



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

B2023/543

s.234 - Application for an intractable bargaining declaration

**Virgin Australia Regional Airlines Pty Ltd
and
The Australian Licensed Aircraft Engineers' Association
(B2023/543)**

Sydney

11.45 AM, MONDAY, 26 JUNE 2023

PN1

JUSTICE HATCHER: I will take appearances. Mr Follett, you appear for the applicant, Virgin Australia Regional Airlines Pty Ltd?

PN2

MR M FOLLETT: Yes, seeking permission to do so, your Honour.

PN3

JUSTICE HATCHER: Yes. Mr Saunders, you appear for the ALAEA?

PN4

MR L SAUNDERS: Yes, your Honour.

PN5

JUSTICE HATCHER: All right. I grant permission for legal representation for the purposes of today's proceeding. Mr Follett, how should we proceed? Assuming the application is pressed I should say that I intend to refer the matter to a Full Bench due to its novelty. So you might want to bear that in mind.

PN6

MR FOLLETT: Yes, your Honour. Well, the application was filed on 8 June, and it's been our intention since filing to have the application heard and determined with a degree of expedition. We note, your Honour is probably aware, there was a cooling off application filed at the same time which was disposed of by Commissioner Schneider last week. It's our position that consistent with what I have just outlined that we would be seeking a hearing with a degree of expedition, of course appropriate or giving a proper opportunity for at least the ALAEA to respond.

PN7

It's difficult to estimate, your Honour, the duration of the hearing. That might depend upon the number of witnesses which is difficult to identify just now. Certainly from our perspective our principal in-chief evidence is likely to be one witness. There may be a second, but at this stage we are proceeding on the basis that there's likely to be one witness. Whether or not we have additional witnesses in reply might depend on the nature of the evidence led by the union, and in particular the extent to which matters of chronology are disputed, including particular conversations or bargaining meetings or things of that type.

PN8

We would be contemplating I think for safety sake, your Honour, noting the president's intention to direct the matter be heard by a Full Bench, for the matter to be listed for three days. It may well be depending upon the evidence that it could be accommodated in two. Evidently there will be some cross-examination of witnesses, but the length and breadth of that will depend upon the evidentiary issues that separate the parties. With that in mind, your Honour, we were contemplating a hearing on or around 19 July or the week or so after.

PN9

JUSTICE HATCHER: Yes. So how would that work in terms of a timetable?

PN10

MR FOLLETT: So we were proposing perhaps a slightly unorthodox separation of evidence and submissions, but still having us go first, simply as a matter of timing. So we were contemplating for example our evidence by Friday 30 June; our submissions by 4 July; the union's evidence by 11 July; the union's submissions by 14 July; our reply evidence by 17 July, which may be a little tight depending upon the union's evidence, and then a hearing on or around 19 July or some time shortly thereafter.

PN11

That's a period for the union, certainly in response to our evidence-in-chief, of some 11 days. As your Honour will appreciate whilst our evidence will be lengthy a very large part of that will be annexed documents, and a very large part of it will be matters of chronology traversing bargaining, bargaining meetings, exchange of correspondence in respect of them, et cetera. We don't imagine that much of that material, lengthy as it may be, will be controversial.

PN12

There may be some differences of views, particularly around what may or may not have been said at particular meetings, but the correspondence will largely speak for itself. So whilst I'm flagging that our evidence when received will look lengthy we don't anticipate that 11 days will cause any difficulties, particularly in circumstances where the application was filed 18 days ago, and we would have anticipated that the union would have been preparing some material in the interim period.

PN13

JUSTICE HATCHER: So, Mr Follett, would we anticipate that the matters in contention would be confined to section 235(2)(b) and (c)? It seems there's no dispute about (a).

PN14

MR FOLLETT: I don't imagine there to be a dispute about (a), depending upon what construction may or may not be placed upon that provision. Certainly as expressed it contemplates participation in a section 240 process. I don't know whether some submission is to be made about the quality of that participation, but that would be right, your Honour. So (b) and (c), (b) being intractable, and (c) reasonableness.

PN15

I was just about to mention, your Honour, reasonableness contemplates having regard to the views of other bargaining representatives. On my instructions there are no individual bargaining representatives that we know of. The agreement that is sought to be made covers licenced engineers as well as unlicensed engineers; that is LAMEs and AMEs, AMEs eligible for membership of the AMWU or potentially CEPU.

PN16

The AMWU was initially involved in bargaining at the very beginning, but has not been involved in bargaining for a very long period of time. They've attended no meetings. We do not know, your Honour, whether they are a default bargaining representative, because we do not know whether they have a member. If they were a default bargaining representative it would seem that the Commission would have to have regard to their views. We don't know what the solution to that, your Honour, might be other than potentially either us or the Commission enquiring of the AMWU whether it claims to have a member within the relevant cohort. But as I said they haven't participated in bargaining for a very long period of time.

PN17

JUSTICE HATCHER: All right. So how would the CEPU fit in?

PN18

MR FOLLETT: I think they might - I could be wrong on this, your Honour, but I thought they might have had capacity to cover certain avionics, AMEs.

PN19

JUSTICE HATCHER: They haven't participated at all?

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MR FOLLETT: Not at all.

PN21

JUSTICE HATCHER: Mr Saunders, any reason why I shouldn't make those directions?

PN22

MR SAUNDERS: Only minor matters of detail. The first is I don't have a difficulty with the timetable proposed generally, but I don't see a particular reason to split the union's evidence and submissions, and would frankly be assisted by the (indistinct) preparing the union's evidence. So if it could be the union's evidence and submissions on 14 July, so removing that 11 July direction. I appreciate that compresses the time for my friend's reply, but the evidence is likely to follow along the lines of what was filed in the 245 application. We've all had at least an early indication what the evidence is likely to be, and I do agree that the dispute is likely to be confined to matters of characterisation as to what happened as opposed to the chronology itself.

PN23

JUSTICE HATCHER: How many witnesses would you anticipate, Mr Saunders?

PN24

MR SAUNDERS: One to two. One major witness and a second one to fill in some gaps potentially. I agree broadly with the estimate of hearing time. It seems to me more likely to be two days, but it's I suppose better to take the three rather than having to find a third day. The difficulty is I'm not available at all in the week of the 17th, but I can accommodate anything in the week of the 24th and anything in the week of the 31st except the Tuesday the 1st.

PN25

JUSTICE HATCHER: What's the position with protected industrial action, is that ongoing at the moment?

PN26

MR SAUNDERS: It is, yes.

PN27

JUSTICE HATCHER: Anything else, Mr Saunders?

PN28

MR SAUNDERS: Only that I'm instructed that the AMWU is a default bargaining representative, or they're at least certainly claiming to be. We don't know about the CEPU.

PN29

JUSTICE HATCHER: All right. Mr Follett, do you want to say anything in response to that? I should indicate that if it's not done in the week of the 17th then it probably can't be done until at least 26 July.

PN30

MR FOLLETT: I may or may not have something on 26 July. I'm available the entire week of the 24th except potentially for 26 July. I have a mediation listed in my diary, but I don't know whether it's progressing or not. But I wouldn't feel comfortable accepting a date on the 26th for that reason. If your Honour couldn't sit before the 26th and your Honour is not prepared to contemplate a hearing on - -
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PN31

JUSTICE HATCHER: Just hold on a sec, Mr Follett. I might be able to offer the 24th with a slightly later start, but we can sit later, and then the 27th. It's probably the best I can do in that week.

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MR FOLLETT: The 24th and 27th?

PN33

JUSTICE HATCHER: Yes.

PN34

MR FOLLETT: Would your Honour be able to reserve either the 28th or the 31st?

PN35

JUSTICE HATCHER: Not the 28th. The next date would be the 1st.

PN36

MR SAUNDERS: That's the one day that week I can't do.

PN37

JUSTICE HATCHER: Mr Saunders, you definitely can't do anything in the preceding week?

PN38

MR SAUNDERS: I was just looking at my diary. I may be able to make myself available on the Friday the 21st.

PN39

JUSTICE HATCHER: So we've got three days to play with then, assuming I can line up the other members.

PN40

MR FOLLETT: That's 21, 24, 27?

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JUSTICE HATCHER: Correct. It would probably need to be in Sydney. Is that a difficulty?

PN42

MR SAUNDERS: Not for us.

PN43

MR FOLLETT: Not for us, your Honour.

PN44

JUSTICE HATCHER: So given that slippage in the date, Mr Follett, is there any difficulty in accommodating Mr Saunders' proposal just effectively to make - - -

PN45

MR FOLLETT: The union's evidence and submissions 14 July?

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JUSTICE HATCHER: Yes.

PN47

MR FOLLETT: No. No difficulty with a subsequent variation to our reply perhaps on the 19th?

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JUSTICE HATCHER: Yes, all right, we will do that. All right, anything further?

PN49

MR SAUNDERS: Only in respect of at least the AMWU and potentially the CEPU.

PN50

JUSTICE HATCHER: I will make the directions in response to the application applicable to any bargaining representative, and we will notify the AMWU and the CEPU for more an abundance of caution.

PN51

MR FOLLETT: If your Honour please.

PN52

JUSTICE HATCHER: We might also set up a web page so that if anyone else is interested they can turn up.

PN53

MR SAUNDERS: I think that's already be done, your Honour.

PN54

JUSTICE HATCHER: All right. Well, there we go. All right. I will have to check the other Full Bench members' dates, but assuming they're available that's when we will proceed. If there's still a problem I will contact parties directly.

PN55

MR SAUNDERS: May it please.

PN56

JUSTICE HATCHER: All right, nothing further, we will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[12.17 PM]