TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT O'NEILL
COMMISSIONER BISSETT

C2022/7889

s.604 - Appeal of decisions

Appeal by Sydney Trains
(C2022/7889)

Sydney

10.00 AM, MONDAY, 20 FEBRUARY 2023

PN1

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. Mr O'Grady, you're seeking permission to appear for the appellant?

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MR C O'GRADY: Yes, along with Mr Watts who is in Sydney at the moment.

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DEPUTY PRESIDENT GOSTENCNIK: Yes. Good morning to you both. Mr Fam, you're similarly seeking permission to appear for Mr Galea and Cambridge?

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MR P FAM: Yes, Deputy President.

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DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning.

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MR FAM: Good morning.

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DEPUTY PRESIDENT GOSTENCNIK: And, Mrs Tripp, you're representing yourself?

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MS K TRIPP: That's correct.

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DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning.

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MS TRIPP: Good morning.

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DEPUTY PRESIDENT GOSTENCNIK: And, Mr Aiono, you're representing yourself also?

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SPEAKER: I think he may have lost connection.

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SPEAKER: He may be on mute.

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DEPUTY PRESIDENT GOSTENCNIK: Mr Aiono, are you able to hear me?

PN15

MR U AIONO: Yes. I lost connection, sorry.

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DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. You're representing yourself this morning?

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MR AIONO: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. I understand we have some difficulty with Mr Taylor. Has Mr Taylor joined us? It would appear not. I should indicate that we have received email correspondence from Mr Taylor dated 10 February 2023, which appears to set out some brief submissions in response to the appellant's submissions. I take it, at least so far as Mr Fam and Mr O'Grady are concerned there's no objection from either of you to the grant of permission to the other.

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MR O'GRADY: No, not from our part, Deputy President.

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MR FAM: Nor from us.

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DEPUTY PRESIDENT GOSTENCNIK: Does any other party wish to be heard in relation to the applications for permission to be represented by lawyers? Sorry, Mrs Tripp, you want to say something?

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MS TRIPP: I said no, that's fine.

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DEPUTY PRESIDENT GOSTENCNIK: Mr Aiono?

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MR AIONO: I'm the same. No.

PN25

DEPUTY PRESIDENT GOSTENCNIK: And we are satisfied taking into account the complexity of the matter that the matter will go more efficiently if we were to grant permission to some of the parties to be represented by lawyers, and we do so in each case. I should indicate that we have had an opportunity to read the submissions that the parties have filed. Just to confirm, Mrs Tripp, you haven't filed any written submissions?

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MS TRIPP: Not for the appeal, no.

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DEPUTY PRESIDENT GOSTENCNIK: All right. And, Mr Aiono, you also haven't filed any written submissions?

PN28

MR AIONO: Not for the appeal.

PN29

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. Yes, Mr O'Grady?

PN30

MR O'GRADY: Yes, thank you, Deputy President. Can I turn first to the issue of permission to appeal, and the Full Bench will have seen that we have sought to address that in our written submissions, and indeed Mr Fam has put in extensive submissions as to why it is his submission we shouldn't get leave to appeal.

PN31

The starting point, in my respectful submission, is of course the terms of section 604, which identify public interest as a basis for the grant of permission in 604(2), but of course doesn't confine public interest, or doesn't confine the basis for a grant of permission to public interest.

PN32

DEPUTY PRESIDENT GOSTENCNIK: I think the position is, Mr O'Grady, that we are required to grant permission if we are satisfied it's in the public interest, but otherwise have a discretion.

PN33

MR O'GRADY: Indeed. And in my respectful submission it is in the public interest that my client be granted permission to appeal, but in any event there are important discretionary considerations as to why the grant of permission to appeal should be given in this case. Those submissions really turn on the fact that my client is currently bound by a construction of clause 33 of the enterprise agreement as set down by the Deputy President. And whilst Mr Fam in his submissions has asserted that it would be open for any other member of the Commission to in effect ignore what the Deputy President has decided clause 33 means, in our respectful submission Mr Fam is in error in respect of that.

PN34

I should note that Mr Fam himself accepts that the decision of the Deputy President has a broader application than the four individuals who were before the Deputy President in this proceeding. It extends to some 180 individuals, which in our submission is a basis for both invoking public interest, but perhaps more broadly the discretionary considerations the Full Bench can take into account. But in our submission as we have noted in the written submissions this is a clause that applies to some 2,000 Sydney Train employees, and there's an identical clause in respect of some 10,000 other employees.

PN35

Principles of comity as they are applied in the Commission would, we submit, require that a member of a differently constituted Bench to follow the determination of the Deputy President, unless they were of the view that it was clearly wrong, and hopefully this morning my instructors have been able to send through the decision in *ANF v Alcheringa Hostel* [2004] 134 IR 446.

PN36

And relevantly at paragraphs 46 to 48 a Full Bench of this Commission set out the position in respect of comity as it applies in the Commission, in that whilst the

Commission is not strictly bound by the doctrine of stare decisis the policy considerations that give rise to the desirability of one member of the Commission following determinations of other members of the Commission still apply in respect of the Commission. In our submission in those circumstances when one has regard to the very broad construction of clause 33 adopted by the Deputy President there is a significant public interest and indeed other discretionary basis for my client to be granted permission to appeal.

PN37

But the second consideration I would draw to the Full Bench's attention is the matters that flow from a recent decision of a Full Court of the Federal Court in *Airservices Australia v Civil Air Operations* [2022] FCAFC 172. That was a matter that flowed from a determination of Commissioner Wilson in respect of a dispute over the application of the relevant enterprise agreement, and in effect what the Commissioner found was that Airservices had not complied with its obligations in respect of consultation and status quo.

PN38

The union in that case, Civil Air, then issued proceedings in the Federal Court seeking penalties and declarations as against Airservices for Airservices non-compliance with the provisions of consultation and status quo, in circumstances where it was common ground that Airservices because of the determination of Commissioner Wilson was in effect estopped from arguing that it had not contravened those provisions; as a matter of fact it had not complied with those provisions.

PN39

Airservices brought application in the Federal Court seeking to have the Federal Court proceedings dismissed for want of jurisdiction on the basis that the dispute, if you like, had been in effect subsumed by the determination of Commissioner Wilson, and/or that Civil Air in electing to pursue the matter through the dispute resolution provisions in the Commission had in effect determined to pursue a particular course that was inconsistent with it subsequently going to seek the imposition of penalties and/or declarations.

PN40

Airservices was unsuccessful in those arguments both before Murphy J at first instance and subsequently on appeal. Again hopefully this decision has been provided to the Full Bench, and if I can just briefly direct the Full Bench to the relevant parts of it. You will see that in paragraph 1 Bromberg J in effect agrees with O'Callaghan J that the jurisdictional complaints made by Airservices should be dismissed. There was of course another line of appeal concerning the quantum of the penalties in which Airservices was partly successful. And then O'Callaghan J sets out the background at paragraphs 25 and following, and ultimately concludes at paragraph 58 - - -

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DEPUTY PRESIDENT GOSTENCNIK: Mr O'Grady, can you just hold on for just one minute. I'm sorry, paragraph - - -

PN42

MR O'GRADY: So, O'Callaghan J, his consideration commences at paragraph 58, and you will see there that there's a summary of what had occurred - sorry, there's a summary there in respect of the submissions that were put, and then ultimately at paragraph 83 and following O'Callaghan J rejected the arguments that the court did not have jurisdiction to issue penalties and/or make the declarations that were the subject of the Federal Court proceeding.

PN43

The reason for raising this authority is that if it be right that the Deputy President misconstrued clause 33 for the reasons that we have said in our submissions that have been filed and considered by the Full Bench, in our respectful submission there is a clear public interest and/or other discretionary reasons for the grant of permission to appeal in circumstances where as things currently stand my client is bound by the determination of the Deputy President and could potentially be the subject of penalty proceedings and/or applications for declaratory relief in respect of those findings, and in circumstances where it would not be open for my client to argue in the Federal Court that the construction adopted by the Deputy President was in error, because we would be bound by his construction of the clause.

PN44

For both of those reasons and for the reasons that we have sought to set out in the written submissions in my submission it would be appropriate for my client to be granted permission to appeal. If it were granted permission to appeal then of course this is an appeal that would be subject to the (indistinct) standard. There's no suggestion here of any finding of fact or exercise of a broad House v The King discretion. Rather the issue is what does clause 33 mean as applied to the facts of this case, and clearly the Full Bench would be in as good a position as the Deputy President was to determine that issue.

PN45

But in my submission if the Full Bench were otherwise persuaded that the Deputy President was in error in the construction of clause 33 that he adopted then both because there's a clear public interest in having these provisions properly construed, particularly in circumstances where they have a broader application than does the individuals who were before the Deputy President in this matter, which as I have indicated already is conceded by Mr Campbell at least in respect of some 180 other employees, but also in circumstances where my client is potentially, or could potentially be subject to further proceedings in which it would be in effect precluded from arguing the Deputy President got it wrong. So for those reasons we would submit that permission should be granted.

PN46

Turning to the reasons why Mr Fam has submitted permission should not be granted Mr Fam seems to be suggesting that this is some sort of anomalous proceeding that doesn't have broader application. It may be the case that the particular factual scenario that confronted the Deputy President was unusual. It certainly wasn't unique, and as Mr Fam has acknowledged there are at least 180 employees who are in a similar position. But in our submission the issue isn't whether or not the particular factual scenario was unusual, but rather was in the import of the construction of clause 33 adopted by the Deputy President, and as

we've sought to submit in the written submissions, the effect of what the Deputy President has done is that my client can trigger clause 33, and the various obligations it imposes, unintentionally, and indeed, I think Mr Fam puts that submission overtly.

PN47

In our respectful submission, such a construction is completely at odds with the terms of clause 33 and the function that the clause purports to give effect to, namely, to provide protection for employees who are the subject of a disciplinary investigation during the currency of that investigation.

PN48

But in my submission, it is just not correct to suggest that somehow this is an anomalous one-off that doesn't have broader application. The construction adopted by the Deputy President in all of its features, which we've expanded upon in the written submissions, clearly has flow on effects.

PN49

At paragraph 6, Mr Fam in his submissions suggests that the Deputy President considered whether or not there was a proper basis for my client not paying the employees concerned. As the Full Bench would appreciate from the submissions that we've filed, there was a specific question that was before the Deputy President.

PN50

That specific question didn't raise broader issues as to whether or not there was some basis for my clients not to pay those employees who had refused to be vaccinated. That specific question was confined to the application of clause 33, and in our submission, as we've said in the written submissions, there is a clear public interest in the Commission when it's exercising its powers of private arbitration to confine itself to the questions that are put before it.

PN51

That is a particularly acute problem, in our submission, in circumstances where the Deputy President has gone on to express concerns about the adequacy of the material that was placed before it by my client at first instance.

PN52

It is, with respect, hardly surprising that my client did not seek to justify through its evidence on some broader basis its capacity to not pay these employees when they have refused to be vaccinated, because that wasn't the issue that was before him. And so, again, in our submission, that's a matter that goes to the grant of permission to appear.

PN53

Again, as we've submitted in writing, it would appear that the Deputy President came to his view as to the scope of clause 33 informed by the fact that my client did not have a proper basis to stand down the employees.

PN54

In our submission, to adopt that in effect binary approach to clause 33, to suggest that the clause applies and the obligations to provide wage maintenance arises unless you can separately establish that you have some other basis for standing down employees is in error, in that the task before the Deputy President, in our submission, was to address himself to the terms of clause 33 rather than seeking some broader sense of industrial fairness, in the sense rejected by Madgwick J in Kucks to come up with an answer that he thought was fair or appropriate in all the circumstances, and that of course is particularly acute where the parties have put a specific proposition to the Deputy President for his consideration and determination.

PN55

In paragraph 8, Mr Fam in his submissions again seeks to confine the determination to some factual scenario, for the reasons that I've already sought to put in my submission. That's not the correct approach. The facts of course weren't in issue. There was no suggestion that my client hadn't issued the policy that it issued, or that the individuals who were the subject of the proceedings had complied with the policy.

PN56

The concern, and the issue that my client would seek to agitate on appeal, is the construction of the clause that the Deputy President adopted in assessing the consequences of those facts.

PN57

Those are the submissions I'd seek to put in respect of permission. Of course we rely more generally on the submissions we have put as to why the Deputy President was in error, but before going to those, could I ask the Full Bench to have regard to clause 33, and then I'd seek to go to the decision of the Deputy President.

PN58

Clause 33 is at appeal book page 545, the enterprise agreement commencing at page 509, and the Full Bench will see that it's headed, 'Disciplinary matters'. In the submissions that we've put in writing, we make the point that this is not a clause dealing generally with the capacity of my client to stand employees down, nor is it a clause dealing generally with the capacity of my client to punish employees by way of suspending them without pay.

PN59

Rather it is a clause dealing with the process that my client is to adopt once it has elected to institute a disciplinary investigation, and that appears from clause 33.1, where there is a distinction drawn between uncomplicated disciplinary investigations, which are there to find, and you will see there's an obligation that they should generally have completed within 10 to 12 weeks from when an employee is notified that an investigation is commencing.

PN60

Again, we rely on the fact that the clause speaks in terms of an employee being notified that an investigation is commencing. That did not happen here. As the correspondence that is referred to in the Deputy President's decision makes clear,

my client, whilst threating the potential of a disciplinary investigation, at no stage informed the employees concerned that a disciplinary investigation was commencing, and indeed in its evidence expressly disavowed the suggestion that it had commenced a disciplinary investigation.

PN61

Then in 33.2, we have a process for discussion and dealing with safety investigations, which is not relevant for current purposes, but again, you will see that in the last of the subparagraphs in 33.2 there is in the last sentence reference again to a disciplinary investigation being commenced.

PN62

Then in 33.3, we have a reference to an investigation period. Again, for the reasons that we've sought to put in writing, we would submit that an investigation period necessarily connotes a determination that there is to be a disciplinary investigation that has commenced. There is an obligation during the investigation period that an employer representative will update an employee under investigation no less frequently than every two weeks as to the status of the investigation. All updates can be provided in writing.

PN63

Again, the Full Bench will appreciate in our written submissions we have made the point that in the context of a clause that puts in place obligations fixed by reference to timing after an investigation has commenced, a clause should not be read so that it can be triggered inadvertently or without a conscious decision by my client.

PN64

Yet the consequence of the Deputy President's construction is that in addition to the obligations that he found we didn't comply with in 33.5, we also haven't complied with the obligation in 33.3, in circumstances of course where we didn't realise that a disciplinary investigation had been commenced, and that's, in our respectful submission, the fundamental vice of the approach of the Deputy President, that he has in effect determined that whether or not a disciplinary investigation is commenced or not is to be determined objectively irrespective of the subjective intention of Sydney Trains.

PN65

Again, in 33.4, where an investigation arises out of a complaint by another employee, the employee will also be advised of the progress of that matter. Now, of course that wasn't the scenario confronting the Deputy President in this case, but again we would submit that that obligation is consistent with there needing to be a determination by Sydney Trains that it is going to commence a disciplinary investigation.

PN66

Then at the beginning of the investigation he would have the clause that was before the Deputy President. At the beginning of the investigation the employer will determine if an employee is to remain at work on normal duty, placed in alternative duties, suspended with pay, reassessed and returned to normal duties or suspended without pay for serious misconduct.

PN67

Again, there is a raft of obligations imposed upon my client as to matters that it needs to determine at the beginning of the investigation. The effect of the determination of the Deputy President is that if sometime down the track a Member of the Commission or indeed a Court forms the view that an investigation has been commenced(?), then my client is subject to findings that it has failed to comply with the various obligations that the clauses impose.

PN68

There is of course no suggestion, in my submission, that my client commenced an investigation overtly and intentionally and just decided not to comply with these various obligations. Its position throughout has been that no investigation was commenced, and in those circumstances there was no occasion for the provisions in clause 33.5 to have effect.

PN69

Then 33.6 deals with the issue of special circumstances and the obligation to pay according to the master roster, unless there are special circumstances.

PN70

I would note that in 33.8 and 33.9 there are further timeframes put in place in respect of – well, that commence from the employee being notified that an investigation has commenced. Again, in my submission, that's consistent with the clause being directed to a conscious decision on behalf of Sydney Trains to commence an investigation. It's not consistent, in my respectful submission, to the approach of the Deputy President that inadvertently a disciplinary investigation can be held to have been commenced.

PN71

And then in 33.10 there are additional obligations in respect of an investigation extending beyond 12 weeks. Again, the notion that there is a timeframe fixed within the clause, in our submission, is consistent with there needing to be a determination on the part of Sydney Trains to commence an investigation.

PN72

The same point can be made in respect of 33.11. In order to ascertain whether or not an employee's period of suspension exceeds 17 weeks, we would submit that there needs to be a notice as to when it starts, and that in turn focuses attention on what my client is intending in respect of a disciplinary investigation.

PN73

Whilst I have the Full Bench with the appeal book, could I also direct the Full Bench's attention to the disciplinary policy, which is referred to in our submissions? It is Annexure PMK38 and it is at appeal book page 744.

PN74

You will see from the footer it is a policy that has an effective date of June 2014. In other words, it is a policy that was in place at the time that this agreement was made, and for the reasons that we've said in our written submissions, it is part of the context in which the clause needs to be read, and in

our submission, it too is consistent with the requirement that there needs to be a conscious decision on behalf of Sydney Trains to commence an investigation.

PN75

If I can take the Full Bench to page 746 under the Just Culture framework, in the last paragraph, so just before the heading, 'Principles':

PN76

The policy provides the disciplinary procedure describes a process to be followed when it has been determined as a result of an initial assessment, that reckless and/or at risk behaviour may have occurred and disciplinary action may be the most appropriate response

PN77

Again, in our submission, the policy makes it clear that it needs to be over termination on behalf of Sydney Trains, (a) that there may have been reckless and/or at risk behaviour that may have occurred, but also that disciplinary action may be the most appropriate response.

PN78

And then under the hearing, 'Principles' in the fifth paragraph from the bottom in the paragraph commencing, 'Generally', there's a provision that says:

PN79

Generally the employee who has been the subject of the disciplinary investigation, will be advised in writing of the allegations within seven days of the investigator being appointed having regard to the nature and circumstances of the matter. This timeframe may be extended where the manager investigations has a reasonable concern that the nature of the allegations or circumstances surrounding the matter may lead to the destruction of evidence, collusion, harassment or victimisation of suspected complaints.

PN80

Again, for the reasons I've already sought to articulate, in my submission the imposition of a seven day timeframe is consistent with there being a need for there to be a conscious decision to commence an investigation.

PN81

And then on the next page 747, there are actions pending a disciplinary outcome and those include suspension with pay, suspension without pay, temporary transfer and any reasonable direction in relation to his or her employment. And there's a reference then, in the first of the paragraphs with this review, there's a reference to the 17 week timeframe that is found within the clause.

PN82

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr O'Grady, can I just ask you this: On page 753 of the appeal form, part 18 or section 18 of the policy, is headed 'References' and below that there's a table which lists external material that supports or is referred to in this document and I note that there is no reference to

the enterprise agreement. So I'm just trying to understand how this document provides some context to the construction of the agreement.

PN83

MR O'GRADY: Well, there's no reference in the enterprise agreement in that it predates the agreement. And so it's in that context that we submit that there is context provided for it in it. This was the policy, it would appear on its face, that has been in place since 2014 and was in place when the enterprise agreement was made. So it's put on that basis, Deputy President.

PN84

SPEAKER: Deputy President, (indistinct words) also referred me part 15 of that document - 752 which makes reference to the relevant enterprise agreement.

PN85

MR O'GRADY: Yes, yes. But, as I understand the chronology, that would be an enterprise agreement that – it's not the current enterprise agreement.

PN86

SPEAKER: It was the relevant applicable one at the time.

PN87

MR O'GRADY: Yes. And, in my submission, when one has regard to the nature of the obligations that the policy puts in place and seeks to flesh out, it would appear that there was an intention that the enterprise agreement, and this policy, in effect be read together.

PN88

DEPUTY PRESIDENT GOSTENCNIK: Yes, I understand.

PN89

MR O'GRADY: And if I can then come back to part 8 which deals with the disciplinary process – this is at 747 and 748, you'll see, 'Stage 1 – disciplinary investigation':

PN90

The first stage in the disciplinary process is an investigation of the matter. All disciplinary investigations will be managed or conducted by Sydney Trains investigations unit. The objective of the investigation is to determine whether a breach has occurred. In conducting the disciplinary investigation, the conduct of each disciplinary investigation will vary depending on the circumstances of each individual's case.

PN91

And then there's various things that it my include. And then the heading, 'Notification and opportunity to respond to allegations':

PN92

If during the course of the investigation there appears to be insufficient information for an allegation to be put to the employee, they will be given an

opportunity to respond to the allegation in writing. Employees are to be provided in detail specifically what they have allegedly breached.

PN93

And then there's processes for interviews and the like. But, again, in my submission, it's consistent with there having been a determination, that there is to be a disciplinary investigation. It is not consistent with the notion that because a disciplinary investigation has been threatened and because an employee has been suspended without pay, that there necessarily is a disciplinary investigation triggering the obligations in clause 33.

PN94

Could I then go to the decision of the Deputy President. And, again, we've sought to make these points in writing and I don't want to take up too much time. But you'll see at paragraph 4 there is the question that's to be arbitrated and it's:

PN95

Does clause 33 of the agreement apply (or has it applied) to any or all of the applicants at any time from 6 December 2021 onwards?

PN96

So the question that was being submitted for determination was not whether or not my client had the capacity to suspend the employees without pay for non-compliance with the vaccination policy put in place. It was rather a narrowly confined question dealing with the issue of whether clause 33 in terms applied to this scenario.

PN97

And for the reasons that we've said in the written submissions, that was consistent with a focus on clause 33 of the various dispute notifications that were before the Deputy President. There were – and we've summarised this in the written submissions – but there were, in effect, two core issues being ventilated in those various dispute notifications. There was the fact that it was being asserted by the applicants that clause 33, and in particular clause 33.5, applied. And secondly, there was an element of asserted unfairness in respect of the approach that my client had taken in respect of a different cohort of employees.

PN98

But, in my submission, the broader issue of whether or not there was some proper basis to stand down the employees who had refused to be vaccinated, was not raised by the dispute notifications and it clearly wasn't the subject of the question that the Deputy President had adopted for determination.

PN99

And then you'll see at paragraph 6, the Deputy President goes to the clause, and I've taken the Full Bench to the relevant parties. And I of course rely upon the other parts of clause 33 that I've already taken the Full Bench to. And then at paragraph 8, the Deputy President summarises the background facts associated with this matter, including the implementation of the policy on 13 October 2021, which is paragraph 8(b), and then the various correspondence that were went out

in slightly different forms but, in our submission, not materially different forms to the various applicants below.

PN100

And you'll see that in the correspondence that sets out in paragraph 8(d), there is reference – and this is emphasised by the Deputy President – to the threat of disciplinary action that was accompanying the communication on 9 November in respect of the policy.

PN101

And then in paragraph 8(h), you have the letter that was sent on 8 December to Ms Tripp and, again, you'll see that that letter has been emphasised by the Deputy President and it's apparent from what the Deputy President has emphasised, there were two communications being made to the employees, including Ms Tripp, through this correspondence.

PN102

The first communication, which appears with the first of the emphasised paragraphs, is that:

PN103

Given you have not complied with the requirement to submit the declaration form, nor have you complied with the policy, you are not willing, ready and able to work. Accordingly, you are not permitted to attend or perform work and you are not entitled to salary or wages.

PN104

So it's clear that the basis upon which my client is refusing to accept the service of Ms Tripp and is asserting that it is not obliged to pay her her salary or wages, is her failure to comply with the policy which, as we've said in our written submissions, involves a conscious act on behalf of the employees; they had provide us with the relevant declarations. And it's asserted by my client that, in those circumstances, it's not required to accept service.

PN105

And then if one goes down further to the second of the paragraphs that commences, 'On 7 February 2022', you'll see my client is saying that on 7 February 2022:

PN106

If you remain non-compliant with the policy, your situation will be reviewed and further discussed with you.

PN107

And then under the various dots point, there's a statement:

PN108

Given you have not complied with the requirement to submit the declaration form, nor have you complied with the policy, you are not ready, willing and able to work. Accordingly, you are not permitted to attend or perform and work and you are not entitled to salary or wages.

PN109

And then going to the last part, that's emphasised by the Deputy President:

PN110

Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment or engagement may occur.

PN111

So again, whilst there is clearly a threat that this is something that could be subject to a disciplinary investigation and/or disciplinary action, the basis upon which my client is asserting that he has not obliged to accept service and/or make payment, is a different basis. Namely, that in its view Ms Tripp, and the other employees who receive this correspondence, were not ready, willing and able to perform work.

PN112

And then if one turns to Mr Taylor's letter, which is dealt with in 8(j), you'll see that there's a similar theme. Dealing with the first of the emphasised passages:

PN113

*Until you comply with the Policy (that is, having received your first and second vaccination), you are not willing, ready and able to work. Accordingly, you are not permitted to attend or perform work and you are not entitled to salary or wages.   *

PN114

Again, that's the basis being asserted by my client for not paying Mr Taylor. And then you have in the next of the emphasised passages:

PN115

*If you remain non-complaint with the policy, your situation will be reviewed at a later date and further discussed with you. If you have not complied with the direction as set out in this letter, a disciplinary process will commence, and your employment may be terminated. *

PN116

Now, whilst it is clear that disciplinary processes are being foreshadowed in this correspondence, they're disciplinary processes that are to occur in the future. And they are to occur after a review and after a discussion. And there's no suggestion that either that review or that discussion took place. There's no suggestion that, as I understand the evidence, that my client had decided, after having discussed with Mr Taylor, to discipline him. Indeed, the evidence was to the contrary and was not contested.

PN117

And then there's the last emphasised passage again indicating the capacity of my client to take action up to and including termination of employment that may

occur. But, of course, that would subject to there having been a disciplinary investigation commenced and there having been a determination that there had been a basis for taking disciplinary action.

PN118

And you'll see that in paragraph 8(n), that there was a decision made - and this is the second half of the paragraph:

PN119

Supported by the Sydney Trains Chief Executive, that no further action, including no investigative or disciplinary action, would be taken in respect of non-compliant employees at that time, and that non-compliant employees would remain out of the workplace on the basis they were still not ready, willing and able to work.

PN120

Now, again, this is evidence that wasn't contested, and indeed the witness called by Sydney Trains, Mr McKaysmith, wasn't even required for cross-examination, and that was what he said.

PN121

Then in 8(o), we have further correspondence to Ms Tripp where these arrangements are extended, at least until Tuesday 5 April. That's the paragraph that says there's a transport worker who is non-compliant, and then at the foot of the page, in the paragraph commencing:

PN122

Following 5 April 2022, your compliance with the Transport COVID safe measures will be assessed. It's important to know that non-compliance may lead to termination of your employment.

PN123

And then 8(p), there's a further review on 5 April, and you will see there that the Sydney Trains chief executive decided that 'no further action, including no investigation or disciplinary action, will be taken in respect of non-compliant employees at that time'; that 'non-compliant employees would remain out of the workplace on the basis they will still not ready, willing and able to work'.

PN124

So the position, as we would put it, Deputy Presidents and Commissioner, is that whilst my client had foreshadowed the potential for a disciplinary investigation, no such disciplinary investigation had been commenced as at 5 April, as opposed to threatened, and as at 5 April it communicated to the employees that it did not intend to commence a disciplinary investigation, whilst it maintained its position that in its view the employees were not ready, willing and able to work and therefore would not receive remuneration.

PN125

I don't believe I need to take the Full Bench to the other factual findings. You will see that at paragraph 8(t) there is descriptions of the various dispute notifications that were filed by the applicants, and you will see that in respect of Mr Taylor, he

is relying upon 33.5, and I've taken the Full Bench to that clause, and asserting that under that clause:

PN126

I should have remained on a master roster payment as part of the status quo while the issue of vaccine mandates and vaccination status was being resolved.

PN127

In our respectful submission, that's not what clause 33.5 is directed to.

PN128

Then in 8(u), you have Ms Tripp's dispute notification, and you will see that in the second last paragraph, again there's an emphasis on clause 33 and clause 33.5:

PN129

I request status quo be applied, which entails being paid the master roster, also backpay and rec leave or leave entitlements.

PN130

Again, there's no suggestion that the broader issue of my capacity to stand these employees down without pay was being agitated. Rather - - -

PN131

DEPUTY PRESIDENT GOSTENCNIK: Mr O'Grady, can that test though – perhaps you can tell me, if you're able, how it is that the questions came to be settled in the manner that they were. But when I look at paragraph (t) of the factual background, page 26 of the appeal book, and the second to last paragraph, there Mr Taylor says: 'I am also requesting recrediting of long service leave I was forced (indistinct)', blah blah blah – 'I should also be back-paid the difference between' - isn't Mr Taylor there suggesting that he should have been paid?

PN132

MR O'GRADY: Well, he is suggesting that he should have been paid, but in my submission, he's suggesting he should have been paid because he says that clause 33.5 applies, and it wasn't complied with and therefore he hasn't been provided with the payments that the clause would have entitled him to, and in those circumstances he has been required to take leave that he says he wasn't required to take.

PN133

You will see there that there is the reference in the last part of that paragraph, Deputy President, to the comparison between long service leave and the master roster - - -

PN134

DEPUTY PRESIDENT GOSTENCNIK: The master roster – yes, I understand that. But ultimately, dispute notifications shouldn't be taken as though they're formal pleadings.

PN135

MR O'GRADY: I accept that, Deputy President, but I would say that when one has regard – and Mr Taylor's is the most expansive of these, and can be contrasted with the others, but after these notifications had been filed, there is a specific question - - -

PN136

DEPUTY PRESIDENT GOSTENCNIK: I do understand that, Mr O'Grady. The question I was hoping you might shed some light on, how is the question going to be settled, but you obviously weren't in the room.

PN137

MR O'GRADY: No. Well, I wasn't aware of this matter at that stage, Deputy President.

PN138

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN139

MR O'GRADY: And in fairness to the Deputy President, he's confronted with a number of unrepresented individuals who are raising issues, and my client of course was represented, but I can't really advance things further as to how the question came to be settled, other than there doesn't appear to have been any dispute that that was the question to be determined.

PN140

DEPUTY PRESIDENT GOSTENCNIK: Yes>

PN141

MR O'GRADY: You will see when you have a look at the notifications of Ms Tripp, Mr Aiono and Ms Cambridge - well certainly in respect of Ms Tripp and Mr Aiono - there is a substantial identity, if you like, between the two notifications. The paragraph, 'As an employee with Sydney Trains', in both of them seems to be in very similar terms, with reference to clause 33 and 33.5 and status quo, and master rosters and the like.

PN142

And then there was, if you like, the instigation of the process in step 1 by Ms Cambridge and Ms Galea, and again, if one goes to the paragraph that commences:

PN143

As employees with Sydney Trains, clause 33, subclause 33.5, we request status quo be applied, which entails paid master roster and also backpay and re-credit of all leave entitlements used because of being stood down from the 6th of the 12th '21 until such time as the policy has been resolved.

PN144

So the submission is, as we've said in our written submissions, that there was a specific question before the Deputy President for determination. That question was consistent with the dispute notifications that had been filed. That question was directed to not the broader issue of the lawfulness of the policy or whether or

not my client was entitled to say that the employees were not ready, willing and able to work; it was concerned with a very different question, which is whether or not clause 33.5 was triggered, and that was a question that should have been answered, and in circumstances where, as we've said in our written submissions, the uncontested evidence was that no disciplinary investigation had been commenced in respect of any employees. That should have been the end of the matter, in our submission.

PN145

And then, the submissions that were put were summarised, and I don't need to take up the Full Bench's time with that other than to note that when asked by the Deputy President, or when my client was seeking to explain where it got the power to not accept service, there was reference to a number of authorities, including the BHP Billiton case and Mr Thomas Goldspring, where a Full Bench of this Commission held that in circumstances where an employee's contract required them in effect to be licenced in order to perform what might be described as the inherent requirements of their job, the fact that the employee had lost his licence and therefore wasn't able to perform those tasks gave rise to a capacity on behalf of the employer to refuse to accept service and not pay the employee, and that was the basis upon which, below, my client sought to explain where it wasn't required to pay these employees.

PN146

But as we have submitted, whether my client be right or wrong about that, in our respectful submission, does not impact upon the proper construction of clause 33, and in circumstances where, in our submission, what the Deputy President has in effect said is that there can be a disciplinary investigation, triggering the obligations contained in that clause even if you don't intend to commence a disciplinary investigation, because you are inquiring about some wrongdoing, or making inquiries about some wrongdoing about employees based on a very broad view of what 'investigation' means.

PN147

In our respectful submission, that obviously has clear adverse outcomes for my client, in that it can be in a world where it is contravening these obligations inadvertently.

PN148

In our submission, the clause isn't directed to some objective assessment of whether or not what my client is doing should or shouldn't be considered to be a disciplinary investigation. Rather it is a clause that is predicated upon a conscious decision on the part of Sydney Trains to go down that path, and to the extent that the Deputy President, and with respect to him, Mr Fam, seem to be suggesting, well, here you were talking about disciplining employees by way of suspending them without pay and therefore that means that it falls within the scope of the clause, we would respectfully submit that that's just not right.

PN149

Clause 33.5 isn't directed towards punishing employees, or disciplining employees. It's designed to deal with the situation where there has been a decision to investigate conduct by employees. There are going to be some

circumstances where my client is not expected or obliged to continue to pay them, where the conduct that's being investigated is of sufficient seriousness, but there are other circumstances where my client is expected to pay(?) them.

PN150

But that's a very different thing, in our respectful submission, to a decision by my client that it is not required to accept the service of employees, because in its view their decision not to be vaccinated means that they are not ready, willing or able to perform in effect the inherent requirements of their role.

PN151

Then, if I can go back to the decision, you will see that under the heading, 'Consideration', there is a discussion by the Deputy President of whether or not the employees were ready, willing and able to work, and the Deputy President notes in paragraph 36 that no evidence was advanced by the respondent as to the relevant contracts of employment of each applicant, and we accept that, but when one has regard to the nature of the dispute notifications, and the nature of the question that was submitted for arbitration, in my respectful submission, that's hardly surprising.

PN152

The broader issue of whether or not the contracts authorise my client to act the way that it did simply wasn't before the Deputy President, and in circumstances where that issue wasn't before the Deputy President, it is hardly surprising that there was no evidence going to that issue that was adduced.

PN153

Then at paragraph 38 you will see there's a reference to the BHP Billiton decision, and then in paragraph 39 there's an observation about the policy, and in the second sentence, the Deputy President says:

PN154

> *It is not, however, specified how the Policy was said to be reasonably and lawfully imposed on the Applicants.*

PN155

Again, that wasn't the issue before the Deputy President. The issue before the Deputy President was whether clause 33.5 applied, and again, in my submission, it's hardly surprising that my client did not seek to adduce evidence as to issues that weren't the subject of the arbitration.

PN156

And then the Deputy President notes in paragraph 44 that questions of reasonableness haven't been addressed by the parties, and so the specific reasonableness of the policy cannot be determined. Well, again, with respect, that wasn't the issue that was the subject of the arbitration, so that is not surprising.

PN157

And then in paragraph 45, there's some observations about reasonableness, and then in paragraph 47 the Deputy President in effect concludes:

PN158

I am not prepared, in the absence of appropriate evidence, to simply conclude that the Policy is reasonable and/or lawful or proportionate as a workplace health and safety response to the risks presented by COVID 19. I am fortified in the correctness of my reticence because it would appear that at least since 3 June 2022, or possibly as early as 5 April 2022, the Respondent has itself been considering removing the Policy and the Vaccination Requirement.

PN159

And you'll have noted, Deputy Presidents and Commissioner, that we make two complaints about that. The first of course is that that issue wasn't before the Deputy President and so, in our respectful submission, that's not a matter that should have influenced the Deputy President in any way, shape of form. And the second point, of course, is the timing issue in that the authorities, that we've referred to in our submissions, make it clear that the time for assessing the reasonableness and/or lawfulness and/or proportionality of a policy of this type, is when it's being implemented, not some many months later. And the reasons for that are obviously, in our respectful submission.

PN160

And the reason why we have raised these issues in our ground of appeal and dealt with them in the submissions, is it does appear that what the Deputy President has done is, not having satisfied on the material before him, that there was an appropriate basis for refusing to accept service by my client and, therefore, refused to pay the applicants, that it was a binary proposition. So if there's no other basis, then it must be discipline. And in that regard, in our submission, he was in error because clause 33 isn't concerned with any other basis upon which you're standing people down; rather it is a clause that is specifically directed towards to disciplining employees.

PN161

And then in respect of this issue of - - -

PN162

DEPUTY PRESIDENT GOSTENCNIK: Mr O'Grady, is that a fair reading of the way in which the Deputy President approached the matter or did he say that he accepts that the employer, (indistinct words) doesn't accept, he's not satisfied whether or not, in this case, the employer had a right to engage in a no-work, has directed no pay circumstance. But isn't he saying at 49, in effect, that even if such a right exists, the right yields to the instrument which deals specifically with a disciplinary measure. In other words, he regarded what was happening as a disciplinary measure. So it's not another binary proposition as such, but rather he's saying that there might be such a right, put to one side whether or not it existed in this case, but even if there is such a right, this was a disciplinary matter and should have been dealt with in accordance with clause 33?

PN163

MR O'GRADY: Can I respond to that in two parts.

PN164

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN165

MR O'GRADY: Firstly, in my submission, when one has regard to what appears at paragraph 49 and following, it does appear that the Deputy President has, in effect, been influenced by the fact that he wasn't persuaded that there was, in effect, some other basis for standing down the employees.

PN166

The second part of the response is that, in my submission, it is wrong to characterise clause 33.5, even where it provides for an employee to be stood down without pay, as a disciplinary measure. Clause 33.5, in my submission, and 33.6, isn't concerned with a form of punishment to impose upon an employee, rather it is concerned with, in effect, an obligation to maintain wages during a disciplinary investigation unless and until there are, in effect, specific circumstances that remove that obligation. And this, of course, is in circumstances where – it's a clause that is triggered and has operation prior to any finding of wrongdoing is made.

PN167

And to the extent that in paragraph 49, the Deputy President confuses that language, disciplinary measure, and in effect says, 'Well, clause 33.5 codifies the circumstances in which you can suspend somebody without pay as a means of punishing them for some misconduct'. In my respectful submission, he has misconstrued the clause. The clause is – as we said in our written submission – I think it is an ancillary provision designed to deal with what happens to employees whilst an investigation is going on. And, in effect, opposes an obligation to maintain salary maintenance whilst an investigation is going on unless you're dealing with something that is serious misconduct, in which case that obligation doesn't exist.

PN168

(Indistinct words) form of punishment, and it does seem to us that the language, disciplinary measure, in paragraph 49 does suggest that what the Deputy President was doing is viewing it through, in effect, this binary lens, if I can put it in those terms. But whether the binary lens is accepted or rejected, it is, in our submission, wrong to suggest that 33.5 is dealing with disciplinary measures; rather it's, as I've sought to say, an ancillary mechanism to impose an obligation to continue payment during the disciplinary investigation save and except if it's through misconduct.

PN169

And then in paragraph 51, the Deputy President refers to the evidence of Mr McKaysmith and you'll see there that that involves the unequivocal rejection of the proposition that a disciplinary investigation has been initiated in respect of any of the applicants and an indication that he does not know whether or not such an investigation will commence into the future. And I think I've mentioned this, but I should just perhaps take the Full Bench to the transcript, as I have noted, Mr McKaysmith wasn't required for cross-examination. There were some questions asked about his statement and then there was, in effect, a determination that in those circumstances he did not need to be cross-examined. Just bear with me. Yes. So the transcript commences at appeal book page 33.

PN170

And at appeal book page 51, you'll see there – well, perhaps more correctly at paragraph 50 – you've got Mr Watts, on behalf of my client, explaining Mr McKaysmith's statement. And then he provides some explanation at paragraph 71. And then it would appear that at paragraph 74, the Deputy President determines that Mr McKaysmith is not required to cross-examination.

PN171

Mr McKaysmith's statement is, in our submission, comprehensive and it commences at appeal book page 496 through to 508. But I don't need to take the Full Bench to it because, as the Deputy President has correctly noted, he disavowed any suggestion of a disciplinary investigation.

PN172

And then he goes on in paragraph 52 to set out a further passage from Mr McKaysmith's statement. And then in paragraph 51 – and this is, of course, the subject of a specific appeal ground – he says:

PN173

While the Respondent, particularly relying on the evidence of Mr McKaysmith and the Exemption Denial Letter, submitted that no investigation had commenced into any of the five Applicants from 6 December 2021 onwards, I consider that submission unacceptable as it misconstrues the facts and the correspondence between the parties. The evidence of Mr McKaysmith, while untested, was mere submission.

PN174

Well, with respect, it's not apparent to us how the Deputy President reaches that conclusion. The relevant manager from Sydney Trains has gone into evidence as to whether or not a disciplinary investigation has commenced and has said it hasn't. The correspondence that the Deputy President has himself set out earlier in this decision makes it clear that there were, in effect, two discrete links to the response of Sydney Trains. Namely:

PN175

You are not ready, willing and able to perform your work and, therefore, your service won't be accepted and you won't be paid your wages, and we may conduct a disciplinary investigation in respect of your conduct relevantly, in some of the correspondence, after further consideration and discussion.

PN176

But, in our submission, there's no proper basis with respect for the rejection of Mr McKaysmith's evidence in that regard. And you'll see that in respect of the correspondence in paragraph 55 where those two limbs emerge. In the indented part of it:

PN177

If you remain non-complaint with the Policy, your situation will be reviewed at a later date and further discussed with you.

PN178

Well, again, that's not consistent with a disciplinary investigation having commenced, in our respectful submission. And then in paragraph 56, the Deputy President rejects the submission and evidence no investigation had been commenced, as disingenuous. And the broad proposition is put:

PN179

Well, if investigations had commenced, how could the findings of non-compliance with Vaccination Requirement, and non-compliance with the Policy, be made?

PN180

Well, with respect, the policy, as we've said in our written submissions, required the applicants to do positive things. There was no dispute that they hadn't done those positive things. And we've sought to expand upon that issue in the written submissions.

PN181

And then the Deputy President adopts what we would submit is an unduly broad definition of investigation for the purposes of the clause and says:

PN182

Clearly an investigation had commenced because the fact of the vaccination status of the Applicants, and their compliance or otherwise with the Vaccination Requirement, had been established by the Respondent.

PN183

Well, again, with respect, that confuses the function of clause 33.5 and the notion of some disciplinary sanction by way of suspension without pay. Clause 33.5 is not there to punish people. Clause 33.5 is there to provide an obligation to maintain salary other than in certain circumstances. But the Deputy President seems to have assumed, 'Well, we had not only conducted an investigation, but we concluded it'. And for the reasons we've said in our written submissions, we say that he was respectfully in error in that regard.

PN184

And then the Deputy President concludes – well, rejects the submission that was put below, which we're pursuing on appeal about serious misconduct, and then the Deputy President concludes in 65 that:

PN185

Clause 33 applied to all Applicants since 6 December 2021, when the Applicants were determined by the Respondent to be non-compliant with the Policy and the Vaccination Requirement.

PN186

It does seem to us, Deputy Presidents and Commissioner, that the Deputy President has, in effect, adopted the course that Madgwick J, in Kucks, expressly warned against. We've included Kucks in our authorities. It is no.12 in part B and it's report, of course, in (1996) 66 IR 182, and the Full Bench will recall that after setting out the approach to construing an award, which we say has been

obviously picked up and adopted in respect of enterprises, the warning appears at the foot of page 184:

PN187

But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.

PN188

And the reasons that we've expanded upon in writing, in our submission, the words as they appear in clause 33 and 33.5, in particular, aren't capable of bearing the meaning that the Deputy President attributed to them.

PN189

If you just bear with me. Turning to the submissions that have been filed by Mr Fam, the parties would appear to be in general agreement to the approach of interpreting, an agreement we both relied on paragraph 65 of Ridd, and we've expanded upon those aspects of Ridd that we say are particularly important.

PN190

But one thing that Ridd, of course, makes clear is the need to focus on:

PN191

The ordinary natural meaning of the words, 'read as a whole and in context.

PN192

And, again, applying the language of clause 33 to the scenario that was before the Deputy President, we would submit, is not consistent with that approach.

PN193

At paragraph 15, Mr Fam picks up the suggestion that, in effect, clause 33 codifies a circumstance where an employees can be stood down as a disciplinary measures, for the reasons I've already sought to explain. And we say that that's not the correct reading of what 33.5 and 33.6 do. They're not concerned with punishing employees, they're concerned with the position that pertains during an investigation.

PN194

At paragraphs 19 to 21, Mr Fam makes the point that the decision was (indistinct words) by the primary question; we accept that. But, in our submission, when one has regard to the approach or process of reasoning adopted by him, it is clear that he didn't confine himself to simply determining that question. And to the extent that he did confine himself to determining that question, the answer he arrived at is not consistent with the language that was used in the clause.

PN195

At paragraph 22 to 26, Mr Fam raises the fact that the appellant sought to explain why it considered it was not required to pay employees and, in effect, that opened up the process of the consideration of that issue. In our respectful submission, accepting that my client did seek to explain why it did what it did, that didn't change the question that was subject to determination. And as the Deputy President himself noted, my client didn't seek to put on evidence going to the broader question of either its capacity to stand the employees down under their contract of employment or, alternatively, the justification of the policy; an approach that, in my submission, was perfectly understandable in circumstances where that wasn't the issue that the Deputy President was being asked to determine.

PN196

Unless there are any questions from the Full Bench, those are the submissions that I'd seek to put in support of the appeal.

PN197

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr O'Grady. Before I come to you, Mr Fam, I should just indicate for the record that at about 10.30, during the course of Mr O'Grady's presentation, Mr Taylor joined the hearing. Yes, Mr Fam.

PN198

MR FAM: Thank you, Deputy President. I am going to start by addressing whether permission to appeal should be granted and I'll then move on to arguing why, if permission is granted, that the appeal should nonetheless be dismissed. In that part of my submissions, I'll address the appellant's grounds of appeal directly, but there is a little bit of overlap. So the time that I spend on permission to appeal, which is about 15 minutes, will eat out some of the time I spend time on, particularly, grounds 5, 6 and 7 of the appellant's appeal.

PN199

I'd just like to spend five minutes first addressing the decision of Cross DP itself. I won't repeat Mr O'Grady, but we have a slightly different reading of the decision and I'd just like to point out some of Cross DP's key paragraphs, in our submission, as well as the way the decision is structured because it is relevant to both permission to appeal and the appellant's grounds.

PN200

So the decision is, of course, at page 14 of the appeal book and, as Mr O'Grady noted, at paragraph 4, which takes us from page 14 onto page 15 of the appeal book, the Deputy President (indistinct) out the primary question, what we call the primary question, which is whether clause 33 of the agreement applies or has applied to any or all of the applicants from 6 December. We agree with the appellant that that is the primary question in the case.

PN201

The Deputy President, moving from there, rightly extracts key clauses of the enterprise agreement in full, particularly clause 33 which he extracts at paragraph 6 of the decision. And then in paragraph 8, which stretches from pages 17 to 27 of the appeal book, he extracts again, almost in full, all of the

correspondence between the parties which forms the evidence going towards one of the key disputes in this case, which is whether an investigation had commenced into the respondents and whether clause 33.5 therefore applied.

PN202

Now, after summarising the position of the applicants and the respondents, as well as the authorities relied on, we come to what the Deputy President calls his consideration which is on page 35 of the appeal book, and I'll - - -

PN203

DEPUTY PRESIDENT GOSTENCNIK: (Indistinct words.)

PN204

MR FAM: Sure. I'll just put to the Full Bench that he uses the word 'consideration' intentionally. He doesn't use the word 'determination' or 'decision'. And the other thing that I want to emphasise is that his consideration is split into two separate parts. First, beginning on page 35 of the appeal, he considers the question of whether the respondent in that case, the appellant in this case, was correct in their submission that the respondents were off work without pay because they weren't ready, able and willing to work as per the established common law on that point. And, as Mr O'Grady noted, at paragraph 36 he begins by noting that he cannot and will not make any determination on that point, which he indeed does not do. And I will show the Full Bench a little later in my submissions that we say the reason he addressed that question is because the respondent raised that issue in their own submissions.

PN205

Now, in the course of considering that point, the Deputy President does consider the question of the lawfulness and reasonableness of the policy because in order for the assertion that employees were not ready, able and willing to work to be true, he had to consider that question because they can only not be ready, willing and able to work if they're not compliant with their employment contract and they're only not compliant with that contract if the direction that they have to follow to be vaccinated was lawful and reasonable.

PN206

So he considers it in that context. But, again, he does not make a determination one way or another. He just considers it. He merely considers that question. Specifically he says at paragraph 47, which is page 38 of the appeal book:

PN207

I am not prepared, in the absence of appropriate evidence, to simply conclude that the Policy is reasonable and/or lawful or proportionate as a workplace health and safety response to the risks presented by COVID 19.

PN208

So he does not conclude that it is lawful and reasonable, nor that it isn't lawful and reasonable as the Deputy President noted earlier. Then with respect to the question of whether the respondents below and the appellants in this case were

correct in their submission that the appellants were not ready, willing and able to work, he says at paragraph 48, which is on page 39 of the appeal book:

PN209

I do note that, in the absence of any evidence or submissions regarding relevant contracts of employment, I have below focused on the terms of the Agreement. That focus naturally leads to consideration of the whole of the Agreement, and clauses 8 and 33 in particular.

PN210

So we say that paragraph 48, in the Deputy President's decision, is really a signing post in the decision, where the Deputy President confirms and explains why he could not and did not make any determination in respect of the ready, able and willing to work question, or the reasonableness of the policy and why he's instead going to focus exclusively on the agreement for the remainder of the decision, which is exactly what he does.

PN211

Now, the second part of his consideration, which runs from pages 39 to 42 of the appeal book, is titled, 'Was it discipline?' and that's because clause 33 of the enterprise agreement was - the focus of the case is titled, 'Disciplinary matters' and at this point, again the Deputy President has dispensed with his consideration of the ready, able and willing submission, the lawfulness and reasonableness of the policy, and focuses on only the primary question. And he then finds, with reference to the evidence that was put forward by the respondent below, that in the affirmative that clause 33 of the agreement did apply to the appellants from 6 December 2021 onwards and he decides accordingly. I'm going to speak to that a little bit more later.

PN212

But I'll just move on to permission to appeal. Now, we do say that this is a case in which the Commissioner should not grant permission to appeal. We acknowledge section 604 of the Fair Work Act, that the Commission does have a broad discretion to allow appeals. But nonetheless, we say permission should not be granted.

PN213

Now, the appellant says that the appeal concerns the proper construction of the enterprise agreement and that there's a public interest in ensuring that such instruments are properly construed and arbitral determinations to their effect accord with their legal meaning. We say that that's a slightly tangential reading of what the appeal actually concerns. And it goes back to the nature of Cross DP's decision and how it's structured.

PN214

The primary question in the case below was, 'Does clause 33 of the agreement apply or has it applied to any or all of the respondents at any time on 6 December 2021'. So the Deputy President's task was to consider the facts in evidence put before him by the parties and to consider whether clause 33 was therefore triggered by the facts in evidence in the case. And this is what he did as we just

saw in the second half of his consideration, which is where having dispensed with the other points, he makes a determination to that effect.

PN215

So there was no disagreement down below and I'll just stress this, about the nature or appropriate interpretation of clause 33 of the enterprise agreement. That's not what the case was about. The appellant themselves said in their outline of submissions for the case below – and I'll just take you to them if that's okay?

PN216

DEPUTY PRESIDENT GOSTENCNIK: What page?

PN217

MR FAM: Page 491 of the appeal book. And it's paragraph 23, in the middle of the page. So this is the outline of submissions that the appellant in this case put down below. As the opening words in clause 33.5 made clear, the threshold question to determining whether that provision is enlivened, is whether an investigation has begun.

PN218

Now, there was no dispute about that down below. We still agree with that now in the sense that we, the respondents that I represent, agree with the submission put by the appellant to this case down below about how the clause operates. And that approach aligns very closely with the manner in which Cross DP applied the clause to the facts in evidence in his decision.

PN219

So we say that this is not a case about the proper construction of the agreement. The real question in the case was the primary question, which is not what does clause 33, but does clause 33 apply. And we say there is a difference there that's important and that's a question that, in the appellant's words – again, to go back to paragraph 23 on page 49 of the appeal book – is a factual enquiry. And it's a question that in and of itself does not attract the public interest.

PN220

Now, the suggestion that the Deputy President's decision might somehow alter the way that clause 33 is generally applied or interpreted, is one we disagree with. The Deputy President's decision was very clearly based on and constrained to the context and the facts of this case. That is, that Sydney Trains barred the respondents from working and did not pay them because they did not comply with the policy and a direction within that policy that said they had to vaccinated to undergo a medical procedure in order to continue to be paid.

PN221

Now, any future interpretation of clause 33 will be made in the context of the facts and circumstances of that case. The policy at the core of this case is not even in place anymore. Put another way – actually, I'll leave that and move on. Just because, you know, we understand that the appellant does not agree with the manner in which the Deputy President applied the clause to the facts in the evidence in this case, it doesn't mean that he misinterpreted the agreement itself, thus enlivening the public interest in their appeal.

PN222

We also say, respectfully, that the appellant shouldn't be allowed to claim by way of appeal that the Deputy President's interpretation of the clause was somehow flawed or erroneous when he used an interpretation of the clause that they themselves put forward in the case below.

PN223

Now, the appellant also makes a submission that the Deputy President considered an issue that was not before him, and that there's public interest attached to the Commissioner confining itself to the issues that are before them for arbitration. And the issue that they refer to was whether non-compliance with the appellant's policy provided a basis for standing the respondents down from work independent of any disciplinary process; essentially the ready, willing and able question.

PN224

I'd just like to take you to page 59 of the appeal book, if I may, which takes us to a – I'll just give you a second. So this takes us to a very early point in the appellant's oral submissions in the case below. And here, counsel for the appellant directed the Deputy President's attention to the exemption denial letter on which much of their case lies. And particularly he pointed the Deputy President's attention to the following sentence at the bottom of page 59 of the appeal book, it's paragraph number 161, which is an extract from that letter:

PN225

*Until you comply with the Policy, you are not willing, ready and able to work. Accordingly, you are not permitted to attend or perform work and you are not entitled to salary or wages.   *

PN226

Now, counsel for the appellant below then said in the following paragraph, early in his oral submissions. So pausing there, that is the rationale upon which the respondent took the view that each of these five applicants, and indeed all of the unvaccinated cohort of employees of the respondent, of which there is a considerable number, more than just these five, all of them were deemed not wiling, ready and able to work and that was the basis upon which they were told they had to cease working and that was the basis upon which they were not going to be paid.

PN227

So counsel for the appellant below put forward to the Deputy President, voluntarily, a submission that the rationale upon which the appellant did not pay my clients because they were not ready, able and willing to work. Following that, the Deputy President simply asked on page 60, 'Where does that power arise?', a very reasonable and appropriate question and, in fact, a question which supports and directs the appellant, the respondent in that case, back to the enterprise agreement.

PN228

And in the next seven or so pages, the appellant spent quite some time leading the Deputy President through their position on the ready, able and willing to work point, which I won't take you through now, but I'll just say that, in our submission, a fair reading of the transcript shows clearly that the appellant's submissions on this issue were voluntarily put forward and elaborated on by the appellant down below; even when the Deputy President tried to direct their focus back to the agreement, which is was the subject of the dispute.

PN229

And by the way, in fairness to the appellant, we don't say that was inappropriate. The appellant's argument was and is that clause 33 of the agreement does not apply to the respondents. They said in actuality that the respondents were not ready, willing and able to work. And that is the argument they made to the Commission at first instance. We say is that, in those circumstances it was entirely reasonable for the Deputy President, and probably necessary as a part of the context of the case, to consider whether the respondents' submissions on that point were sound or not, and he only considered them. And this is because to understand whether clause 33 of the agreement applied to the respondents or not, it may be reasonable for a Deputy President, or to at least consider, whether the appellant's reasons for saying that it did not apply were sound or not.

PN230

And I have to note again that the consideration was not, in the end, material for his decision. The decision was based on the primary question. We disagree with the submission made by the appellant that somehow the second part of his consideration was infected by his consideration of the earlier issues. He clearly deals with them and then dismisses those issues and says explicitly that he's going to focus on the agreement in order to make his decision.

PN231

Now, we think as well, with respect to the appellant, it's not fair or efficient for the appellant to try to draw lines around what the condition may or may not consider when arbitrating a matter, particularly when those considerations were not material to a finding and particularly when those considerations were instigated by the submissions of the respondent, down below, themselves. And we certainly don't say that such consideration was erroneous or that it somehow attracts the public interest.

PN232

In general – and this is my final point on permission to appeal – we would say that the appellant seems to be claiming that the matter is in the public interest when really it's only in its own interest. Although we don't say that its own interest in the case is not substantial, it is substantial but it's not public.

PN233

In my friend's submissions – my learned friend's submissions, I should say – they say that the decision will require it to backpay 180 of its own employees, we're in the same position as the respondents to the appeal and that this will be a substantial cost. With respect to the appellant, they are a large and well resourced organisation with over 12,000 employees. They would have been paying these

180 employees anyway if the extraordinary circumstances of the last few years didn't eventuate. And although the cost of paying those 180 employees may be substantial, the decision to withhold work and pay from those employees for almost a year was also very substantial. And this doesn't enliven the public interest anyway, in our submission. You know, they are 180 private employees of Sydney Trains. That is a defined class of people who the decision will affect and the policy is no longer in existence, so it's unlikely that there will be future disputes which align with the facts in this case.

PN234

Similarly, there's a submission that the agreement covers more than 12,000 employees. We say that's not enough to enliven the public interest either. As I said, the vaccine policy is no longer in existence. Those 12,000 staff have not been and now cannot be barred from work on the same basis as my clients in this case. In general, we would say that clause 33 is there for a reason and it's application to future disputes will turn on the facts of those disputes.

PN235

So we say that the appeal is not in the public interest. But we also say, in terms of the broad discretion that the Commission has to allow the appeal anyway, that the appeal is confined to one employer and one clause and the application of that clause is to a factual scenario which cannot exist any longer, and it has no utility apart from saving the appellant from having to backpay 180 of its own employees.

PN236

The Deputy President's was not erroneous or unfair, and I'll elaborate on that. He considered matters raised in submissions by the respondent themselves and then made a decision on the questions everybody agreed were the questions which he had to arbitrate. And we say that he interpreted and agreement fairly and in accordance with the appellant's own interpretation of the agreement.

PN237

So although the decision may be damaging to the appellant financially, that alone is not sufficient reason for permission to be granted and we respectfully put to the Commission that the appeal should not be granted permission to proceed.

PN238

I'll move on to the appellant's grounds now, unless the Full Bench has any questions?

PN239

DEPUTY PRESIDENT GOSTENCNIK: Mr Fam, do you accept the proposition advanced by Mr O'Grady earlier that, putting aside your differences about whether or not there's a constructional dispute, but the answer to the question is either right or it's wrong, there's no discretion involved.

PN240

MR FAM: To the extent that the appeal concerns the construction of the enterprise agreement, we do accept that, yes.,

PN241

DEPUTY PRESIDENT GOSTENCNIK: Well, to put the question in the way in which you framed it; that is, the facts of the agreement wasn't in dispute.

PN242

MR FAM: Yes.

PN243

DEPUTY PRESIDENT GOSTENCNIK: It was whether the facts, which very much turned on the contest of the respondents, whether those facts led properly to a conclusion that clause 33 was engaged.

PN244

MR FAM: Yes.

PN245

DEPUTY PRESIDENT GOSTENCNIK: And do you say there's any discretion involved in answering that question or a circumstance where the answer is either correct or it's not?

PN246

MR FAM: No. We do agree with the appellant that the correct standard applies.

PN247

DEPUTY PRESIDENT GOSTENCNIK: Okay. Well, if you accept that – and let's assume for a moment that the Deputy President's answer was wrong, hasn't he in fact exceeded his jurisdiction in that he has acted inconsistently with the terms of the agreement, which he's prohibited from doing, and doesn't that enliven the public interest?

PN248

MR FAM: Yes. If his interpretation of the agreement was wrong, we say it wasn't wrong. And I will elaborate on that.

PN249

DEPUTY PRESIDENT GOSTENCNIK: I understand that. But I'm just focusing on public interest for a moment.

PN250

MR FAM: Sure.

PN251

DEPUTY PRESIDENT GOSTENCNIK: So if ultimately we were to accept that he was wrong in his answer, then he has in fact exceeded jurisdiction by a new determination which was inconsistent with the employment, and that goes to his jurisdiction, then that would enliven public interest; would it not?

PN252

MR FAM: I accept that, Deputy President, yes.

PN253

DEPUTY PRESIDENT GOSTENCNIK: All right. And you shouldn't take from that that I'm indicating one way or the other our view. I'm just testing the public interest issue with you.

PN254

MR FAM: I understand, Deputy President. Thank you.

PN255

DEPUTY PRESIDENT GOSTENCNIK: That's all right. Thank you, Mr Fam. Continue.

PN256

MR FAM: So moving to the appellant's first four grounds, which I'll deal with together. They have to do with the proper application of clause 33 of the enterprise agreement to the facts in the case; did Cross DP somehow misapply or misinterpret the enterprise agreement? And to be fair to the appellants, specifically the grounds are, first, that the Commission erred in finding clause 33 of the agreement applied to the respondents; second, the Commission erred in concluding that an investigation into each respondent, for the purposes of clause 33 of the agreement, had commenced; third, the Commission erred in concluding an investigation, for the purposes of clause 33 of the agreement, commenced when the appellant asked the respondents if they had complied with the appellant's policy; and fourth, the Commission's factual findings, the subjects of grounds two and three, were not open in view of the unchallenged and uncontroverted evidence led below.

PN257

Now, with respect to the first ground in particular, the appellant says that the Deputy President departed from the ordinary meaning of the words used in clause 33 of the enterprise agreement. And in the course of saying so, my learned friend makes reference, which as he says, 'We agree is the appropriate reference to the principles of construction in *James v Ridd*. I should say *James Cook University v Ridd* [2020] at paragraph 65. But what we say is that the Deputy President's interpretation of the enterprise agreement accords very closely to the principles summarised in that paragraph. And, in particular, there are three that I'll highlight. So this is paragraph 65 of that case and, if it assists, I can provide the page number of perhaps the appellant's list of authorities which helpfully included the decisions in it. And that's page 22 of the pdf, page 15 at the top of the page.

PN258

Now, the first principle, paragraph 65(i), is that:

PN259

The starting point is the ordinary meaning of the words, read as a whole and in context.

PN260

And then 65(ii):

PN261

A purposive approach is preferred to a narrow or pedantic approach.

PN262

And 65(vi):

PN263

A generous construction is preferred over a strictly literal approach.

PN264

So if we bring that together:

PN265

The ordinary meaning of the words is preferred, read as a whole and in context; a purposive approach is preferred to a narrow or pedantic approach; and a generous construction is preferred over a strictly literal approach.

PN266

So I'd just like to demonstrate, essentially, that Deputy President's approach to the agreement aligned and was consistent with those principles. So if I could take you to the decision again. Now, on page 39 of the appeal book, the Deputy President begins his application of the enterprise agreement to the facts. It's the second limb of his decision.

PN267

And at paragraph 49, the Deputy President acknowledges the primacy of the agreement, noting that any common law no work as directed, no pay principle, 'Must yield to the superior force of any statute or statutory instrument'. And he then says:

PN268

In this matter, the Agreement deals significantly with the right to suspend an employee as a disciplinary measure, with or without pay.

PN269

So here he's focusing on the purpose of clause 33, which as the Deputy President says, deals significantly with the right to suspend an employee as a disciplinary measure with or without pay. There's no other clause in the enterprise agreement, as the Deputy President noted below, that deals with discipline in general or which deals with the right to suspend an employee at all. And this purpose must be taken into account when deciding whether the clause applies.

PN270

With respect to the appellant, we say that the appellant is pushing, to use the words of *James v Ridd*, narrow and pedantic approach to the clause. And, you know, they call it an ancillary clause and they say it should be strictly limited in its application and that its application doesn't extend to employees who have been barred from work for almost a year without pay because their employer finds that they're not in compliance with the company direction, even though, as the Deputy President says, there's a clause in the enterprise agreement which deals significantly with the right to suspend an employee as a disciplinary measure with

or without pay. Now, it's not that simple. Because the purpose of the clause is only the starting point for the Deputy President.

PN271

He then also examines the ordinary meaning of the words, but the key words in clause 33.5 of the agreement, in particular, read as a whole and in context, and that is at paragraph 50 of his decision, still on page 39 of the appeal book, he gives an interpretation of the clause which is entirely uncontroversial given it is entirely consistent with the way the appellant themselves submitted that the clause operates down below. And I'll just read that paragraph. Paragraph 50 he says:

PN272

Clause 33.5 of the Agreement requires a determination at the beginning of an investigation as to whether an employee will remain at work on normal duty, placed in alternative duties, suspended with pay, reassessed and returned to normal duties, or suspended without pay for serious misconduct.

PN273

Then he applies that interpretation to the evidence submitted by the appellant, considering in particular the statement of Mr McKaysmith and, in particular, paragraph 75 of that statement where Mr McKaysmith says that:

PN274

No disciplinary investigation or disciplinary process been initiated by Sydney Trains.

PN275

And the appellant notes that this evidence was uncontested which the Deputy President notes in his decision as well. And he also takes into account the exemption denial letter which the appellant also relies on on this point. And this is where we come to what was essentially at the core of Cross DP's decision. At paragraph 53 of the decision, he finds that the appellant's submission that – and I'm sorry, that's page 40 of the appeal book, paragraph 53 of the decision:

PN276

No investigation has commenced into any of the five...

PN277

Let me start that again. At paragraph 53 he finds that the appellant's submission that:

PN278

No investigation has commenced into any of the five respondents from 6 December 2021 was unacceptable as it misconstrues the facts and the correspondence between the parties.

PN279

And at paragraph 56 he says:

PN280

The submission and evidence that no investigation had commenced into any of the respondents was disingenuous.

PN281

And this was the nub of Cross DP's answer to the primary question, that just because the appellant says that no investigation had commenced into any of the respondents, it does not mean that an investigation had not in fact occurred as a result of the conduct of the appellant, and such conduct fit within the boundaries of the disciplinary matters clause of the agreement when interpreted in a manner aligned with the principles of construction in *James v Ridd*, even if their words said otherwise.

PN282

And in making this assessment, it considers the policy itself and if I could take you to page 639 of the appeal book, that's where the appellant's vaccine policy is – and I apologise, could you flick to the next page, page 640, that's the second page of the policy. Under the heading 'Compliance', the policy states:

PN283

Other than those with legitimate reasons such as a medical contraindication, workers are required to comply with lawful and reasonable directions issued by their principal/employer. Lawful and reasonable directions can include a requirement for a worker to comply with any control measure, including being vaccinated against COVID-19 and a requirement to provide evidence of this.

PN284

Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment or engagement may occur.

PN285

So with respect to these paragraphs, Cross DP said at paragraph 54 of his decision – and I'm sorry to send you around, but page 40 of the appeal book – he said that:

PN286

The policy did not make any reference to the application of any 'no work as directed, no pay' principle.

PN287

And the paragraphs that I read on compliance:

PN288

Referred to what could only be understood to be the provisions of the Agreement regarding discipline.

PN289

Now, second, the Deputy President considered the exemption denial letter which, although it did state that until the respondents complied with the policy, they are not ready, willing and able to work, we know that such a position is only sound if no statute overrides it. And, indeed, Cross DP found that the letter and the very

fact that each of these drivers applied for an exemption to a direction that the appellants sought to impose, which was then assessed and rejected at paragraph 55:

PN290

Clearly invoked Clause 33 of the Agreement, 'Disciplinary Matters', by advising the Applicants:

PN291

*If you remain you remain non-compliant with the Policy, your situation will be reviewed at a later date and further discussed with you. If you have not complied with the direction as set out in this letter, a disciplinary process will commence, and your employment may be terminated.   *

PN292

And:

PN293

Any failure to comply with the requirements of Transport policies, procedures, standards or lawful and reasonable directions will be managed in accordance with applicable policies and procedures. Action up to and including the termination of employment may occur.

PN294

So the appellant wants to say that an investigation had not commenced into the respondents because they had not formally chosen to commence it, they had not intended to commence an investigation even though the respondents were already off work without pay due to a finding by the appellant that they were not capable of working due to alleged non-compliance with the company policy which they were all actively in opposition to and which they all applied for exemptions in respect of, exemptions which were considered and then denied by the appellant.

PN295

But we say that position does not accord with what clause 33 says or how it was interpreted by all parties in the case below. The enterprise agreement, of course, does not define the term 'investigation' and the clause is clearly designed to apply to disciplinary matters where an investigation is presumed by the clause. And if an investigation does indeed occur, the employer must pay the employee absence any serious misconduct. That's the interpretation of the clause that was put forward below.

PN296

Now, there's a submission that the Deputy President focused on the word 'investigation' in isolation or too much. And in addition to that, his decision might, to some extent, imply that – and I quote the appellant's written submissions here at paragraph 20:

PN297

Might imply that any kind of factual enquiry by the appellant that may have adverse consequences for an employee, amounts to an investigation for the purposes of clause 33 in the agreement.

PN298

There can't be any doubt, in our submission, that the Deputy President had to decide whether an investigation had commenced. But we saw earlier that the appellant themselves said in their outline of submissions for the case below that:

PN299

The opening words in clause 33.5 make clear that the threshold question in determining whether that provision is enlivened is whether an investigation has begun.

PN300

Then I'll just take you to page 57 of the appeal book, if I may. Again, this is the transcript from the case before Cross DP. And I'm taking you to paragraph 144 of that transcript. This is the oral submissions made by counsel for the appellant, in this case the respondent down below. He said:

PN301

In particular, can I just emphasise in clause 33.5, the opening words to that clause refer to at the beginning of the investigation. So that is really, we say, the gateway by which clause 33.5 is accessed. As we've set out in the written submissions, ultimately that is a factual enquiry. Has an investigation been done?

PN302

So, as I've said, and I won't repeat the point, but everybody down below agreed that an investigation was the gateway, to use the appellant's words, to clause 33.5's application. And, as I've said, the term is not defined in the agreement. So it was entirely reasonable, in our submission, and indeed necessary, for the Deputy President to consider the dictionary definition of the term 'investigation' in his decision. Now, he had to do that because the clause is not defined in the enterprise agreement.

PN303

And indeed the dictionary definition of the word 'investigation' is a broad definition, but it is the definition of that word and that is the word that's used in the clause. As he said in paragraph 57 of his decision:

PN304

The Macquarie Dictionary defines 'investigation' as: the act or process of investigating.

PN305

And he then finds, after considering all of the evidence against that definition, that by reference to that definition, whether intentionally or not, but to use his words at paragraph 58 of his decision:

PN306

Clearly an investigation had commenced because the fact of the vaccination status of the Applicants, and their compliance or otherwise with the Vaccination Requirement, had been established by the Respondent.

PN307

So the finding was essentially that Sydney Trains had conducted an enquiry or an investigation with disciplinary outcomes. It certainly had, in our submission, the hallmarks of an investigation. The respondents were barred from working on the basis of, first of all, suspected non-compliance with the company policy even though they were otherwise, we say, ready and willing to work. And there were deadlines by which they had to comply with certain requirements if they were to return to work. There was an exemption application process, an assessment process for those exemption applicant's and then a deemed decision for those applicant's. There was the threat of termination for non-compliance. These are all features of a disciplinary investigation and certainly, we say, meets the dictionary definition of the term 'investigation' which, again, everybody agreed was the gateway to the application of clause 33.5.

PN308

So just to wrap up on the first four grounds. We say that the Deputy President's approach to clause 33 was consistent with the *James v Ridd* principles. And just as a way of corroborating that, the ordinary meaning of the term 'disciplinary' is concerning or enforcing discipline. So disciplinary matters within the agreement should properly be considered in a purposive and a generous way to include any matter which concerns or enforces disciplined. We don't say that's controversial. As acknowledged below, the next step in triggering let's say the payments allowance clause, if we can call it that, 33.5, is that an investigation had commenced, and I've addressed that already.

PN309

So Deputy President did not, as the appellant says, fail to give effect to the terms of the evidence purpose of the provision. He instead applied the proper principles of construction when considering whether the conduct of the appellant, despite their assertions otherwise, properly triggered it. And in doing so, he focused precisely on the purpose of the clause, being that within the enterprise agreement that deals significantly with the right to suspend an employee as a disciplinary measure with or without pay, and (indistinct words) consistent with the dictionary definition of the term 'disciplinary matters', which is the title of the clause, as well as 'investigation' which is sort of a trigger to the payment part of the clause.

PN310

So that's all I'll say about the first four grounds. I've only got about ten minutes left, and I'm just going to speak about grounds five, six and seven.

PN311

DEPUTY PRESIDENT GOSTENCNIK: Sorry before you do, Mr Fam.

PN312

MR FAM: Yes.

PN313

DEPUTY PRESIDENT GOSTENCNIK: Can I just ask you this by way of a hypothetical example and just to better my understanding at least of the submission that you're putting.

PN314

MR FAM: Yes.

PN315

DEPUTY PRESIDENT GOSTENCNIK: Let's assume for a moment that we have an employee who has absented him or herself from work without explanation, and the employer writes, after five or six days of absences, the employer writes to the employee and says, 'Well, you haven't been attending work, so we're not going to pay you because you haven't produced a medical certificate and you can't have access to your leave, so we're simply not going to pay you. And if you continue to absence yourself from work, then we may take disciplinary action against you'. Now, at the point of advising the employee that they're not going to be paid; has an investigation on your construction commenced?

PN316

MR FAM: I would say that that's, with respect, quite a different factual scenario to what's occurred in this case, but I'll answer your question directly. I would say that anything that meets the definition of investigation in the dictionary, because the term's not defined in the enterprise agreement, which is the act or process of investigating would trigger the clause.

PN317

On the hypothetical that you gave me, Deputy President, I don't think the clause is triggered, but in our case I say that it was. And I say that our case is quite different to that example, with respect.

PN318

DEPUTY PRESIDENT GOSTENCNIK: In the scenario that I posit, the employer has reached a conclusion that the employee is absent without explanation and is withholding pay.

PN319

MR FAM: I would say that in reaching that conclusion, they very likely have engaged in an investigation.

PN320

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. Yes, thank you, Mr Fam.

PN321

MR FAM: Thank you, Deputy President. So with respect to grounds five, six and seven, the appellant says that Cross DP erred or acted beyond jurisdiction in concluding two things. First – and they use the word 'concluding' in their written submissions – first, the appellant had not established that its policy was lawful and reasonable; that's ground five. And second, in concluding that the appellant had not established that the respondents were not ready, able and willing to work; that's ground seven.

PN322

And I'll just deal with those two grounds first. You know, I would just say, firstly, the Deputy President made no such conclusion. He merely considered those points explicitly avoiding a conclusion, as we've already seen. Now, the appellant says that, at least in part, the Deputy President's decision was – or I should say his interpretation of the enterprise agreement occurred, 'Because he determined an issue' - and I'm quoting the written submissions of the appellant – 'Because the Deputy President determined and issue not raised by the disputes before him; namely, whether the respondents' non-compliance with the appellant's policy provided a basis for them to be stood down without pay'.

PN323

Now, I went through earlier the way that we say the decision should be read. Part of the reason I did is that, with respect, we say that the appellant has misconstrued the Deputy President's decision. It's clear on the face of the decision that the Deputy President at all times had the correct and limited questions which he was to arbitrate front of mind. Most obviously, as Mr O'Grady pointed out, we say that the decision is book-ended with those questions, paragraph 4 at the beginning of the decision and paragraph 64 to 67 at the end of the decision, and we do understand the line that the appellant is trying to draw here, but it is important to acknowledge that the decision comes in two separate parts.

PN324

And we highlighted earlier that in paragraphs 36 to 48 of the decision, the Deputy President considers only the appellant's various submissions made to establish the basis on which the respondents were suspended from work without pay, and then noting that it's the only course his decision can take explicitly, he moves on to focusing on the agreement clearly making his ultimate decision on the basis that the evidence put forward by the parties, in his view, sufficiently triggered clause 33.5 of the agreement; and that's paragraphs 49 to 67 of the decision.

PN325

Now, earlier in my submissions I pointed towards the transcript from the hearing before the Deputy President. I wanted to show the Full Bench that the ready, able and willing to work issue was not one that, to quote the appellant's written submissions, 'A rose in the course of submissions in response to a question asked by the Deputy President', and they say that at paragraph 30 of their written submissions. But was rather one voluntarily by the appellant, very early in his oral submission, as the basis upon which the respondents to this case were not being paid.

PN326

I also said that this was a reasonable thing for them to do. It makes sense contextually that if you are arguing that you do not have to pay your employees for a considerable length of them while you barred them from work, that you might explain the legal basis upon which you purported to do so, it's quite an extraordinary step to take. And I won't labour on this point because I've already covered it, but I'll just say one thing which is, in our view it's not reasonable for the appellant to open up an issue via submissions and then to admonish the Deputy President for merely considering that issue, then dismissing it in his decision, which is what he did.

PN327

And I'll just, again, read paragraph 48 of the decision, at page 39 of the appeal book, where he says:

PN328

I do I do note that, in the absence of any evidence or submissions regarding relevant contracts of employment, I have below focussed on the terms of the Agreement. That focus naturally leads to consideration of the whole of the Agreement, and clauses 8 and 33 in particular.

PN329

So the submission that somehow the rest of his decision is affected by the consideration of the first half, we disagree with. Now, to put all of that another way, we say that paragraphs 36 to 48 of the decision, which are those that the appellant cavils with, could be cut from the decision and it's clear, we say, that the decision would have been same. If he didn't consider the ready, willing and able question or the lawfulness and reasonableness of the policy question, it's clear that his interpretation of the enterprise agreement would not have changed.

PN330

The Deputy President merely provided a complete decision which dealt clearly with all of the issues raised before him. The outcome wasn't contingent on those issues that the appellant says were outside the bounds of the Commissioner's jurisdiction.

PN331

And we apply the same reasoning to the Deputy President's consideration of the lawfulness and reasonableness of the policy. He didn't make any determination one way or another. The appellant says that:

PN332

The Deputy President should have proceeded on the basis that the lawfulness and reasonableness of the direction was not in contest and that the issue he had jurisdiction to arbitrate was whether, on the proper construction of clause 33 of the agreement, a disciplinary investigation had been commenced in respect of each of the respondents.

PN333

Again, the Deputy President dealt with those two issues entirely separately. And we do say the Deputy President was entitled to consider the lawfulness and reasonableness of the policy given the context of the case. But it would not have affected his decision even if he did not, especially given that he doesn't actually make any decision on the lawfulness or reasonableness of the policy. Instead noting that, as my learned friend says, he could not make such a determination in the absence of appropriate evidence.

PN334

So with respect to ground six, very briefly, the error that the appellant alleges was made with respect to the time at which the Deputy President assessed the lawfulness and reasonableness of the policy is immaterial. It did not affect his decision one way or another.

PN335

So we say that grounds five, six and seven are lacking in substance because they rely on an assumption or an assertion that matters, which were not material to the Deputy President's decision, somehow infected its outcome. That simply is not the case. The real disagreement here lies in whether clause 33 of the agreement applied to the respondents and whether the Deputy President's decision that it did was correct or not, which I've already spoken about.

PN336

So I'll very briefly conclude. We say that this appeal is brought on the basis of an inaccurate reading of the decision which seeks to establish that matters that the Deputy President merely considered, which indeed the appellant themselves raised in their submissions, were material to the ultimate conclusion. But the decision is not error. Cross DP clearly answered the primary question in a manner consistent with the principles of interpretation in *James v Ridd*.

PN337

We say the Commission should not grant permission to appeal to the appellant; it's not in public interest; it is in Sydney Train's interest; and the decision has no real utility given the relevant vaccine policy is no longer in existence. If permission is granted, then we say the appeal should nonetheless be dispensed with. And despite the consequences it has for the appellant, there was no error in the original decision. Those are my submissions.

PN338

DEPUTY PRESIDENT GOSTENCNIK: Mr Fam, can I just ask you this. Given that several of the provisions in clause 33 of the agreement require the employer to take certain steps, vis-à-vis the employee and perhaps other employees, within a period after an investigation has commenced; do you accept that an investigation can't have commenced unless the employee has first been notified an investigation is commencing?

PN339

MR FAM: No, Deputy President. Because we say that, in this case, Sydney Trains, as they submit, did not intend to instigate an investigation, but that although there's not much guidance in the clause in general, the only option that we have in interpreting the clause is to do what the Deputy President did which is to look at the dictionary definition of the term 'investigation' because the enterprise agreement doesn't define it.

PN340

DEPUTY PRESIDENT GOSTENCNIK: Well, was this an uncomplicated disciplinary investigation or a complicated one?

PN341

MR FAM: Well, we don't know because Sydney Trains didn't intend to implement a disciplinary investigation and never defined it one way or another. We accept that the other parts of clause 33 weren't compiled with by Sydney Trains, but we say that clause 33.5 nonetheless applies and applied to the respondents.

PN342

DEPUTY PRESIDENT GOSTENCNIK: All right. Well, when did the investigation begin?

PN343

MR FAM: We say that investigation began at the time that Sydney Trains deemed that the respondents were not compliant with the direction to be vaccinated, which has to have occurred before 6 December, at the latest, because that's when they were barred from work.

PN344

DEPUTY PRESIDENT GOSTENCNIK: All right, thank you.

PN345

MR FAM: Thank you.

PN346

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Fam.

PN347

MR FAM: Thank you.

PN348

DEPUTY PRESIDENT GOSTENCNIK: Now, Ms Tripp, is there anything you wish to say?

PN349

MS TRIPP: No, I think Mr Fam pretty much covered any points, and more, that I had, just in a much more eloquent manner and I thank him for that. So at this time, I don't have anything further to add.

PN350

DEPUTY PRESIDENT GOSTENCNIK: This is the last point, so.

PN351

MS TRIPP: Yes.

PN352

DEPUTY PRESIDENT GOSTENCNIK: All right, thank you. Mr Aiono, do you wish to say anything, make a submission? While we're waiting to hear from Mr Aiono, Mr Taylor, you missed the beginning of the proceeding, but do you wish to say or add anything to the submissions made?

PN353

MR TAYLOR: Other than apologising for my lateness, no, I don't have anything else to add. Thank you.

PN354

DEPUTY PRESIDENT GOSTENCNIK: And I know at the beginning of your submissions, that you'd sent through – sorry, at the beginning of the proceeding – that you had sent earlier through an email dated 10 February, which we have.

PN355

MR TAYLOR: Okay. Great, thank you.

PN356

DEPUTY PRESIDENT GOSTENCNIK: Mr Aiono, are you there? Well, Mr Aiono, if in the next few minutes you are able to engage with this conference, just speak up and we'll allow you to say something. But in the meantime, so that we're not wasting time, I'll ask Mr O'Grady whether he wishes to say anything by way of a reply.

PN357

MR O'GRADY: Yes. Thank you, Deputy President. Just very briefly. Firstly, in respect of Mr Taylor's email –whilst I didn't refer to that expressly earlier, I think it's been covered off by the matters I've already said and I don't need to go any further than that.

PN358

In respect of the submissions that were made both under the head of permission to appear, but also in respect of the approach of the Deputy President - - -

PN359

DEPUTY PRESIDENT GOSTENCNIK: I think you mean permission to appeal. Permission to appear (indistinct words), Mr O'Grady.

PN360

MR O'GRADY: Yes, thank you. And I apologise, Deputy President.

PN361

DEPUTY PRESIDENT GOSTENCNIK: Right.

PN362

MR O'GRADY: One would have thought they could have kept (indistinct) for one of them and used permission for the other perhaps.

PN363

DEPUTY PRESIDENT GOSTENCNIK: Yes, well.

PN364

MR O'GRADY: But instead it was (indistinct words). You might recall you were taken to page 491 of the appeal book and that was the submissions of Sydney Trains. In the paragraph directly under the paragraph, that Mr Fam took you to, a submission is made. The evidence of the respondent is that:

PN365

No investigation has commenced into any of the five applicants from 6 December 2021 onwards.

PN366

If that evidence is accepted, that is, (indistinct words) proceedings, it illustrates that clause 33.5, on which the applicants' disputes are solely based, is not engaged. In my submission, the effect of paragraphs 23 and the paragraph I've just read, paragraph 24, is that whilst Sydney Trains below was accepting that

there has to be an investigation and that's a factual enquiry, it was also submitting that determinative of that factual enquiry was whether or not there had been a determination by Sydney Trains to conduct an investigation. It wasn't some objective enquiry that could give rise to a situation where, unbeknownst to Sydney Trains and unintentionally, an investigation was entered into.

PN367

And I'd make the submission in respect of that part of the transcript that Mr Fam took the Commission to at paragraph 144. Whilst it is the case that counsel for Sydney Trains below was saying that there had to be an investigation, that was a gateway through which clause 33.5 is assessed and that ultimately is a factual enquiry, it was a factual enquiry to be determined by what Sydney Trains did or did not decide, not some matter to be determined or assessed objectively for the reasons that I put earlier this morning.

PN368

In respect of the submissions put in respect of paragraph 49 of the submission, again, I just repeat the point I made earlier that, in my respectful submission, 33.5 is not a disciplinary measure, rather it is an ancillary provision concerning what happens to an employee who is being the subject of investigation.

PN369

In respect of the submission made about the COVID policy that appears at appeal book page 640. As the correspondence that I took the Full Bench to this morning shows, my client, it maintained, that it did have the potential to conduct a disciplinary investigation in respect of the non-compliance of the COVID policies and was consistent in maintaining that.

PN370

But at the same time it also maintained that employees who were not vaccinated, or had not complied with the policy, were not considered to be ready, able and willing to work and that Sydney Trains had made the decision not to accept their service. At no stage did my client say that, 'Whilst we have the potential to conduct a disciplinary investigation into your non-compliance with the COVID policy, that is what we are going to do and that is what we have done'.

PN371

And if I can make the same point in respect of Mr Fam's submissions regarding the exceptions demand letter that's set out in paragraph 56 of the decision. Again, it's clear from the terms of that correspondence that whilst there is a potential for a disciplinary investigation, that is not something that my client had elected to pursue.

PN372

In respect of the question that you asked, Deputy President, regarding the absence from work. We would endorse the suggestion implicit in that question, that absent there being a conscious decision to engage the disciplinary investigation provisions in clause 33, the clause becomes unworkable. It would be, in our respectful submission, a very strange outcome if, in circumstances of the type that you described, an employee would be entitled to insist upon being paid pursuant to the master roster when they're not attending.

PN373

And again, we would rely upon the fact that, as I understood the question that you asked Mr Fam, the scenario envisaged an express reserving of the right not to, or to subsequently, engage with a disciplinary investigation. I would make the point that if one goes to the terms of 33.5, it would appear that non-attendance, as such, would not necessarily fall within the definition of 'serious misconduct', giving rise to a right to suspend without pay. So an employee who simply didn't turn up, as we understand the Deputy President's construction, would be prima facie entitled to wage maintenance pursuant to the first limb of 33.5. And, again, we say that is a capricious outcome.

PN374

In respect of Mr Fam's submissions regarding grounds five to seven. We rely upon what we've said in writing and what I said this morning. I do, however, agree with Mr Fam that the primary focus of the appeal is the proper construction of clause 33 and that, for the reasons that we've already submitted, the Deputy President was in error in adopting the construction that he adopted. Unless there are any further questions, those are the submissions in reply.

PN375

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr O'Grady. Mr Aiono, last chance? (Indistinct words) might be some technical difficulties with Mr Aiono. Can I just indicate (indistinct words) were matters (indistinct words) Mr Aiono wants to put to us, he can do so in writing in the next 48 hours.

PN376

If that occurs, Mr O'Grady, I'll give your client an opportunity to respond to that. I'm just mindful that I don't want to deny him to say something (indistinct words) technical difficulty. But otherwise we propose to reserve our decision and we thank both you, Mr Fam, and you, Mr O'Grady, for your helpful written and oral submissions today. And we will otherwise adjourn. Have a good day.

ADJOURNED TO A DATE TO BE FIXED [12.33 PM]