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

10.00 AM, TUESDAY, 13 JUNE 2023

Continued from 05/04/2023

PN203

THE COMMISSIONER: Good morning. I'll take appearances, please.

PN204

MR N PEFANIS: Thank you, Commissioner. Mr Pefanis for the applicant.

PN205

THE COMMISSIONER: Thank you, Mr Pefanis.

PN206

MS K SWEATMAN: Commissioner, Ms Sweatman for the respondent.

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THE COMMISSIONER: Have I granted permission, Ms Sweatman?

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MS SWEATMAN: You have granted permission, which you have noted also in the directions.

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THE COMMISSIONER: Yes.

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MS SWEATMAN: Thank you.

PN211

THE COMMISSIONER: Thank you. I note that we're not going to be joined by anyone out the front today. It was a bit noisy last time we were here, Mr Pefanis.

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MR PEFANIS: I heard just before, yes.

PN213

THE COMMISSIONER: Okay, Mr Pefanis, this is your application.

PN214

MR PEFANIS: Thank you, Commissioner. As you will have seen from our submissions in reply, the United Workers Union having been properly understood from the respondent's submissions and evidence that Toll Personnel Pty Ltd was intended to be the employer of a fixed term or outer-limit term contract employees. That being the case, the union doesn't seek to have question 3 answered and agrees that at this stage there is no dispute in respect of that matter.

PN215

THE COMMISSIONER: Certainly. Could I just ask, what agreement covers Toll Personnel?

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MR PEFANIS: I think they are award-covered, but my friend - - -

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THE COMMISSIONER: Ms Sweatman?

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MS SWEATMAN: Yes, that's correct. They are covered by the Storage Services and Wholesale Award.

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THE COMMISSIONER: Thank you.

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MR PEFANIS: So that being the case, there are only the first two questions to be answered and in our view in a sense – I mean, the two questions and the relevant clauses are inextricably linked. In our view while the questions can be answered separately, based on our construction of the agreement both questions have to be answered in the affirmative together. There is sort of a bit of artificiality in answering sort of the questions separately because of our construction of the agreement.

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THE COMMISSIONER: But there are two questions.

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MR PEFANIS: There are two questions.

PN223

THE COMMISSIONER: One is the obligation to maintain staffing at – 175, I think it was. The other one is how you go about maintaining the staffing.

PN224

MR PEFANIS: Yes.

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THE COMMISSIONER: They can be answered totally separately.

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MR PEFANIS: They can be, but – yes, they can be answered separately, but on our construction they are very much linked, the two issues. Just in terms of the first question, this is is there essentially a minimum head count by virtue of clause 9.2 of the Altona site-specific agreement. In our view there is, subject to the potential exemption contained within that clause itself which, to make it clear:

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In the event that significant operational matters arise preventing this number from being maintained –

PN228

then there is a consultation obligation with the union. So there is a minimum head count, but there is an exemption contained within the clause. I just wish to make clear though that in our view we are not here in a dispute as to whether the exemption is enlivened in this case. The question is whether there is a binding obligation at all. We never apprehended that we were in a dispute as to the application of the exemption.

PN229

It is possible that down the track we may well find ourselves in a dispute about the application of that exemption, but at this stage we're only seeking the question as posed to be answered. As I say, the union never apprehended that there was an enlivening of that application because of the resistance of the respondent to the binding nature of the obligation at all.

PN230

The union's outline of submissions sets out our position in respect of interpreting that clause. We say that in the context of the agreement and the clauses working together there is a clear meaning, and the obligation at 9.2 is not aspirational. I think it's clear that clause 9.1 – as is often the case with job security clauses of this kind – sets out the context of the clause and is aspirational in nature, except for – well, the first sentence is certainly aspirational in nature.

PN231

As we've set out in Bromberg J's decision – the Full Court agreeing with Bromberg J - in *NTEU v La Trobe University*, the Commission is tasked with reviewing the clause as a whole and it may be that certain sentences can be pinpointed as aspirational in nature, while others there is a clear promise. We say that 9.1 sets out the context and certainly the first sentence is aspirational. Clearly the agreement to meet with the union and delegates on a quarterly basis to discuss permanent employment opportunities is promissory.

PN232

Clause 9.2, we say having regard to the clause as a whole, clause 8.1.2 and the agreement as a whole, the intended purpose is clear and the language used is not in fact aspirational. There is a promise that there will be a minimum head count of 175 permanent employees. So, in our view, the various clauses work together - - -

PN233

THE COMMISSIONER: Mr Pefanis, I understand your submission but why should I read the phrase 'it is the intention' differently in 9.2 to how I read it in 9.1?

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MR PEFANIS: We would say, Commissioner, it's the context and the actual matters being discussed. The intentions of the parties to maximise the opportunity for permanent employment is a very nebulous concept and I can't see how an intention to maximum opportunity could be binding in any respect. In our view it's clearly aspirational, whereas an intention of the employer to have no less than 175 permanent employees, we would say that's a very different concept. It's not nebulous, it's not vague. There is a clear purpose to it.

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THE COMMISSIONER: Because it's measurable?

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MR PEFANIS: It's measurable, that's right, and also just the wording used of 'have no less than', there are clear constraints, outer limits, however one wants to

put it. Also in the context of the second sentence which, as I will discuss, is the exemption to that obligation, in our view you wouldn't have an exemption or a carve-out to the first sentence if it wasn't promissory in nature. There would be no utility in that. It would be purely aspirational and you wouldn't have to have a carve-out at all.

PN237

In fact the wording used in the carve-out sentence, 'Matters preventing this number from being maintained', points to the promissory nature of the obligation itself. The context of the clause as a whole read - so that includes 9.3 which is important, as well, where:

PN238

The employer shall undertake quarterly recruitment intakes to replace any available roles.

PN239

The first of these intakes is to commence no later than four weeks after the operative date, then there is the cross-reference to clause 8.1.2 and also the final sentence 'permanent vacancies'. Before you even read clause 9 within the agreement as a whole, clause 9 itself read as a whole we would say points to the promissory nature of the first sentence of clause 9.2 because there is a discussion of available roles and permanent vacancies. Then there is the reference to 8.1.2, as well, which forms the method by which the permanent vacancies/available roles are to be filled, so there is within the agreement a harmonious system which gives meaning to the potentially ambiguity phrases 'available roles' and 'permanent vacancies'.

PN240

Commissioner, I just sent a decision before which I just wanted to refer to, as well. I sent it to the respondent, too. That is Project Blue Sky. In accordance with the principles in Berri obviously regard should be had to the principles of statutory interpretation, although they are not strictly binding in the context of construing an agreement. In this respect Project Blue Sky at paragraph 70 is an important decision where the High Court stated that:

PN241

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.

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It goes on from there and we would say that is a particularly apt principle in construing this agreement. One should strive to construe the various clauses in a harmonious way. The next paragraph, the High Court further made clear that:

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A court construing a statutory provision must strive to give meaning to every word of the provision.

PN244

That is also an important principle here. You have a couple of phrases where at first glance there is no self-contained definition. At 9.3, 'available roles' and 'permanent vacancies', there is no self-contained definition of those two phrases, but to give meaning to those phrases our submission is that the Commission should construe the agreement – the various clauses that operate together in a harmonious way which will of course give meaning to available roles/permanent vacancies, in that a permanent vacancy/available role becomes available if the head count falls below 175 permanent employees.

PN245

They are sort of the key parts of the clause itself and, as I said, there is the cross-reference which I will go into with clause 8.1.2 which sets up the pool of labour hire employees who are to be made permanent to fill the vacancies that arise. In our submission, having put in place this infrastructure of maintaining permanent employment and job security, and conversion of casual employees, labour hire employees, at various parts of the agreement the clauses working together, it would be curious if fact it was all just simply at the discretion, at the managerial prerogative, of the employer and in fact those clauses have no real definition, 'available roles/permanent vacancies'.

PN246

In reality if that were the case, really all these clauses that the parties have come to are simply aspirational and everything is left to the managerial prerogative. We would say that that's not a construction which flows from this agreement, all these clause working together. I think we would make it clear that in the context of this agreement, the context of the words themselves, the agreement is clear. The wording of the agreement is clear and it's not aspirational; there is a binding obligation. As I said, there is a specific carve-out for circumstances in which the employer is not obliged to maintain a minimum head count.

PN247

If you were to consider that there is ambiguity and that there is utility in turning to extrinsic materials to interpret the clause, as we've said in the submissions the most relevant industrial context of that clause is in fact the manner in which the clause has been applied over the years, the predecessor clauses of the previous enterprise agreements and the manner in which those clauses were – well, the manner in which they operated and then to a lesser extent the negotiations themselves for this most recent agreement.

PN248

THE COMMISSIONER: Mr Pefanis, just with respect to the previous agreements I note that there were some commitments – and I use the term loosely - - -

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MR PEFANIS: Yes.

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THE COMMISSIONER: - - - without making any findings – to particular staffing levels in those. Were those levels achieved? I don't know that the evidence of - - -

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MR PEFANIS: The evidence is not - - -

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THE COMMISSIONER: - - - anyone goes there.

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MR PEFANIS: No one goes there in very exact details. Mr Greg Morrell and Mr Dixon both go there to the extent that it's their understanding that the clauses were always complied within that manner and that permanent head counts were maintained, except Mr Morrell and Mr Dixon both give evidence about a dispute that did occur under the 2019 agreement whereby Toll understandably in mid-2020 sought not to comply with the minimum head count because of COVID and the uncertainty, as everyone will recall, where we were in mid-2020.

PN254

The delegates and the union didn't disagree with that position. However, once there was a some certainty the issue was raised again. A dispute was in fact filed in the Commission and subsequently rather than the dispute being heard and determined, the minimum head count was maintained.

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THE COMMISSIONER: Thank you.

PN256

MR PEFANIS: Unfortunately, we don't have any specific details about head count other than the understanding of, I think, as well, Mr James Vido, although he as I understand it wasn't close to these particular issues until more recently.

PN257

THE COMMISSIONER: Thank you.

PN258

MR PEFANIS: In terms of the way in which the clause has been applied, we would say that it has been complied with in a manner consistent with the union's interpretation of the clauses and we would say that position is not in fact contested by the respondent, although as we say in the submissions in reply it does appear that there is a submission that that was done in good faith rather than by virtue of a binding obligation. We would say that it has been the common understanding of the parties to these enterprise agreements that that is how it operates and that is in fact how it has operated.

PN259

In terms of the actual negotiations for the most recent agreement and I suppose the previous agreements, Mr Dixon and Mr Morrell give some evidence in relation those matters. In particular after the taking of protected industrial action, a

24-hour strike with more notified, there was an in-principle agreement reached between the parties. That is evidenced in annexure JD5 to Mr Dixon's statement which is the email from Ryan Olsen, senior manager, employee and industrial relations at Toll, to Mr Dixon and Alex Noble, a former industrial officer at the union.

PN260

Relevantly, in that email – this is at 193 of the court book – there are various headings of the principal matters that have been agreed and there is the heading 'Permanent full-time jobs'. Relevantly Nike, which is the Altona site, minimum 175 full-time permanent roles, which is then what was communicated to the employees in their acceptance of the in-principle agreement, ultimately the voting up of the agreement during the access period the following year.

PN261

So in light of those, the *Short v Hercus* principles more recently explained in *RTBU v KDR Victoria t/as Yarra Trams*, set out at paragraph 9 of our reply submissions, in our view those negotiations and the understanding of the parties in light of the negotiations and the application over time of the clauses in the relevant agreements go to evidencing the union's construction of the relevant clause, both 9.2 and 8.1.2.

PN262

If I can go just quickly to clause 8.1.2, obviously our position is that this clause has to be read harmoniously and it is in fact expressly linked to clause 9.3 of the agreement, but again it has a phrase that the Commission should strive to give meaning to by virtue of this agreement as a whole; that is 'in the event that a permanent employee vacancy arises'. Obviously there is no self-contained definition, as I said, but the clauses working together make clear that a permanent employee vacancy arises when the head count falls below 175.

PN263

In the previous agreements that was a lower number, 150, 97, et cetera, commencing with the 2013 agreement where essentially it was the permanent positions as at the date of the agreement plus 10, which was the minimum head count. Subsequently improvements from the union's perspective has been made to those clauses by increasing the head count and again it would be curious that it would be purely aspirational and it formed a part of every negotiation.

PN264

Other than the phrase 'in the event that a permanent employee vacancy arises', I don't think that there is any real dispute as to the application of the rest of the clause 8.1.2, but as we have said in our reply submissions, to the extent that there is a capitalisation of 'employee' after the word 'casual' in the first sentence, that is just one of the infelicities of drafting that can occur in agreements of this nature in the sense that 'employee' is a defined term - capital 'E' employee.

PN265

Toll Transport doesn't employ casual employees, but the clause makes clear that it's a casual employee whether employed directly or indirectly, so making clear that it is the labour hire employees that are relevant here because everyone knows

there is a common understanding that Toll Transport Pty Ltd doesn't employ any casual employees. That being the case, it's clear that labour hire employees are the pool to which Toll Transport should turn to when the head count falls below 175.

PN266

Clause 9.3 makes clear that recruitment is to occur on a quarterly basis and the manner in which the clauses operated is that in fact Toll have employed the labour hire employees from that pool when a permanent vacancy has arisen by virtue of falling below the minimum head count. That is all I wanted to say in opening. I might say something in reply. Thank you.

PN267

THE COMMISSIONER: Thank you, Mr Pefanis. I note that the witnesses aren't required for cross-examination. That being the case, I'll mark the witness statement of Greg Morrell as UWU1, along with its attachments obviously.

EXHIBIT #UWU1 WITNESS STATEMENT OF GREG MORRELL PLUS ATTACHMENTS

PN268

The statement of Mr Dixon, along with is attachments, as UWU2.

EXHIBIT #UWU2 WITNESS STATEMENT OF MR DIXON PLUS ATTACHMENTS

PN269

Ms Sweatman?

PN270

MS SWEATMAN: Thank you, Commissioner. There are three authorities to which I would like to refer in my reply and just for convenience I might just hand each of them up. Now, one of them is actually one of the authorities to which Mr Pefanis referred, so we'll hand up the authorities of *Reeves v MaxiTRANS*, *RTBU v Yarra Trams* and *NTEU v La Trobe Uni*. I might just hand those all up together just for ease.

PN271

THE COMMISSIONER: Thank you.

PN272

MS SWEATMAN: Just noting the housekeeping from the end of Mr Pefanis's submissions, if you would like to mark the witness statement of Mr Vido, Commissioner.

PN273

THE COMMISSIONER: Thank you. I will mark the witness statement of James Vido, along with its attachments, as exhibit Toll1.

EXHIBIT #TOLL1 WITNESS STATEMENT OF JAMES VIDO PLUS ATTACHMENTS

PN274

MS SWEATMAN: So acknowledging the concession that has been made by the UWU, it is the case we have got two questions left to be answered. There is a connection between them, but we do see them as two quite separate and distinct questions to be determined. Although it is the case that there are policy considerations across each of them, in terms of the first question whether there is a binding obligation on the respondent to maintain a minimum permanent head count of 175 employees at the site, the UWU appears to seek to have the question of the intention and the operational considerations separated out.

PN275

It suggests that the operational element or the exemption that operates in that clause should be considered as a separate entity question, which may in the future be the subject of a dispute. We see that as inherently tied up with the question to be determined by the Commission in this particular matter and it's misleading, I think, to suggest that they are separate and distinct questions.

PN276

If I may refer to the evidence of Mr Morrell, UWU1, at GM3 at digital court book 27, Mr Morrell's own notes of the meeting that occurred on 13 October 2022 are:

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Contract gone, no jobs –

PN278

which I think is uncontroversially a reference to the loss of the contract at that site in respect of its sole customer Nike.

PN279

Company position on permanent employment is that it doesn't make good business sense. James believes it will be difficult to place the existing 150 employees, let alone add 25 more. Our argument is we work for Toll, not Nike, and new contracts come and go so employee staff if no jobs elsewhere, minimum cost. Speaking to other delegates, we should dispute this.

PN280

So it's quite clear that this dispute has inherently come from the company's proposal to activate that significant operational matter aspect, whether you say 'so good business sense' is clearly the same idea as an operational issue. I think insofar as you consider the terms of the agreement, the exemption is that in the event that significant operational matters arise, the loss of the contract for the sole and only client or customer at that site is about as big a significant operational matter as you can imagine.

PN281

The entire site is to be wound down within a couple of years and it is because of that significant operational matter that Toll is unable to achieve its aspiration or its intention to have no less than 175 permanent employees at the site. It has never contended that it ought not meet that head count aspiration for any other reason. So, the clause does need to be read as a whole - - -

PN282

THE COMMISSIONER: What actions did Toll take between the time of the making of the agreement and at least October of 2022 - - -

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MS SWEATMAN: Yes.

PN284

THE COMMISSIONER: - - - to try and meet that obligation?

PN285

MS SWEATMAN: Yes, so Mr Vido's statement talks to – so if I may refer to Mr Vido's statement at digital court book 347:

PN286

On 14 April 2022, Toll announced to the workforce through a toolbox meeting that it has lost its contract with Nike. While the contract with Nike is due to finish in 2023, Nike agreed to extend it. The agreement was approved. On 24 May 2022, I emailed Mr O'Neill to organise a meeting for the purposes of discussing permanent positions at Toll Altona. We had vacancies that could be filled by permanent employees in the immediate future which we proposed to fill with permanent employees on a fixed term given we knew we did not have a long-term need for permanent employees.

PN287

It had those discussions immediately upon the issue of the loss of that contract being raised. Those discussions continued through June through to September and into October where the dispute really took hold. It was the case that, as is expected under the terms of clause 9.2, that the employer would discuss with the union and the delegates the circumstances in which it did not consider it could meet that head count target.

PN288

Now, insofar as you might refer to that target as being – 175 as being a measurable head count, we would say that that's a target; that's what the parties agreed to aspire towards. We don't consider that the fact that that is a measurable number has the effect that it is a binding obligation and, Commissioner, you were very right to point to the fact that the terms of the clause talked to –

PN289

it is the intention of the employer to have no less than 175 permanent employees. In the event that significant operational matters arise preventing this number from being maintained, the Employer shall first discuss with the Union and delegates as to the reasons for this.

PN290

The two parts of that clause cannot be separated out. Mr Pefanis suggests that they are two separate and distinct aspects of how the clause is to be considered. We submit that the better view is that it's expressly contemplated and called out that the most obvious example of how that aspiration may not be met is if there is a significant operational matter.

PN291

The purpose of the second part of that term is to highlight to the parties to the agreement that a significant operational matter will be a circumstance in which the intention to have no less than 175 permanent employees may not be able to be met. To the extent that it is proposed that the clause be split out, I refer to the decision of the Full Federal Court in *NTEU v La Trobe University*, where paragraph 30 of that decision talks to:

PN292

Awards and orders contain the commands, rules and injunctions of a public body authorised to impose upon non-consenting parties a resolution of whatever dispute, issue or proceeding had been before it. There is every reason to approach the reading of such an instrument with a disposition to finding a binding obligation, or the establishment of a substantive entitlement, in each of the operative provisions thereof.

PN293

Enterprise agreements, by contrast, are the doings of the parties themselves (here using the term 'parties' in the loose sense of the employer and those of its employees who, through their bargaining representatives, were involved in the relevant negotiations).

PN294

It goes on:

PN295

Indeed, the admixture in industrial agreements of provisions which give rise to obligations and those which are merely 'aspirational' is a practice of long standing.

PN296

Then if I can move down to the middle part of paragraph 31 of that decision:

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The primary Judge took the view –

PN298

in respect of this matter, in La Trobe –

PN299

that the reference to 'redundancies' in this sentence was a reference to redundancies in the conventional sense, and the appellant took no issue with that approach. The expression 'compulsory retrenchment', on the other hand, is clearly a reference to the non-consensual termination of the employment of a particular employee by the respondent.

PN300

Grammatically, it is possible to slice this sentence into these two sections, and to read each as conveying a prohibition. So to proceed, in my respectful view, would be to change the sense of the sentence as a whole. That sense is one of a

very high-level statement of intent, concerned with making clear the importance which the parties placed on job security.

PN301

In an industrial relations context, there is absolutely no reason not to respect the parties' choice to include a provision of this nature in their agreement, nor to deprecate the significance of the provision on account of its non-obligatory nature.

PN302

We say, Commissioner, that you should not split clause 9.2 into two parts as the UWU would ask you to do. Clearly they intended to work together. The second part of that clause is intended to set out or give an example of where that head count requirement might not be met.

PN303

THE COMMISSIONER: In putting that submission though, why do you need an exemption to not achieve an aspiration?

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MS SWEATMAN: To be fair about the circumstances in which it may arise.

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THE COMMISSIONER: So in other circumstances it's not an aspiration, it's a target.

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MS SWEATMAN: We agree that it's a target.

PN307

THE COMMISSIONER: Sorry, 'target' is the wrong word, that it's - - -

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MS SWEATMAN: We say, Commissioner, it's the right word.

PN309

THE COMMISSIONER: - - - a requirement on the submissions of the UWU.

PN310

MS SWEATMAN: Yes, but we say it is a target and as a matter of fairness and clarity we highlight the primary circumstance in which they may not be met.

PN311

THE COMMISSIONER: But what's the point of having a target if it doesn't have to be met? What is it if it's not required to be met?

PN312

MS SWEATMAN: It's a desirable policy, so if I may - - -

PN313

THE COMMISSIONER: We keep stepping back further from the words, which is a head count of 175.

PN314

MS SWEATMAN: Yes, that's right, but it's an intention. It is a desirable policy. May I park that for a moment because I just want to address one other point arising out of that decision. I promise I will come back to it, Commissioner. Mr Pefanis referred to the decision of Project Blue Sky. That decision was emailed through eight minutes before the hearing commenced, so we have not had an opportunity to consider it.

PN315

Insofar as the sentiments that were set out, which was that the High Court said that a legislative instrument should be read to give best effect to the language of the provision, that paragraph 30 of La Trobe to which I referred I think is relevant in that regard, in that an enterprise agreement – it is a quasi-legislative instrument. You need to look at it in the context of it is an instrument that's created by the parties which gives rise to obligations and aspirational objectives that they're seeking to achieve together.

PN316

If I can go to your question on that point, if I may refer you to the decision of *Reeves v MaxiTRANS*, at paragraph 19 of that decision the court held that:

PN317

It is to be borne in mind that an industrial agreement is the product of negotiation and often of compromise on each side. Not every provision in such a document is to be taken as intended to impose an enforceable obligation on one party or another so as to expose that party to the imposition of a penalty in the event of noncompliance with the provision.

PN318

Some provisions may be characterised as 'hortatory' or merely reflective of a desirable policy or end which the parties have agreed to implement or attempt to achieve but without attracting penal consequences if the efforts of either party towards that end are later seen to be lacking in some respect.

PN319

We submit, Commissioner, that this term should be viewed in that regard. We don't dispute that Mr Olsen communicated to the UWU that the company would look to increase its head count target to 175 as a compromise to resolve bargaining, but that obligation – take into account it expressly talks to it being an intention – needs to be viewed, as the court said in Reeves, as -

PN320

reflective of a desirable policy or end which the parties have agreed to implement or attempt to achieve.

PN321

It was never contemplated that on the day the agreement took effect that the permanent head count could straightaway jump from 150 to 175. It was a case of the parties would work together to achieve that head count and look to maintain it all things being equal, but the exemption – and I think the qualifier to that aspiration or intention - I think the better way of viewing that second part of 9.2 as

a qualification on that head count rather than exemption is that it needs to be taken into account that there may be significant operational matters which would prevent that head count being achieved and then maintained.

PN322

At the time the parties were bargaining for the agreement they thought they would be moving to a bigger, better, faster warehouse to meet the needs of Toll's customer Nike. As set out in Mr Vido's evidence, a pitch was put for Toll to continue its contract at a bigger warehouse and where that contract was secured there would have been the work to justify an increased head count of 175. Unfortunately, quite the contrary happened and the contract was lost altogether. It simply does not make operational sense to work towards that permanent head count where those employees – there won't be work for those employees at that site in the foreseeable future.

PN323

THE COMMISSIONER: Except that the foreseeable future was ultimately three, four years away.

PN324

MS SWEATMAN: Two years.

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THE COMMISSIONER: 2025.

PN326

MS SWEATMAN: Yes.

PN327

THE COMMISSIONER: So in 2022 the employees were told that Toll had lost the contract. I understand that there was some uncertainty early on about when the contract would end, but Toll as I understand it negotiated the maintenance to the contract to 2025, so that's three years' worth of work.

PN328

MS SWEATMAN: The further extension to 2025 was only secured in March this year. This dispute was already on foot at that point. Originally the contract was supposed to have finished already in February '23 and that was originally extended to 24 February 2024. I pulled those dates, Commissioner, from paragraph 19 Mr Vido's statement, at digital court book 347.

PN329

At the time that we were having these discussions we originally thought we were done by February this year. At the time that we were talking about issuing contracts and the contract that Mr Vido arranged to have drawn up for the employees, had regard to the fact that that contract would be extended only to 24 February '24, so that's 12 months away – or at that point about 18 months away, so we are talking about quite immediate future.

PN330

I should say, too, that the steps that Toll took were actually about preserving job security of the affected employees because the casual employees were employees of Toll People. They were offered permanent maximum term employment with Toll People on the basis that they would revert to their casual employment at the end of that maximum term employment and so they would have continuous employment with that same employer all the way through irrespective of the disturbance that was happening at the Toll Altona site.

PN331

So, in a sense, Toll was committing to the job security of those employees knowing that it couldn't provide ongoing employment at the Toll Altona site.

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THE COMMISSIONER: Toll People was committing to it.

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MS SWEATMAN: Yes, that's right.

PN334

THE COMMISSIONER: Toll wasn't.

PN335

MS SWEATMAN: No, that's right, so Toll could commit to nothing because that site has gone. The final point I just wanted to make on that point of the desirable policy or the binding effect of the term of the agreement, Mr Pefanis referred to the decision of *RTBU v Yarra Trams*, which we've handed up. He has said that the union adopts paragraphs 61 to 63 and we would be very supportive of that view – of the Commission adopting that approach.

PN336

Our submission is that it actually works against the union's position. In that regard I refer you, Commissioner, to paragraph 63 of that decision in which the court says:

PN337

In a series of decisions, Gray J emphasised the great care that must be taken –

PN338

I'm sorry, Commissioner, that's relevant to the next point, the casual employment. No, sorry –

PN339

In a series of decision, Gray J emphasised the great care that must be taken in drawing upon a suggested common understanding as an aid to construction.

PN340

In this regard my understanding of the submission that Mr Pefanis is making is that because it was a custom or a practice that that permanent head count would be met by converting casual employees of Toll People into permanent employees of Toll Transport, that that should be taken to be the intended binding operation of

clause 8.1.2. Mr Pefanis can correct me in reply if I've understood that incorrectly. What the court says about that submission is:

PN341

The reasons for caution before regard may be had to a suggested common understanding commence from the premise that it is the instrument itself that is to be construed, and any recourse to industrial practices said to amount to a common understanding are no more than part of the context in which the text of the instrument is to be construed. Industrial practices do not take the place of the terms of the instrument.

PN342

There is also the need to maintain coherence with other principles, including that: (1) usually, recourse to extrinsic matters cannot displace the clear meaning of text; (2) the subjective understanding of individuals is rarely relevant to objective meaning; (3) this is also the case in relation to collective agreements where surrounding circumstances might have to rise to the level of being notorious or known by those intended to be bound by the instrument ... and (4) parties cannot by words or conduct contract out of, or waive the terms of an enterprise agreement, which has statutory force.

PN343

Now, how we say those principles apply in this matter is insofar as Mr Pefanis's submission is that because it has always been the case that Toll has offered permanent employment to Toll People casuals in meeting the objectives of clause 8.1.2 of the agreement, we say that that cannot be taken as creating a binding obligation. There is no dispute about the fact that there are no casual employees employed by Toll Transport, but the Commission cannot enforce the term of an agreement in respect of an employee who is not covered by that agreement.

PN344

Whether it's a case of the capital E against 'casual employee' at that clause 8.1.2 is or is not intended to refer back to the definition of 'employee' at the commencement of the agreement and we say it does, it's a capitalised defined term - even if that term was not defined casual employees of a different entity are squarely not covered by the agreement. They are covered by the Storage Services and Wholesale Award.

PN345

Even insofar as the company may give those employees the benefit of the rights and entitlements and matter of contract to those employees, it does not make them employees covered by that agreement. Casual employees who are not employed by Toll Transport are not entitled to activate the casual conversion provision set out at 8.1.2.

PN346

THE COMMISSIONER: I don't think 8.1.2 replaces the casual conversion rights.

PN347

MS SWEATMAN: No, I'm talking about – so separate from any other statutory casual – sorry, I'm not suggesting that there is any dispute about casual conversion in the ordinary sense of it.

PN348

THE COMMISSIONER: No.

PN349

MS SWEATMAN: But insofar as 8.1.2 talks to a casual employee covered by 8.1.2 who has been working on a regular and systematic basis for nine months or more, where there is a permanent vacancy will be considered and converted, that obligation can only by operation of that enterprise agreement apply to a casual employee employed by Toll Transport, which is the only employer covered by that agreement. A casual employee employed by a different employer cannot claim rights or any binding obligations arising under that term.

PN350

THE COMMISSIONER: It depends who the obligation is on in 8.1.2.

PN351

MS SWEATMAN: So the obligation - - -

PN352

THE COMMISSIONER: It gives rights to an employee whether employed directly or indirectly, which opens up a can of worms.

PN353

MS SWEATMAN: Yes.

PN354

THE COMMISSIONER: So it gives rights to the employee. The question is the obligation on the employer that is afforded by the clause read in context.

PN355

MS SWEATMAN: Yes.

PN356

THE COMMISSIONER: So if the obligation is on the employer to offer a non-permanent Toll Transport employee a role, then potentially it does pick up – so the people employed by Toll People have no right to sue under the agreement and no one is suggesting they do have that right, but it's the obligation on the employer to go to that pool of people that I understand to be the point the applicant makes.

PN357

MS SWEATMAN: Well, perhaps we do need to clarify that point, Commissioner. I agree with what you have just said entirely and I think the issue is about whether a casual employee of Toll People is entitled to seek conversion to permanent employment under this agreement.

PN358

THE COMMISSIONER: They are certainly not direct employees, are they?

PN359

MS SWEATMAN: And that's my submission, Commissioner.

PN360

THE COMMISSIONER: So they are indirect employees.

PN361

MS SWEATMAN: Yes.

PN362

THE COMMISSIONER: Yes.

PN363

MS SWEATMAN: As a matter of practice and as a matter of good faith, it is the case – as a matter of good faith Toll Transport has gone to a pool of casual employees who are employed by Toll People and invited them to apply for permanent employment consistent with the terms of that clause. That doesn't give those employees a right – there's no binding obligation to do so because those employees are simply not covered by that agreement. It is a casual employee which must necessarily be an employee covered by the agreement.

PN364

THE COMMISSIONER: The binding obligation clearly can only operate between parties to the agreement.

PN365

MS SWEATMAN: Yes.

PN366

THE COMMISSIONER: But that does not mean there is not a binding obligation to go and do something external to the organisation. So, for example, there are clauses in agreements that say that money will be contributed to particular funds. The fund has no cause of action against the employer, but the obligation is on the employer because of the binding nature of the agreement to pay that money to the external body.

PN367

MS SWEATMAN: But that's in respect of an employee who is covered by the agreement, Commissioner, so I think it is a different thing. The terms of the agreement need to be about matters pertaining to the employment relationship. I mean, it needs to be the relationship between the employer and the employees who are covered by the agreement.

PN368

THE COMMISSIONER: Yes, so my understanding of the argument is there is a binding obligation on the employer by the agreement, by agreement with its employees, to go to an external pool and say, 'We've got vacancies, apply for them.' It can't make those people apply. It can't force those people to become permanent, but there is an obligation on the employer by virtue of its agreement with the employees to do something external; to go somewhere particular to recruit people to fill vacancies.

PN369

MS SWEATMAN: That's not an agreement – that's not a matter relating to the employees who are covered by the agreement.

PN370

THE COMMISSIONER: Well, yes, it is, because the employees covered by the agreement have an interest in 175 people being employed.

PN371

MS SWEATMAN: Yes, but whether that is - - -

PN372

THE COMMISSIONER: We're not talking about the rights of the casual employees. The people employed by Toll People have no rights under this agreement, but the employer has an obligation by its commitment to its employees employed under the agreement to do certain things and some of those steps involve going external to the people who are covered by the agreement. I suggest that that's not an unusual thing to see in agreements.

PN373

MS SWEATMAN: And we would submit simply, Commissioner, that that is not a binding obligation in respect of there's a requirement to offer employment to those employees in that situation because it goes beyond that external activity and talks about the rights of an employee who is not covered by the agreement, and that would be our submission around that.

PN374

THE COMMISSIONER: Yes. Thank you.

PN375

MS SWEATMAN: I should say also that in a sense there is no practical dispute about the fact of – so the company did go to Toll People casuals and interview them, and get to a process of being about to offer employment. We say that there is no binding obligation, but insofar as the actions that the company has taken, it did take steps towards achieving that intention in any case and I think that's a very relevant consideration.

PN376

THE COMMISSIONER: Well, except to the extent of the actions of the parties. On your previous submissions - - -

PN377

MS SWEATMAN: Yes, yes, that's right, but I think it's notable that the company is being bloody-minded about its position on this term. The question is, is there a binding obligation? We say that there is not, but it has at all times continued to act in good faith acknowledging that the loss of the contract and the impact of the loss of that contract on this site is significant on everyone and it has sought to act in the best way possible.

PN378

I think it's a technical point that has been taken by the union as to whether or not that obligation is binding or not. We're simply saying that we can't maintain that head count. The agreement, we say, doesn't require us to maintain that head count particularly in the significant operational circumstances in which we find ourselves, but, irrespective of that, we're doing the best we can and we've taken steps towards recruiting from that casual labour hire pool to offer them employment for a period of time while we can do that.

PN379

THE COMMISSIONER: Well, you haven't. Toll People - - -

PN380

MS SWEATMAN: Only because of the status quo and these employees could have been working – so there were 24 employees on Mr Vido's evidence to whom he was about to issue permanent employment contracts and they could have been working permanently on a maximum term from October last year, but because of the status quo provisions those employees continued to work on a casual basis because the company has been prevented from taking the very steps that it's seeking to take to give them some certainty and security and act consistently with the objectives of the agreement.

PN381

Now, the final point I would just like to address is Mr Pefanis raised a question saying that managerial prerogative should not be read into these provisions. We have never suggested that there ought to be. We have never suggested that managerial prerogative is relevant in these circumstances. What we say is that it's clear on the terms of the agreement that it's not a case of their exercising a discretion not to recruit. We're saying there are significant operational matters that stop us from being able to achieve and maintain that head count.

PN382

I guess in terms of wrapping up my submissions, the two questions left to answer by the Commission I think to some degree lose a lot of their relevance in a practical consideration when that question 3 falls away, because the real issue here was the capacity to fulfil the head count on the basis of outer-limits contracts or maximum term contracts. When that question falls away, we're left with two pretty trite questions. Is there a binding obligation on the employer to maintain a minimum permanent head count of 175 employees?

PN383

The term clearly talks to an intention. That intention is clearly qualified by the potential that significant operational matters could arise to prevent that head count requirement being met. Notwithstanding that, the company has – the evidence clearly demonstrates, the evidence is not contested that the company sought to act consistent with that intention to offer employment to casual employees employed by Toll People even though we say that there was no binding obligation to do so; to provide them with that permanent employment for the period that that employment could be assured.

PN384

That permanent employment is tied directly to the contract – the issue of the contract. The contract refers at digital court book 363 to:

PN385

Should the arrangement between Toll People and Altona North Nike be extended beyond the expiry date, Toll People may make a new offer on terms and conditions. Any such offer will be made in writing.

PN386

Everything is tied to the ending of this contract. When you take away the concerns about the offering of that maximum term employment, we're back to two questions which – it's a technical question of is there a binding obligation on us to do what we're actually already doing, which is we're looking at our capacity to meet that 175 head count while we can.

PN387

We don't accept that we have a binding obligation to do so, but we're doing what we can or attempting to do what we can before the status quo is being instigated and we've gone to the pool of casual employees even though again we say we don't have a binding obligation to do so; so it really becomes a question of is there a binding obligation on us to do what we're already doing? We say, no, there's not, but the commitment is there to do the best we can in the period that we've got work available at that site. Unless you have got any questions, Commissioner, I think that is my submissions.

PN388

THE COMMISSIONER: No, thank you, Ms Sweatman. Mr Pefanis?

PN389

MR PEFANIS: Thank you, Commissioner. Just while it's fresh in my memory I might just address the last point first. We would submit that Toll Transport is not doing anything in respect of its commitment or otherwise. It's Toll People that have offered the outer-limit term contracts.

PN390

THE COMMISSIONER: I think Toll Transport would say they attempted to.

PN391

MR PEFANIS: Well, attempted to through Toll People potentially.

PN392

THE COMMISSIONER: No, no, originally Toll - Mr Vido's evidence is Toll Transport sought to offer fixed term contracts to the casual employees and because of the dispute. and the UWU insistence of the maintenance of the status quo. was unable to do so. As I understand Toll Transport's submission, it is that they have attempted to do what they could. They have attempted to meet that commitment. There might have been an argument about whether fixed term contracts could be offered under the agreement, but they were attempting to do that.

PN393

MR PEFANIS: Thank you, Commissioner. The respondent might be able to offer some clarity, but we had apprehended that to mean that the intention had always been for Toll People to offer the fixed term contracts. That's our understanding of the evidence.

PN394

THE COMMISSIONER: No, and I think in the original dispute notification the question of the offering of fixed term contracts – no, I can't recall whether it was in the original dispute notification - - -

PN395

MR PEFANIS: Sorry, Commissioner, it was our understanding originally that it was Toll Transport that had proposed the fixed term contracts.

PN396

THE COMMISSIONER: They couldn't proceed with that because of the dispute notification.

PN397

MR PEFANIS: Okay, but our position is that we – in a sense, our understanding of Mr Vido's evidence is that - essentially the union misapprehended what Toll's position was and that Toll's position always was that Toll People was to be the entity to - - -

PN398

THE COMMISSIONER: I had never understood that and my reading of Mr Vido's evidence is – sorry, I don't intend to misread it and, if I have, my apologies. I'll go back and read it again. Certainly Toll didn't intend to employ any more permanent ongoing employees, but Toll would offer the opportunity – so this was a conversation Mr Vido said he had with Mr O'Neill at para 23 of Mr Vido's statement. Mr Vido says:

PN399

I advised Mr O'Neill that as the contract had been extended to February 2024 Toll would offer the opportunity for permanent employment subject to a fixed end date to coincide with the end of the Nike contract.

PN400

That didn't come about because of the dispute as the status quo, so it then - and this was the first time I had heard that this had occurred, and it's not a criticism of anyone, but then apparently Toll People decided they would offer fixed term contracts. Clearly – no, sorry, I'm not going to make any assumptions about any commitments that Toll People and Toll Transport had to each other, but obviously Toll People are of the view that they had the work to be able to employ these people on a fixed term basis.

PN401

MR PEFANIS: Yes.

PN402

THE COMMISSIONER: But the original intent, certainly on Mr Vido's statement, is that the intention was that Toll Transport would offer fixed term employment.

PN403

MR PEFANIS: Yes. Commissioner, there is the conversation with Mr O'Neill at 23. At 24:

PN404

Following this meeting we put up an advertisement for fixed term employment –

PN405

which was not obviously the contracts, it was just the advertisement. Then at 25:

PN406

The intention was for Toll People to continue to employ the employees on that basis.

PN407

So our reading of that - - -

PN408

THE COMMISSIONER: Yes, but if you look at GM2, that would appear to have been placed by Toll Transport. There wouldn't be much point Toll People putting an ad on the noticeboard at Toll Transport. I mean, they would just give it to the people.

PN409

MR PEFANIS: We agree with that, but we think that was – I guess that's probably a separate dispute. Our understanding originally was that it was Toll Transport that was offering the fixed term.

PN410

THE COMMISSIONER: Yes, yes.

PN411

MR PEFANIS: But then now we understand that - - -

PN412

THE COMMISSIONER: It's Toll People now.

PN413

MR PEFANIS: - - - all long it was Toll People.

PN414

THE COMMISSIONER: I don't think it was ever that it was - - -

PN415

MR PEFANIS: In any event, I guess that the dispute as it is now - - -

PN416

THE COMMISSIONER: But at that point in time – I mean, to the extent that the UWU understood at a point in time that it was Toll Transport offering the fixed term contracts, Toll Transport's submission here is at that stage they were doing everything they could to maximise employment opportunities for permanent employment by offering work to the Toll People casuals.

PN417

MR PEFANIS: Yes, I understand that. Thank you, Commissioner. I guess just in terms of that, if that is the case obviously the circumstances as they exist now, at a certain point in time that intention was withdrawn and Toll People stepped in. In the submissions and I think in the evidence there is obviously a very close relationship between the two entities.

PN418

THE COMMISSIONER: But Toll Transport couldn't offer those jobs on a fixed term basis at this point in time because the dispute is subject to the status quo.

PN419

MR PEFANIS: Yes, that's right. I guess we would say that sometime – we don't know when – that intention was withdrawn by Toll Transport and now the proposal is that Toll People employ the employees on a fixed term basis.

PN420

THE COMMISSIONER: I'm not quite sure that that says anything about the intent of Toll Transport though.

PN421

MR PEFANIS: No.

PN422

THE COMMISSIONER: Given the limitations in the dispute settlement procedure.

PN423

MR PEFANIS: Yes, yes, and I understand from your reading of the evidence – I had a different understanding, but I just wanted to explain that.

PN424

THE COMMISSIONER: Thank you.

PN425

MR PEFANIS: The first argument I wanted to address was in relation to the comments in the La Trobe University decision of the Full Federal Court. There was a reference to the caution that should be taken in splitting up a sentence in a clause and parcelling it out into separate obligations.

PN426

THE COMMISSIONER: Yes.

PN427

MR PEFANIS: We would agree with that, but in fact this situation is in a lot of respects very similar to the dispute in La Trobe University and at 36 of our outline

of submissions we set out paragraphs 67 and 68 of Bromberg J's decision. There really is a lot of similarities. Bromberg J found that the first sentence of the clause, 'The university is committed to job security', was aspirational, but the second two sentences imposed binding obligations. Bromberg J goes into:

PN428

The second sentence deals with method. It identifies the means or mechanism by which the overarching goal is to be effected or carried into practice.

PN429

Then:

PN430

The context includes that the reservation of La Trobe's rights in the third sentence would be unnecessary if the second sentence left those rights unaffected. The third sentence reflects that the second sentence contains a limitation upon at least some of La Trobe's rights.

PN431

It would not have been necessary for La Trobe to have reserved its rights as against something that was merely aspirational. The qualified nature of the reservation in the third sentence is also couched in prescriptive rather than aspirational terms.

PN432

We would say this is a very similar situation that there would be no need for what I've termed the exemption sentence in clause 9.2 if the head count obligation was merely aspirational. It's a very similar situation and the reasoning, we would say, in that decision as far as it's relevant - because it's a different industrial instrument obviously and there's a different industrial context and different words used, but it's the same principle here as there. You wouldn't have an exemption whereby Toll claws back some of its – reserves some of its rights in a sense by saying if there are significant operational matters which do not permit it to maintain a level, you wouldn't have that exemption if the minimum head count was only aspirational.

PN433

Just addressing the arguments in relation to Mr Morrell's notes of the meeting and his notation that Toll advised him that it doesn't make good business sense to employ people permanently because the contract is going to end, I disagree that that is the same thing as – and I'll just use the exact words – 'significant operational matters preventing this number from being maintained.'

PN434

As we've said in the submissions in reply, of course Toll might be able to avoid redundancy entitlements if it were to not offer permanent employment and were it to offer fixed term employment or outer-limit term contracts. That is squarely sort of in the realm of good business sense, but that is different to significant operational matters preventing this number from being maintained - - -

PN435

THE COMMISSIONER: The losing of the contract one would have thought is a serious operational matter.

PN436

MR PEFANIS: It was, but I guess the evidence suggests that the work still exists. The contracts proposed by Toll People which are said to commence on 24 October 2022 – and this is JV5, page 2, engagement period, 24 October 2022 to end on 27 October 2024; two-year, 24-month outer-limit term contracts. As at today's date we're not aware of any evidence which would suggest that the work is not currently there.

PN437

THE COMMISSIONER: I don't think that that is an argument. I don't think that's being suggested by Toll. The work is there.

PN438

MR PEFANIS: The work is there, yes.

PN439

THE COMMISSIONER: It's just that the contract is going to end.

PN440

MR PEFANIS: That's right, but there may be – we just don't know what will happen. I mean, we don't know if it's the intention of Toll to pack the warehouse up in 2025 or whether another contract will be obtained. It's just unclear. It's still quite a long way away and so we would say that to the extent - - -

PN441

THE COMMISSIONER: It's 18 months.

PN442

MR PEFANIS: We can understand that there might be a dispute in relation to that matter, but the dispute here before the Commission is whether there is a binding obligation at all, not whether that exemption has been enlivened and whether they have complied with their obligation to consult in relation to that exemption. If that dispute were to be resolved, the parties would have to look at whether the words – well, they would have to look at the words 'significant operational requirements preventing the number being maintained' and give effect to - you know, interpret those words and see whether the circumstances fit within those words.

PN443

The dispute hasn't progressed on that basis, we would submit, in dealing with whether the exemption has been enlivened because the argument of Toll is that there is no binding obligation at all, so that's the question - - -

PN444

THE COMMISSIONER: I don't know that – yes, I agree that Toll say there is no binding obligation, but they say that the aspiration in the clause is modified by what you call the exemption, which they don't call an exemption but more a modification on the obligation that you say exists.

PN445

MR PEFANIS: Yes, I understand that on their construction that exemption is really giving effect to the aspirational nature of the clause, but we say it's not – obviously that there is an exemption, it can be enlivened and that's similar to the La Trobe decision. There is a reservation of rights in that sentence. There are certain constraints on Toll – well, there are certain circumstances in which Toll doesn't have to comply with the head count.

PN446

Obviously we have made the submissions referring to the caution that must be exercised in establishing that there is a common understanding between the parties and we don't resile from those. You know, those are cases that have to be put before the Commission. We have to contend with those. Our submission is certainly not that the industrial context is such that the Commission must interpret in the way that we see it.

PN447

If there is an ambiguity – I mean, obviously my submission before was that the words in context don't give rise to any ambiguity. If there is, there is an industrial context, it's only to assist in interpretation. It doesn't displace the obligations, et cetera, but it's not, we would say – this is not a case where there has been a common inadvertence. It's not that sort of case. We would submit that to the extent that the industrial context is relevant, there was a common understanding as to the application of the clauses by virtue of their application over time.

PN448

In terms of the arguments relating to clause 8.1.2, I hadn't apprehended that the respondent's argument was until now that the clause was not a matter pertaining. We submit that it certainly is a matter pertaining to the employment relationship. It's a clause which sets up a system by which people who are to become permanent employees are to be chosen from the pool. That is the system that Toll are obliged to comply with.

PN449

Certainly we don't suggest that there are rights that the labour hire employees have or anything of that nature, but this type of clause – you know, these clauses are certainly found to be matters pertaining to the employment relationship in the sense that the employees – it's not in the interests of the employees to have labour hire employees who are effectively employed there permanently.

PN450

I can't, because I hadn't apprehended that it was a matter pertaining argument - there is an NUW decision from a while ago and I would have to find it, but there are various decisions – Schenker – but I would have to find those. Those types of clauses have been held to be matters pertaining because it goes to the job security of the employees and the obligation is on Toll to turn to the pool that are already working at the site.

PN451

THE COMMISSIONER: Yes, well, Mr Pefanis, you might locate the relevant decision - - -

PN452

MR PEFANIS: Yes.

PN453

THE COMMISSIONER: - - - and send it to me, and to Ms Sweatman. Ms Sweatman, if you have got any contrary views on the matter or contrary decisions, you might just refer those to me.

PN454

MS SWEATMAN: Yes. Thank you, Commissioner. I think that's a sensible way forward. I should say it's not certainly part of our case that this issue – it was just really in terms of the questions that you and I were going back and forth on that I was saying encroach on questions of whether it's a matter pertaining, but that's certainly not one of our primary positions.

PN455

THE COMMISSIONER: Thank you.

PN456

MR PEFANIS: Thank you. That's all I wanted to say in reply, Commissioner.

PN457

THE COMMISSIONER: Thank you, Mr Pefanis. Anything else from you, Ms Sweatman?

PN458

MS SWEATMAN: No, nothing.

PN459

THE COMMISSIONER: Send me the reference to the decision in any event, Mr Pefanis, that would be appreciated. If there is nothing else, I'll reserve my decision and we will adjourn. Thank you.

ADJOURNED INDEFINITELY **[11.33 AM]**

LIST OF WITNESSES, EXHIBITS AND MFIs