TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER BISSETT

C2022/7494

s.739 - Application to deal with a dispute

United Workers' Union
and
Toll Transport Pty Ltd T/A Toll Global Logistics
(C2022/7494)

Toll Global Logistics and United Workers Union (RCA Victoria) Enterprise Agreement 2021

Melbourne

10.07 AM, WEDNESDAY, 5 APRIL 2023

Continued from 14/03/23

PN1

THE COMMISSIONER: I will take appearances.

PN2

MS A THWAITES: Anna Thwaites for the applicant.

PN3

THE COMMISSIONER: Thank you, Ms Thwaites. And for the respondent?

PN4

MS K SWEATMAN: Katie Sweatman from Kingston Reid. I understand the Commissioner has granted us permission to represent the respondent today. I'm just accompanied by my colleague Mia Steward. I have Mr Vido here who has been relieved of the requirement to give evidence. I just wanted to be sure that you were comfortable with him observing the proceedings today.

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THE COMMISSIONER: Certainly, yes. Permission has been granted and Mr Vido is more than welcome to stay.

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MS SWEATMAN: Wonderful. Thank you, Commissioner.

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THE COMMISSIONER: Thank you. Ms Thwaites?

PN8

MS THWAITES: Thank you, Commissioner. As we don't have any witness evidence to deal with today I propose that I move straight into submissions. What I'd like to do is set out the facts of the dispute here, just why we're here. Talk a little bit about the structure of the agreement, how it came to look the way that it does before dealing with the disputed clauses and the actual operation.

PN9

So the question here pertains to the accrued day off entitlement at the Toll Nike site that's run by the respondent. The terms and conditions that apply to employees at that site are dealt with by a combination of part A of the agreement - sorry, part B schedule A.

PN10

The ADO entitlement that we're talking about today it's been in disagreement or in previous iterations of the agreement for over a decade. So we've had it in there for that period of time, and there's never really been a dispute about the way that it operates. We haven't been in an arbitration to deal with it, and consistent with the witness evidence of both the parties, which is not in dispute, the respondent has been applying the clause in the manner that is submitted by the applicant today, although they say that they did so in exercise of a discretion as opposed to as a result of a binding obligation.

PN11

So last year the respondent stopped applying the clause consistently with the applicant's interpretation, and that's to say that before that year the respondent had been approving all the ADO requests that conformed with the notice requirements in clause 25.10 of schedule A part B.

PN12

Now, our position is that the agreement permits the employees at the Toll Nike site to access ADOs on provision of the requisite notice that's set out in clause 25.10, and that the employer does not have a discretion to refuse those applications provided that the requisite notice is given.

PN13

There isn't a dispute here between the parties about the principles that govern agreement interpretation. We have looked at *AMWU v Berri* and my friend here's reference to *WorkPac v Skene* and this dispute is really about the application of those principles rather than revisiting the principles themselves.

PN14

The construction of the agreement depends on a consideration of the ordinary meaning of the relevant words where the resolution of a disputed construction of an agreement turns on the language of the agreement having regard to its context and purpose, and the context can appear from the text of the agreement viewed as a whole.

PN15

I would like to provide a bit of context for the agreement. It's not the most standard looking enterprise agreement that we deal with. So just to give you some background the agreement itself was negotiated in 2021, and it's the result of an amalgamation of four separate enterprise agreements that were being negotiated concurrently. Part A contains all the common terms that will apply to every single site, and the schedules in part B relate to each of the different sites and almost entirely replicate the content of the previous standalone enterprise agreements for each of those sites.

PN16

The employer in this case is a third party logistics company, and each of the sites that's covered by the agreement services a different customer with different operational requirements. So schedule A deals with Toll Nike, schedule B is Toll Campbellfield, schedule C is Kmart, and schedule D is the two Mondelez sites in Ringwood and Dandenong. Schedule E deals with any new sites that are established by the company.

PN17

That's why in the schedules to the agreement there are a number of similarities between the clause, you see a lot of the same wording, same language repeated between those different schedules, but there are also some peculiarities between the sites and they reflect the different operational requirements of the customers that are serviced at that site, as well as the outcomes of negotiations between the parties which has been Toll and the UWU or formerly NUWU over different periods of time. I'd like to come back to this point a bit later in my submissions, but the background is useful at this point.

PN18

Turning now to the ADO system at Toll Nike. So the agreement sets up a pretty simple framework for the administration of the ADOs, and the consideration begins at clause 25.1.1, which is page 73 of the digital court book.

PN19

THE COMMISSIONER: Thank you.

PN20

MS THWAITES: Clause 25.1.1 sets up a maximum weekly hours, which are an average of 38 per week in line with the National Employment Standards of course, and there are options for the employer as to how these hours can be averaged. The employee's ability to actually accrue an entitlement to an ADO depends on the employer's discretion as to how they structure the working week.

PN21

So in clause 25.4 headed 'Implementation of 38 hour week' there are four options as to how the employer may choose to implement the 38 hour week, and only two of those give rise to an entitlement to accrue an ADO. The employer may fix one week day on which all employees will be off during a particular work cycle or they may roster employees off on various days of the week during a particular work cycle so that each employee has one week day off during that cycle.

PN22

Clause 25.5 clearly states that the method of implementation of the 38 hour week is at the discretion of the employer, and that's really important here, because ultimately the decision to implement a 38 hour week that enlivens the entitlement to an ADO in the first place falls with the employer. The employer gets to decide how to organise the operations, what sort of hours should be worked limited within those four options that are set out at 25.4.

PN23

It is also important here, because as in other parts of the agreement where the parties have agreed to confer a discretionary power on the employer what you see is explicit language, clear language establishing that discretion, which you can see in this clause here. At 25.5: 'The method of implementation of the 38 hour week shall be at the discretion of the employer.'

PN24

Now, the ADO system is like any ADO system in that the employer obtains a benefit by having this system, because as in the case with the Toll Nike site the employees work 40 hours a week. Those extra two hours are paid at ordinary time. The employer doesn't have to pay overtime rates for those two hours, and the employees in turn get a benefit because they get an extra day for every month. So it's kind of a push and pull here, both sides benefit.

PN25

THE COMMISSIONER: Does the Nike site operate 24 hours a day?

PN26

MS THWAITES: At the moment it does. They run a nightshift, yes, so it does run all the time, but sometimes the nightshift doesn't operate and sometimes the hours change, but generally it does, yes.

PN27

THE COMMISSIONER: Thank you.

PN28

MS THWAITES: So once the employer has nominated a working week that gives rise to this ADO entitlement we look to clauses 25.10, 25.11 and 25.12 to understand how that ADO system is implemented and how it operates. 25.10 deals with taking ADOs and the notice that's required. 25.11 deals with accumulating and purchasing ADOs, while 25.12 deals with substituting ADOs.

PN29

Clause 25.10, which is kind of the main clause that we're in dispute about here, it deals only with the amount of notice that must be provided to the employer to take an ADO, and it provides that:

PN30

An employee shall advise the employer at least three days in advance when they seek to take one or two accrued days off. Where an employee makes a request to access three or more ADOs they shall advise the employer four weeks in advance of the week they intend to take off.

PN31

Our written submissions and those of my friend here establish that we're aligned on the purpose. The purpose of notice is to allow the business time to prepare for employee absences. So that is why there's a longer notice period required for three days or more days than that. four weeks is significantly longer than three days as well. So this suggests that the drafters of the agreement considered that in the operational context of the Toll Nike site three or more days was going to require a bit more effort to plan around, whereas one to two days was unlikely to cause so much disruption that more time is needed to make arrangements to cover the absences. And this is consistent with the entitlement to annual leave in the agreement as well, which requires three days notice for single day absences, but one month's notice for consecutive day absences. So that's similar.

PN32

Turning to clause 25.11 this really clarifies the entitlement in 25.10, because it says, 'A employee may elect when they take these days as long as they provide notice per clause 25.10.' And there's nothing else in this clause that suggests that there's an approval process, an ability to refuse the application, only that the employee can elect, they choose when they take these days so long as they provide notice.

PN33

Clause 25.11 then sets out how employees actually accrue ADOs, the maximum number of ADOs that can be accrued, and cashing out of ADOs. So employees can accrue up to four ADOs or five, but with the agreement of the employer. So this implies that you can accrue up to four without the approval of the employer.

PN34

The employer here is also empowered to direct employees to utilise additional days within the month where the employee has accrued more than their entitled number of ADOs, and cashing out is available where the employer is not able to roster the excessive days.

PN35

So these mechanisms for dealing with the number of ADOs will all enable the employer to deal with and moderate any risk to operations that come about from employee absences, and the language is clear and unambiguous. There's a notable absence of any language that enables the employer to exercise a discretion, which again can be contrasted with the entitlement to annual leave, which is at clause 31.5 of schedule B. That clause mirrors the amount of notice required as I stated, but it also states that the employer should not unreasonably withhold the employee's right to take annual leave, and that the employee may elect to take annual leave in single day periods, but only with the consent of the employer.

PN36

Here again we're seeing explicit language to establish a discretion, a discretionary power on the part of the employer and a limitation on the rights of an employee. This language is totally absent from clause 25.10 dealing with notice to take ADOs, and that's what informs our understanding that ADOs can't be refused by the employer, provided they have been accrued and provided the requisite notice has been provided.

PN37

Turning to clause 25.12, substitute days. Now, this clause provides for circumstances in which an employer can require an employee to work on a scheduled ADO. To schedule an ADO in the first place the employee only needs to have the requisite hours accrued and to provide the notice per 25.10. Hence there's no language in that clause referencing an approval process or any discretionary language in terms of what the employer is able to do with those applications.

PN38

But clause 25.12 empowers the employer to substitute the day an employee has notified for an ADO in specific circumstances. So either with the agreement of the majority of the workforce, but only in the case of an emergency situation, or by agreement with the employee per clause 25.12.3. If an employee is required to work on the notified ADO clause 25.12.2 entitles them to overtime rates or to their choice of taking an alternative day, and it says clearly that such choice shall be at the option of the employee.

PN39

We say that the purpose of clause 25.12 overall is to deal with circumstances where an ADO has been notified and needs to be substituted for specific operational reasons. An emergency situation is the language that's used in that clause; a breakdown of machinery, a rush on orders. This is necessary, this language is necessary and this mechanism is necessary, because once an employee complies with the notification requirements in 25.10 there's no approval process

and no discretion on the part of the employer to refuse the request. So that is why a day has to be substituted, it can't be refused.

PN40

To summarise all of that at Toll Nike the employer nominates a method for implementing a 38 hour week, and it's this nomination that either gives rise to an entitlement to an ADO or does not. If the employer nominates a method which gives rise to an ADO the rules in 25.10 and 25.11 govern how ADOs are to be administered. The plain words of those clauses that employees may elect when they take their ADO so long as they provide notice per clause 25.10 means that an employer cannot refuse an ADO when the requisite notice has been provided.

PN41

Clause 25.12 provides a mechanism to both the employer and the employee to substitute scheduled ADOs in emergency situations or by agreement, and I need to point out here that requiring the employee to work on the ADO is different to refusing a request that's been put in for any operational reason, because the ADO is scheduled once the notice is given. It's been scheduled, and scheduled is a word that's used in that substitution clause. But in limited circumstances and by quite constrictive means in clause 25.12 the employer can require the employee to work, but only with the agreement of the majority of the employees. The employee is compensated for the restriction by either receiving the overtime rates or nominating a different day.

PN42

THE COMMISSIONER: Sorry, just in terms of 25.12.1 its language about the employer with the agreement of the majority of employees in the establishment may substitute a day suggests that it operates only with respect to the third circumstance in 25.4.1, and that is where there's a fixing of a single day per fortnight where everyone is off.

PN43

MS THWAITES: That seems to be how it operates too. We would agree with that, but this is intended - why else have a majority vote of the employees if it's only to affect one employee, but I think that the other interpretation is available. The only reason that it's available is it says the employer with the agreement of the majority of employees in any establishment may substitute a day an employee is to take off in accordance. So if a majority is voting to move one person's day there's some ambiguity there, but I would prefer the reading suggested by yourself on that matter. It does seem to be addressing a situation where you've got one day for every single employee at the site.

PN44

THE COMMISSIONER: So then the emergency or the case of the breakdown of machinery, failure or shortage of power, or whatever, might not apply to an individual. So the emergency circumstances that are perhaps contemplated by 25.12.1 then don't apply when you are just talking about an individual where the employer says, well I'd like you to change your day off because of whatever.

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MS THWAITES: For these particular reasons of emergency situation?

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THE COMMISSIONER: Yes.

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MS THWAITES: No. Well, if that's the situation and that's a compelling position we would tend to agree with that. Then the way to substitute a day is by agreement with the employee. That is the way that you can do it, which it's my understanding that's been the practice in the past.

PN48

THE COMMISSIONER: Yes.

PN49

MS THWAITES: Now, the resolution of dispute construction of agreement terms and the language of the agreement having regard to its context and purpose, and context can appear from the text of the agreement viewed as a whole, the ADO scheme at Toll Nike can be compared with the ADO schemes at the other parts of the agreement. For example clause 12 of schedule B, which applies to the Campbellfield multi-user site - I haven't got a digital court book reference for that one.

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THE COMMISSIONER: That's all right. Keep going.

PN51

MS THWAITES: So clause 12.8 of schedule B deals with ADOs at the Toll Campbellfield multi-user site, but the language confers a different entitlement there. At clause 12.8.1 it states that:

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Employees will take their ADOs at a mutually convenient time.

PN53

Clause 12.8.3 states that:

PN54

Employees shall apply to take an ADO in the same manner that they would apply to take annual leave. Provisions contained in the schedule regarding annual leave applications shall apply to ADO leave applications.

PN55

So it's just explicit wording saying that ADO applications are dealt with in the same way that annual leave applications are dealt with, and on top of that there's words like 'mutually convenient' and 'with the agreement or consent of the employer.' Again that's explicit language that contemplates the approval or refusal of ADO requests by management, and it's really different to the plain wording that you see in the Toll Nike context in schedule A.

PN56

I think it's really important too to note that for the Campbellfield site the employer is required to introduce an ADO system as of 1 March 2016. So since the

employer doesn't have an overarching discretion as to how it structures its week whether or not an ADO entitlement will be enlivened by its decision to structure the week one way or another, this actual entitlement to an ADO is much more restrictive and requires the exercise of a discretion by the employer. The same is true for Toll Mondelez as well, which is dealt with in schedule D.

PN57

So at clause 18 of schedule D the employer again is required to introduce an ADO system by no later than 4 July 2016. So they don't have the discretionary ability to structure the week one way or another which will or won't give rise to the ADO. Clause 18.3 states that:

PN58

> *Employees shall apply to take their ADOs in the same manner that they would apply for annual leave, meaning the employer cannot unreasonably refuse a request, but they do have a discretion to reasonably refuse a request.*

PN59

This is not the case for Toll Nike. These words don't apply in the context of Toll Nike. I think as I kind of flagged now where the drafters of this agreement have intended to confer a discretion on the employer there is consistently really plain language establishing that discretion, and the absence of that language in 25.10 and 25.11 of schedule A supports our interpretation that there isn't a discretion to refuse ADOs.

PN60

And this makes sense having regard to the context of the purpose of the clauses dealing with ADOs in the entire agreement, because as I said where the employer has a discretion to implement a working week that doesn't give rise to an ADO, then the entitlement and the entitlement on the part of the employees is much stronger and isn't tempered by a discretionary element on the part of the employer. The converse is true; when you've got a requirement to introduce an ADO system you've got a discretionary element for the employer.

PN61

Now, I would just like to address some of the respondent's submissions a bit more directly at this point. So the respondent is contending that the employer has a discretion to refuse or approve ADO requests, that they can refuse them for any operational reason at any time of year, and we have submitted that there isn't any language in the clauses to support that interpretation.

PN62

In line with *AMWU v Berri* the task of interpreting an agreement does not involve rewriting it to achieve what is regarded as a fair or just outcome. The task is to interpret the agreement produced by the parties. I do have a copy of Berri if the parties require it.

PN63

THE COMMISSIONER: That's fine. I know it well.

PN64

MS THWAITES: Yes, I thought you might. The respondent submits that it's clause 31.8.7.1 of schedule A, the restricted leave period clause, that is evidence that ADO requests can be approved or refused at the discretion of the employer. It's our submission that this clause is evidence of the opposite. If the employer had a discretion to refuse ADO requests at any time of year for any operational reason, then it wouldn't be necessary to include this clause at all, it would simply have no work to do. They could refuse them at any point if it didn't suit the operations.

PN65

What this clause does do is import a limitation on the total number of ADOs that an employee can elect to access during that Christmas peak period, which is a period when many employees are seeking to take leave and also the operationally busier period for the respondent.

PN66

That clause does not otherwise limit the entitlement or confer a discretion on the employer in respect of the ADOs or displace clause 25.10. Without this clause, if we get rid of it, if we imagine that this clause was not in there at all, then employees would be able to access their ADOs in the peak period in line with clause 25.10, and they could access three or more accrued ADOs on the provision of four weeks notice, but no more than four or five ADOs realistically since that's the total amount that they could accrue.

PN67

So you're not talking about weeks and weeks of leave here, but four or five days, and they do that on the provision of four weeks notice. So to limit this entitlement employees may only access two ADOs during the period. But beyond that cap the situation remains the same. The ADO clauses at 25.10, 12.11 and 12.12 are not affected beyond that cap being introduced.

PN68

The only discretionary element of that restricted leave clause pertains to the applications for excess leave requests during the restricted leave period, and that's defined to mean more than two ADOs or more than five days of annual leave during that restricted leave period which is I think 30 November to 31 January. There's no other language in there to suggest that this discretion goes further than that or that in any way displaces the entitlement in 25.10.

PN69

Now, lastly on the matter of the Fair Work Commission's jurisdiction to determine the question in the applicant's favour we rely on our written submissions, but make the following additional comments, or submissions, sorry. The respondent has submitted that the Fair Work Commission would be unreasonably interfering with the employer's discretion to manage its operations by finding in favour of our interpretation here, and that it would thereby exceed its jurisdiction. And the basis for that argument, or it's an assertion that finding that the employer does not have a discretion to refuse ADOs would have the consequence of sort of unleashing a deluge of ADO requests that would make it impossible for the respondent to operate its business at the Toll Nike site.

PN70

I want to be clear from the outset that we are not asking the Commission to interfere with an exercise of discretion on the part of the employer. This question is about establishing whether or not the discretion exists at all. If this were a situation where we had a member and that member had applied for ADOs, a number of different ADOs and they had been rejected specifically and we were asking the Commission to overturn that decision and let them have the leave at a particular time, maybe that would be a situation that would give rise to this argument. But in this case we don't agree that there is a discretionary ability on the part of the employer to refuse these ADOs, and that is the question that we're asking to be determined.

PN71

The applicant is seeking for the employer to comply with terms that they have negotiated in an enterprise agreement to which they're a party. We're not concerned with challenging the specific exercise of managerial discretion. So accordingly this is not a situation where that discretion would be lawful or just or reasonable, because we say it doesn't exist in the first place.

PN72

Again the Commission is just being asked to construe the meaning of a clause as negotiated by the parties and there's no dispute here that the applicant has followed the dispute procedure and that the dispute falls within the scope of that dispute procedure. Notwithstanding our position on this submission, which is that we are not asking the Commission to interfere with an exercise of managerial discretion, the basis for the respondent's assertion of unreasonable interference with business decisions is highly speculative and improbable we say, and we say that for the following reasons.

PN73

The first is that the employer has been applying this ADO system consistent with our interpretation for over a decade. We don't have evidence here that that has caused major disruption and we have not been in dispute, we have not had an arbitration about it previously.

PN74

The second point is that the employer utilises a large pool of labour hire workers who are employed by Toll People which is a related body corporate to the respondent. The purpose of having such a large pool of labour hire casuals is to fill gaps when employees go on leave and to generally supplement the permanent workforce on the site.

PN75

The third point is that the notice requirements provide the employer with time to prepare for employee absences so as to manage any operational interference, and that includes by arranging for labour hire workers to come in and fill a shift or by making any other changes they might need to manage potential interference.

PN76

The fourth is that there is nothing to stop the employer from having a conversation with their own employees to ask them to move their ADOs. There's nothing to

stop them having a conversation with the union rep if there are problems with the ADOs being taken excessively or are rigid notices where employees won't move even when it's unreasonable.

PN77

Ultimately it's at the employer's discretion whether or not they're implementing a working week that gives rise to an ADO. So I would have thought from our perspective at least that the employer is in a position of some leverage to speak to employees about being reasonable as to when they want to take their ADOs, and there is nothing to stop them having those conversations, and that's presumably what has occurred in the past.

PN78

There is also the option to ask employees to substitute their days or to offer them an overtime penalty to come to work, which is some compensation is likely to sway employees one way or the other whether they will come in. And lastly, in the busiest time of year, the restricted leave period, the agreement already provides for a more limited entitlement to ADOs to assist with the potential disruption.

PN79

So for all of these reasons we just say there is no reasonable prospect of a determination in our favour leading to this deluge of applications that can't be managed and an interference in operations that would cause the Fair Work Commission to exceed its jurisdiction, even if that were a relevant consideration given that the question for determination here does not involve the interference of the exercise of managerial discretion. That about concludes my submissions, Commissioner.

PN80

THE COMMISSIONER: Thank you for that. Just with respect to the evidence, so we've got a statement of Mr Morrell along with the respondent's statement of Mr Doe.

EXHIBIT #UWU1 WITNESS STATEMENT OF GREG MORRELL

PN81

MS THWAITES: Thank you.

PN82

THE COMMISSIONER: Thank you.

PN83

MS SWEATMAN: Good morning, Commissioner. We were saying before you came out what a delight it is to be back in person again. I'm super excited to be standing here. I don't want to traverse a lot of the background detail which I think my colleague rightly says we are largely agreed upon and we don't need to labour upon the history of the agreement, except that I just want to raise a few matters in response. And I would just like to flag at the outset that Ms Thwaites made the submission that there are no aggrieved employees affected by that part of the dispute which deals with the granting of ADOs outside the restricted leave period.

PN84

THE COMMISSIONER: But they were certainly aggrieved at the time the application was made.

PN85

MS SWEATMAN: I'm not sure if that's the case, Commissioner, because those who were aggrieved at the time the application was made were those affected by the refusal of ADOs during restricted leave period, which may be a matter that Ms Thwaites and I need to have a think about, whether or not it can rightly be said that the dispute settlement procedure has been fully followed in respect of that part of the dispute which deals with ADOs outside the restricted leave period. And that goes to some observations that I did want to make about the evidence.

PN86

So the evidence of Mr Morrell and Mr Vido is consistent that ADOs are dealt with in much the same way as annual leave, and I think that's a really relevant observation about how ADOs and annual leave have been dealt with in practice and how they're contemplated under the enterprise agreement. At digital court book 15 Mr Morrell says, 'We apply for ADOs in the same way we apply for annual leave.' And the respondent's position is really largely grounded on the fact that in a lot of respects ADOs are dealt with and managed in the same way as annual leave and ought to be viewed that way in terms of how the agreement is interpreted.

PN87

THE COMMISSIONER: It's a question of which is the cart and which is the horse.

PN88

MS SWEATMAN: I think that's right, Commissioner, absolutely, and I think it's a case of in an environment where ADOs are taken flexibly and not as part of a fixed RDO system, then those absences necessarily need to be managed in a way to ensure that the operational requirements of the organisation are able to continue to be met.

PN89

Going to my observations and Ms Thwaites' submission about the absence of aggrieved employees I think it's notable as well that Mr Morrell's evidence - sorry, if I refer to digital court book - his statement starts at 15 - Mr Morrell refers to no - he makes bald statements about colleagues approaching him saying that they had had their ADO request refused outside the restricted leave period, and the only two that he refers to as occurring outside the restricted leave period that we can consider and give some explanation to is at paragraph 35 of his statement on digital court book 17 where he says:

PN90

I've had a lot of members approach me about the difficulty of accessing ADOs since September 2022. Some of them have appeared very upset. We had one member denied an ADO when he needed to take his son to

chemotherapy. Another member was denied her ADO to attend a funeral. Both members gave three days notice required under the agreement.

PN91

Now, that sounds pretty awful, and I can imagine that people would be pretty upset by that. But I think it's relevant just to draw your attention, Commissioner, to Mr Vido's response to those very serious suggestions, and at digital court book 41 in Mr Vido's statement he says:

PN92

In relation to paragraph 35 of Mr Morrell's statement I deny the statement that an employee was denied an ADO when he needed to take his son to chemotherapy. I recall that employee approaching me about seeking an ADO approval as he has to attend to his son's chemotherapy appointment. I advised him at the time that he had accrued personal carer's leave and he should save his ADOs if he didn't need to use them. But I made clear that I was just making a recommendation and regardless of what he chose to do I would approve the leave for him. The employee subsequently applied for personal carer's leave which was approved and taken by him. I also made clear to him that we would support him in any way we could. Since then that employee's son has very sadly passed away and Toll has continued to support the employee in various ways, including by granting him further leave requests. Further at paragraph 35 of Mr Morrell's statement he states that Toll denied an employee's request to take an ADO to attend a funeral.

PN93

Now, the next part of this comes from our misplaced assumption that this dispute was largely centred around restricted leave, but it still holds. Mr Vido goes on to say:

PN94

I am aware of no circumstances of an employee making such a request during a restricted leave period or otherwise. I only recall one instance where an employee applied to take an ADO to attend a funeral. On that occasion the particular employee had only provided one day's notice for the leave, but I still allowed her to take the ADO despite her not having strictly complied with her notice requirements under the agreement.

PN95

So the examples that Mr Morrell provides in his statement with, I think, a very serious tone around them about how capriciously he suggests Mr Vido was taking - are really quite misplaced and misleading, and I think the concerns that are raised need to be viewed in the context of Toll, the respondent, has always taken a very flexible approach to the granting of ADOs when employees have sought to take them. And it is the case that the respondent does approve the majority, if not over periods all of annual leave and ADO requests that are made to it, because it does what it can to accommodate them.

PN96

That is not to say that the respondent is without the right to refuse where it is necessary to do so. Clause 31.8.7, dealing with the restricted leave period, was

inserted into the agreement to contemplate that the need to refuse a request for annual leave or ADO may be more acute over that period of 30 November to 31 January, just to set expectations and to help team members understand that their request may be more prone to being refused over that period, because the business faces the perfect storm of increased demand on its services, as well as team members naturally wanting to take time off over that period. So we have a specific framework for dealing with that over that period.

PN97

While our submissions are largely focused on the restricted leave period, certainly insofar as our submissions refer to the general discretion that will exist for an employer to coordinate its workforce and manage its workforce and to have an inherent discretion to refuse an ADO, certainly applies equally, in my submission, to ADOs arising under that clause 21. And what I would just like to say just generally about our submissions is that to the extent we raise questions about jurisdiction those submissions are really about the ability for the Commission to decide a dispute in a manner which betters the respondent's ability to make a decision about the manning of its business, and I do note that Ms Thwaites has not referred to any authorities to distinguish or respond to the relevant authorities that we have referred to and relied upon in our submissions.

PN98

One thing I should say about our submissions I do need to correct two footnotes that are in there. So at digital court book 32, footnote 7 - - -

PN99

THE COMMISSIONER: I would observe that we all have printed out on paper.

PN100

MS SWEATMAN: I'm sorry?

PN101

THE COMMISSIONER: We all have printed out on paper.

PN102

MS SWEATMAN: We have our analogue digital court book.

PN103

THE COMMISSIONER: Yes. Sorry, which paragraph?

PN104

MS SWEATMAN: So footnote 7. So it's the *Australian Federal Union of Locomotive Enginemen v The State Rail Authority New South Wales*. That's the XPT decision. So the balance of that citation should be (1984) 295 CAR 188 at 191. And the other one I just need to correct is on the following page at footnote 9. So that citation is *Transport Workers' Union v TNT Australia* [2013] FWC 780 at 11. So that reference should actually be to paragraph 123.

PN105

At paragraph 123 of *TWU v TNT* Sams DP quotes the decision of *CFMEU v HWE Mining* and it is paragraph 11 of that *CFMEU v HWE Mining* to which we

actually refer, so whether you refer to it at paragraph 123 of Sam DP's decision or at 11 of *CFMEU v HWE Mining*. I do want to hand up *CFMEU v HWE Mining* because I think it is relevant insofar as describing or talking to how we say XPT should be approached. We have got copies of XPT if you would like it, Commissioner, but I don't know if you will want it. It's 123 pages.

PN106

But I think it is relevant to go back to this source decision, because we've got the core paragraph which is regularly quoted. But I think it is very relevant in this situation, because it dealt with the manning of the XPT, the train. It dealt with the ability of the State Rail Authority to be able to make decisions about the workforce that it needed to have in place to continue its operational requirements. And there's the seminal quote that gets regularly referred to, but the start of that full paragraph, I think it's worth referring to the full paragraph, and perhaps having said that maybe I should hand it up.

PN107

THE COMMISSIONER: Yes, that might be useful.

PN108

MS SWEATMAN: So page 191, it starts:

PN109

The principles which the Commission should apply in circumstances such as those before us have been the subject of a number of submissions to us and reference to a number of cases. The main case relied upon by the State Rail Authority is the decision of Coldham J in Airline Hostesses case.

PN110

Of course women only were hostesses and secretaries back then.

PN111

In that decision Coldham J applied the test whether or not the work asked to be done was unjust, unreasonable, harsh or oppressive. In adopting this test his Honour referred to a decision of Wright J in an appeal under the Public Service Arbitration Act. In that case Wright J said, 'This Commission and the Arbitration Court before it have throughout their existence acknowledged the right of an employee to manage and regulate his own business subject to the protection of his employees from injustice or unreasonable demands.' In that case not only did Wright J use that expression, but Williams and Franke J in their separate decision referred to the right of an employer to manage and regulate his own business unless in doing so he imposes unjust or unreasonable demands on his employees. He said, 'This approach has been accepted by the Commission and the Arbitration Court since the Conciliation Arbitration Act became operative, and has been reiterated from time to time since then.'

PN112

And I would submit continues to be reiterated.

PN113

It is not clear to us why Coldham J added the words 'harsh or oppressive.'

PN114

And this is where the key quote that the previous Commission decisions picks up.

PN115

It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all of the facts and not interfere with the right of an employer to manage his own business unless he is seeking from employees something which is unjust or unreasonable. The test of injustice or unreasonableness would embrace matters of health and safety, because a requirement by an employer for an employee to perform work which was unsafe or might damage the health of an employee would be both unjust and unreasonable.

PN116

And the paragraph goes on and talks to the submissions that were made there.

PN117

THE COMMISSIONER: Ms Sweatman, isn't the difference here though that what we're talking about is an already fettered right of the employer and it's fettered by the existence of the agreement. It seems to me that you can't having reached an agreement, having done the trade, done the deal with the workers and reached the agreement, you can't then say, well, yes, that might be what the agreement says, but that's an unreasonable fetter on our right to run the business.

PN118

MS SWEATMAN: Our submission, Commissioner, is that that fetter doesn't actually exist the way that the applicant submits.

PN119

THE COMMISSIONER: Obviously subject to further consideration of it, but I would accept that I don't have the power, and it would be an incorrect use of - I don't have the jurisdiction to impose an obligation on the respondent that is not already there, and the disagreement between the respondent and the union in this case is whether that fetter exists.

PN120

MS SWEATMAN: That's right, and we say that it doesn't, and insofar as Ms Thwaites made the submission a few times where the agreement says that there is an express discretion the agreement says so.

PN121

THE COMMISSIONER: You're not suggesting that where it doesn't suggest there is discretion or that there is no discretion that the discretion operates in any event?

PN122

MS SWEATMAN: No, that's not my submission. I'm just saying that I don't think you should accept Ms Thwaites' submission, because clause 25.10.1 notably does not provide that any express discretion held by an employee - it does not say

anywhere in that clause the employee shall at their sole discretion elect when they will take their ADO.

PN123

THE COMMISSIONER: Well, what does it say?

PN124

MS SWEATMAN: That's an interesting question, Commissioner, and it's a really muddy clause. It's not very well drafted with all due respect to my client and the UWU, but when you actually pick apart that clause where we agree is that the fundamental operation of that clause is to provide the notice to access ADOs. If you actually start reading the clause at the start and look at the sub-clauses that it cross references you start scratching your head wondering how it's intended to operate, because it talks to - except as provided as in clause 25.1, which talks to how 38 hour week will be arranged, 'In cases where an employee in accordance with clause 25.3' - which talks again to averaging 38 hours per week, and 25.4, which talks to the implementation - 'is entitled to a day off, such employee shall advise the employer at least three days in advance.'

PN125

Now, those clauses don't actually specify very clearly how the ADO will arise. We extrapolate from the references in those clauses - - -

PN126

THE COMMISSIONER: Clearly they arise through 25.4.

PN127

MS SWEATMAN: Well, yes, but even that clause talks to, as you've already observed, Commissioner, that it talks to fixing one week day on which all employees will be off. So that is your traditional RDO - that's not what we're talking about - or by rostering employees on various days of the week during a particular cycle. That's the employer rostering (indistinct). That at a practical level is where employees will say, 'I would like to take my ADO on Friday', and the employee is rostered accordingly where that day would be accommodated.

PN128

But when you look at the clauses together it's actually not as clearly drafted as you might expect. And the other thing with the drafting is the clause overall, so clause 25 talks variously to requests, seeking, electing, all manner of different language to describe what is really, we submit, is a request.

PN129

To the extent that the applicant submits that we can take guidance from how ADOs are provided for in other parts of the agreement I actually think that that submission is flawed taking into account Ms Thwaites earlier submission about the history of the agreement with which we agree, which is this is one agreement which was the amalgamation of four different agreements. So there was no conscious effort to make the drafting of those different parts of the agreement consistent.

PN130

So I don't think it's useful to look at Mondelez or to look at Campbellfield or to look at any other part of the agreement to inform how these ADO provisions work, because they have a very different industrial history. They were drafted and bargained for separately and have been brought together, and we can imagine that the next iteration of bargaining for this agreement will seek to make the language a bit more consistent and the approach clearer, but I don't think it's helpful to have reference to those other parts.

PN131

Now, going back to the exercise of a discretion or the inherent holding of a discretion, we're not saying that that is an absolute discretion, and we're not saying that it's an immutable right to say 'No' whenever we want to because it's inconvenient for us to accommodate a request for an ADO. And I think that Vice President Lawler put the test quite neatly at paragraph 12 of *CFMEU v HWE Mining* where he said:

PN132

> *That an exercise of managerial prerogative will not be unreasonable in this sense if a reasonable person in the position of the employer could have made the decision in question.*

PN133

And we say it's reasonable for there to be a final stop gap that if it's going to have an unreasonable impact on the business operations of the respondent's business that it has the ability to say no.

PN134

In the applicant's written submissions the submission was made that because this is a right that exists under the agreement given by a notice that that notice operates in lieu of there being mutual agreement, and I would submit that that argument or that contention doesn't properly describe how notice of an exercise of a right properly arises.

PN135

The applicant refers to two examples, the first being notification of rostering, and we would say, well that's not an immutable right or not an absolute right, just that once the notice is given it is what it is. Notice is given so that employees can plan, consider the impact, object to the roster, can seek to consult, seek to substitute, do all of those things. So it's not a case of once that notice is given it's a fait accompli that that is what happens at the end. The other example that's given is notice of termination, and we say that's not a relevant consideration here because that's notice of a right to terminate the entire employment relationship, not the rights that exist within it.

PN136

Getting back to the analogous annual leave and even long service leave the exercise of that right comes with notice, but similarly it's uncontentious that when an employee gives notice of their intention to take annual leave or long service leave there is that period of notice to allow planning, consultation, discussion about substitution or rejection if it's absolutely necessary. And we say that a similar approach ought to be adopted in respect of ADOs.

PN137

The notice is given, yes, to find people to try and replace it, and at a practical level that's what happens. The business bends over backwards and far exceeded the threshold that it set for itself under the agreement for granting ADOs, because it wants to support its employees through flexibility, but there needs to come a point at which it needs to be able to say, 'No, we can't actually run our business if we say yes to everyone.'

PN138

Notwithstanding that notice requirements have not been met in particular circumstances, referring to the funeral example that both the witnesses refer to, Mr Vido who is at this site, the ultimate decision-maker, has approved that. There is no evidence before you of any real cogent example of where an ADO has been refused and why it was unreasonable.

PN139

The other thing I would say is in terms of how the provisions fit together I think your observations about the operation of clause 25.12, Commissioner, are absolutely right, and I submit that that clause only has sensible operation where the workplace is operating a roster which has a fixed RDO, not where employees nominate their ADOs on a case by case basis, and my understanding certainly is that that clause sits idle and it's not exercised. It's there historically, it has no work to do in these particular circumstances. I think the right of the employer - sorry, did you have a question?

PN140

THE COMMISSIONER: Sorry, I was distracted by the noise out the front. Sorry, did you say all of 25.12 or just 25.12.1?

PN141

MS SWEATMAN: 25.12.1.

PN142

THE COMMISSIONER: Yes, okay. Thank you.

PN143

MS SWEATMAN: I think we can look at 25 as a whole to look at how the discretion ultimately exists, and I would refer you to clause 25.11.4, which talks to where an employer has been unable to roster employees for ADOs they have accrued there is a mechanism for dealing with those ADOs. That contemplates that an employer has been unable to roster employees for their ADOs they have sought to take; that an employee has made a request and that request has been unable to be accommodated. If that was not the case that provision would have no work to do. That provision is enlivened where an employee has accrued an excess number of ADOs and those ADOs have been unable to be taken.

PN144

THE COMMISSIONER: I think that we've just discussed however that there are clauses in this agreement that have no work to do, 25.12.1 being one of them.

PN145

MS SWEATMAN: Yes.

PN146

THE COMMISSIONER: So the existence of a clause that might have no work to do - - -

PN147

MS SWEATMAN: No, I think that's right, but I would submit that this clause does have work to do and it does work, and the reason I say that with some confidence is Ms Thwaites' submissions that there are a number of different ways of dealing with ADOs and a number of different ways in which ADOs have been dealt with in the workplace. I think some of those submissions about how ADOs can alternatively be dealt with are of limited assistance here, because we are talking here not about the efforts the respondent is taking to reduce its ADO liability by paying them out or taking other measures, we're talking about an employee seeking to have a day off which is unable to be accommodated. An aggrieved employee is not going to be satisfied when they want to have a day off by being told they will have it paid out instead if really their ultimate objective is to have the day off. So I think the submissions around the alternative measures of dealing with ADOs are of limited assistance here.

PN148

If I can speak to Berri, and we have not handed up, and I do know that it's also - we agree that the principles are faithfully replicated in the applicant's submissions at digital court book 5.

PN149

THE COMMISSIONER: I feel like I'm in a football match I have to say.

PN150

MS SWEATMAN: We weren't quite sure where the day of action was. We now know. So the first principle which Ms Thwaites also referred to is talking about the construction of the agreement, and that we need to look at the ordinary meaning of the relevant words. We say that this issue of whether there's a discretion to refuse or not is not clearly dealt with one way or the other. As much as Ms Thwaites submits that there is no right to refuse written into the agreement we say that there is equally no prohibition against a refusal that is written into the agreement. We say it's not dealt with under the ordinary meaning of the words. So principle 1 we say is of limited assistance to us and why we're here in the first place.

PN151

In terms of the second principle the second principle talks about not rewriting the agreement to achieve what might be regarded a fair or just outcome. We say that you don't need to rewrite the agreement to create a fair or just outcome which is that a request for ADOs will usually be approved, but there is an ultimate right to refuse if required as part of that exercise of that ultimate discretion.

PN152

The third principle I just wanted to refer to, and I am certainly not going to take you through the 15 principles, Commissioner, is that the common intention of the

parties is sought to be identified objectively by reference to what a reasonable person would understand by the language the parties have used to express the agreement without regard to the subjective intention or expectations of the parties. And we submit that it's reasonable that an employer has an ultimate ability to say to an employee, 'We're not able to accommodate, exercise that right at this point in time because it would shut down our business.'

PN153

It is not reasonable, as the applicant submitted in their reply submissions, to say that, well if everyone applied to take ADOs all on the same day then that would give rise to unprotected industrial action and the employer has rights they can exercise under section 418. That's not practicable. That's not what a reasonable person would say would be the outcome in that situation. A reasonable person would say, as is the practice here and as the agreement has been applied, that ADOs like annual leave will usually be approved and there will not be any unreasonable refusal, but there is ultimately an ability to refuse, and there's no inconsistency with the agreement that arises from that interpretation.

PN154

THE COMMISSIONER: I mean 25.12.2 really deals with, and I think this is Ms Thwaites' submission, that 25.12.2 is where you get the ability to say, well, no, we can't accommodate. Yes, you want next Friday off. We can't accommodate, so we need you to work, and if you work you get overtime, but otherwise we will swap. Let's talk about what day is available.

PN155

MS SWEATMAN: And that is precisely what happens, and we say the evidence reflects that, and - - -

PN156

THE COMMISSIONER: But it's different to a right to refuse. It's different to the right to say, well, no, next Friday is not suitable, having been told that the individual intends to take next Friday. It's different to saying, no, next Friday doesn't suit, you can have Wednesday the following week, because the person might say, well I'd rather work and get the overtime.

PN157

MS SWEATMAN: And we say that that goes into whether a refusal is unreasonable. So if the respondent was arbitrarily saying 'No' without any regard to the circumstances, without any discussion where it's sought to reach a mutually agreeable outcome, then it would be open to you, Commissioner, to say that that was an unreasonable refusal, but we say that the way the agreement operates and the way that it has operated in practice is that an employee makes an application for an ADO using exactly the same application form that they use for their annual leave. They submit that same form to their manager. It's considered by Mr Vido who looks at the workforce planning for the period in question and he signs his approval or refusal of that, it goes back to the employee. The process is exactly the same.

PN158

Mr Morrell says that the process is exactly the same. That's not contentious. And we say that in any situation in which an ADO or a request for annual leave for that matter falls on a date which is a problem because of other absences or other demands on the business the first point of call is to have that discussion, have to consult. That happens in practice and it's not written into the agreement, but it is implicit in how that process works. So there is a process of consultation to try and reach a substitute day, some sort of alternative arrangement, take it another time.

PN159

If that is not successful, if an employee is unwavering in the day that they want to take and we're not able to accommodate it, noting that there are a number of situations in which the respondent has initially said 'No', they've had an upset employee, they've looked further at it, they've worked out how to accommodate it, if that's not able to occur there needs to be a final discretion that they exercise as a final stop gap to make sure they're able to man their business as was relevant to the relevant members in XPT to be able say, 'Actually, no, we simply can't accommodate this. We give you a lawful reasonable direction to come into work on that day.' It is that ultimate stop gap. There is no evidence to suggest that the agreement has been applied in any other way.

PN160

Mr Morrell refers to a situation in which an employee was aggrieved at having their ADO refused. He raised it. There was a discussion, they worked out how to accommodate it. There are a number of different situations referred to in Mr Vido's evidence of where ADOs have originally been refused and then employees have been given an opportunity to put further information and they work out how to do it, and they approve more ADOs than the business could reasonably accommodate and it had impacts on their business as outlined in that evidence.

PN161

Ms Thwaites said that there was no approval process, and we say that that's fundamentally not the case, and I don't think that's reflected in the applicant's evidence either. If you forgive me, Commissioner, I'm just checking there's nothing else that I wanted to cover. The final point I just - and to pick up your point - Ms Thwaites said there's nothing to stop the employer from having conversations, and certainly the evidence reflects that's what happens.

PN162

So if we imagine that clause 31.8.7, which it seems we don't have an awful lot of dispute over - notwithstanding that it forms part of the F10 - it seems that there is actually not really a live dispute about how that clause operates and how it's been applied. There are employees who are disappointed and upset by it, Mr Morrell included, but if I understand Ms Thwaites' submissions correctly we don't really have a dispute about how that clause applies or has been applied.

PN163

What we have a dispute over, notwithstanding it seems we've got an absence of aggrieved employees, is the agreement, if we imagine that that clause 31.8.7 is not there, and we say, yes, Commissioner, consider the agreement without clause 31.8.7 and we say that our submissions still hold true, that the agreement provides for ADOs, the agreement provides for a very flexible way to take ADOs. It is

contemplated that employees will be able to apply for those with short notice, because the employer is generally able to accommodate those and wants to do so. It's a great benefit, it's able to offer employees that flexibility.

PN164

But the application of XPT and the application of Lendlease and *CFMEU v HWE Mining* following it says that we do hold inherently an ultimate discretion. If we're not able to have discussions to find a mutually agreeable outcome, if we're not able to have the employee apply for the ADOs on a different date, that there is that final ultimate discretion for it to make sure its business is manned properly, that it is able to continue to operate its business. So I think with all of that said I believe that's my submissions subject to any questions that you have, Commissioner.

PN165

THE COMMISSIONER: Thank you. Just on the question of whether or not there is a live dispute before the Commission, I think, Ms Thwaites, you might need to file some written material on that question.

PN166

MS THWAITES: Thanks, Commissioner. I think that the confusion might have arisen, because I have had communications with David Russell about what the position is going to be in relation to the annual leave component of the dispute, but we have been talking consistently about whether or not there is an entitlement to access ADOs. My understanding was always that that went beyond the restricted leave period, because the position of the business was that there was a discretion to refuse ADOs at any time of year. My understanding is that we had clarified that issue.

PN167

I'm still waiting on information from the respondent to clarify their position in relation to the annual leave component, and what we had always said we would do is meet to discuss how annual leave would be treated in the restricted leave period, but I haven't had confirmation from them about what their position is yet. So that's why I have not clarified to the Commission, also my friend here whether or not we're pushing that element of the dispute. That's why the question is articulated the way that it is. It's not just about the restricted leave period, it's year round because the change in approach, or we say the change in approach affects the whole ADO entitlement across the whole year, not just the restricted leave period.

PN168

THE COMMISSIONER: And the question for you, Ms Sweatman, in those circumstances is whether the way the dispute resolution procedure is written actually requires an employee to have a matter in dispute, because the DSP in this agreement is relatively broad in that disputes over matters arising from the agreement or any other dispute must be dealt with in accordance with the following procedure. It actually doesn't require an individual identification of dispute.

PN169

MS SWEATMAN: And I apologise to Ms Thwaites for not having had this thought earlier and raising it in our earlier submissions or in discussions, because I think we do agree the issue was raised in the workplace, however largely in connection with, you know, people feeling aggrieved about having their restricted leave period ADOs refused. And it was really only upon Ms Thwaites' very clear submission that it triggered the thought, and 11.1.1 talks to the matter, it will firstly be discussed between the aggrieved employee and their direct manager and whether that can be said to have occurred.

PN170

We accept that we have different views about how the ADO clause applies, and there may be use in having that question determined, but equally I think there's a question about, you know, to what end, because are there employees who are feeling aggrieved by having their ADOs refused outside that restricted leave period, or is this a hypothetical concern that all of a sudden the respondent is going to change its practices and be capricious in arbitrarily refusing them, contrary to its established practice of having the conversation, and that's where it may require just some further consideration by the parties perhaps.

PN171

THE COMMISSIONER: Looking back at the notification of dispute as was filed by the UWU and my recollection, and it was some time ago of the conciliation conference and discussion that was had, there was a question that there had been a change in process. So while it might have been - and I can't recall this, it may have become a live issue because of the restricted leave period, but there was a view that that change would operate outside the restricted leave period as well, and so it was the cause of a broader issue of dispute.

PN172

MS SWEATMAN: And I think that's a fair characterisation, Commissioner.

PN173

THE COMMISSIONER: Ms Thwaites, anything in reply? Sorry, just before you do, just with respect to the witness statement of James Vido I will mark that as Toll 1.

EXHIBIT #TOLL1 WITNESS STATEMENT OF JAMES VIDO

PN174

Thank you.

PN175

MS THWAITES: Just on that last matter it was the treatment of leave around the restricted leave period that gave rise to the initial meetings and the reasonable dispute procedure, but the dispute was about the granting of ADOs and annual leave at all times. And throughout the course of that dispute procedure initial steps there's a number of emails between the delegate group and the site management that really clarify what the dispute was, which was more than what's our allocation in the restricted leave period, it's we can take ADOs with three days notice or four weeks notice, and a response from the employer stating that, 'No, any operational reason will give us the right to refuse.' And I'm happy to share

that paper trail that we've got there just to establish that this was always the nature of dispute, but I appreciate that there's been some confusion and I think that is a problem with a dispute application that contains so many issues that have been drawn out separately.

PN176

THE COMMISSIONER: Can I suggest on that, Ms Thwaites, that you provide that documentation to Ms Sweatman and to my chambers.

PN177

MS THWAITES: Yes.

PN178

THE COMMISSIONER: Ms Sweatman, if there's anything that you wish to say in reply to that if you could do that within five working days of receipt of the documents.

PN179

MS SWEATMAN: Yes, I think that's a very sensible course, thank you, Commissioner.

PN180

THE COMMISSIONER: Thank you. I think it probably would have been useful just for future reference, Ms Thwaites, to have attached that to the witness statement of Mr Morrell.

PN181

MS THWAITES: Yes, I will do that in future. Thanks, Commissioner. I just wanted to start by responding to some comments from Ms Sweatman that are about the witness evidence of Mr Morrell suggesting that he was wrong or incorrect or where there's conflict between Mr Vido and Mr Morrell. We say that we arrived at a consent position that we did not want to cross-examine the witnesses, so I would ask that the Commission do not afford very much weight to those submissions about reliability of Greg's statements versus the reliability of Mr Vido's statements in circumstances where the parties have agreed not to cross-examine.

PN182

The respondent has made quite a lot out of the application process for the ADOs and that there is a leave application form and that ADOs are applied for by way of that leave application form, that that somehow means an ability to reasonably refuse a request from the agreement that applies to annual leave is magically imported into this treatment of ADOs.

PN183

Now, if you look at the application form it's a generic leave application form and it's in the evidence of Mr Vido, and it's the same application form that's used for any type of leave except there is no provision in it for ADOs. Instead there's only an 'Other' box. It's here, I've got it here, it's 174. There's only an 'Other'. This is the same application form that is used for WorkCover, leave in lieu, other, leave without pay or unpaid leave, compassionate leave, personal leave, public holidays,

annual leave. It is one generic form that functions to notify the employer that an employee is going to take leave.

PN184

For some of these leave requests there is an ability for the employer to refuse or approve it, but for public holidays for example, or we say ADOs, that's not the situation. So the fact that one generic form is used for all leave entitlements can't and shouldn't be considered evidence that what's written in the agreement is a requirement or an ability on the employer to reasonably refuse any applications for ADOs. There's just limited weight that can be afforded to this as evidence in support of the respondent's position.

PN185

On the submissions regarding XPT my friend has provided this *CFMEU v HWE Mining* case. To that I will add *Lendlease Project Management v CFMEU*. I have got copies of this. In both of these scenarios, so looking at *CFMMEU v HWE Mining* and looking at *Lendlease Project Management* both of these decisions concern a review of some kind of exercise of discretion on the part of the employer in circumstances where there isn't a live dispute about whether the discretion itself exists, which is the basis on which I have sought to distinguish the facts in this scenario and the question for determination in this scenario from an XPT scenario.

PN186

In HWE Mining we're looking at an employer's decision to vary a policy, and in *Lendlease Project Management v CFMEU* we're looking at an employer's decision to stand down an employee who has a medical illness and the way to treat their return to work, and in that last case the Commission had decided that the employee should be returned to work immediately and the review was regarding whether or not that was unreasonable interference in management's discretion.

PN187

At paragraph 27 of *Lendlease Project Management* there's some comments made by the Full Bench on the XPT case to say that:

PN188

> *To elevate the XPT case principle into an immutable rule applicable to any employer decision is to overstate the effect of the principle.*

PN189

And I think we need to keep that in mind when we're talking about employers' decision-making. The Commission quite rightly pointed out earlier that an enterprise agreement is in nature about compromise, about having some rules that will limit the employer's ability to make decisions about its operations and in order to give the employees some rights that they can exercise. There is a give and take here and that's the nature of it.

PN190

In terms of public holidays we have had a recent decision that decides that employers cannot force employees to work on a public holiday, they cannot direct

them to do that. If that's the case where is the line where XPT stops interfering with these decisions, and in this case we say that the application of this principle is so tenuous, and it's so tenuous partly because we're not talking about an employer's discretion, we're talking about does the discretion exist in the first place.

PN191

But secondly and critically we're talking about a situation where the employer does have a discretion and we're aligned on that, and the employer has a discretion to implement a working week that it decides to implement. If the ADO system is such a problem for them and employees being able to exercise their rights in the way that the agreement provides, then they should be talking to the employees about looking at a different system to implement. That's the bottom line.

PN192

Now, just some comments on the amalgamation point. My friend here has suggested that little information can be gleaned by a comparison of the clauses in schedule A with the other clauses for the other agreements and that that's because they were previously separate agreements that had been integrated. What we would say in response to that is that it has been the same employer, it has been the same union negotiating all of those agreements, and that is why you see so many similarities.

PN193

If you read the schedules what is more striking than the differences is the similarities. The way that operations are run are extremely similar. There is even clauses in the agreements that provide for a temporary relocation of employees between the operations. For that reason - - -

PN194

THE COMMISSIONER: Yes, but it is reasonable though given that they have only recently been brought together into one agreement to assume that they have all developed down their own paths.

PN195

MS THWAITES: Yes.

PN196

THE COMMISSIONER: And I think unless there's been a conscious effort to moderate the language, so that where words are used in one part of the agreement they mean exactly the same as they do in another part of the agreement when they are separate agreements, is perhaps - - -

PN197

MS THWAITES: That comes in the form of the common terms. So the common terms, everything that's in that, was previously in the separate agreements has been married into that and the references have been changed. There's limitations to how much I can say unless I was involved in the drafting of the agreement, but you can see from the agreement looking at it that the common terms are where there's been - yes.

PN198

THE COMMISSIONER: Yes. No, I accept that the common terms have all been put into one part of the agreement, but to assume that the schedules to the extent that they were separate agreement all developed with exactly the same intent and exactly the same meanings to be attributed assumes a uniformity across the entire workforce given that different groups have at the times approved the different agreements. So the workers at Nike had nothing to do with approving whatever the agreement was prior to schedule C. That I think is an issue.

PN199

MS THWAITES: Sure. It's not our submission that the agreements are all exactly the same and they need to be read exactly the same. That's why we've said at the beginning or I said at the beginning of these submissions that there are different requirements at each of the sites, they're servicing different customers, there are going to be some peculiarities, and you can see that, right, but you also see really striking similarities as I pointed out earlier say between Mondelez and Campbellfield where there is an obligation on the employer to implement an RDO system. That applies from a very particular date, and alongside that obligation to implement the RDO system there is also an accompanying discretion on the part of the employer to refuse or approve RDO requests, and that situation is not something that you see in the Nike agreement where the ADO system has been running a lot longer.

PN200

My friend has said that there's no prohibition on refusing an application, but we would say that the language that the employee may elect when they can take the ADO, and in the absence of a discretion to approve or deny, refuse that request, it's a meaningless statement to say that if it doesn't say they can't refuse it then it's not possible. With the positive language that we've got in those clauses, the use of the word 'elect' and the absence of any limiting language as far as the employer is concerned, we say that there clearly is a positive right on the part of the employee to take that ADO once the employer has implemented a system of working hours that gives rise to it.

PN201

That is the fundamental point that speaks to this question of unreasonableness and whether the employer won't be able to operate their site any more. Fundamentally they've got this option. They don't have to be implementing a working week that gives rise to an ADO. That concludes my submissions. Thank you, Commissioner.

PN202

THE COMMISSIONER: Thank you. There's nothing else? No. I will reserve my decision pending the receipt of a note on the material that Ms Thwaites will provide, and we will adjourn, us along with the people out the front it seems.

ADJOURNED INDEFINITELY **[11.34 AM]**

LIST OF WITNESSES, EXHIBITS AND MFIs