United Firefighters' Union v Country Fire Authority* [2015] 228 FCR 497 at 243 to 248.

PN92

The dispute resolution clause contained in the - and I'll just use the shorthand - 2020-24 agreement contains objects and, your Honour, we say that you must use these objects to give effect to the words used, bearing in mind that the draftsmen are not of a legal bent and are of a practical nature, or the draftspersons, that the object of these procedures is the prevention and resolution of disputes about matters arising between employees and the employer, the union and the employer, including disputes about the interpretation or implementation of the agreement.

PN93

We submit that the clause does not state that clause 3 applies to all disputes, and consistent with this position is the decision of Flick J in *Tomvald v Toll Transport* where he considered the operation of a status quo provision in the context of an adverse action claim. His Honour's observation of dispute resolution clauses, which had included a status quo provision, has been extracted at paragraph 9 of the applicant's reply submissions. If I can just read from paragraphs 280 to 283:

PN94

> *A 'dispute' divorced from any attempt to resolve that 'dispute' with either the worker's 'immediate supervisor' or the supervisor's immediate superior is not a 'dispute.*

PN95

He was applying the clause here where the steps of the dispute resolution clause had not been followed by the employee in question. He then goes on to say:

PN96

> *An employee cannot, accordingly, unilaterally create a 'dispute' without thereafter attempting to resolve that 'dispute' and still bring himself within the protection afforded by sub-cl 15(g) requiring the maintenance of the status quo until his grievance is resolved to his satisfaction. Such a 'dispute' would be divorced from the dispute' contemplated by the Enterprise Agreement.*

PN97

His Honour then goes on at paragraph 281:

PN98

> *Although on the facts of the present case it may readily be accepted that there were a series of issues or 'disputes' between Mr Tomvald and Toll Transport which Mr Tomvald (and even Toll Transport) wanted to resolve, there was no 'dispute' as that term is used in cl 15 of the Enterprise Agreement.*

PN99

Deputy President, this is where we get to the nub of the dates.

PN100

Clause P3 provides that an employee may appoint a representative for the purposes of the procedures in clause 3.4. In the event that there is a dispute, there are certain procedures that apply. Clause 3.5.2 involves cascading steps, as His Honour Flick J referred to in considering the dispute resolution before him in Tomvald.

PN101

In this case, the first step is discussions are to take place with the Chief Officer. The second step is where a dispute remains unresolved, the Chief Officer, the employee or the union will discuss a course of action for the resolution of the dispute within seven days of the notification of the dispute, or the last discussion, unless the parties otherwise agree to extend that time period in writing, and the third step is a party, if the dispute is not resolved, may then notify the Commission.

PN102

A chronology of the events is summarised in the submissions of the applicant, which are document 1 at paragraphs 8 to 28. I am not going to take the Commission through that in detail, other than to say that the chronology is dealt with in much greater detail in the witness statements of Mr McConville and Mr Hakkinen. We do observe that, other than the minor objection made by the respondent, that evidence has gone in uncontested.

PN103

ACT Fire & Rescue contends that the pre-dispute work arrangements in place were those arrangements in place before 16 December. This assertion is predicated on the assumption that the letter of 16 December 2022, which is found at GMC 7, constituted a notification of dispute for the purposes of the dispute resolution clause. There was no dispute prior to 16 December. There were dissatisfied employees, but certainly no dispute. There was unilateral dissatisfaction and this does not constitute a dispute as per Flick J's observation in Tomvald. Importantly, the facts regarding the issues associated with Superintendent Weston did not come to light until 19 December and were notified on 20 December.

PN104

Yes, the 16 December letter from the union was directed to the Chief Officer, and it's the submission of the union that that's as high as the compliance with the requirements of P3, it's as high as it gets. In fact, Mr McConville, prior to sending the letter to the Chief Officer, engages in discussions with not the Chief Officer but rather the Assistant Commissioner of the ESA, Mr Phillips, and the Deputy Director of the Department of Justice and Community Safety, Deputy General Director Doran, notably, neither of whom have been called by ACT Fire & Rescue, in an attempt to arrive at a position that would avert disputation litigation. That evidence can be found at paragraphs 21 to 27 of Mr McConville's witness statement.

PN105

After a series of discussions with these two high-level employees in the ACT Government, leave was granted by ACT Fire & Rescue to the relevant members

on a formal application by them. That leave was leave at half pay. Leave was not granted on an interim basis, so to speak, but for the purposes of avoiding dispute and litigation and for the purpose of furthering discussions about the matter in the new year.

PN106

No discussions were held with the Chief Officer or the Acting Chief Officer regarding issues raised in the correspondence of 16 December; there was no discussion between the union, the Chief Officer or the Acting Chief Officer within seven days of the 16 December correspondence; neither party agreed in writing to extend the time in which discussions would take place.

PN107

Deputy President, it is submitted that, in short, there was no dispute as contemplated by the provisions of P3. In fact, there was a meeting of the minds on that point that neither the union nor ACT Fire & Rescue considered that there was a dispute on foot and, in that regard, I direct you to the witness statement of Mr McConville at paragraphs 52 to 55.

PN108

On 30 January 2023, a dispute was notified by the union, which is exhibit 25 to Mr McConville's statement. A response to the dispute filed on 30 January was received by the union on 31 January. The parties then were in strict compliance with the procedure prescribed in P3. It is submitted that the pre-dispute work arrangements, bearing in mind that the Commission has given the term 'work' and 'pre-dispute work arrangements' a broad meaning, even extending to policies and procedures in place - and in that regard I direct you to the decision of Rail Corp extracted at paragraph 20 and Harrison SDP's comments regarding the meaning of the word 'work' - it is submitted that the work arrangement was put in place to all intents and purposes, that is the paid leave at half pay, as a status quo position.

PN109

Again I take you back to the decision in Tomvald and particularly in his Honour's observations at paragraph 283 about how dispute resolution clauses operate and the protection afforded by them. The protection afforded by clause 15(g) is, accordingly, a protection which attracts reciprocal obligations. On the one hand, an employer may be bound to maintain the status quo pending a resolution of the dispute. On the other hand, the employee only gains that protection by following the steps set forth in clause 15 and providing the opportunity for the dispute to be resolved. The protection is not attracted, nor does it persist where that procedure is not invoked or where it is invoked but later abandoned.

PN110

Deputy President, the union submits that the whole nature of the arrangement that was arrived at was to ensure that the status quo, while dispute resolution procedures and discussions took place, was that each and every member affected was on leave at half pay.

PN111

As I said earlier, your Honour, the union is of the view that that position can only be maintained with respect to the work arrangement in place and that work

arrangement was an employment arrangement whereby the employees would remain on leave with half pay until the dispute was resolved or the accrued leave had expired.

PN112

The ACT Fire & Rescue's attempt to create a work arrangement or pattern in a narrow, pedantic manner is contrary to the objects of the provision when the dispute resolution process has been followed.

PN113

If policies and procedures can form part of a work arrangement, it only follows that an arrangement where an employee may take leave, including leave on a flexible basis, at half pay must fall within the ambit of the clause.

PN114

It is submitted, Deputy President, that the Commission should find that the relevant date that the dispute commenced is 30 January 2023 and that, at that time, the relevant pre-dispute work arrangement was that all the affected employees were on leave at half pay based on their accrual.

PN115

If the Commission pleases.

PN116

THE DEPUTY PRESIDENT: Thank you, Ms Bingham. Mr Chilcott, perhaps we can start - as I said, I realise it might not be quite so easy based on my reading of your submissions, but can we start with perhaps what I have referred to as the dispute date. Would you agree that the two dates effectively in question are either 16 December 2022 or 30 January 2023? You are just on mute,
Mr Chilcott. Mr Chilcott, can you hear me?

PN117

MS JUNAKOVIC: Deputy President, it's Georgia Junakovic again. I have just messaged Mr Chilcott. He might be having a technical issue. One moment.

PN118

MR CHILCOTT: Sorry, we're back. Yes, apologies for that. Deputy President, I heard the question and I hope I interpreted it the right way. My opening to the submissions was going to deal with that point.

PN119

THE DEPUTY PRESIDENT: All right. If it's easier just to - - -

PN120

MR CHILCOTT: If I can perhaps - - -

PN121

THE DEPUTY PRESIDENT: If it's easier, you make your submissions and if I've got any questions, I'll ask them at the end.

PN122

MR CHILCOTT: I will pause at the beginning of what I'll call the summary because I think, as I'll explain, we are going to be a little bit longer in our submissions than what you have just heard from the applicant.

PN123

Deputy President, the issue that you are asked to consider today arises from what I have described as the union's substantive application to this Commission about which Ms Bingham spoke about earlier. The proceeding today is an ancillary application in that the applicant union asserts that clause 3.16 of the enterprise agreement has been enlivened, commanding that pre-dispute work arrangements and patterns will apply during the dispute resolution process.

PN124

The respondent's position is, in simple terms, that that is not the case, that that provision has not been enlivened. We do submit that the resolution of the difference between the parties requires you to rule on the application of clause 3.6 to this matter and is best approached by you, firstly, by determining when the matter attracted the operation of the dispute avoidance provisions or, more accurately, the dispute resolution process, as it is described in clause 3.16 - I should say P3.16 - and, two, where there was a work arrangement or pattern that applied at the date upon which you make the applicable finding.

PN125

In summary, as we understand it, the applicant has submitted that there was a dispute, that the relevant date of that dispute is 30 January 2023. Their submission continues by inviting you to conclude that the work arrangement or pattern was for each of the employees to be granted recreational leave at half pay until the dispute is resolved, although this morning we also heard a concession that leave cannot be granted where there is not an existing entitlement to that leave, so, for example, if the employee had run out of a leave entitlement, it's not within the purview of the Commission to actually make an order that demands that leave be granted.

PN126

On the other hand, the respondent submits, in effect, that the date on which it should be found that clause P3.16 operates is 16 December 2022 and that there is no relevant work arrangement or pattern. The effect of that submission is that clause P3.16 does not apply in the circumstances of this case and that the normal rights of an employee under the EA will apply, such as the right to work or the right to apply for leave. To put that another way - - -

PN127

MS JUNAKOVIC: Deputy President, Mr Chilcott has dropped out again. We keep hearing - - -

PN128

MR CHILCOTT: No, no, I haven't dropped out, I had just paused.

PN129

THE DEPUTY PRESIDENT: Can you hear Mr Chilcott now?

PN130

MS JUNAKOVIC: I can, thank you.

PN131

MR CHILCOTT: I can hear. I hadn't dropped out.

PN132

THE DEPUTY PRESIDENT: No, that's okay, just continue, thanks.

PN133

MR CHILCOTT: Thank you. To put it another way, our position is that the employees are on leave subject to an approved application.

PN134

I will pause there, Deputy President. I am hoping that has addressed the question that you have asked in relation to our position.

PN135

THE DEPUTY PRESIDENT: Yes, thank you.

PN136

MS BINGHAM: In the context of the exchange of documents that have occurred over the last few weeks, I do need to make some submissions about the submissions in reply, and I will be rather firm in doing so because it's our position that the submissions in reply were objectionable in that it refers in part to material issues that have not been the scope of the submission in reply and, secondly, it offered, in our submission, new material which was dressed up as being in response to material that we had addressed in our response, but which, in reality, should have been central to the applicant's primary submission, so in opening these submissions, I need to explain why my initial focus will be on the written submission in reply by the applicant.

PN137

It is my intention to spend a little time considering that document and its contents in order for it to be understood why our oral submissions this afternoon will be perhaps longer than was anticipated and longer than had been intended when your directions were published.

PN138

Firstly, the reply features some preliminary statements, effectively on the first page of the reply, some preliminary statements about the exchange of the written submissions, highlighting with great precision the time when the submissions were received and then read. This is all done without explanation for the need to do so and, questionably, does not meet the purpose of what a submission in reply is in the case, and there has been no suggestion of how that is relevant to the matters that you are considering today.

PN139

To understand our submissions, we do need to consider the original submissions, as I will call them, of the applicant, which were dated 21 April 2023. Despite there being a couple of paragraphs at paragraphs, perhaps, 5 and 6 about the

construction of industrial instruments, the original submissions offered nothing in relation to the relevance of the application of the rules of construction to the clause which was identified in paragraph 5, being clause P3 of the enterprise agreement. To put it another way, it failed to put the respondent on notice of the interpretation of the clause that the applicant offered in the submissions.

PN140

The respondent was not overly concerned by this and prepared a submission, a detailed submission, indeed a comprehensive submission, I submit today, on the meaning, the operation and the proper construction of clause P3. In doing so, we were not directly responding to the applicant's offering about the preferred interpretative approach because, in the primary submission from the applicant, there was none. Indeed, we took the view at that time the evidence of the applicant's witnesses was largely uncontroversial from our perspective and that the respondent did not require to present further evidence or to cross-examine the witnesses that had been offered by the applicant.

PN141

Instead of hearing a sigh of relief from our adversaries in relation to this, we have been criticised for this approach, we have been chided for not calling witnesses who have been named in the reply and we have been threatened, although that threat has not been followed through, with the need to draw adverse inferences from the evidence as a consequence. We don't know even today, having heard the oral submissions, what those adverse inferences were to relate to. More critically, our decisions were based on that with which we were presented and the witnesses, but we weren't to know what was to come because what was to come was in the reply itself.

PN142

If we go to the structure of the reply, because it's just easy to do so in terms of our consideration of it, we see that paragraphs 1 to 4, the paragraphs that I have already indicated, were largely factual matters about the exchange of the submissions and the evidence and, as I suggested earlier, probably not properly the subject of a matter of a submission in reply.

PN143

Paragraphs 5 to 14 then dealt with the interpretation issue of an industrial agreement, and each of the paragraphs from paragraph 5 to 14 dealt with that particular issue, but, in doing so, there were issues that were raised which, in my submission, should have been raised at an earlier time to put us on notice in relation to the arguments that were being advanced by the applicant. For example, in paragraph 7 of the submission in reply, there's a reference to the Qantas decision that has been referred to this morning where the meaning of the concept of a dispute was considered and cited, I infer from the submission, with support by the applicant.

PN144

Then, at paragraph 8, what we have is a question, which is the question that you are invited to answer. Frankly, I'm not sure it was done, but that is the question that should have been advanced, in my submission, in the primary submission.

PN145

I am going to stay with the interpretation provisions. The respondent had referred to other decisions and, as, Deputy President, you would be very much aware, there is a surfeit of decisions about the proper approach to the construction and application of a clause in an enterprise agreement or other industrial arrangements. So, at paragraph 6 of the respondent's submission, we set out the provisions and refer to cases that we submitted were relevant to your consideration and your approach to the construction of this agreement.

PN146

The applicant, in their submission in reply, selects the decision that was cited in the Qantas case, the decision of Kucks, and the quotations are presented at some length in the submission from Madgwick J, but, at paragraph 6, having gone through those principles, set those principles out, the respondent is said - trying to pick a neutral word - to have selectively overlooked a number of principles applied by the courts, including:

PN147

(a) a narrow or pedantic approach to interpretation is misplaced;

PN148

(b) it is justifiable to read the document to give effect to its purpose having regard to the context, despite the inconsistencies which might tend to some other reading; and

PN149

(c) meanings which avoid inconvenience or injustice may be strained for.

PN150

Now, what those provisions do is highlight provisions that assist the applicant's position, but if we go back to the respondent's submissions, we submit, and continue to submit, that the primary position is that which is set out in section 6(a) of those submissions, which says, and supported by the authority of Berri, that:

PN151

An interpretation of an enterprise agreement should start with a consideration of the ordinary meaning of the relevant words having regard to context and purpose, including the text of the agreement as a whole and the disputed provision's place and arrangement in the agreement.

PN152

In (b), contrary to what we are said to have cherry-picked, we are told the agreement is not to be interpreted as written as to achieve a fair or just outcome, which, ironically, we had ignored that in relation to 6(b) of the respondent's submissions in reply.

PN153

I won't go on in relation to that, but it causes concern because the very case that is relied upon, Kucks, says, at paragraph 29, as set out in paragraph 5 of the submissions in reply on page 3 - and it's a short summary:

PN154

The main guides to construction are text, context and purpose.

PN155

Text, context and purpose. In our submissions, they are the most important principles, as we indicated in our submissions, that need to be applied in relation to the interpretation of this enterprise agreement.

PN156

But, we are then said that we were striving for an interpretation of clause P3 which is legalistic, narrow and pedantic. That has been repeated again today and, having heard it again today, I am still not sure what the import of that submission is.

PN157

We are told in clause 6 that the ACT F&R, the respondent, is seeking an interpretation of the clause which ignores its industrial context and purpose, but that hasn't been addressed further in the reply, nor was it addressed in the oral submissions today, so, in our submission, because no argument has been advanced in relation to that, that particular submission, as I have summarised it, has no weight and must be ignored by you, Deputy President.

PN158

What is important is to determine the ordinary meaning because that's what the authorities say you must do, or at least attempt to do, to determine whether or not the clause in question requires you to go beyond the plain words in the clause to determine the meaning. For example, if I go to the meaning of the word 'dispute', in the respondent's submissions at page 5, section 13 - sorry, section 12 first of all - we say:

PN159

To determine the meaning of 'pre-dispute', one must first determine the meaning of dispute.

PN160

We then turn to the meaning of 'dispute'. The enterprise agreement does not define 'dispute', such that we must turn to the ordinary meaning of the word, and we offer the following meaning, which is derived from a dictionary, to determine whether or not that ordinary meaning has been used or applied within clause P3, that 'dispute' means, 'To engage in argument or discussion.'

PN161

So, having been told that that interpretation, or we infer we have been told that that interpretation, is legalistic, narrow and pedantic, paragraph 7 is offered in the submissions in reply, and again a reference is made to the Qantas decision where it is said the meaning of the concept of dispute was considered, and it goes on to say:

PN162

The Full Court, on appeal, endorsed the view that the word should be given its ordinary English meaning, namely, the exchange of opposing views or positions for or against.

PN163

A dispute resolution clause needs to be applied to a wide range of circumstances and this is indicative of the language used in clause P3, it is submitted by the respondent.

PN164

I strain to actually see what the difference is between the approach that we offered to the approach that was offered in Qantas, yet our approach was criticised.

PN165

I just need to come back to the comment about the industrial context and just to make it clear that, having raised the issue of industrial context, nothing has been said to suggest how the industrial context and purposes ought be used in relation to the interpretation of P3, other than we have had reference today, for the first time, to the object of clause P3, which is contained initially in clause P3.1 to be, and I say objectively to be a naturally sensible provision, that the objective of these procedures is the prevention or resolution of disputes about matters arising between employees and the employer and the union and the employer, including disputes about the interpretation or implementation of this agreement.

PN166

It goes on to say at P3.3, which I read to be as part of the objectives of the agreement:

PN167

All persons covered by this Agreement agree to take reasonable internal steps to prevent and explore all avenues to seek resolution of, disputes.

PN168

It has just dawned on me that there is evidence that that was the approach the parties took. Despite some of the language that was used in the material that is before you, that was the approach that the parties took through January of 2023 from the circumstances that arose in December of 2022. I will come back to that later.

PN169

If I move to paragraph 9 of the submission in reply, again, in our submission, at this point in time, this decision was something new. It's an argument, based on authority, which had not been advanced in the substantive submission and, of course, we had not addressed it, and it is a significant matter and I will come back to that and address it separately towards the end of the submissions I will be making, and that applies also to paragraph 10.

PN170

Paragraph 11, there is reference then to the letter of 16 December 22 that was sent to the Chief Officer. What is written in the submission is:

PN171

It is accepted that such correspondence was notification of an issue between the union and ACT F&R, namely, alleged contraventions of section 50 and section 351 of the Fair Work Act by reason of breaches of the enterprise agreement and age discrimination.

PN172

The submission then goes on to say:

PN173

Notably, these issues are matters outside the jurisdiction of the Commission.

PN174

But, again, that is a statement that is said, presumably relied upon, but remains largely unexplained either in the submission in reply, in the earlier submission, or, indeed, in the oral submissions today.

PN175

Significantly, the use of the word 'issue' was not used in the letter of 16 December. What was said there is, at page 74 of the court book:

PN176

We write to you in relation to reports from a number of our members that ACT Fire & Rescue have not been abiding by the terms of the enterprise agreement.

PN177

So, what is described - in fact, in our submission, there has been an avoidance of describing anything, the word 'issue', the word 'matter' or the word 'dispute', until we get to the very last page, page 79 of the court book:

PN178

Where you refuse to rescind the refusal decision and grant the relevant applications for each discriminated member for reason that you dispute the matters alleged in this way, we say that you need to, at the very least, grant Mr (Indistinct) an interim grant of leave on half pay until 31 January 2023 to allow time for resolution to be reached regarding the return to work issues.

PN179

The provisions of the enterprise agreement is a variety of words in relation to - I'm not going to use the word 'issues' that arise between the parties because 'issue' is not one of the words that are used - so P3.1, there are two words used, the resolution of disputes about matters arising between the employees and the employer and the union and the employer, including disputes about the interpretation or implementation of this agreement.

PN180

Further, down the page at clause 3.5 of the clause, at 3.5.1 in particular, it requires that there be a discussion between the employee's representative and the employee's supervisor and they will discuss the matter, and it says, at 3.5.2, 'with respect to matter arising.' Then 3.6 engages the word 'dispute' on at least two

occasions and, of course, in clause 3.16 itself, pre-dispute work arrangements that had to apply during the dispute resolution process.

PN181

Things did happen between 16 December and 20 December and they have not been addressed today, and again we will address the Tomvald decision in a little more detail shortly.

PN182

Paragraph 13 of the response says that the parties followed the cascading series of requirements from 30 January 2023. Our submission will be, of course, that that's not so, that there was an adherence to those requirements prior to 30 January 2023.

PN183

Finally, in relation to that section of the reply, there is a statement made - it's the last sentence of that submission:

PN184

> *The work arrangement that had been put in place, namely, that each of the employees remain on leave on half pay pending the resolution of the dispute by the parties.*

PN185

Well, that is not the case. The evidence is quite clear in the correspondence from ACT Fire & Rescue in December of 2022 that that was the arrangement that was in place until 31 January 2023 and, indeed, in my submission, the parties acted accordingly in relation to that, to the point where there were actually applications made during the month of January in relation to leave. In other words, what has been quoted in paragraph 14 is incomplete.

PN186

Paragraphs 15 and 16 raise issues, but I am, again, still not sure of their importance. First of all, it is said that it is not open to the respondent, as it does at paragraph 19 of its submissions, to say what was meant by the author of the correspondence. It is said the correspondence speaks for itself, and it made reference to the fact that we determined not to call the Chief Officer in relation to the correspondence that was written, and the same applies at paragraph 16 where reference is made to the Deputy Director General of Justice and Community Safety, Ms Doran, and Assistant Commissioner Phillips of the Emergency Services Authority.

PN187

It is submitted that an adverse inference should be drawn that the failure for us to provide evidence from either the Acting Chief Officer, Mr Brewer, Ms Doran or Assistant Commissioner Phillips would not assist the case as to the reason for granting the leave on half pay.

PN188

Our submission is that there were some objective circumstances around which you can draw an inference that this issue between the parties, however it is described,

which was brought to the attention of the Chief Officer directly by virtue of the correspondence dated 16 December, was never going to be resolved in a satisfactory sense because of the time of the year, being Christmas, the likelihood that many of the people involved in the matter and advising in relation to the matter would be on leave, and, again, in those circumstances, there would be a fair inference to draw from that material that there was a desire not to unnecessarily interfere with the payment arrangements that had been in place.

PN189

I don't know and, in our submission, very little weight can be placed on the matters at paragraph 15 or 16 in relation to the resolution of the issues that you are being asked to consider.

PN190

Moving on then to the section of the document that's called 'The Status Quo Provision', there the respondent's submission in relation to this interpretation of the status quo provision, P3.16, starts at paragraph 11 of our submissions. I have already made submissions in relation to our approach in relation to the ordinary meaning of the words, which is - I am not going to take you through them ad infinitum, but which are described - and there was reliance on the dictionary to ensure there was a clear understanding of what the ordinary meaning of the word according to the dictionary is, so, in other words, to make sure that the understand of the word is held by an understanding of what the dictionary meaning is, as provided.

PN191

But, we are told that that approach was unhelpful, and I have already reminded the Commission's search for the meaning of clause 3.16 must be - and I quote:

PN192

Intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon.

PN193

Now, that's a quote from the Kucks case, as I recall it.

PN194

If we turn to the extract of the Kucks case, that quote omits the full quote where his Honour sort of concludes:

PN195

Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading.

PN196

As I have quoted before, he indicated the main guides to construction are text, context and purpose.

PN197

But the irony comes next because, having been told that our reliance upon dictionary meanings in clause 17 - it emerges in the very next paragraph, at section 18 of the reply, where there is a quote extracted in relation to the meaning of the word 'work' and Bull DP found as follows:

PN198

The word 'work' is given an extensive meaning in the Macquarie Online Dictionary to include employment, a job -

PN199

et cetera.

PN200

So, the very case that's cited actually does what we have been told was unhelpful, which was to refer to the dictionary.

PN201

But there's more because Harrison DP did the same thing, according to the extract in paragraph 20 of the submission in reply, because, again considering the word 'work', he went to another dictionary, the New Shorter Oxford Dictionary, and sought some guidance from that dictionary to determine the meaning of that word.

PN202

Indeed, if I go back to the Qantas case, and what you haven't got entailed in the Qantas case - when you go to the submission that is - sorry, the extract or the reference to paragraph 7 of the submission in reply - their Honours there also had reference, when considering the meaning of the word 'dispute', to a dictionary meaning.

PN203

We are then told, in paragraph 21, that we are inviting you to take a narrow and pedantic approach to the interpretation of clause 3.6. In our submission, no, we never urged you in our submission in reply to do so. We invited you to adopt the natural meaning of the words that you were being asked to consider, in particular, the word 'dispute' the word 'pre-dispute' and the word 'work' as it appears in the phrase 'work arrangements and patterns'.

PN204

At paragraph 21 of the submission in reply, there is another, in my submission, new submission (audio malfunction), authority, in my submission, is contrary to the authorities that have been cited in relation to the construction of enterprise agreements or other industrial instruments, where it is submitted that the Commission should be expansive in its interpretation of the clause, taking into account the object of the clause itself, the resolution of disputes and dispute avoidance.

PN205

Firstly, it is not submitted to you how the application of the ordinary meaning of the words fails to give appropriate meaning and appropriate construction of the clauses that are being considered, in this particular instance clause 3.16 of the

enterprise agreement, and it hasn't been submitted really, in my submission, in a way that can assist you, as to why it is that clause P3.1, which is the objective of the dispute avoidance and settlement procedures, how that impacts, requiring an expansive interpretation of clause 3.16. It is just left hanging.

PN206

In response, we would simply ask you to read, consider and apply the submissions that we have made in relation to those matters in our submissions, our written submissions.

PN207

At paragraph 22 of the reply, there is the phrase 'work/employment arrangements' regarding the taking of paid leave. Technically, of course, that's not the wording of the EA. The EA refers to 'work arrangements and patterns', but that may be being a little pedantic.

PN208

What the sentence then proceeds to do is to say that part of this arrangement is that the employee is entitled to payment, whether it be a full-time or half-time basis. Well, that's mostly correct. In my submission, it depends on the nature of the leave that's sought and, in fact, leave can be granted on the basis that it's leave without pay, but, putting that to one side, there is no question that leave can be granted - and the key word is 'granted', 'applied for and granted' - approved - with payment on a full-time basis, or on a half-time basis, as it said in the submission - half pay.

PN209

This is a discretion, not an entitlement. It's a discretion in the hands of the employer that must be exercised properly - there's no question about that - but that's not the situation that we are considering here, but it's certainly what paragraph 22 is strictly about. More accurately, it is an entitlement for an application to take leave at half pay and that application is considered by the employer.

PN210

Paragraph 23 states that:

PN211

It is submitted that the granting of paid leave and the taking of paid leave must be a work arrangement or pattern.

PN212

I stress the word 'must' and I have to ask the rhetorical question 'Why?' Why is it that the granting of paid leave and the taking of paid leave must be a work arrangement or pattern? This is not being argued before you. It's not in the submissions, either the submissions in reply or the expanded submissions - sorry, the original submissions or the submission in reply. There is nothing there to assist you in relation to why it must be, and again we invite you to consider our submissions, which are quite comprehensive and analytical on that point.

PN213

Before I turn to the case of *Tomvald v Toll Transport*, which I said I would need to return to in a little detail, I generally invite you, in relation to the position of the respondent, to consider the comprehensive submissions that we have presented to you, which are the submissions in reply, which address, in our submission, all the issues that you need to consider.

PN214

To return now to the decision in *Tomvald v Toll Transport*, I indicated that, in my submission, this raises new issues in relation to the approach that you have been invited to adopt. At paragraph 9 of the submissions in reply, there is an extensive quote from Flick J's decision. It was said that a clause similar to P3, clause P3 generally, was considered and that clause itself is reproduced at length in his Honour's judgment. It has some important elements. I do make these comments by reference to the quotes that have been provided at clause 9.

PN215

Firstly, there is no formal requirement to notify a dispute. That's clause 280. We do not take issue with that. The dispute resolution process is characterised by a series of cascading events. Again, paragraph 280 of the judgment. Third, an employee cannot unilaterally create a dispute without an attempt to resolve it. Again paragraph 280. No disagreement with that. Significantly, at paragraph 282, it is said:

PN216

> *Both parties to any dispute need to be aware that there exists a dispute which falls within the ambit of the Enterprise Agreement and a dispute which attracts mutual obligations to try to resolve.*

PN217

That is paragraph 282. Then, at 283, there is the mutual obligation provision, as it is described, and which Ms Bingham cited to you earlier:

PN218

> *On the one hand, an employer may be bound to maintain the status quo pending the resolution of a dispute; on the other hand, an employee only gains that protection by following the steps set forth in cl 15 and providing an opportunity for the dispute to be resolved.*

PN219

So, in other words, the protections that are provided by, in that instance, the status quo provision, which was clause 15(g) of the relevant agreement, which is our P3.16, is only achieved by following the steps.

PN220

But then there are some other provisions that are quite important that haven't been provided. Firstly, the dispute resolution procedure in the Tomvald case is found at paragraph 256 of the decision and the dispute resolution provision itself is slightly different to ours. It reads:

PN221

Until the matter is resolved by agreement, conciliation or arbitration, the status quo before the Dispute arose will be maintained and work will continue without disruption. No party is to be prejudiced as to the final settlement by the continuance of work in accordance with this procedure.

PN222

One significant matter that appears in the dispute resolution clause there is that the dispute isn't described as a dispute, it is described as, 'The matter must first be addressed.' That's clause 15(a) of the dispute resolution procedure that was set out that applied in Tomvald. The matter must first be discussed by the aggrieved transport worker directly with his or her or their immediate supervisor.

PN223

His Honour then, at paragraph 258 of his judgment, says:

PN224

The requirement to maintain the status quo, according to the terms of cl 15, hinges upon the existence of a 'matter' first being 'discussed' between the worker and his immediate supervisor. It is from the date of that discussion that the status quo is to be preserved until the matter is resolved.

PN225

Then, at paragraph 268, after some further analysis of what actually occurred in relation to the cascading series of events, as I will call them, his Honour says:

PN226

No case was sought to be advanced on behalf of Mr Tomvald (the applicant) at paras [46] and [47] of the Further Amended Statement of Claim that the 'dispute' arose on any date other than a date 'no later than 18 May 2016'.

PN227

What that indicates is that there is an onus, in my submission that I've said directly, on the party making the assertion that needs to be discharged that the factors that appear in the dispute resolution process have been met so as to attract the operation of clause 3.16.

PN228

Now, in the submissions in reply, it is suggested at paragraph 11 that there was a letter sent on 16 December, and there is no issue with that and we have already made mention of that letter. Secondly, it is submitted at paragraph 12, although it's stated as already submitted at paragraph 30 of the primary submissions that were filed on 21 April, that neither party adhered to the cascading series of requirements that characterise the dispute to which the clause refers, and in the early submissions, at paragraph 30 of the primary submissions, it is said, relevantly, as at 16 December 2022, neither party followed those steps set out in clause 3.5.2, namely, that discussion would take place with the Chief Officer, nor did either party follow the procedure set out in clause 3.6 where a dispute remains unresolved, that is, convening a meeting within seven days of the dispute being notified.

PN229

Sorry, I'm just checking something. So, the sequence of events that occurred in relation to this matter is that prior to 16 December, there was clearly an exchange of applications that were made in relation to a variety of applications, no matter how described, leave or flexible work arrangements, and management had dealt with those appropriately, but there was clearly not a meeting of the mind. In other words, to use Ms Bingham's words, there was a degree of dissatisfaction in relation to the outcome of those applications.

PN230

That resulted in the letter of 16 December, to which we have already referred, and that's at page 74 of the court book, and which ultimately went through all the matters that were in contention, accused the ACT Fire & Rescue management of being in breach of the Fair Work Act, telling management that there was no proper basis for the refusal and the like, but it concluded with the idea that:

PN231

If we are unable to take the steps that we have outlined above...

PN232

which is a series of demands in relation to the actions that should be taken and which should be taken in favour of the employees:

PN233

...we intend to apply to the Federal Court seeking a mandatory injunction compelling ACT Fire & Rescue to comply with the provisions of the agreement.

PN234

It is the language of disputation, in my submission.

PN235

What happens next is that there are meetings on 16 December, and that's referred to in the affidavit of Mr McConville at page 26 of the court book and particularly at paragraph 21, where he refers to a telephone discussion with Ms Doran, a discussion with Assistant Commissioner Phillips later that day, at paragraph 22, and then, at paragraph 23 significantly, at page 27 of the court book:

PN236

While in discussions with Assistant Commissioner Phillips, I caused to be sent correspondence to the Chief Officer on the subject of the Chief Officer's refusal to grant requests for flexible working arrangements sought by four members.

PN237

Significantly, I also should pause to indicate that, at that point, the parties to the dispute have moved from the issues, the contentions, whatever it is, however you want to describe it, have moved from being the four or five individuals that are now named in the application to being one where the union was representing, properly according to the EA, representing their interests in discussions and negotiations with the respondent in accordance with - I've just lost my copy of the EA - in accordance with clause P3.4 of the EA where it is agreed that:

PN238

A party to the dispute may appoint a representative, which may be a relevant union, for the purposes of the procedures of this clause.

PN239

So, on the 16th itself, we have a series of actions that are being taken that, in my submission, are consistent with the broad requirements of clause P3 in the sense there have been discussions and further correspondence.

PN240

Then, on 20 December, there was an email sent - and again I refer to Mr Hakkinen's affidavit, which is at page 164 of the court book - where he says by noon on 20 December 2022, as the union had still not received a response - I paraphrase - the secretary wrote a further email to the Acting Chief Officer, Glenn Brewer, at 4.38 pm:

PN241

I was copied into this email and I was copied into the Acting Chief Officer's email response that was received.

PN242

It goes on to say:

PN243

The response received made it unnecessary for the union to seek interlocutory relief on behalf of the members.

PN244

Each of the members, significantly, were granted leave on half pay from 16 December 22 to 31 January 22 - 23. In fact, there's a typographical error there because it should be - it's described as 2022 and it should be 2023. So, in other words, leave had been granted, and if we go to the letter from Acting Chief Officer Brewer, the words become important. It's page 86 of the court book, the third paragraph of the letter. He says or he wrote:

PN245

Following a review on this matter, I can confirm that annual leave on half pay is approved for all firefighters mentioned in both your letter of 16 December and your subsequent email of 20 December through to January 2023.

PN246

He then goes on to say:

PN247

I can confirm that a review of the matters raised in your correspondence will be undertaken in the new year and a response provided to you prior to 31 January 2023.

PN248

The earlier email, which is at page 81 of the court book, which was on 20 December 2022 at 4.48 pm, Mr Brewer wrote:

PN249

Dear Greg, I just tried to call you on this matter and left a message. As I'm coming up to speed on this matter since taking over the Acting CO role, I have asked JACS PWS...

PN250

that's the human resources area of the Justice and Community Safety Directorate:

PN251

...to assist in the drafting of formal correspondence and will forward it to you once finalised. In the interim, I can confirm that the intent of the formal correspondence will be to extend leave to your individuals until 31 January 2023.

PN252

That arrangement, which, in my submission, as I recall the correspondence, was consistent with what was asked for by the applicant union, and the idea that there would be detailed responses in relation to the matters raised in the correspondence was not disagreed with at any point that I understand from the material that has been presented, and there was a response to be provided by 31 January 2023. Indeed, there appears to have been a discussion between Mr McConville and the Chief Fire Officer on 11 January and Mr McConville says directly in his affidavit that he did not raise this matter with the Chief Fire Officer.

PN253

Further, leave applications were lodged by some of the employees on or about 10 or 11 January 2023 and then, on 19 January 2023, a letter was sent to the Chief Fire Officer, which is annexure 2 of Mr McConville's affidavit and it can be found at page 113 of the court book. It is a letter dated 19 January, and despite what was advised earlier in the earlier correspondence, it asserts that:

PN254

We note that we have not received a substantive response to our letter of 16 December.

PN255

So that's the first complaint that there had been no response, but, more significantly, the union had been told not to expect a response prior to 31 January in any event.

PN256

Further, the letter then goes on:

PN257

While the 21 December letter that we received simply preserved our members' entitlements and avoided the issue of termination by approving leave on half pay applications on an interim basis until 31 January 2022 -

PN258

an acknowledgement of the interim nature of the arrangement that was put in place during primarily the January period of 2023. Again there's a reference there to January 2022. That should be a reference to January 2023.

PN259

They then reminded us, at page 114 of the court book, reminded the respondent that they are prepared to seek a mandatory injunction compelling compliance with the agreement, and the paragraph goes on:

PN260

In the event that we are compelled to obtain an injunction, we rely on this letter and our letter of 16 December in the matter of costs.

PN261

They go on to say:

PN262

We say that ACT Fire & Rescue has had more than enough time to consider its position and provide a complete response to our request.

PN263

So that was written in the knowledge of the 31 January deadline that was offered, also written in the knowledge that there had been at least one conversation between Chief Officer Mavity and Mr McConville on 11 January 2023 where he chose not to raise the matter. In fairness, Mr Mavity did not raise the matter either, but it shows that there were meetings and discussions occurring, on other matters perhaps, but there seemed to be no reason why the matter could not have been raised.

PN264

On 25 January, there was a discussion, and that is to be found at - I'll come back to the reference to that in a moment. Then, on 27 January, a significant letter was written by the respondent to the applicant addressing the issues. The reference to the 25 January discussion was the meeting on 25 January at approximately 10 am, which was conducted, it would seem, by video conference. Present were the Chief Officer, Mr McConville, Mr Hakkinen, Ms Peasley from ACT Fire & Rescue, Commander Perks. That reference is found at paragraph 42 of the affidavit of Mr McConville and that is found at page 30 of the court book. During that discussion, there is a discussion about the issues that were, we say, in dispute and had been in dispute since 16 December 2022.

PN265

Bearing in mind the authorities tend to say that there does not need to be a formal notification of a dispute for there to be a dispute, if one accepts the decision in Tomvald, there needs to be an understanding between the parties, a mutual understanding, that there is a difference between them that meets the characterisation of a dispute. The fact that, in this instance, it may be that there wasn't a dispute formally notified does not mean that there wasn't a dispute and the parties are broadly acting in accordance with the dispute resolution process that is set down in clause P3 of the agreement.

PN266

If we go back to the agreement, what it requires at clause 3.5:

PN267

In the event there is a dispute the following processes will apply:

PN268

Where appropriate, the relevant Employee or the employee's representative will discuss the matter with the Employee's supervisor.

PN269

In clause 3.5.2 it says:

PN270

...where the Union is the nominated representative and matters arising between the Union and the Employer will not apply where the Chief Officer has been notified of the dispute by the Union. In these circumstances a discussion will take place with the Chief Officer.

PN271

So, what happened in January, a letter was written, a fairly assertive letter, it was, in our submission, a letter that threatened certain action if certain things were not done, it was met by effectively a response, 'This is not going to be resolved in the days between now and' - sorry, if I said January, I withdraw that. The letter was written on 16 December 2022.

PN272

THE DEPUTY PRESIDENT: (Audio malfunction.)

PN273

MR CHILCOTT: Thank you. What the correspondence by the end of that week, as I will call it, had said, and without disagreement, was that there would be further correspondence after the matter had been given due consideration, but clearly there was a disagreement between the parties that is evidenced by the discussions that have been relied upon by the applicant with Ms Doran, Assistant Commissioner Phillips and the correspondence with Acting Chief Officer Brewer and, of course, there was the discussion on 25 January, upon which we also rely, which has not been mentioned by the applicant in their submissions today or in their written submissions.

PN274

So, the effect of P3, taking into account the approach that is to be taken in relation to construction of enterprise agreements as set out in the Kucks decision the Qantas decision, the Berri decision, and presumably applied by his Honour in the Tomvald decision, was to look to the essence of what actually occurred between the parties at all relevant times.

PN275

In our submission, what occurred was that there was a difference between the employees and the employer. I am assuming - I can't speak for this - that, for reasons that are not known, the employees decided to seek the assistance of the

applicant union and the applicant union announced itself as the representative of the five employees on or around 16 December 2022, primarily in the letter of 16 December 2022.

PN276

If there had not been discussions between the employees individually and their supervisors, what transpired next was a discussion of sorts - I'm not suggesting for a moment there was a complete discussion - a discussion of sorts with the Acting Chief Officer and certainly with other persons who the applicant must have regarded as persons with authority or influence, Ms Doran and Mr Phillips.

PN277

While they did not quite meet the requirement of there needs to be, or may not have quite met the requirement that there needs to be a discussion with the Chief Officer, as required in 3.5.2, the reality is that they were discussions that were aimed to achieve the objectives of P3, which is the objective of prevention and resolution of disputes about matters arising between them and, to that extent, by 20 December, that had been reached because, as I have said before, an interim arrangement had been put into place in relation to the leave arrangements, at all times made clear it was an interim arrangement, which was leave at half pay in relation to the employees, but with the promise that there would be more substantive discussions and correspondence in relation to the matters between us, that is, between the respondent and the applicant representing the employees and, as I indicated before, that proposal was not met with any objection until later in January and, indeed, there was a meeting on 25 January and correspondence was received by the applicant on 27 January addressing the issues.

PN278

In conclusion, if it please, we rely, as I indicated before, on the written submissions that were provided and in particular the conclusion that we advanced at paragraph - - -

PN279

MS JUNAKOVIC: Deputy President, has Mr Chilcott dropped out?

PN280

THE DEPUTY PRESIDENT: No, I don't think so. Mr Chilcott? Mr Chilcott, you are on mute, if you can hear me. Mr Chilcott? Just a moment, we'll see what's happening.

PN281

MS JUNAKOVIC: Thank you, Deputy President.

PN282

THE DEPUTY PRESIDENT: Ms Junakovic, are you able to contact Mr Chilcott?

PN283

MS JUNAKOVIC: I am contacting him. I understand he might be speaking at the moment, but we can't hear you, sorry, Michael. I understand he's talking at the moment, Deputy President, but it does not appear to be coming through.

PN284

THE DEPUTY PRESIDENT: No, it's not. Mr Chilcott, if you can hear me, or otherwise if you could message, Ms Junakovic. It might be easier just to disconnect and dial back into the call and let's see if that fixes the problem.

PN285

MS JUNAKOVIC: Deputy President, does that require me to hang up and dial back in?

PN286

THE DEPUTY PRESIDENT: Sorry, no, just Mr Chilcott.

PN287

MS JUNAKOVIC: Okay, thank you.

PN288

THE ASSOCIATE: Deputy President, I have suggested that he log out and back in again, so we'll just give that one moment.

PN289

THE DEPUTY PRESIDENT: Okay, thanks. Mr Chilcott, can you hear me?

PN290

MR CHILCOTT: I can. Can you hear me?

PN291

THE DEPUTY PRESIDENT: Yes, thank you, we can now.

PN292

MR CHILCOTT: I apologise. I don't know what happened then.

PN293

THE DEPUTY PRESIDENT: That's okay.

PN294

MR CHILCOTT: I'm assuming you didn't hear any of the submission we made about clause 3.16?

PN295

MS BINGHAM: Deputy President, my instructor informs me that the last words that we heard were, 'I will rely upon the submissions provided and especially at paragraph' - blank. 'I wish to rely on the submissions provided and especially at paragraph' - and that's when Mr Chilcott fell off the line.

PN296

MR CHILCOTT: Okay. If you will bear with me. The submission that we want to make - sorry, before I go to the conclusion in the written submissions, there were submissions made about clause P3.16 in the applicant's oral submissions. Reliance was placed on the pre-dispute work arrangements, that patterns will apply during the dispute resolution process, but then it was suggested that the remainder of the words had no relevance to the interpretation of clause 3.16.

PN297

We submit to the contrary that the words actually do help the construction of the word 'work arrangement and patterns' because the rest of the words in the provision, in the first sentence, 'Unless there is reasonable concern by the employee about an imminent risk to his or her health or safety' shows that is an issue that is relevant to the working environment of the employees concerned and, indeed, the second sentence of P3.16, which, in broad terms, talks about reassignments if there is an unsafe working environment, again deals with the working environment and the opportunity to make decisions to alleviate through reassignment of duties the fears about the risks that are created by that working environment.

PN298

The second point that I need to turn to is in relation to the Tomvald case where it was suggested that a party cannot avail themselves of the protection of the dispute resolution clause if they did not follow the process, but it's not the case, in our submission, that the clause does not, as a matter of ordinary course, apply to all disputes, rather it should apply to all disputes, particularly where those parties follow the process, and we submit in this instance, the process has been followed such that the operative date for making the necessary decisions about the operation of clause P3.16 is 16 December 2022.

PN299

THE DEPUTY PRESIDENT: Mr Chilcott - - -

PN300

MR CHILCOTT: Sorry, Deputy President, I was about to enquire about whether or not the audio fell off before that point in time, but I'm assuming that may not - I don't know what to assume because I don't know.

PN301

THE DEPUTY PRESIDENT: No, I could hear you. There was just - - -

PN302

MR CHILCOTT: Okay. That's all right. We will make the assumption that it went through, I think.

PN303

In conclusion, we take you to paragraph 49 of the written submissions where our position, in my submission, is quite clearly stated, that the dispute arose on 16 December 2022, in answer to the first question that you posed, but that there was no - and you can gain this from the respondent's submissions that have been made in support of this - that there were no work arrangements and patterns within the meaning of P3.16 of the enterprise agreement prior to that date because the employees were on leave and therefore clause P3.16 did not apply.

PN304

Alternatively, we say that the solution is actually met by - that the arrangements for these employees pending the resolution of the matters before you are met by, we'll call it the normal workplace arrangements, and I described them before as the rights to work, the right to take leave, the right to apply for leave, et cetera,

that they are best resolved by management in the normal course of events through those mechanisms.

PN305

Unless you have any questions, they are the submissions in relation to this matter.

PN306

THE DEPUTY PRESIDENT: Thank you, Mr Chilcott. Ms Bingham, anything in reply?

PN307

MS BINGHAM: Just a short reply, your Honour. Firstly, may I take you to the directions made by yourself on 4 April, which only required the filing of outlines and not full submissions.

PN308

Secondly, it is imposed upon legal practitioners an obligation to the court, and in this case the tribunal, to bring to the tribunal's attention all those cases for and against the arguments that are being put forward by each party. In the circumstances, there was no reference to authorities with respect to the submissions of ACTF&R in reply to the primary submissions, outline of submissions, of the union. We note that the matter was listed for a full day where cross-examination, leading of witnesses and full submissions by reason of the evidence could have been anticipated.

PN309

Secondly, although the word 'dispute' has an ordinary meaning, a dispute for the purpose of the dispute resolution clause has a technical meaning and that is what is set out in the Tomvald case in Flick J's decision. A dispute for the purpose of the dispute resolution clause must step through the cascading provisions. Not an unusual principle for the Commission to apply.

PN310

On the issue of the definition of 'work' used by the employer, the employer has been selective and pedantic in the references provided to you. The Macquarie Dictionary, which I have presently before me, has, not one, not two, but 35 meanings of the word 'work', consistent with what Bull DP and Harrison DP said looking at the term. You were asked to apply the word 'work' in a narrow, pedant manner.

PN311

It is uncontested evidence that no steps were taken under the dispute resolution procedure until 31 January 2023 when Mr Mavity wrote to the union acknowledging a dispute on foot. On 27 January, despite Mr Chilcott's valiant attempts to say otherwise, Mr Mavity's correspondence shows there is not a meeting of the minds that there is a dispute on foot. 27 January in fact expressly says that there is no dispute on foot; the dispute resolution clause is not enlivened.

PN312

I also take you to the decision of Bull DP of 23 June 2021, paragraph 48, where he says:

PN313

The words 'work procedures and practices'...

PN314

like terms to 'work arrangements and patterns':

PN315

...must be given some work to do. I accept that work procedures and practices provides a wide field of consideration but they do not cover every occasion where a dispute is raised.

PN316

We say the pre-dispute work arrangement here was the grant of leave, and I am not going to press that point further. Your Honour understands what the union has to say.

PN317

We also say that the placing of all but Superintendent Weston on leave with half pay changed the status quo to all those members being on leave at half pay. Notably, the meetings that take place between Mr McConville, the Assistant ESA Commissioner and the Deputy Director General of Justice and Community Safety take place before the correspondence has been issued.

PN318

Mr Chilcott alleges that the letter of 16 December is the language of disputation. This implies that all matters must be pursued as a dispute, rather than, for example, an application for a court or a matter that's to be resolved at a high level, which, of course, is what Mr McConville was attempting to do.

PN319

If that construction is preferred that Mr Chilcott is pressing upon you, there is a potential that this would result in the clause being objectionable insofar as it offended the scheme of general protections.

PN320

Mr Mavity and Mr McConville did not discuss the matter on 11 January. There is no reason why this issue should have been discussed at every point. Mr Chilcott said, at approximately 2.16 pm today, that the union was on notice not to expect a response before 31 January. That is just plainly incorrect on the evidence. This is not what Acting Chief Officer Brewer's correspondence at GMC9 states. The penultimate paragraph says, 'Prior to 31 January 2023.'

PN321

MR CHILCOTT: I have got to object. I should do it while it's there. I did read out that paragraph. I didn't say that it clearly means prior - - -

PN322

MS BINGHAM: Deputy President, I am entitled to finish. We have a note exactly - and the transcript will show what submission was made.

PN323

THE DEPUTY PRESIDENT: I will review the transcript. Can you continue, thanks.

PN324

MS BINGHAM: Yes, thank you. And that was at 2.16 pm, your Honour.

PN325

The union did not notify the dispute on behalf of the employees. The union took the dispute on its own behalf, and that's clear from the notification that was made by the union on 30 January.

PN326

Sorry, your Honour, I'm just checking my notes. Mr Chilcott also characterises the steps of the parties as being in compliance with the dispute resolution procedure. Mr Mavity, in his letter of 27 January, his last paragraph states that the letter of 16 December does not accord with the dispute procedure.

PN327

For example, your Honour, on the issue of work arrangements, putting aside the very, very narrow definition of 'work' you are being asked to accept, work arrangements could cover people on WorkCover who may not be able to return to the workplace. Work arrangements can include the policies and procedures regarding selection of candidates for positions or redundancies.

PN328

Your Honour, I just wish to check with my instructors that there is nothing else that I need to add. Your Honour, I have no further issues in reply and we commend the evidence, the uncontested evidence, and the outlines of submissions provided to you in accordance with your directions. If the Commission pleases.

PN329

THE DEPUTY PRESIDENT: All right. Thank you all. I will consider the evidence and the submissions that have been made and a decision will be issued in due course. Thank you. We will now conclude.

PN330

MS BINGHAM: Thank you, your Honour.

PN331

MR CHILCOTT: Thank you, Deputy President.

ADJOURNED INDEFINITELY **[2.48 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs