



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER BISSETT**

**C2022/8256**

**s.739 - Application to deal with a dispute**

**"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union"  
known as the Australian Manufacturing Workers' Union (AMWU)  
and  
Opal Packaging Australia Pty Ltd T/A Opal Fibre Packaging  
(C2022/8256)**

**Orora Fibre Packaging National Enterprise Agreement 2019**

**Melbourne**

**10.00 AM, THURSDAY, 31 AUGUST 2023**

**Continued from 25/08/2023**

PN142

THE COMMISSIONER: Thank you. Last week we heard the evidence of Mr Horan, and I understand that the remaining witnesses for the AMWU are not required for cross-examination.

PN143

MS YUEN: Yes, that's correct, Commissioner.

PN144

THE COMMISSIONER: Thank you. So we should mark the witness statements of those people. Mr Horan was exhibit A1 I think, AMWU1. And then we had another document. No, I didn't mark anything else?

PN145

MR BONELLO: No, Commissioner.

PN146

THE COMMISSIONER: I'm sorry. I might have been getting confused with another matter I heard in between. You want to tender the other three witness statements?

PN147

MR BONELLO: Yes, Commissioner, if we may.

**EXHIBIT #AMWU2 WITNESS STATEMENT OF LORRAINE  
CASSAN DATED 15/08/2023 AND TWO ATTACHMENTS**

**EXHIBIT #AMWU3 WITNESS STATEMENT OF MICHAEL BULL  
DATED 16/08/2023**

**EXHIBIT #AMWU4 WITNESS STATEMENT OF ABA DEBASIA  
DATED 14/08/2023 AND ONE ATTACHMENT**

PN148

THE COMMISSIONER: Thank you. Anything else from you, Mr Bonello?

PN149

MR BONELLO: No, Commissioner, thank you.

PN150

THE COMMISSIONER: Thank you. Ms Yuen?

PN151

MS YUEN: Thank you, Commissioner. Mr Bonello and I have spoken and we think best to do submissions at the end. So if you're comfortable I would like to call Mr Beales.

PN152

THE COMMISSIONER: Thank you. Call Mr Beales.

PN153

THE ASSOCIATE: Can you please state your full name and your address.

PN154

MR BEALES: Rodney Beales, (address supplied).

**<RODNEY BEALES, SWORN** [10.02 AM]

**EXAMINATION-IN-CHIEF BY MS YUEN** [10.02 AM]

PN155

THE COMMISSIONER: Thank you. You may sit down?---Thank you, Commissioner.

PN156

THE COMMISSIONER: Ms Yuen?

PN157

MS YUEN: Thank you, Commissioner. Could you please confirm your full name?---Yes. Rodney Beales.

PN158

And your address?---(Address supplied)

PN159

Thank you. Could I ask you to open the folder in front of you and turn to page 57. You will see the page numbers in red font at the top?---Yes.

PN160

And if you could have a look at pages 57 through to 72, please?---Yes.

PN161

Can you confirm that that is the witness statement and attachments that you prepared for these proceedings?---Yes.

PN162

Is that witness statement true and correct?---Yes.

PN163

Commissioner, I seek to tender that statement.

PN164

THE COMMISSIONER: Thank you.

PN165

MR BONELLO: Sorry, Commissioner, if it pleases the applicant intends to object to two paragraphs of the witness statement of Mr Beales.

PN166

THE COMMISSIONER: Certainly.

\*\*\* RODNEY BEALES

XN MS YUEN

PN167

MR BONELLO: We object to paragraphs 10 and 17 of the witness statement on the grounds of hearsay. The respondent had an opportunity to get Mr Hines to write a witness statement in this matter, but chose not to.

PN168

THE COMMISSIONER: Thank you.

PN169

MS YUEN: Commissioner, we say the Commission can allocate appropriate weight to the evidence rather than excluding it entirely.

PN170

THE COMMISSIONER: With respect to both paragraphs 10 and 17 I note that the evidence is in the form of this witness telling me what he says was told to him. It doesn't go to the truth of Mr Hines - it doesn't go to whether Mr Hines actually did it or not, but rather what Mr Hines said to this witness. So this witness can give evidence of what Mr Hines told him, but it doesn't go to the truth of the statement of Mr Hines.

PN171

MR BONELLO: Yes, okay, Commissioner.

PN172

THE COMMISSIONER: For that reason I will allow them.

PN173

MR BONELLO: Yes, okay. Thank you, Commissioner.

PN174

MS YUEN: Thank you, Commissioner.

PN175

THE COMMISSIONER: They will be accorded that weight.

PN176

MR BONELLO: Thank you, Commissioner.

PN177

MS YUEN: I seek to tender that statement, Commissioner.

PN178

THE COMMISSIONER: Thank you.

**EXHIBIT #OPAL1 WITNESS STATEMENT OF RODNEY BEALES  
DATED 26/07/2023 AND SIX ATTACHMENTS**

PN179

MS YUEN: Thank you, Commissioner. Mr Beales, in paragraph 2 of your statement you mention that you've held the role of General Manager Workplace Relations for the Opal Group since January 2022; is that correct?---Yes.

\*\*\* RODNEY BEALES

XN MS YUEN

PN180

In that role have you been involved in any disputes under the National Fibre Agreement across the 10 sites covered by the agreement?---Yes.

PN181

Now, in this hearing Mr Horan has given some evidence that in his experience as a union delegate at the Scoresby (indistinct) site he did not consider it normal practice to use the word 'dispute' when informing Opal that an issue is in dispute under the disputes procedure. What do you say about that based on your own experience?---The word 'dispute' is used quite frequently by the AMWU. So when a matter is not in agreement it's always referred to as a dispute in my experience.

PN182

No further questions, Commissioner.

PN183

THE COMMISSIONER: Thank you. Mr Bonello?

PN184

MR BONELLO: Thanks, Commissioner.

**CROSS-EXAMINATION BY MR BONELLO**

**[10.07 AM]**

PN185

Good morning?---Good morning.

PN186

I have only got a few questions for you today, so I won't keep you long. If I may get you to turn to page 63 of the court book, please. On 6 December 2023(sic) Ms Debasia sent that email to you; is that correct?---Yes.

PN187

And this email expresses a view that Opal has failed to follow the disciplinary procedures in the agreement; is that correct?---Yes.

PN188

And it would have been your position at the time, Mr Beales, and the position of Opal that the correct procedures were in fact used?

PN189

MS YUEN: Commissioner, I object to the question on the grounds of relevance. The matter for determination here is whether the disputes process has been followed, not the substantive question of following the relevant procedures that may have applied in terms of the substantive issues at play.

PN190

THE COMMISSIONER: Mr Bonello?

\*\*\* RODNEY BEALES

XXN MR BONELLO

PN191

MR BONELLO: Commissioner, the question goes to, I guess, what the discussions were about, which is a common part in the jurisdictional objection hearing.

PN192

THE COMMISSIONER: I am going to allow the question.

PN193

MR BONELLO: Mr Beales, I will repeat the question. Following the email of Ms Debasia it was your position and Opal's position that they had in fact used the correct procedures in the agreement; is that correct?---Yes, the process was on foot, so, yes, we were following the agreement.

PN194

To confirm Opal at the time and yourself understood that you were following the correct procedures in the agreement; is that correct?---At the time of this email there was dispute on foot, an investigation on foot, so, yes.

PN195

So is it your evidence, Mr Beales, that Opal had opposing views to the views contained in the email of Ms Debasia?---Yes.

PN196

Did you reply to Ms Debasia's email, Mr Beales?---No.

PN197

No further questions, Commissioner.

PN198

THE COMMISSIONER: Thank you. Re-examination?

PN199

MS YUEN: No re-examination, thank you, Commissioner.

PN200

THE COMMISSIONER: Thank you, Mr Beales, you're excused?---Thank you.

<THE WITNESS WITHDREW

[10.10 AM]

PN201

MS YUEN: Commissioner, I call Melissa Chew, please.

PN202

THE COMMISSIONER: Thank you.

PN203

THE ASSOCIATE: Can you please state your full name and your address.

PN204

MS CHEW: My name is Melissa Chew, (address supplied).

\*\*\* RODNEY BEALES

XXN MR BONELLO

<MELISSA CHEW, AFFIRMED

[10.11 AM]

EXAMINATION-IN-CHIEF BY MS YUEN

[10.11 AM]

PN205

MS YUEN: Could you please state your full name?---Sure. My name is Melissa Chew.

PN206

And could you state your business address, please?---Business address is at Opal (indistinct) Services Pty Ltd. The corporate office is at Botanicca Building 1, Swan Street, Burnley, Victoria 3121.

PN207

Thank you. Now, just in front of you you will see a folder which contains the court book. If you could open that up, I'm going to ask you to look at a few pages in that document. The page numbers are in red at the top. So could I start by asking you to find pages 51 through to 55?---Yes.

PN208

And then secondly if you could please go forward to pages 85 to 86?---Yes.

PN209

Are they the two witness statements that you prepared for the purposes of this matter?---Yes, that's correct.

PN210

And are those statements true and correct?---They are true.

PN211

Subject to any objections that my learned friend might have I would seek to tender those statements, Commissioner.

PN212

THE COMMISSIONER: Thank you. Any objections, Mr Bonello?

PN213

MR BONELLO: No objections, Commissioner.

PN214

THE COMMISSIONER: Thank you.

**EXHIBIT #OPAL2 WITNESS STATEMENT OF MELISSA CHEW  
DATED 26/07/2023 CONSISTING OF 11 PARAGRAPHS AND TWO  
ATTACHMENTS**

**EXHIBIT #OPAL3 REPLY WITNESS STATEMENT OF MELISSA  
CHEW DATED 22/08/2023 CONSISTING OF SEVEN PARAGRAPHS**

\*\*\* MELISSA CHEW

XN MS YUEN

PN215

MS YUEN: Thank you, Commissioner. Ms Chew, if I could ask you to please turn to page 85 again of the court book?---Yes.

PN216

Now, at paragraph 5 of that reply witness statement you've described Mr Edwards's role. Could you explain to the Commission in a little bit more detail what Mr Edwards's role involves?---Yes, sure. So Mr Justin Edwards, his role is the original general manager for Victoria and Tasmania. He's been appointed to this role early last year based in Melbourne, Victoria.

PN217

And what are his main duties in that role, Ms Chew?---So he looks after the box clients for Victoria and Tasmania.

PN218

And is he a member of the HR team at all?---No.

PN219

And have there been any changes to Mr Edwards's role between the 5 December meeting and now?---No, there hasn't been, no change at all.

PN220

Now, if I could ask you to please turn to page 53 of the court book?---Yes.

PN221

Could you please confirm whether you prepared that file note?---Yes, I did.

PN222

And when did you prepare it?---On the day itself.

PN223

Thank you. And the next two pages later, page 55?---Yes.

PN224

Could you confirm when you prepared that file note?---That was also prepared on the day itself.

PN225

And do you believe that both file notes are accurate?---Yes, I do.

PN226

MR BONELLO: Objection to the question, Commissioner, leading.

PN227

THE COMMISSIONER: Ms Yuen?

PN228

MS YUEN: I'm happy to rephrase the question, Commissioner.

\*\*\* MELISSA CHEW

XN MS YUEN

PN229



THE COMMISSIONER: Thank you.

PN230

MS YUEN: Ms Chew, Mr Horan has given evidence in these proceedings that the file note on page 53 is not accurate. What do you say to that?---I disagree.

PN231

Thank you. In fact Mr Horan gave evidence that he said more at the 5 December meeting than what is reflected in the file note. What do you say to that?---I disagree. I don't remember him saying much on that day.

PN232

And more specifically Mr Horan gave evidence that he said something about a dispute in the meeting. What do you say about that?---I don't remember that at all.

PN233

Thank you. No further questions, Commissioner.

PN234

THE COMMISSIONER: Thank you. Mr Bonello?

PN235

MR BONELLO: Thank you, Commissioner.

**CROSS-EXAMINATION BY MR BONELLO**

**[10.16 AM]**

PN236

Good morning, Ms Chew?---Good morning.

PN237

Can you please turn to page 53 of the court book, please?---Yes.

PN238

These are your notes that you took in the meeting on 5 December, aren't they?---Yes, that's right.

PN239

THE COMMISSIONER: Sorry, what was the question?

PN240

MR BONELLO: I will repeat that, Commissioner. These are your notes that you took in the meeting held 5 December, aren't they?---Yes.

PN241

Your role in this meeting was to record notes?---To take meeting notes, yes.

PN242

Your role wasn't to type exactly every word spoken, was it, Ms Chew?---No.

\*\*\* MELISSA CHEW

XXN MR BONELLO

PN243

You didn't record exactly every word spoken by Mr Horan, did you, Ms Chew?---Not verbatim.

PN244

No further questions, Commissioner.

PN245

MS YUEN: No re-examination, thank you, Commissioner.

PN246

THE COMMISSIONER: Thank you, Ms Chew, you're excused. You're free to go?---Thank you.

**<THE WITNESS WITHDREW**

**[10.17 AM]**

PN247

THE COMMISSIONER: Thank you. Mr Bonello?

PN248

MR BONELLO: May the applicant request to adjourn for 10 minutes just to compile the evidence given today and just to add it to the existing notes of the closing itself.

PN249

THE COMMISSIONER: Certainly. We will adjourn until half past 10.

PN250

MR BONELLO: Thank you, Commissioner.

**SHORT ADJOURNMENT**

**[10.18 AM]**

**RESUMED**

**[10.30 AM]**

PN251

THE COMMISSIONER: Thank you. Mr Bonello?

PN252

MR BONELLO: Thank you, Commissioner. Commissioner, first and foremost in closing we thank you for your assistance in this matter. The Commission's task is simple. It is whether the procedures for the resolution of disputes has been carried out or has been met between the parties. Based on the materials represented to the Commissioner we say the Commission must find that there is jurisdiction here.

PN253

In accordance with clause 15.2(b) of the agreement in the first instance the parties will attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor/manager. From the evidence given by Mr Horan this step was satisfied on 5 December 2023(sic).

\*\*\* MELISSA CHEW

XXN MR BONELLO

PN254

From his evidence and his consistent evidence during cross-examination Mr Horan raised a dispute with the respondent on two occasions that morning. Firstly, after he was refused a support person he raised to Mr Steve Hutchinson that this is not the correct procedure pursuant to the agreement. But secondly also he noted to Mr Edwards in that meeting that the disciplinary processes implemented by the respondent were not correct and not in line with the agreement.

PN255

When Mr Horan raised the dispute with Mr Hutchinson and Mr Edwards Mr Horan knew the agreement entitled him to the right of a support person or union representation, and in addition to this full disclosure and notification of the complaint within two working days. This is expressly stated at annexure 4 at clause 4.1 of the agreement. Mr Horan being a delegate of the site understands the agreement to an extent quite well.

PN256

He has been in these situations before as a support person for other employees, and given his understanding he was able to immediately acknowledge that on that day, 5 December, the respondent or the procedures that the respondent was implementing were incorrect. He was immediately able to identify that (1) they had not offered him a support person. They had not given him full disclosure before that initial meeting, and they had not given him notification within two working days of the complaint being made. On this day Mr Horan raised his concerns. He raised his view that the procedures were not being followed, and unfortunately he was shut down on each occasion.

PN257

I have cited, Commissioner, and I may not pronounce this correctly, the Maersk Crewing Australia matter I have cited, and at paragraph 92 of that judgment it sets out, 'The dispute procedure may begin with a question or an inquiry.' Also in the Qantas Airways matter I have cited at paragraph 70 of that judgment states that, 'The relevant clauses are to be construed with some degree of informality and flexibility.'

PN258

Further it notes a minimum content requirement, which is that there needed to be an occasion on which those participating in meetings had to know that there were opposing views being expressed, and that those opposing views needed to be resolved. And also in that judgment at paragraph 70 he states:

PN259

*It is not necessary with respect to those participating in the meeting or discussions know that they were participating in a meeting or discussion which forms part of the dispute resolution procedure.*

PN260

So, Commissioner, with reliance on those judgments we say Mr Horan wasn't required on 5 December to actually say the words, 'We are in dispute pursuant to clause 15.2 of the agreement', or just simply to say 'We are in dispute.' That is

construing the relevant clause in a formal and inflexible way which I guess is not the preferred way, or is not just (indistinct) preferred way of interpretation.

PN261

Mr Horan has expressed an opposing view that morning, an opposing view of the respondent, which the respondent ought to have known that that required resolution. However, unfortunately the respondent didn't entertain the, I guess, discussions to resolve that. So given this we say, and with reliance to the minimum content requirement that's referred to in the Qantas judgment, we say that the 5 December meeting meets that requirement and satisfies clause 15.2(b) of the agreement.

PN262

So now, Commissioner, we will move to 15.2(c) of the agreement and the, I guess, second discussion requirement in the disputes procedure. Again we submit that at the very least the attempt by Ms Debasia of the applicant to resolve the matter on 6 December with Mr Rod Beales by email satisfies that requirement. In her email she raises quite clearly a dispute in regards to the procedures the respondent has used regarding the disciplinary processes that Mr Horan was subject to.

PN263

It's clear that she raises an opposing view of the respondent, and from the email it's clear that such a view needed to be resolved. Mr Beales, as put in his evidence, did not reply to that email. If we look at paragraph 94 of the Maersk Crewing Australia judgment it reads:

PN264

*The discussion requires communication between the parties. If the discussion commences with an email which produces no response then the discussion has been brought to an end by the party who does not respond. However, it does not mean that there has been no discussion by the party who sent the email. Rather, in that event, the party who sought to instigate the discussion has met the requirement. The party who fails to respond has not.*

PN265

So in light of this, Commissioner, it's very clear that (1) the discussions for the purpose of this disputes procedure can be raised by different uses of technology, which in this case is an email, and (2) the email of Ms Debasia contains substance of the dispute, which was initially commenced by Mr Horan, and unfortunately she received no response. However, we can understand from the case law cited that this does not mean that there's been no discussion, and the party who instigated discussion has met the requirement. So based on that, Commissioner, we say that clause 15.2(c) has been met.

PN266

And, Commissioner, I will just add to that, further Mr Beales just gave evidence and his evidence contained that he himself and Opal had an opposing view to the email of Ms Debasia. So we seek that be also given some weight by yourself, Commissioner.

PN267

Lastly we turn to the discussion between Ms Lorraine Cassan and Mr Brad Hines which occurred on 7 December, and press that this discussion satisfies clause 15.2(d) of the agreement. Here it's again evident that Ms Cassan attempted to resolve the dispute with Mr Hines.

PN268

From the email correspondence it's evident that (1) a discussion has occurred between them regarding the dispute that concerns the disciplinary process in the agreement, and (2) it's clear that Ms Cassan is attempting to confirm with Mr Hines that they will follow the correct procedures of full disclosure prior to the next meeting, which I believe was the day after.

PN269

This in itself, Commissioner, and from the discussions with Ms Cassan and Mr Hines, this contained the dispute again which was initiated by Mr Horan, progressed by Ms Debasia, and now was up to Ms Cassan's authority, and unfortunately was unable to be resolved. We say that this discussion clearly presented an opposing view of the dispute which needed to be resolved, again quoting that matter I did before.

PN270

In that sense we say the minimum content requirement as noted in the Qantas judgment at paragraph 70 is met, and as I have noted before the judgment clarifies that it is not necessary for those participating in the discussions to know that they were participating in a meeting that was forming part of the disputes resolution procedure. So whether Mr Hines knew that such a discussion was for the purposes of satisfying clause 15.2(d) we say shouldn't be any concern to the Commission, and obviously we rely on the judgment that I cited before. So, Commissioner, based on what I have just said we submit that clause 15.2(b), (c) and (d) has been satisfied, the three discussions, if I may.

PN271

Now, Commissioner, I will just touch on one other issue very briefly which the respondent raised in their submissions. The respondent submits at paragraph 1.4 of their reply submissions that we are now seeking a determination from the Commission which is different to what we were initially seeking. We say that's incorrect, and what we are seeking the Commission to determine now is of the same substance to that expressed in the F10 filed back in December last year.

PN272

The F10 notes at clause 1.4 that the dispute concerns clause 17.3 and annexure 4 of the agreement. Further at clause 2 we identify the issue, which is whether the respondent has failed to follow annexure 4 in clause 17.3 of the agreement. This is the issue we seek be determined by yourself now, Commissioner. It is the same or carries the exact same substance in December last year. So for all those reasons, Commissioner, and with our materials and evidence we contend that the Commission does have jurisdiction in this respect, or in respect of this application, given that the AMWU has complied with the necessary steps contained in the agreement. Thank you.

PN273

THE COMMISSIONER: Thank you, Mr Bonello. Ms Yuen?

PN274

MS YUEN: Thank you, Commissioner. Commissioner, I refer to our submissions and our reply submissions which set out three key arguments from Opal, and as Mr Bonello has rightly identified the task for the Commission is to determine whether or not the dispute resolution procedure has been complied with. In our submission the applicant has not complied with the dispute resolution procedure. The relevant steps have not been taken. Even if the Commission finds that the relevant steps have been taken the dispute subject of the application was previously resolved.

PN275

And thirdly, even if the Commission finds against Opal in relation to those first two arguments and the Commission does determine it has jurisdiction Opal submits that the scope of the dispute to be determined moving forward is limited to the investigation and not to any disciplinary process commenced well after the dispute was notified to the Commission. If I can go through those three arguments - - -

PN276

THE COMMISSIONER: But that would mean, Ms Yuen, that if there's not a status quo clause in a dispute settlement procedure and a dispute is notified to the Commission the employer can continue on with doing whatever it is that's in dispute, and the Commission actually can't deal with what's happening while the Commission is actually trying to resolve the dispute, because we're restricted to, in your submission, the dispute that's notified.

PN277

MS YUEN: Yes, Commissioner, I can imagine there would be lots of scenarios. If I talk about this particular matter there is a clear distinction between the investigation process, which is really what Mr Horan had concerns with, continues to have concerns with. Mr Bonello referred to some of those specific substantive concerns; support person, provision of documents, et cetera. In our submission that is what the scope of the dispute was.

PN278

In our submission thereafter once the investigation was concluded that's when a disciplinary process started. And we submit that at that point, because I guess the second and third arguments are linked, Commissioner, and I acknowledge that because the dispute, we say, had been resolved in relation to the investigation and we had a way forward, therefore to now seek to reopen that and now bringing to the scope of the dispute the disciplinary process we say is not appropriate. If Mr Horan had concerns about the disciplinary process he should have raised them, and indeed he did and they were the subject of a separate application that the union made.

PN279

THE COMMISSIONER: Except that if the Commission finds, if we take what you're saying and the Commission does find for example that the investigation

process was not complied with, not completed in accordance with the agreement, that raises issues about the ability of the respondent to rely on the outcome of that investigation to then inform the next step, so the discipline process, doesn't it?

PN280

MS YUEN: Yes, Commissioner, I concede that that linkage could be made. In our submission - - -

PN281

THE COMMISSIONER: There is either a relationship between the investigation and then the discipline process, or there's not, and if there's not one wonders why you have the investigation.

PN282

MS YUEN: Yes, I understand, Commissioner, and I accept there's definitely a linkage between the two. I guess the key point that we would like to make in our submissions is the two are separate processes, and we say the first was the subject of the first dispute. The second was the subject of the second dispute which was subsequently discontinued. And I would submit, Commissioner, that should the Commission find that it has jurisdiction we can perhaps deal with that in more detail at that point in terms of what - in the event - we say there's evidence to come on that if we go down that path - in the event there were findings of issues with the investigation what that means to what happened thereafter.

PN283

THE COMMISSIONER: Yes. The reason I raise it now of course is to the extent that you rely on it in terms of the jurisdictional issue I am not quite sure it's as clear cut as you have put.

PN284

MS YUEN: Understood, Commissioner, thank you. Are you content for me to continue with submissions?

PN285

THE COMMISSIONER: Yes, certainly.

PN286

MS YUEN: Thank you, Commissioner. So if we start with the first argument, which really Mr Bonello's submissions focused on, which is compliance with the dispute resolution process in the enterprise agreement. The first point that I will make is the respondent's position in this matter does not rely on the Commission making findings on particular contested facts. Most of the facts are not in dispute. There is some differences in Mr Horan and Ms Chew's evidence about the 5 December meeting which I will come to. But largely the chain of events is not in contest.

PN287

The question for the Commission to determine is whether that chain of events satisfied each of the required steps in the dispute resolution procedure in order to establish the Commission's jurisdiction. In this regard by way of context if I can

just take a step back and refer to section 186(6) of the Act, which sort of sets the scene for dispute settlement procedures.

PN288

That section provides that an enterprise agreement must contain a term that provides a procedure for settling disputes about matters under the agreement or under the NES. And in our submission that context needs to be considered in the interpretation of this clause, why it is in the agreement and how it should be interpreted against the factual scenario that is before us.

PN289

In our submission given that section 186 requires enterprise agreements to contain a procedure for settling disputes it should be read as being it's not about simply notifying of disputes, expressing concerns or displeasure with what's going on, it's about the parties actually seeking to see if they can settle or resolve the concerns that are at play.

PN290

In our submission the manner of required compliance with the dispute resolution procedure should also be read in the broader context of the objects of the Fair Work Act, including the object of cooperative and productive workplace relations, as referred to in our submissions. So viewed in that context and in the context of the actual working of clause 15.2 I refer to paragraph 2.3 of our reply submissions, which sets out the reasons why we say the chain of events did not amount to compliance with the dispute resolution process.

PN291

In our submission there's four factors that the Commission should consider when looking through the sequence of events. The first one is that in our submission the dispute resolution procedure does require discussions to occur. Flicking off an email, flicking off a text message we say does not meet this requirement.

PN292

THE COMMISSIONER: Then what does a party do if the other party doesn't respond; what are they meant to do, sit there and wait?

PN293

MS YUEN: And Mr Bonello was absolutely right, the Maersk decision deals with that, and the Maersk decision was a good example, because in that case there was a lengthy, considerable period where one party was waiting for the other party to respond and engage, and in that case the court held that, well the discussion was essentially concluded because one party refused to participate.

PN294

In our submission that is a very different case to the one before us. At no stage was there a protracted period where we were being chased and people were seeking discussions and we were refusing to respond and refusing to engage. This all happened over a very short space of time, and in our submission the evidence has not established that Opal effectively stonewalled the attempts by the applicant or his representatives to engage in dispute discussions.



PN295

THE COMMISSIONER: How long is a bit of string.

PN296

MS YUEN: I appreciate that, Commissioner, and we are perhaps testing some principles here that need to be tested, and I appreciate that and I will make some further submissions about that shortly, but in our submission the situation before us is clearly not at the level of the stonewalling that applied in the Maersk decision.

PN297

THE COMMISSIONER: It might not be at that level of stonewalling, but the issue of course is how long a party needs to wait, and it might well be argued that the matters raised by Ms Debasia in her email demanded a response. None has yet to be given. Sorry, none has been given to date, or at no stage as I understand the evidence of Mr Beales responded to that email. He recognised that it indicated a difference of opinion between the parties as to what Opal thought they were doing and what the AMWU thought they were doing, but still didn't respond.

PN298

MS YUEN: Yes, Commissioner, and in my submission there's nothing inappropriate about that. Indeed the very following day Ms Cassan and Mr Hines engaged in correspondence to clarify that, you know, what was going to happen at the 9 December meeting and what was going on. So to suggest that Mr Beales stonewalled or deliberately held things up or was not engaging in the disputes process, in our submission is not the case on the evidence. Ms Debasia's email does not request a discussion, does not request a response, does not indicate that the parties are seeking to resolve a matter. It simply makes a statement as to the position of the applicant, and in the context that there were ongoing discussions happening at the time, we submit that it is not enough to conclude that there was a stonewalling that would give rise to the satisfaction of the step in the dispute resolution procedure.

PN299

THE COMMISSIONER: Sitting around waiting for Mr Beales, and this is not a criticism of Mr Beales, but sitting there and waiting for Mr Beales to respond to the email or decide whether he should respond to the email was going to make it too late. Everyone knew, and certainly Ms Cassan's evidence was that she knew the meeting was going to happen with Mr Horan, she wanted to make sure things happened properly, so she escalated the matter.

PN300

So I guess the issue here and what differentiates this from Maersk was that it wasn't that nothing would happen if Mr Beales didn't respond, it was that things kept moving and there was a need from the AMWU's perspective to try and get the matter that they say was in dispute back under control in some way or another. So it's a little bit different from the Maersk situation in that respect.

PN301

MS YUEN: Yes. Yes, I agree, Commissioner, it's quite different from the Maersk situation and it's an interesting challenge to apply the principles there to

this quite unusual set of facts. In our submission a fundamental aspect of the dispute resolution procedure is that there must be an attempt to resolve the matter before proceeding to the next step in the disputes procedure, again read in conjunction with section 186(6) of the Act, being a procedure for settling disputes.

PN302

In our submission a finding that a perfunctory statement of one party's concerns is all that is required is inconsistent with the Act and would have far reaching consequences for the willingness of parties to participate in attempts to resolve a dispute, not only at the 10 sites covered by this agreement, but more broadly. In our submission it should be the case that both parties understand that there's something that they need to resolve.

PN303

Now, I appreciate the point made by Mr Bonello, and we accept that it doesn't need to be overly technical, it doesn't have to be a formal notification issued or a formal form or something along those lines, but in our submission both parties need to understand that they're trying to settle or resolve or address something because they have obligations under the agreement to seek to resolve those items if they are in a disputes process. It's difficult to see how the parties can be expected to comply with that if they don't know that they're in dispute, and even Mr Horan acknowledged this in his evidence.

PN304

When I asked him, you know, about his experience about notifying disputes his evidence was, well we often don't use the specific words, but it's obvious to all parties that there is a dispute. And in our submission in this case that was not the case, it was not obvious to Mr Beales when he received that email that there was a dispute that needed to be resolved.

PN305

It was a statement of understanding or concerns or issues raised by the AMWU, but there was no request for a meeting. There was no request for a response. There was no question, what's your position on the matter, we'd like to further discuss it or consider it. It was merely a statement of the AMWU's concerns. We submit that the AMWU has sought to re-characterise various steps as the disputes process after the fact.

PN306

And just on that I also note that at all relevant times it was open to Ms Debasia or any of the others involved to seek a meeting to call Mr Beales or Mr Edwards or any of the people involved in the whole process to engage in discussions rather than just firing off emails. And in our submission the failure to do so or the election to do so indicates that in fact they didn't consider themselves to be in the dispute resolution process. They were simply making statements of what they thought should occur in the investigation process, and that should be taken into account.

PN307

The other point, Commissioner, that I would like to make, or the other submission I would like to make is that clause 15.2 does require each step to be exhausted in

the process before moving to the next step. It's not a tick and flick and move on. The parties can only move from step 1 to step 2 if the step 1 discussions do not resolve the dispute, and the parties can only move from step 2 to step 3 if the dispute cannot be resolved at the workplace level.

PN308

Now, if we work through the claimed events in the various sequences that have been put forward by the applicant - well, the first point I'd make there is in our submission the suggestion today that the initial discussion with Mr Hutchinson in some way formed part of a dispute resolution process, that's the first time that has been raised. We have not had the opportunity to bring Mr Hutchinson to provide evidence on what has happened in that discussion because our understanding was the reliance was on the meeting with Mr Edwards and Ms Chew that Ms Chew gave evidence about.

PN309

So we make the point that Opal has not had the opportunity to provide evidence, and to the extent that the meeting with Mr Hutchinson is relied on as some step in the dispute resolution process we say that that simply can't be a conclusion that the Commission can reach.

PN310

If we turn them to the 5 December meeting with Ms Chew and with Mr Edwards. As I mentioned before this is really the only area of conflicting evidence. Everything after that is quite clear on the documents in terms of emails and text messages that were exchanged. We submit that Ms Chew's evidence was supported by a contemporaneous file note and should be preferred to the evidence given by Mr Horan.

PN311

In our submission Mr Horan's recollection was clearly confused. Even the basics of how Mr Edwards introduced himself and his role and his work location were unclear in Mr Horan's mind. This is not a criticism at all of Mr Horan. We appreciate, and he said in his evidence that going to the meeting threw him, and we submit that that has impacted his recollection of the events.

PN312

Even Mr Horan commented in his evidence that it was difficult to recall the specifics of the meeting that occurred some time ago. He acknowledged that he could not remember exact words. In cross-examination he seemed confused about what was said in his initial discussion with Mr Hutchinson versus what was subsequently said in the meeting with Mr Edwards and Ms Chew.

PN313

We also make the point that Mr Horan talked in cross-examination about wanting to refer to notes of the 5 December meeting, but no notes have been produced to the Commission, and in our submission the Commission can make an inference that if there are notes those notes would not assist the applicant's case in terms of what was said in that meeting.

PN314

We also submit that the Commission should not accept Mr Horan's evidence that he said something about a dispute in the meeting. In our submission his evidence was not convincing and Ms Chew's evidence in that regard should be preferred. Ms Chew confirmed that Mr Horan did not say something about a dispute in that meeting.

PN315

So that's the 5 December meeting. Then the 6 December email we have spoken about, Commissioner. In our submission clearly this was not a discussion. It was not an attempt to resolve a dispute. We say there is no basis on which to conclude that either party saw that sending of this email was a step in the disputes process.

PN316

Mr Bonello made the point out of the Maersk decision that while it doesn't have to be technically this is a dispute, this is called blah, blah, blah, it needs to be clear that there's a difference of views that needs to be resolved. In our submission that was not clear to Opal. Ms Debasia sent an email stating certain views. Did not request a response, did not request a discussion, did not seek to engage to see if those views could be resolved or settled in some manner.

PN317

And while Mr Beales did acknowledge that Opal had an opposing view there was never any attempt by the parties to exchange those views. On the one hand you can criticise Mr Beales for that, but on the other hand you can say, well how was Mr Beales to know that the union was seeking an exchange of views and seeking to resolve something when they simply flicked off an email. Didn't ask for a response, didn't ask for a discussion, didn't call to say we're really concerned, can we have a chat about this and see if we can work it out.

PN318

So if I then move to the 7 December emails that were exchanged Ms Cassan and Mr Hines. We say that it was not - firstly, as I said before, before these emails were exchanged it was not established that the dispute could not be resolved in the workplace for the reasons I have given before about the 5 December meeting and the 6 December email. In any case we say in relation to the 7 December emails this was not a discussion and was not done in an attempt to resolve a dispute as required by clause 15.2.

PN319

Now, Commissioner, there's been a few different sequences put forward by the applicant in terms of what were the steps that satisfied the dispute procedure. It seems today that the applicant has landed on that sequence that I have just been through; the 5 December meeting, the 6 December email and the 7 December emails. Would you like me to give submissions on the 9 December meeting and the 14 December text messages as well?

PN320

THE COMMISSIONER: Yes, please.

PN321

MS YUEN: Thank you, Commissioner. So if the 9 December meeting is found to potentially form part of the dispute resolution process, in relation to this we say again there was no attempt to resolve the dispute in the 9 December meeting. To pick up on the Maersk reasoning, to the extent that the AMWU argues that Mr Wilmore refused to engage in dispute discussions at the 9 December meeting we say that argument is misconceived.

PN322

The purpose of the meeting was to obtain Mr Horan's version of events as part of the investigation that was underway at that time. Mr Wilmore was the appointed investigator, and quite rightly and appropriately kept bringing the meeting back to its purpose. Why they were all there was to get the version of events.

PN323

In any case Mr Wilmore is neither a relevant supervisor or manager within the meaning of clause 15.2(b), nor a more senior level of management within the meaning of clause 15.2(c). Neither he nor Ms Chew had any capacity to engage in a dispute resolution procedure on behalf of Opal.

PN324

We submit there's no evidence before the Commission that Mr Horan or Mr Bull sought to have a meeting with relevant management representatives to discuss the dispute. No explanation has been provided by Mr Horan nor Mr Bull for not seeking to have that meeting. The clear conclusion is that none of the participants at that meeting understood the meeting to be a meeting that was seeking to resolve a dispute or seeking to resolve a difference of views between the parties.

PN325

Then, Commissioner, if we move to the 14 December text messages. The first most obvious point is these text messages were sent after the filing of the F10 in relation to this dispute earlier that same day. In any case even if they were to be taken into account they were not a discussion again, they were not in an attempt to resolve a dispute, and we submit that at this point that condition had not been met that the dispute could not be resolved at the workplace level, such as to give rise to the need for a discussion between Mr Hines and Ms Cassan.

PN326

While the sequence was that the text messages were exchanged after, if it was the other way around and the F10 had been filed after the text messages, this is precisely the sort of scenario that we say the objects of the Act and section 186(6) cannot be contemplated; that the parties could fire off a couple of text messages, agree to speak the next day, and minutes later an application is filed in the Commission.

PN327

So, Commissioner, for all of these reasons the respondent submits that our first argument should be accepted, that the dispute resolution procedure has not been complied with, has not been followed, and the attempt by the applicant to re-characterise these events after the fact by proposing various alternative sequences in the hope that one will stick should be rejected.

PN328

Commissioner, our second argument is that the dispute was already resolved. Clause 15.2(f) of the dispute resolution procedure provides for a dispute to proceed to arbitration where the Commission is unable to resolve the dispute by way of mediation and/or conciliation and where the matter in dispute remains unresolved. In our submission this is not the case here. The respondent participated in a conference while reserving our rights in relation to the jurisdictional objection, and the dispute in relation to the investigation was resolved at that conference.

PN329

We are not arguing here that there was a broader resolution of all matters relating to Mr Horan's employment or anything along those lines. We absolutely accept it was a limited resolution relating to the dispute at that time which was about an investigation that was underway at that point in time and was completed a week or so later. We refer to Mr Bonello's email on page 47 of the court book which specifically acknowledges this. Mr Bonello says:

PN330

*In this matter before the Commissioner common ground was reached between the parties for the purposes of resolving the matter on 15 December 2022 listing date.*

PN331

And then Mr Bonello goes on to say:

PN332

*Unfortunately the common ground reached between the parties later fell apart via a decision from the respondent to administer disciplinary action that was not agreed upon. The parties have since tried to resolve the matter, however haven't been able to reach a solution.*

PN333

I repeat again the respondent's assertions at paragraph 4.7 of our reply submissions. The applicant has not explained any of the matters set out there, and we say it's simply not credible for the applicant to maintain a position that the dispute in relation to the conduct of the investigation was not resolved. There is nothing in the applicant's material that contradicts the position set out in Mr Bonello's email that the matter was resolved.

PN334

And that really leads in to the third argument, Commissioner, which is that even if Opal fails in relation to the first and the second arguments, and if the Commission finds that it does have jurisdiction, we say that the spoke of the dispute is limited to the investigation and not to any disciplinary process commenced well after the dispute was notified to the Commission. As set out in Mr Bonello's email it was only afterwards when the disciplinary process commenced that things fell apart, so to speak, and at that point we say a new dispute arose.

PN335

It is clear from Mr Horan's evidence that there is perhaps a bit of muddling of the difference between an investigation process and a disciplinary process. We say that the evidence provided by both Mr Beales and Ms Chew is very clear. The events leading up to the filing of the F10 related to a misconduct investigation, an investigation process. There was no disciplinary process on foot.

PN336

Take the hypothetical scenario where the investigation had concluded, there was no misconduct, the matter would have been ended and nothing further would have happened. It was ultimately the subsequent conclusion of the investigation which found substantiated misconduct allegations, which then triggered a disciplinary process to follow thereafter.

PN337

So in our submission as set out in Mr Bonello's 23 June email at page 47 of the court book the respondent's decision to administer disciplinary action occurred after the Fair Work Commission conference on 15 December, and as such the disciplinary process itself cannot be said to form part of this dispute should the Commission find that it does have jurisdiction. And I appreciate, Commissioner, we had an exchange before about the limits of that and we obviously reserve our rights to provide further submissions on that should the matter proceed in due course.

PN338

Now, in this regard the commencement of the disciplinary process after the conclusion of the investigation and the subsequent issuing of the final warning by the respondent as part of that process was a matter that was open to Mr Horan to raise a dispute in relation to at any time on or after 22 December. The applicant appeared to take such a step by filing a Form F10 on 17 April, which became matter C2023/2018. For reasons that have not been explained to the Commission the applicant chose to discontinue that proceeding.

PN339

The applicant has not filed any materials, has not provided any explanation for why it would have filed a Form F10 which subsequently became C2023/2018.

PN340

THE COMMISSIONER: Sorry to interrupt you, Ms Yuen, I don't think it's 2018, I think it was 2081.

PN341

MS YUEN: Sorry, have I made a typo in my submissions?

PN342

THE COMMISSIONER: Yes. Because I went looking for it and ended up in some other dispute, but that's fine, I found the right one.

PN343

MS YUEN: My apologies for that typo in our submissions, Commissioner.

PN344

THE COMMISSIONER: But if anyone else is trying to find that dispute notification I think it's not 2018.

PN345

MS YUEN: Thank you very much for picking that up.

PN346

THE COMMISSIONER: That's all right.

PN347

MS YUEN: So, Commissioner, as I was saying the applicant is now saying that the matters seeking to be agitated here relating to the disciplinary action and the final warning are part of this dispute. There's no explanation been provided as to why the subsequent dispute was filed or considered necessary. Taking into account all of this on this basis we submit that the Commission can conclude it does not have jurisdiction. In the event that the Commission does conclude it does have jurisdiction we say the dispute is limited to the investigation process only and not the subsequent disciplinary process.

PN348

The last few points from me, Commissioner - thank you for bearing with me - in the event that the Commission does find that it does have jurisdiction I note that the respondent has reserved its rights in full in relation to the substantive issues, and we will lead detailed evidence should it be required setting out the respondent's position on the substantive issues mentioned; support person, provision of documents, et cetera, et cetera.

PN349

To the extent that the applicant's evidence deals with the substance of the dispute itself as opposed to compliance with the dispute resolution procedure, we say that evidence should be considered irrelevant to the question that the Commission is required to determine in these proceedings.

PN350

To the extent that the applicant has included references to substantive concerns, and appreciating my submission that they are irrelevant I will make a couple of observations in relation to those. The first one is that a decision regarding jurisdiction is not a discretionary decision. There's no balance of convenience or other matters that are taken into account. The authorities are clear that compliance with a dispute resolution steps is required to enlighten the jurisdiction of the Commission.

PN351

The second point I would make is that annexure 4 clause 3(d) of the enterprise agreement and its replacement agreement that has since come into effect make clear that warnings expire after 12 months. As such once 30 December 2023 comes along all of this becomes quite irrelevant.

PN352

And finally in the unlikely event that Mr Horan engages in some form of misconduct in the short period between him returning from leave on 23 October



and the expiry of the final warning on 30 December, if the respondent were to seek to take the final warning into account in determining the disciplinary action to be taken it would be entirely open to Mr Horan at that point to raise a dispute under the current agreement, and as part of that dispute to make an argument that the respondent cannot rely on the final warning. That concludes my submissions unless you have any questions, Commissioner.

PN353

THE COMMISSIONER: Can I just ask you on that, Ms Yuen, are there any investigations on foot into Mr Horan?

PN354

MS YUEN: No there are not, Commissioner.

PN355

THE COMMISSIONER: Is it intended to - - -

PN356

MS YUEN: No. There are no concerns from our perspective, and certainly things are going well and we certainly hope that the two months after Mr Horan's return will be very smooth and without issue and we can all move on.

PN357

THE COMMISSIONER: Thank you, Ms Yuen.

PN358

MS YUEN: Thank you, Commissioner.

PN359

THE COMMISSIONER: Mr Bonello?

PN360

MR BONELLO: Thank you, Commissioner. I will just keep my reply short and I will refrain from saying things that have already been - I will refrain from repeating - - -

PN361

THE COMMISSIONER: Tell me what you need to. That's all right.

PN362

MR BONELLO: I have been told before by a member of the Commission that they can read, and so I will leave it at that.

PN363

THE COMMISSIONER: Mr Bonello, can I just say that you should tell me what it is you want to tell me. Certainly I will read the material, but if you feel that you should express some things on the record now then please do it.

PN364

MR BONELLO: Thank you, Commissioner. I will just say this then, Commissioner. In respect to the argument that the matter was resolved we say, and as we have noted in conference before, there was an agreement on a way

moving forward. However, unfortunately that agreement, I guess, fell apart, and by virtue of this we don't see this as a new dispute arising. We see this as the initial dispute remaining active. So that is just what I want to indicate in that respect.

PN365

THE COMMISSIONER: So you see the discipline process as an extension of the investigation dispute?

PN366

MR BONELLO: Yes, Commissioner. It's related, yes.

PN367

THE COMMISSIONER: You might not know the answer to this, Mr Bonello, but can a discipline process take place without an investigation first occurring?

PN368

MR BONELLO: No, Commissioner. I'd have to look at the agreement again. I guess it would depend on what the actual complaint or events are.

PN369

THE COMMISSIONER: It certainly would depend on how - I mean there certainly may be circumstances where it is such that immediate discipline action such as summary dismissal is warranted because of the conduct of someone.

PN370

MR BONELLO: Yes.

PN371

THE COMMISSIONER: But in other circumstances - I don't know that appendix 4 actually makes it clear, though appendix 4 certainly sets out the requirement to have discussions as part of the general procedure. Presumably that leads to a decision about whether disciplinary action will be taken or not.

PN372

MR BONELLO: Yes, Commissioner, that's exactly how I read it. Whether there is an investigation, I guess, or annexure 4 absolutely - - -

PN373

THE COMMISSIONER: One hopes there is. It's a little bit difficult to provide procedural fairness to someone who's accused of misconduct or poor performance without - well, misconduct in particular without doing an investigation.

PN374

MR BONELLO: And annexure 4 absolutely would, I guess, imply that there is a need for an investigation to comply with that annexure 4 of the agreement.

PN375

THE COMMISSIONER: Sorry, I mean I only ask that question not because I am suggesting that Opal would impose disciplinary outcomes without doing a proper investigation, but there are some enterprise agreements where the discipline process itself contains the investigation process, as opposed to some suggestion -

sorry, my concern here that the discipline process or the steps in the discipline process seem to be articulated separately to the investigation process. Does that make sense? I just want to make clear - my apologies, I am probably confusing everyone at this point, and I should perhaps step back from it - but that it is expected prior to some disciplinary action being taken that an investigation will occur.

PN376

MR BONELLO: I can confirm, Commissioner, the AMWU would expect that to be the case, yes.

PN377

THE COMMISSIONER: Yes. Thank you.

PN378

MR BONELLO: I will just note as well, Commissioner, there's been a reference to the matter that was commenced, the 2081 matter. Commissioner, the actions of the applicant making a further application should not limit or have any bearing on this application. We do apologise if that was the case, and at the time there was a change in the carriage of this matter at the AMWU. My colleague I should say, and I have told you, or I have noted this in conference before, was required to go to America during that period because of an ill father, and there was quite a bit of confusion. We had no contact with him, and so we do apologise that that was the case, and it was an error on our part.

PN379

THE COMMISSIONER: It's not a matter that goes to the jurisdiction of the Commission, but it may well be a matter if this proceeds any further that gets raised, and the obvious question is why you didn't just continue with that dispute. But I don't need an answer to that now.

PN380

MR BONELLO: I can provide one - - -

PN381

THE COMMISSIONER: No, no, that's all right. To the extent that it might be relevant or that it does come into play in my decision, and I can't see how it will, I will send a note to the parties so that you can say anything else about it that you might want to say. Okay?

PN382

MR BONELLO: Thank you, Commissioner. Just lastly I just wanted to clarify something. Commissioner, you noted before while my friend was giving her closing submissions that the process of a disputes process occurred quite quickly and that there was a talk or reference to the Maersk Crewing Australia decision, that there was quite a delay in a response. Commissioner, I just want to note that the circumstances here was in regard to disciplinary - I guess there was a warranted outcome, or there was a potential outcome of termination here. Hence this process is required to, I guess, move in the extent that it has done, and the dispute was required, or it needed to be resolved prior to the meeting that was to be had for - well, why we say for there to be procedural fairness.

PN383

THE COMMISSIONER: Which meeting, the meeting of the 9th?

PN384

MR BONELLO: That would have been the meeting which is referred to in the evidence of Ms Cassan. It would have been 9 December, Commissioner, yes, the 9 December meeting. So, Commissioner, we appreciate that the Maersk decision, I guess, had the delay, but nevertheless in that decision it refers to the fact that if there's no response, well then the person attempting to resolve the matter has met the requirements under the agreement. And we say that similar we have met those requirements. It was of a much shorter period than the judgment in the Maersk decision, but that judgment wasn't referring to or a potential termination; this was. So just on that basis, Commissioner, if you don't have any questions for me I think I will close there.

PN385

THE COMMISSIONER: Can I just clarify whether the AMWU relies on the discussion between Mr Hutchinson and Mr Horan as a step in the dispute resolution procedure, or a step where the applicant raised a dispute?

PN386

MR BONELLO: Yes, Commissioner, we do.

PN387

THE COMMISSIONER: You do?

PN388

MR BONELLO: That was fleshed out in our last conference.

PN389

THE COMMISSIONER: No. Where is it in the material before me?

PN390

MR BONELLO: It is in Mr Horan's chief examination evidence, Commissioner. He noted on Wednesday - no, Tuesday that he made Mr Hutchinson aware that he required a support person. And apologies, Commissioner, this is in Mr Horan's evidence.

PN391

THE COMMISSIONER: Yes, it is in his evidence at paragraph 5.

PN392

MR BONELLO: Yes.

PN393

THE COMMISSIONER: But I am just wondering whether you're relying on that as the raising of a dispute.

PN394

MR BONELLO: Yes, Commissioner. It's probably not clear in my submissions, but I will make it clear now. We say that that was the first instance when the

dispute was raised on that day, and then it further was raised in the meeting between Mr Edwards and Ms Chew.

PN395

THE COMMISSIONER: Do you rely on the meeting of 9 December and then the text messages of 17 December as steps taken to try and resolve the dispute?

PN396

MR BONELLO: Yes, Commissioner. I hope my submissions haven't confused you with the three sequences I have referred to. We do refer to those meetings, but nevertheless if sequence 2 and 3 do not satisfy the requirements we say that sequence 1 most certainly does.

PN397

THE COMMISSIONER: Sorry, if sequence 2 and 3 - - -

PN398

MR BONELLO: I will refer you to my submissions, Commissioner. And again I hope this doesn't confuse you, page 18 we say there's a series of - - -

PN399

THE COMMISSIONER: Sorry, yes, you set out - - -

PN400

MR BONELLO: - - - meetings that can establish jurisdiction. As you can see - - -

PN401

THE COMMISSIONER: I think the difficulty from Opal may be, and I understand what you mean about sequences now, I had seen this, my apologies, is that the 5 December discussion appears to have been taken by Opal to refer to the discussion that Ms Chew and Mr Edwards were in.

PN402

MR BONELLO: I see your point, Commissioner. Yes. So are you trying to establish where the discussion between Mr Horan and Mr Hutchinson comes in?

PN403

THE COMMISSIONER: Yes.

PN404

MR BONELLO: Yes. Commissioner, we would say that that relates to the 5 December discussion.

PN405

THE COMMISSIONER: So you rely on both of those discussions on 5 December?

PN406

MR BONELLO: Yes, Commissioner, yes. I could have made that a bit more clear, my apologies.

PN407

THE COMMISSIONER: Thank you.

PN408

MR BONELLO: Thank you, Commissioner.

PN409

THE COMMISSIONER: Ms Yuen - - -

PN410

MS YUEN: Thank you, Commissioner.

PN411

THE COMMISSIONER: - - - does that raise any issues for you?

PN412

MS YUEN: Just two issues from our perspective. One is maybe an issue, the other a clarification. In relation to that 5 December discussion I refer to page 12 of the court book which contains the applicant's submissions, which define the 5 December discussion as the discussion between Mr Horan and Mr Edwards, and we also know Ms Chew was there taking notes. We framed our response and our case based on those submissions, and to the extent that the Commission is going to see the discussion with Mr Hutchinson as a relevant part of the dispute resolution process we would seek the opportunity to cross-examine Mr Horan on that and also provide evidence from Mr Hutchinson.

PN413

THE COMMISSIONER: Cross-examining Mr Horan is going to be a bit difficult.

PN414

MS YUEN: Yes, I know, Commissioner.

PN415

MR BONELLO: Commissioner, if I may?

PN416

THE COMMISSIONER: Mr Bonello?

PN417

MR BONELLO: Mr Horan made it quite clear in his evidence during chief examination that he did in fact raise the issue with Mr Hutchinson. The respondent had an opportunity then to cross-examine him, however chose not to.

PN418

THE COMMISSIONER: The evidence will show what it does. Sorry, and the transcript will clarify that, because my notes don't quite indicate that extent of his answer. But if that is the case, and if I am going to rely on it then the respondent has, I think, broadly has the right to call her rebuttal witness in that respect, because it's evidence that was not clear in the submissions that you made. It wasn't clear in the submissions you made or in Mr Horan's written witness statement that that was claimed to be a step in the dispute settlement procedure,

and given that it's come out in the evidence-in-chief there may well be a question about whether Mr Hutchinson should be called to give evidence on that particular point.

PN419

MR BONELLO: Yes, Commissioner.

PN420

THE COMMISSIONER: But that's a matter for Ms Yuen.

PN421

MS YUEN: Commissioner, perhaps in the same context of the other matter you raised with Mr Bonello before if this is a matter that is going to be relevant to your decision one way or another then we would seek that opportunity. In my submission we had always planned to say, as we have said today, that the fluff around the edges, if I might call it, of was he given a support person and all that sort of stuff is part of the substantive dispute, and that was when I heard Mr Horan's evidence-in-chief. That was why I didn't ask him because I thought, well that's all irrelevant, I am going to submit that.

PN422

The focus here is was that 5 December meeting as defined on page 12 of the court book part of the disputes process. So we would say that we have not had the opportunity to cross-examine Mr Horan on the understanding that was being relied upon as part of the disputes process, as opposed to it being part of the broader context of the concerns that the applicant had at the time.

PN423

THE COMMISSIONER: Thank you.

PN424

MS YUEN: Thank you, Commissioner. And the only other matter I just wanted to briefly clarify was in relation to annexure 4 of the enterprise agreement. I think we're all largely on the same page in terms of the distinction between a disciplinary process and an investigation process, but I might just refer the Commission to it, and I believe this might even be referred to in the F10 if I am not mistaken. Annexure 4 clause 1(b) refers to:

PN425

*The parties to this agreement have committed to developing supplementary guidelines relating to investigations conducted under this agreement.*

PN426

So we say that 1(b) deals with investigations, and there are supplementary guidelines which I am sure we will talk about, should this matter proceed further. But we say the remainder of annexure 4 is about the disciplinary process that occurs once an investigation is concluded.

PN427

THE COMMISSIONER: So there are guidelines that have been developed?

PN428

MS YUEN: There were under this agreement, yes.

PN429

THE COMMISSIONER: Under this agreement. Yes, okay. Thank you.

PN430

MS YUEN: Thank you.

PN431

THE COMMISSIONER: Mr Bonello?

PN432

MR BONELLO: Commissioner, if I may.

PN433

THE COMMISSIONER: Yes.

PN434

MR BONELLO: Just going back to the point in regards to affording the respondent the opportunity to have Mr Hutchinson give evidence, if I may take you to page 24 of the court book. That's Mr Horan's witness statement, at paragraph 5. He quite clearly raises a concern with Mr Hutchinson. He requests that he wants representation from the AMWU. However, he is not given, or Mr Hutchinson refuses or allowing him to get the representation. So, Commissioner, we say the respondent had an opportunity from that. That's clear that there is - or Mr Horan raises a dispute.

PN435

THE COMMISSIONER: It's not necessarily clear, Mr Bonello, that he did at that point raise a dispute with Mr Hutchinson. That's the question. The question is whether that conversation with Mr Hutchinson was him raising or included him raising a dispute and saying, well we're in dispute or we disagree or I'm not going to the meeting until I get my representation, or whatever it may have been. I appreciate he has given evidence of the discussion with Mr Hutchinson. The issue is in part whether - you're now saying that was step 1 of the dispute settlement procedure.

PN436

MR BONELLO: Commissioner, I'm saying that, I guess, step 1 commenced there, yes, and then was - well, continued to operate through the 5 December as well, through the second discussions with Mr Edwards and Ms Chew.

PN437

THE COMMISSIONER: So you're saying the asking of a question is the commencement of the dispute settlement procedure?

PN438

MR BONELLO: Yes, Commissioner. I refer to the matter cited before and if I may I will refer you to the paragraphs which says clearly that a dispute can arise from a question or an enquiry. Would you like me to - - -



PN439

THE COMMISSIONER: No, I know where that is.

PN440

MR BONELLO: Yes. Sorry, Commissioner, if I'm confusing you, but - - -

PN441

THE COMMISSIONER: I don't know that it was particularly clear from the material initially filed by the AMWU that you claimed that the meeting - it wasn't a meeting - that the request of Mr Hutchinson and Mr Horan's response to that was the commencement of the dispute settlement procedure.

PN442

MR BONELLO: Yes, Commissioner, I understand. Thank you.

PN443

THE COMMISSIONER: We have a problem, Ms Yuen.

PN444

MS YUEN: Yes, Commissioner. We can certainly arrange for Mr Hutchinson to provide evidence in relation to that 5 December meeting, but perhaps the bigger challenge is Mr Horan's unavailability to be cross-examined on that particular meeting.

PN445

THE COMMISSIONER: Yes, and my unavailability post the end of October.

PN446

MS YUEN: I am in your hands, Commissioner, as to the best way forward.

PN447

THE COMMISSIONER: Okay. If it is that more evidence, that cross-examination of Mr Horan is necessary then this matter will have to go somewhere else, because I can't deal with it. I think the best thing for me to do at this point is to go and consider the matter and work out whether that discussion is a critical component of the matter. If it's not then I can make a decision without hearing further about that discussion. If it is critical then we have a problem, and we will have to discuss that.

PN448

MS YUEN: Thank you, Commissioner. Would it be of assistance for us to obtain a witness statement from Mr Hutchinson or is it best for you to do your consideration first and then let us know?

PN449

THE COMMISSIONER: I think it's best for me to think about it first, and then let the parties know.

PN450

MS YUEN: Thank you, Commissioner. Mr Hutchinson is available, so should a witness statement be required we can arrange that.

PN451

THE COMMISSIONER: The difficulty is not Mr Hutchinson, the difficulty is you wanting to cross-examine Mr Horan.

PN452

MS YUEN: Yes, Commissioner.

PN453

THE COMMISSIONER: Okay. Anything else?

PN454

MR BONELLO: No, Commissioner.

PN455

THE COMMISSIONER: Thank you. I will adjourn and the parties will hear from me in due course.

**ADJOURNED INDEFINITELY**

**[11.45 AM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

<b>EXHIBIT #AMWU2 WITNESS STATEMENT OF LORRAINE CASSAN DATED 15/08/2023 AND TWO ATTACHMENTS .....</b>	<b>PN147</b>
<b>EXHIBIT #AMWU3 WITNESS STATEMENT OF MICHAEL BULL DATED 16/08/2023.....</b>	<b>PN147</b>
<b>EXHIBIT #AMWU4 WITNESS STATEMENT OF ABA DEBASIA DATED 14/08/2023 AND ONE ATTACHMENT.....</b>	<b>PN147</b>
<b>RODNEY BEALES, SWORN.....</b>	<b>PN154</b>
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<b>EXHIBIT #OPAL1 WITNESS STATEMENT OF RODNEY BEALES DATED 26/07/2023 AND SIX ATTACHMENTS .....</b>	<b>PN178</b>
<b>CROSS-EXAMINATION BY MR BONELLO .....</b>	<b>PN184</b>
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<b>MELISSA CHEW, AFFIRMED.....</b>	<b>PN204</b>
<b>EXAMINATION-IN-CHIEF BY MS YUEN .....</b>	<b>PN204</b>
<b>EXHIBIT #OPAL2 WITNESS STATEMENT OF MELISSA CHEW DATED 26/07/2023 CONSISTING OF 11 PARAGRAPHS AND TWO ATTACHMENTS.....</b>	<b>PN214</b>
<b>EXHIBIT #OPAL3 REPLY WITNESS STATEMENT OF MELISSA CHEW DATED 22/08/2023 CONSISTING OF SEVEN PARAGRAPHS.....</b>	<b>PN214</b>
<b>CROSS-EXAMINATION BY MR BONELLO .....</b>	<b>PN235</b>
<b>THE WITNESS WITHDREW .....</b>	<b>PN246</b>