



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT BELL

AG2022/4262

s.217 - Application to vary an agreement to remove an ambiguity or uncertainty

**Monash University T/A Monash University (Monash)
and
National Tertiary Education Industry Union
(AG2022/4262)**

Monash University Enterprise Agreement (Academic and Professional Staff) 2019

Melbourne

4.00 PM, THURSDAY, 11 MAY 2023

Continued from 14/03/2023

PN1

THE DEPUTY PRESIDENT: Good afternoon, everyone. I will quickly take appearances. Mr Bourke, Mr Denton, good afternoon.

PN2

MR J BOURKE: Yes, if your Honour pleases, I appear with Mr Denton for Monash.

PN3

THE DEPUTY PRESIDENT: And Ms Kelly, as well. Good afternoon.

PN4

MS S KELLY: Good afternoon. I appear for the respondents.

PN5

THE DEPUTY PRESIDENT: All right. Thank you, everyone, for being available at shortish notice. The primary purpose of this mention hearing is just to deal with the non-party issues and whether it was interpreted this way or not, my email from 3 May was essentially a call to assistance for the parties to potentially head off an issue of managing 58 or so individuals that I was concerned could cause things to go off the rails. It was all coming to a head on day one of the hearing.

PN6

I have received, through chambers, some emails from Clayton Utz just before an email exchange that has been going on between the parties that most recently as I can tell the final word in that was at 2.44 pm today. Ms Kelly, do you have a copy of that? You have got that - - -

PN7

MS KELLY: I do indeed, Deputy President.

PN8

THE DEPUTY PRESIDENT: - - - so everyone knows what we're talking about. As an initial observation we don't seem too far away from getting to a landed position on that as I read the email. However, they could be woefully famous last words. Perhaps given that the final chain in the email I'm reading is from Clayton Utz to the NTEU, Ms Kelly, do you want to perhaps give me an indication as to where you might see things are at in light of what they have suggested in their 2.44 pm email?

PN9

MS KELLY: Certainly, Deputy President. Can I do that by identifying first what my client sees as the three issues that come out of the correspondence we received from your Honour's chambers. Two of them are dealt with in the email chain. One of them is referred to in the email chain, but it's certainly not clear to me at least what Monash's position is in relation to that issue.

PN10

The three issues, Deputy President, as my client sees them are these: (1) the material received from the non-parties my client says is evidence of the attitude of those non-parties to the application and that itself is a matter your Honour is entitled to take into account if your Honour gets to the point of deciding whether or not to exercise discretion to vary the agreement.

PN11

The question of what weight your Honour might attach to that evidence is a separate question, but the submissions themselves and the documents that I've been provided are, in my submission, themselves evidence of a particular fact which is the attitude of certain individuals which my client will say your Honour can and should take into account if your Honour reaches the point of exercising a discretion. That's issue (1).

PN12

Issues (2) and (3) are about discrete factual matters contained within some of the documents that have been received from non-parties which my client says are relevant and within Monash's knowledge, and either ought be put in issue or admitted. They are, Deputy President, you will have seen, the question of contrary practice which looms large in this application.

PN13

There is, as I understand it, a live contest between the parties about whether there has in fact been a consistent payment practice by the university in relation to the application of these clauses or not. I understand Monash says there has been, my client says there hasn't been and certain aspects of the non-party material go directly to that question. The second factual issue, Deputy President, is the duties that teaching associates perform that is generally and in scheduled student consultation. My client has put on some material that is evidence of that fact. Parts of the non-party materials also go to that question.

PN14

In relation to those two categories 2 and 3, Deputy President, my client's position is that they are intended by the authors as evidence. They are directly relevant to two issues in the proceeding: is there a consistent practice or not and what are the duties that teaching associates perform in the course of their duties generally and also scheduled consultation.

PN15

They also, Deputy President, ought not to be controversial. They are facts that should be within Monash's knowledge and, if they aren't controversial, they should be admitted. If they are controversial, then we need to decide what the next course of action is and that might look different, Deputy President, depending on what is admitted and what is not. If there are documents that go to the truth of the relevant facts, my client might need to seek an order for production of those documents. If they are facts that can only be proved by evidence, my client might need to ask the individuals to attend for cross-examination.

PN16

My client's principal position is that none of that should be necessary, Deputy President. It looks to be uncontroversial or they look to be facts that are readily identifiable through documentary records and my client really ought not to be having to prove things that are either uncontroversial or are within Monash's knowledge. So the approach we have taken in the correspondence is to say in relation to those two factual categories are you willing to admit them and, if not, then we will need to move to what the next appropriate course is.

PN17

THE DEPUTY PRESIDENT: On that, as I read Monash's final email in a chain, it indicates:

PN18

We are prepared to duly consider this proposal, but could you firstly precisely identify the parts of your statements you rely on.

PN19

That is not a terribly surprising position in the sense that as I read the email chain you're a little bit skittish about categories expressed in a general term. Given that we are really talking about seven – well, you have identified seven specific statements, Judy Tant, et cetera, all the way through to Branislav Zivanovic in your email of 4 May at 7.50. I don't know whether the second bullet point picks up any others, but is one option to just put those – if it's just the seven or the seven are sufficient – into a single .pdf document, highlight the very specific parts that you rely on and give them to Monash?

PN20

MS KELLY: No issue doing that at all, Deputy President. It goes slightly beyond the seven for two reasons: (1) there was four that my client wasn't provided with. We have now located them. There are an additional two that fall into that first category and then there is the material that deals with teaching associate duties. There is no issue whatever, Deputy President, with us identifying the material with specificity.

PN21

THE DEPUTY PRESIDENT: All right. I might just look then to Mr Bourke. Mr Bourke, in light of all of that, is that sounding more promising?

PN22

MR BOURKE: Your Honour, we thought our original proposal was enough, which was you could tender all the non-party material, it could be treated as evidence and for your Honour to then assess what weight and relevance to give to it. We don't require anyone for cross-examination. We thought that was enough. We proposed that on Monday. We had to follow up the NTEU to even get a response on that today and this is when we have heard, 'No, it's not good enough.'

PN23

We are fine if they identify the precise parts of statements. We have now heard that there are more statements than the seven they rely upon. Can we also add this which may assist: your Honour, if you go to dot point 1 of Mr Debets' email of today at 1.10 - - -

PN24

THE DEPUTY PRESIDENT: Yes.

PN25

MR BOURKE: - - - we admit that some teaching associates have been paid for performing scheduled consultations. It won't be in dispute. We admit dot point 2, that some teaching associates have not been required to perform scheduled consultations at all. We admit that. What we didn't want to admit is how we read the email of the NTEU that (indistinct) admit everything regarding the seven witness statements – or if you call them that. We weren't in a position to do that.

PN26

Now, can we just say something about duties. That is a loaded word, your Honour, because do you mean contractual duties are obliged? That's a documentary question and where pretty much all roads will lead to the enterprise agreement unless there is something different over and above that which may in fact not be relevant for the purposes of a variation application in a position description or in a contract.

PN27

What we have, your Honour, is a number of people saying, 'Oh, I consult the students, but I sort of did more pastoral care or career advice. I didn't really talk about the subjects I'm teaching.' Now, whether that occurred or did not occur, that's not within our knowledge, but (2) that's not their duties. We may be able to not dispute that at some meetings tutors – or teaching associates – discussed more pastoral issues.

PN28

It's not their job, so we cannot admit duties in that loaded term, but, as we said – and I want to come back to that. As we have said, they can put that material in and your Honour can assess what weight to give to it, so we really don't understand why this apply and then my learned friend Ms Kelly talked about we would have to put people in the witness box to be cross-examined. That's the one thing we're trying to avoid. That's the very proposal we put up at the start.

PN29

The one thing we don't want, your Honour, is some later order for production because we are five working days from this hearing and we don't want to be distracted running down all this, particularly after we have made those two admissions and we've made the point about duties. We can't rule out, your Honour, that in an arrangement where a teaching associate is meeting a student that the conversation might traverse to more personal, pastoral or career issues. We can't rule that out. We say that now, but our case will be that's not part of their duties.

PN30

THE DEPUTY PRESIDENT: I understand. Well, I think then, Ms Kelly, you have still got an offer on the table of everything going in, albeit there will be some submissions on admissibility, relevance and weight, but assuming that, as I do, you want to press ahead with, well, the seven plus a couple of extras, then can I

ask that the NTEU send Monash a bundle as soon as possible just with parts that are highlighted?

PN31

MS KELLY: We will certainly do that, Deputy President. It can be done tomorrow morning. I do need to correct – I withdraw the 'need', but I'm going to correct some of what was just said by my learned friend. We have not had until this point an offer that material can go in as evidence, not submissions. What was put to us in the email of 3 May was that the documents could go in as submissions but not evidence. That's why we're here and that's why there is a dispute.

PN32

(2) Monash was never asked to admit the full content of those statements. The relevant words are, 'We ask that Monash admit to the facts in those statements to that extent and only to that extent', having earlier identified the matters that I just took your Honour to. None of that matters right now, Deputy President, because we are working through it and reaching a resolution but I think it is very unhelpful when submissions are made that do not accurately reflect the way that my client has conducted itself in the course of trying to resolve this issue.

PN33

THE DEPUTY PRESIDENT: Yes.

PN34

MS KELLY: With the admissions that have just been made, that may deal with the first issue. I will need to take some instructions, but that is the first time that those admissions have been made. They are on transcript. I will take them as having been made. That might resolve the first issue. That was the factual contest we were concerned about.

PN35

The second aspect is we will then identify those parts that go to teaching duties. We'll do that with precision. We will provide them to Monash tomorrow morning, but to avoid any doubt if it is to be put that your Honour cannot accept the statements as evidence of those facts, we do have a dispute. If my learned friend wants to say something about weight, that goes to the form of the statement, the fact it hasn't been sworn, any of the ordinary things that might go to whether or not something is evidence or not, then we have an issue. If he wants to put something about the weight that should be attached to it or the relevance of it, different question altogether.

PN36

So we will do what is now being proposed and we will do that by tomorrow morning, and if that allows that material to go in as evidence rather than submissions it may be that the whole of the dispute is resolved.

PN37

THE DEPUTY PRESIDENT: Yes.

PN38

MS KELLY: There is of course, your Honour, that first category that I described which is that the whole of this bundle of non-party material, my client intends to say it is evidence of the attitude of this cohort and your Honour can take that into account, and to date Monash has not had anything to say about that first category.

PN39

THE DEPUTY PRESIDENT: Just to be clear, we have been currently talking about principally the 58 or thereabouts – I'm not sure whether it's still 58 – for the non-parties. In my email there is about another 130-odd. I'm assuming from what you have just said that in terms of evidence of attitude - or the fact of opposition I think as I might have described it in my email – it applies to those people, as well.

PN40

MS KELLY: Indeed it does, Deputy President.

PN41

THE DEPUTY PRESIDENT: I understand. Well, look, Mr Bourke, you can perhaps give an indication at some point if you are not in a position to do so today.

PN42

MR BOURKE: We can do that now. Your Honour, we accept to the extent X number of people say, 'We oppose the variation', in your Honour's exercise of discretion you may wish to take that into account.

PN43

THE DEPUTY PRESIDENT: All right.

PN44

MR BOURKE: Just to be clear, we didn't play some game that the, let's call it, submissions could not be treated as evidence. As made clear in our proposal of 8 May at 3.02 pm, we refer to the statements not as submissions. We talk about issues of inadmissible hearsay opinion, so we're talking about evidence, not submissions. Then we say subject to admissibility that's as to hearsay opinion, for example, but otherwise relevance on weight, so we're not going to take the point that documents need to be put in as stat decs or anything like that. We're not going to make that type of point.

PN45

THE DEPUTY PRESIDENT: Look, I can indicate that's how I read your email, but it appears that the parties have ended up at cross-purposes on this. Be that as it may, I think we're not too far off resolving it. Just to be clear for both parties – and I think, Ms Kelly, you alluded to this – I'm assuming I will get from both parties submissions as to weight in any event on this. No one is going to be shut out from making submissions as to weight.

PN46

MS KELLY: Yes, that's what I anticipate, Deputy President.

PN47

THE DEPUTY PRESIDENT: Yes, yes. Well, I suppose weight, relevance – I mean, the usual sorts of things that are described about why evidence isn't of assistance in the more general sense, yes. All right. I think then that's all pretty good. Sorry, Ms Kelly, I think you indicated or perhaps were in the process of indicating – was it tomorrow morning I think you suggested you could get that to Monash?

PN48

MS KELLY: I did indeed.

PN49

THE DEPUTY PRESIDENT: Excellent. Why don't I just leave that process to work itself out. Can I perhaps indicate though what I think is prudent and is on my list is that assuming that issue gets bedded down, I would like to be writing to either the 58 or the nine perhaps, if there is some specific email to the nine, saying this what's – you know, other than – I'm calling it nine just because I'm assuming you're going to add, say, two.

PN50

The others, I'm pretty much intending to write to them to say, 'Your material is being treated as a submission. The parties are aware of this and unless you want it treated – well, if you want it treated differently, you need to turn up and tell us if you're going to want to turn up by' – and I'll insert a time. Other than that, that will be largely self-executing.

PN51

For the 130-odd who have sent what I might call sort of the more pro forma email, they're essentially going to get something one way, but just treating that their email has been received and they're not required to attend. For the seven or nine it will be, well, probably similar to the first one other than to say that there is some specific parts where the parties between them have made agreement in reference to some of that material.

PN52

MS KELLY: That's certainly a suitable course from the respondent's perspective, your Honour.

PN53

THE DEPUTY PRESIDENT: Mr Bourke, the view to all of that is that we don't need or require 58 or nine or let alone another 130 people to attend. I have a feeling that a number may still well attend, but it won't be because of any indication of requirement by the parties or me, so that's probably the highest we can put that there.

PN54

Just because we're not too far away from our hearing, I would be keen to sort of get something out by the end of Monday, so if I can perhaps suggest to the parties that whatever happens unless there is a – if there is some other dispute that's going to arise on this that in particular might require parties to be called or a change of process, then my chambers be told about that or at least told about the outcome of where everyone lands by Monday lunchtime, I'm hoping.

PN55

I'm just seeing some nods there so I thank the practitioners there for giving that indication. I think that's everything I wanted to say about non-parties unless anyone else needed to talk about it. If so, I can just briefly move on to lighter housekeeping topics.

PN56

MS KELLY: Nothing on the question of non-parties from the respondent, your Honour. There is one small housekeeping matter that might be worth discussion, but perhaps you're coming to it in any event.

PN57

THE DEPUTY PRESIDENT: I might come to it. Mr Bourke, nothing further on non-parties?

PN58

MR BOURKE: Can I just say - a matter for NTEU, but we would urge that the word 'duties' not be used in relation to identifying evidence because it's a loaded term which has a legal meaning. We would prefer something neutral like what the teaching associates did and we can then have the legal debate about whether it constitutes duties.

PN59

THE DEPUTY PRESIDENT: Yes, I understand that. Ms Kelly, back to you on notice, just have a think about that, as well.

PN60

MS KELLY: Certainly, Deputy President.

PN61

THE DEPUTY PRESIDENT: All right. Just so everyone knows what's on my remaining housekeeping list; court book. I have another topic of possibly supplementary court book. I have authorities with a question mark and I have the fact that I will be ordering transcript at least for the hearing, although I have a feeling that someone might want a transcript for today and I can do that, as well. so they are my topics.

PN62

Now, court book. Can someone refresh my memory. I have a feeling Monash volunteered or was volunteered at one point by the NTEU for court book preparation. Is that, roughly speaking, on track?

PN63

MR BOURKE: Yes, your Honour. There are orders for us to do that and file and serve it by 12 May. That's on track.

PN64

THE DEPUTY PRESIDENT: That's on track. In terms of copies, I can't actually recall whether the orders say anything about copies. I had assumed, unless the orders have said otherwise, that everyone is going to be responsible for just printing their own copies and having copies for their own parties.

PN65

I don't know whether we would need a witness copy, but perhaps if there is a spare copy floating around given that there will possibly be multiple copies at least on one or more sides, that perhaps an instructor just bear in mind not to overtly scribble over – or keep one copy of the parties clean just in case there is someone that ends up getting in the witness box, that we have a court book copy available for a witness that's clean.

PN66

MR BOURKE: Sorry, your Honour, just to be clear there are no witnesses for Monash and we're not requiring any witnesses for the NTEU or non-parties to attend for cross-examination, so in those circumstances any statement for example filed by the NTEU can simply be tendered.

PN67

THE DEPUTY PRESIDENT: I understood that. I'm more just mildly apprehensive - and I stress it's only mildly - given that we're having this discussion with practitioners before me and that's fine and everything is on track as far as the three on the screen before me. I am conscious that there are potentially 58, plus another 130-odd people who might wish to turn up and say something that causes someone to be required to get into a witness box. If that's the case, then as long as there is floating around on someone's side a clean copy of the court book that might be utilised, that's all I would ask.

PN68

MS KELLY: There is no difficulty, Deputy President. My side will ensure that that happens.

PN69

THE DEPUTY PRESIDENT: Excellent. All right. Thanks, Ms Kelly. Now, in terms of if there is a court tomorrow, given that there might be some other bits and pieces floating around, anything further I'm happy for it just to be called a supplementary court book if that's – unless someone has something different in mind, but it did occur to me particularly in light of what we were talking about with the seven or nine individuals and that just might be convenient for that. I don't think I need to say anything further on that unless anyone wishes to do so.

PN70

MS KELLY: There is no difficulty with that.

PN71

THE DEPUTY PRESIDENT: All right. Good. Sorry, Mr Bourke?

PN72

MR BOURKE: No, nothing.

PN73

THE DEPUTY PRESIDENT: Authorities; I'm not sure whether my original orders said anything about authorities. I am content or at least content enough that electronic copies of authorities be provided. If someone wants to take me to

authorities, preferably provide them at least I think the day before just so we can print them.

PN74

Look, I'm mindful that there's probably a little bit of preparation, submissions and thinking to go on about these things. I think electronic copies is fine. I'm not going to ask everyone to print off folders and folders of court books for authorities that may not actually be referred to, so that might just be an indication there.

PN75

If there are any authorities that aren't in the parties' submissions, perhaps just make sure that they are exchanged at least between counsel sometime sufficiently prior to the hearing. I don't think I need to say anything to three barristers about authorities or anything like that further, unless anyone has got any questions there.

PN76

MR BOURKE: No, your Honour.

PN77

MS KELLY: No, your Honour.

PN78

MR BOURKE: We will provide a copy to the NTEU of our bundle of authorities.

PN79

THE DEPUTY PRESIDENT: All right. Thank you. I think in authorities I include, well, legislation. Sometimes I would have included enterprise agreements, but they're in evidence. If there is any legislation or parts or legislation, I'll include that under the catch-all category of authorities. I have indicated transcript. Just so everyone knows, a transcript is a five-day transcript – or it's allegedly a five-day transcript when I order it. There is provision for it to be available sooner. I won't be doing that, but if anyone wishes to do it then they can do that at their expense. I'll just sort of mention that and say nothing further.

PN80

Otherwise, that was the list on my list of housekeeping items. Ms Kelly, you indicated you had one item. I don't know whether we have covered that off or yours still needs to be addressed.

PN81

MS KELLY: Two small items, Deputy President. One is we would ask for transcript of today for the purposes of the admissions earlier made, but it might be able to be avoided if Mr Bourke's side is content to put that in an email perhaps to us. Failing that, we would ask that transcript be ordered for today's directions hearing.

PN82

THE DEPUTY PRESIDENT: I will get a transcript for today. Turnaround time is not amazingly quick, but at the very least we can do what I might call a slightly quicker and dirtier version of having the audio available; so if there is any doubt

about that, you can track down the audio, but I'll get a transcript ordered just as a matter of course. It will not be blindingly quick is perhaps - - -

PN83

MR BOURKE: We will send an email. We can send an email.

PN84

THE DEPUTY PRESIDENT: Thanks, Mr Bourke.

PN85

MS KELLY: I'm grateful to my learned friend. The other matter, Deputy President, was if it remains the case that there is to be no cross-examination of any witnesses, then it seems unlikely that we'll take the two days that have been listed. From my side's part, we think we should still commence on the Thursday in any event, to have the Friday in reserve in case something happens that alters the likely length of the hearing.

PN86

THE DEPUTY PRESIDENT: I'm very much staunch to start on the Thursday. If we finish on the Thursday, great. We may not, but we'll just see how we go. It just could be one of those things that it's possible even that counsel, both of you, wish to – or three of you wish to finish perhaps even earlier on the Thursday and then come back maybe even slightly earlier for a Friday start with a view to, dare I say it, being able to finish Friday before lunchtime.

PN87

MS KELLY: Certainly, Deputy President.

PN88

THE DEPUTY PRESIDENT: With the advantages that that may entail or not.

PN89

MR BOURKE: I didn't hear that.

PN90

THE DEPUTY PRESIDENT: There's no transcript yet. I think that's everything, isn't it?

PN91

MR BOURKE: Thank you.

PN92

MS KELLY: Thank you, Deputy President.

PN93

THE DEPUTY PRESIDENT: Thank you, everyone. I think as far as I'm concerned the next thing I'll hear is some form of email just on the non-party issue by – if I can put a time on it – midday on Monday.

PN94

MR BOURKE: Sure.

PN95

MS KELLY: Okay.

PN96

THE DEPUTY PRESIDENT: I appreciate it, everyone. We can adjourn.

ADJOURNED INDEFINITELY

[4.30 PM]