



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER HUNT**

**C2023/3082**

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

**Ms Kelly McCulloch**

**and**

**Queensland Bulk Water Supply Authority T/A Seqwater  
(C2023/3082)**

**Seqwater Enterprise Agreement 2019 - 2023**

**10.00 AM, MONDAY, 30 OCTOBER 2023**

**Continued from 17/07/2023**

PN1

THE COMMISSIONER: Good morning, parties. I will take the appearances.

PN2

MR B ELLIS: If it pleases the Commission, my name is Ellis, initial B; also appearing next to me is Henderson, initial N, and we are appearing today on behalf of the applicant, Ms McCulloch, who is with us today, and the Australian Municipal, Administrative, Clerical and Services Union.

PN3

THE COMMISSIONER: All right, thank you. Thanks, Mr Ellis.

PN4

MR ELLIS: Thank you, Commissioner.

PN5

MR C MURDOCH: May it please the Commission, Murdoch, initials C J. I appear for the respondent, instructed by Ashurst.

PN6

THE COMMISSIONER: Thanks, Mr Murdoch. There's no objection, is there, Mr Ellis?

PN7

MR ELLIS: No objection, Commissioner.

PN8

THE COMMISSIONER: Thank you. Leave is granted. Very good. All right parties, I note we had an earlier conference and it wasn't able to be resolved, but what I have to deal with is the material before me, not what was said at conference. I take it that Ms Siaoisi is not required for cross-examination?

PN9

MR MURDOCH: That's my understanding.

PN10

MR ELLIS: That's correct, Commissioner.

PN11

THE COMMISSIONER: All right. Very good. Any preliminary issues we need to deal with?

PN12

MR ELLIS: Not that I am aware of, Commissioner, just that I will be examining Ms McCulloch in chief.

PN13

THE COMMISSIONER: Yes.

PN14

MR ELLIS: Yes.

PN15

THE COMMISSIONER: I think it has been stated she is required for cross-examination. Any preliminary issues, Mr Murdoch?

PN16

MR MURDOCH: In terms of Ms McCulloch, there may have been some wires crossed, but she is not required for cross-examination.

PN17

THE COMMISSIONER: She is not required?

PN18

MR MURDOCH: No.

PN19

THE COMMISSIONER: Okay.

PN20

MR MURDOCH: So we are content, subject to anything the applicant might wish to say, if it's satisfactory to you, of course, for her affidavit just to go in as her evidence.

PN21

THE COMMISSIONER: Do you have any questions in chief there, Mr Ellis?

PN22

MR ELLIS: I do, Commissioner, yes.

PN23

THE COMMISSIONER: How long do you think you will be with her in chief?

PN24

MR ELLIS: It should only be about - less than five minutes.

PN25

THE COMMISSIONER: Okay. So just a small number of questions in chief?

PN26

MR ELLIS: Just a small number of questions, yes.

PN27

THE COMMISSIONER: Look, I may have some questions, so we will bring her in. You definitely want to cross-examine Mr Kendall, do you?

PN28

MR ELLIS: That's correct, Commissioner.

PN29

THE COMMISSIONER: All right. Very good. Are they the only preliminary issues we need to deal with?

PN30

MR MURDOCH: Yes, thank you.

PN31

THE COMMISSIONER: All right. Thank you. Thanks, Ms McCulloch, please come to the witness box.

PN32

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

PN33

MS McCULLOCH: Kelly Ann McCulloch, (address supplied).

**<KELLY ANN MCCULLOCH, AFFIRMED [10.17 AM]**

**EXAMINATION-IN-CHIEF BY MR ELLIS [10.17 AM]**

PN34

THE COMMISSIONER: Thanks, Mr Ellis.

PN35

MR ELLIS: Ms McCulloch, I just want to ask you a few questions to clarify some of the issues raised in your statement, the statement of Mr Kendall and the submissions put forward by the respondent; is that okay?---Certainly, yes, that's fine.

PN36

Thank you. First, to provide us with a bit of an understanding of how things work at Seqwater, could you please explain how the timesheeting process works?---Sure. So what will normally happen is we all work our standard week and then we put our timesheets into a program called CIS. Then that actually gets sent to our manager. They approve or, if there's any corrections, they will come back to us and ask us to correct it. Then, when they're happy with it, it will actually go through to payroll, who do a second vetting of that, and then, if they've got any questions, they come back and double-check with us as well.

PN37

Thank you, Ms McCulloch. How are managers informed around what the correct practices are at Seqwater when it comes to payroll issues?---Yes, so that would - that would come from HR or payroll. They would actually give them direction on how they expect the timesheets to be approved and how they would appear and the information that's in them.

PN38

Before 2022, what remuneration would you receive if you performed remote response work and the period you worked was less than one hour?---Okay, so if it was less than one hour, what we used to do was we used to put - say, for example, if it was 15 minutes, I'd put 15 minutes in the clock-on time and then we would actually use the minimum engagement time in the EBA, which was an hour, and we would put that in the TOIL accrual and that gets accrued as TOIL in our timesheets, yes.

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS

PN39

Before 2022, how did the business respond when you claimed these minimum payments for remote response work?---Yes, so pretty much it would go through, as I mentioned, the payroll process, they would approve the hour accrual for TOIL and it would just go into our TOIL accrual bank.

PN40

Thank you.

PN41

THE COMMISSIONER: I'll just intervene there. Ms McCulloch, you might claim TOIL, but you don't know if other employees were claiming TOIL, do you?---I believe they were all claiming TOIL.

PN42

For that remote work?---Yes, that's correct, yes.

PN43

All right. Thank you.

PN44

MR ELLIS: You said before that payroll provides advice to employees and managers. Have you or your manager sought advice from payroll in whether minimum payments apply when claiming TOIL and, if so, can you explain what payroll's position was?---Yes, certainly. So there were a few times we wanted to double-check to make sure that we were putting it in the timesheet correctly, so typically I will go through my manager first and clarify with him and, if he's unsure, he will then go to payroll directly to ask for assistance and then we'll get communicated back the outcome of that discussion.

PN45

Would they provide any advice around the issue of minimum payments and TOIL?---Yes. So prior to March 2022, they would be saying, 'Yes, you put - if you've worked 15 minutes, you put 15 minutes in your clock-on and then you accrue the minimum hour', as stated, yes, correct.

PN46

Is there any further evidence you would like to add, Ms McCulloch?---I've just got an email which basically is just referencing that process, so it was an email that came from me and to my manager and then to payroll, so payroll just confirming that process.

PN47

THE COMMISSIONER: Is it in the material, Mr Ellis?

PN48

MR ELLIS: It was not in the material, Commissioner.

PN49

THE COMMISSIONER: You say it was?

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS

PN50

MR ELLIS: It was not, sorry.

PN51

THE COMMISSIONER: So why are you introducing it now?

PN52

MR ELLIS: This only came to light, I think, on Friday afternoon when Ms McCulloch was going through her emails in preparation for today.

PN53

THE COMMISSIONER: Have you shown Mr Murdoch the email?

PN54

MR ELLIS: I have not shown Mr Murdoch the email.

PN55

THE COMMISSIONER: Well, it's appropriate that you do so.

PN56

MR ELLIS: Okay.

PN57

THE COMMISSIONER: I will have my associate take the document and show Mr Murdoch.

PN58

THE WITNESS: I've got a couple of copies there.

PN59

THE COMMISSIONER: I won't admit it yet, thank you. Let's see what Mr Murdoch has to say. Take a seat, Mr Ellis, thanks.

PN60

MR ELLIS: Thank you.

PN61

MR MURDOCH: I will just have to take a moment to read it.

PN62

THE COMMISSIONER: Yes, of course.

PN63

MR MURDOCH: There's no objection.

PN64

THE COMMISSIONER: All right, thank you. I will have a look at it. All right, you can ask questions regarding that, Mr Ellis, if you wish.

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS

PN65

MR ELLIS: Thank you.

PN66

Ms McCulloch, do you still have a copy of that email in front of you?---Yes, I do. Yes, correct.

PN67

What was the advice that was provided to your manager in that email?---Yes, so the information that came from Deb in payroll was that we would record the actual time that was worked, if it was a 15-minute provision period, and then we would record the minimum engagement time as TOIL in our TOIL accruals on our timesheets.

PN68

Ms McCulloch, do you have a copy of Mr Kendall's statement in front of you?---I do.

PN69

Have you read through Mr Kendall's statement?---Yes, I have.

PN70

At paragraph 29 of Mr Kendall's statement, Mr Kendall refers to an email you sent to payroll?---Correct.

PN71

That email is also attached to the statement. What was the purpose of you sending this email?---Okay, so I sent that email because there was - I'd received my payslip and there was actually an inconsistency, I guess, with the normal practice on what was happening with on call and that had actually been paid as overtime into my bank account, which was not the normal practice. So my email was to let them know that there appeared to be an error on their side so that they could make any corrections and check to see if it had affected other staff.

PN72

At the time of writing this email, what led you to have the understanding that you only accrue TOIL and you don't receive overtime pay?---That was pretty much the way it was always explained to me ever since I started. That was the common practice of, whenever we were on call, we always just accrued TOIL, not actually payment.

PN73

That's what your managers and payroll told you?---Yes, correct.

PN74

Thank you. Were you ever given the option to accrue overtime pay instead of TOIL?---No.

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS

PN75

What form of agreement did you have with Seqwater to accrue TOIL instead of overtime pay?---Well, basically, it was just whenever we were on call on the

weekend and we got calls, it was just a matter of putting the TOIL accrual on the timesheets, which was approved by my manager and payroll, and then, yes, it went through.

PN76

Did you ever agree to accrue TOIL instead of overtime pay? Did you explicitly say to Seqwater that that is your preference?---No.

PN77

Thank you, Ms McCulloch. Commissioner, that's all the questions I have for Ms McCulloch.

PN78

THE COMMISSIONER: All right. Take her to her statement on page 43 and ask her whether she agrees with it and if there's any changes she wishes to make to it and then you can ask to tender it.

PN79

MR ELLIS: Ms McCulloch, just refer to your statement at page 43 of the digital court book?---Yes.

PN80

Do you agree with that statement?---Yes, I do.

PN81

Commissioner, can we tender that statement?

PN82

THE COMMISSIONER: Ask her if there's any changes that she wishes to make.

PN83

MR ELLIS: Are there any changes you would like to make?---No.

PN84

THE COMMISSIONER: You seek to tender the statement?

PN85

MR ELLIS: Yes, Commissioner.

PN86

THE COMMISSIONER: Any objections, Mr Murdoch?

PN87

MR MURDOCH: No, Commissioner.

PN88

THE COMMISSIONER: No. I will include it as part of the digital court book, which is likely to be admitted as evidence in full, but I will hear from everybody about that a bit later on. All right. Do you wish to tender this new email of 3 March 2022, Mr Ellis?

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS



PN89

MR ELLIS: Yes, Commissioner.

PN90

THE COMMISSIONER: You have no objection, Mr Murdoch?

PN91

MR MURDOCH: No, Commissioner.

PN92

THE COMMISSIONER: All right, I will mark that document A1.

**EXHIBIT #A1 EMAIL DATED 03/03/2022**

PN93

Thanks, Mr Ellis.

PN94

MR ELLIS: Thank you, Commissioner.

PN95

THE COMMISSIONER: Any questions in cross-examination, Mr Murdoch?

PN96

MR MURDOCH: No, Commissioner.

PN97

THE COMMISSIONER: All right.

PN98

Ms McCulloch, do I take it that in respect of the remote payment, you would prefer to receive payment instead of TOIL?---If I was given the opportunity, yes, I would, at this point in time, for sure.

PN99

At this point?---Yes.

PN100

Had you thought about it earlier?---It was never really an option that was given to us, so I'd probably never really thought about it before. It was just - it was explicitly explained to us from when we started on call that TOIL was the option that we used for payment.

PN101

How long have you been on call?---I've been with Seqwater for 15 years now, so probably, maybe - I'd have to be guessing - but probably about 10 years.

PN102

So you've always received TOIL, have you, for remote work?---Absolutely, yes.

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS

PN103

Up until 2022, was it at least one hour, was it?---Yes. So there was a minimum engagement for that period of the EBA. So within a certain time frame on the weekend, like between, I think it was - so any time on the weekend, except for 11 pm to 5, it was one hour for any time.

PN104

Yes?---And between 11 and 5, it was two. So, if we got a phone call like at 2 am and we got woken up, there was a two-hour minimum engagement paid prior to that, yes.

PN105

You have been under a number of generations of enterprise agreements?---I have.

PN106

But, at least under this agreement, up until 2022, you were receiving either the one-hour payment or the two-hour payment, were you?---Correct, yes.

PN107

When the business said, 'We're no longer doing that', they didn't seek to recover any overpayment from you that they thought they might have overpaid?---No, no.

PN108

Right. You have seen the messages from the business attached to Mr Kendall's statement?---Mm-hm.

PN109

Do you recall receiving those, for example, page 131 in the red numbers? Do you have that in front of you?---I don't. I've only got Mr Kendall's statement and my statement and my email.

PN110

Got to PSK2 of Mr Kendall's statement?---Okay, yes, certainly.

PN111

You have the book?---PSK2, thank you.

PN112

So the red numbers, page 131?---Yes.

PN113

You are being instructed what to do?---Correct.

PN114

Did you read in there anything about it being inappropriate to do what you had earlier done and that you might get in trouble if you tried to claim an hour for 15 minutes' work?---No.

PN115

Did you think you might get in trouble if you claimed an hour for - - -?---No, no.

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS

PN116

Since the edict?---Sorry, since? Well, every time we tried to do that, there was initially - when we changed that, payroll would come back and change it back and say, 'No, you're not getting the hour, you're only entitled to the 15 minutes.' So, originally, we were getting the extra accrued time and then, once it started to change, then payroll would come back and correct our timesheet, and that's where this communication from Duncan Middleton came trying to get clarification about how they wanted us to do our timesheets.

PN117

Did anybody ever challenge you that you had engaged in inappropriate behaviour for claiming an hour or two hours for less than that being worked?---No.

PN118

Do you know if anybody else was challenged?---Not to my knowledge, no, no. It's just there was a period we were claiming it and then there was a period where we couldn't claim it any more and, if we did put it on our timesheet, when there was a bit of, not miscommunication, but lack of understanding, then payroll would change it and modify it back. Then we'd seek clarification after that and then we just changed to time worked equals time accrued.

PN119

Go to page 135. This is from payroll in 2022, August 2022?---Mm-hm.

PN120

At 3, it says:

PN121

*Payroll will then review each remote response and ensure correct payments are applied, including any minimum engagement, where applicable.*

PN122

?---Yes.

PN123

Do you recall receiving that email?---Yes.

PN124

What did you understand that to mean?---To me, it's always meant that that is the minimum engagement, so if I'm called in the middle of the night for 15 minutes, well then that would be the two-hour. I guess there's been so much confusion around that because - and that's all we've been trying to get clarification - because there seems to be different answers from different people in payroll. I think there's - and then - yes, so sometimes the pay sheets, they'd come back and correct it and then they'd go back and let you know and, yes, it was - it seemed - even though eventually the message was the same, it was a bit of an inconsistent, ad hoc, confused approach.

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS

PN125

All right. So go to 132?---Yes.

PN126

There's various scenarios there. Scenario 2 on the top of 132, the third paragraph down says:

PN127

*Payroll will ensure the appropriate entitlement is then calculated and paid.*

PN128

?---Mm-hm.

PN129

And that's the case for scenario 3, about two-thirds of the way down?---Yes.

PN130

And then the second-last paragraph, that's the message, is it, that:

PN131

*Payroll will ensure the appropriate entitlement is then calculated and paid.*

PN132

?---Yes, and actually, in response to this pay code here, when we're talking about this top paragraph, we were actually putting 11 pm to 5 am and that's what actually caused the pay - my pay run to actually pay into my bank account, so now we actually don't use that pay code any more, so they've got a standard generic - so we just basically put our time in and hours worked and then we actually disaccrue it as TOIL. So that's the practice we don't even follow any more because it caused an overtime payment into my bank account.

PN133

All right. But where you are being told to trust that payroll will pay the correct entitlement, you started seeing less TOIL, didn't you?---Yes, I did, yes, and then they came back to me and said, 'No, you're putting it in wrong. If you work seven minutes, you are only accruing seven minutes.' So then I started putting my timesheets in that way because, regardless, they come back and used to correct it otherwise, so, yes.

PN134

And that's when the dispute arose?---Yes.

PN135

All right?---Yes.

PN136

Thank you. Anything arising, Mr Murdoch?

PN137

MR MURDOCH: No, Commissioner.

PN138

THE COMMISSIONER: All right, thank you. Anything arising, Mr Ellis?

\*\*\* KELLY ANN MCCULLOCH

XN MR ELLIS

PN139

MR ELLIS: No, Commissioner, thank you.

PN140

THE COMMISSIONER: All right, thank you.

PN141

Thanks, Ms McCulloch, you are welcome to leave the witness box?---Thank you.

**<THE WITNESS WITHDREW**

**[10.35 AM]**

PN142

THE COMMISSIONER: That's your only evidence there, Mr Ellis?

PN143

MR ELLIS: That's correct, Commissioner.

PN144

THE COMMISSIONER: Very good. Thank you. Mr Murdoch, do we have Mr Kendall?

PN145

MR MURDOCH: Yes, he's outside and I call him now, if that is satisfactory to you.

PN146

THE COMMISSIONER: Yes, thank you.

PN147

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

PN148

MR KENDALL: Paul Kendall, (address supplied).

**<PAUL STANLEY KENDALL, AFFIRMED**

**[10.37 AM]**

**EXAMINATION-IN-CHIEF BY MR MURDOCH**

**[10.37 AM]**

PN149

MR MURDOCH: Could you give your full name to the Commission, please?---Yes, Paul Stanley Kendall.

PN150

What is your current occupation?---Payroll - sorry, team lead, payroll services at Seqwater.

PN151

What is your current business address?---117 Brisbane Street, Ipswich.

\*\*\* PAUL STANLEY KENDALL

XN MR MURDOCH

PN152

Have you provided a statement for use in this proceeding made by you on 11 September 2023?---I have.

PN153

May I have a copy of that shown to the witness, please, Commissioner?

PN154

THE COMMISSIONER: Well, is it part of - do you have the court book there? Go to page 122 there, Mr Kendall.

PN155

MR MURDOCH: I beg your pardon. Thank you, Commissioner.

PN156

THE COMMISSIONER: On the bottom red - there's red numbers.

PN157

THE WITNESS: 122, did you say?

PN158

THE COMMISSIONER: Yes, 122, thanks.

PN159

MR MURDOCH: Just have a look at that document, please, and confirm that the document that is on page 122 through to 143 is your statement and attachments?---To 142 then 143, yes, correct.

PN160

Are there any changes or clarifications which you would like to make to that statement?---No, thank you.

PN161

Are the contents of that statement true and correct to the best of your knowledge and belief?---Yes.

PN162

I tender the statement, may it please the Commission.

PN163

THE COMMISSIONER: Thank you. Any objection, Mr Ellis?

PN164

MR ELLIS: No, Commissioner.

PN165

THE COMMISSIONER: No. Thank you. The statement will be admitted as part of the court book.

PN166

MR MURDOCH: That is the evidence-in-chief of Mr Kendall.

\*\*\* PAUL STANLEY KENDALL

XN MR MURDOCH

PN167

THE COMMISSIONER: Thank you. Questions in cross-examination?

PN168

MR ELLIS: Thank you, Commissioner.

**CROSS-EXAMINATION BY MR ELLIS**

**[10.38 AM]**

PN169

Mr Kendall, my name is Ben Ellis and I am one of the senior industrial officers employed at the Services Union and I am here today on behalf of the applicant, Ms McCulloch. First of all, thank you for being here today. As part of this process, I am going to ask you a few questions about your statement and about payroll practice at Seqwater in general. Are you happy for me to go ahead?---Of course, happy to help.

PN170

Thank you. Mr Kendall, your employer is of the view that Ms McCulloch has been fairly remunerated for undertaking remote response work. While she no longer receives minimum payments for undertaking such work, your employer maintains that she is fairly remunerated as she receives TOIL on a time for time basis, as well as payment of the on-call allowance of \$63.41 per day?---Mm-hm.

PN171

Your employer believes that this is enough to fairly compensate someone for performing remote response work and all the disruptions to one's personal life that go with that type of work. Mr Kendall, I want you to now turn your mind to an employee who receives overtime pay instead of TOIL?---Mm-hm.

PN172

Let's say this employee was required to perform remote response work and they received the on-call allowance but did not receive the minimum payment of one hour and instead received only five minutes of pay. Would you agree that this employee has not been fairly compensated?

PN173

MR MURDOCH: I object to that. A question that asks for this witness's opinion in respect of a scenario, ultimately that's a matter of argument and submission, it's not a factual question to ask a witness.

PN174

THE COMMISSIONER: Yes, thank you. Mr Ellis, the question might be better put as, if somebody was receiving the overtime payment - sorry, the exact word is - not call out - - -

PN175

THE WITNESS: Remote response?

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN176

THE COMMISSIONER: Remote response payment. Instead of TOIL, if they worked five minutes, what would they be paid? So do you want to put it that way?

PN177

MR ELLIS: So if the employee worked five minutes, what would they be paid, Mr Kendall?---For an employee of a lower classification, they would be paid - depending on the time of the day - let's assume that it's 8 am - they would get paid one hour of remote response.

PN178

Thank you, Mr Kendall.

PN179

THE COMMISSIONER: So that's somebody with a lower classification, is it?---Correct, yes.

PN180

Can you tell me how that works out under 6.7.4?---I'm sorry, I don't have that reference in front of me.

PN181

Page 17 will show you the relevant section of the agreement?---Thank you.

PN182

Do you see that?---Yes, that's correct, so if it was at 8 am, they would receive a minimum of one hour at time - - -

PN183

Do you mean 8 pm?---8 am or 8 pm, it's neither here nor there.

PN184

Okay. So that's only for a lower classification, not someone like Ms McCulloch?---Correct.

PN185

Is that right?---Correct.

PN186

How do you get to that?---Because there is another clause relating to the classifications that is related to - that Ms McCulloch does have, where it says overtime worked by these employees have mandatory TOIL accrual for time worked.

PN187

Is that what you understand 6.5.5 to mean?---Yes, it would be, yes.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN188



So when Ms McCulloch, because she's a higher classified employee, works the one hour at, say, 8 pm, she's only entitled to, say, five minutes?---If she works five minutes then the accrual is five minutes.

PN189

Yes, but a lower level employee - - -?---That is not part of 6.5.5 would be paid as per the remote response call, which would be the minimum payment of one hour.

PN190

Is that your understanding or what you have been told?---Both, both. It's what I've been told as well as it makes sense to me.

PN191

Okay. Thank you. Ask away, thanks, Mr Ellis.

PN192

MR ELLIS: Mr Kendall, in your statement at paragraph 8, if you could refer to that section of your statement?---Sorry, did you say 8?

PN193

Paragraph 8, yes, correct?---Yes.

PN194

You explain that:

PN195

*Seqwater's payroll system is a claim-based system and this works by employees entering their own clock-on and clock-off times, as well as entering various pay codes.*

PN196

Is this correct?---Correct.

PN197

Thank you. At paragraph 9, you state:

PN198

*The payroll team relies on a practice called exceptional reporting to identify and correct inaccuracies in employee pay by producing numerous different types of report.*

PN199

?---Correct.

PN200

You state:

PN201

*If a report identifies that a timesheet is not correct, the payroll team will amend the time sheet.*

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN202

Is that correct?---Yes.

PN203

Is it correct that this practice of exceptional reporting was in place before you commenced your employment with Seqwater in 2021?---Not in its entirety. There was at some level of it, but it was quite minimal compared to what it is today.

PN204

But there was still some oversight?---Some.

PN205

You further state at paragraph 15, if you can refer to that paragraph, after undertaking a thorough review of historical pay practices at Seqwater, you identified that many employees were entering minimum payments when claiming for TOIL; is this correct?---Sorry, one moment, I'll just quickly read that paragraph.

PN206

Yes, of course?---Sorry, it's not - I wouldn't agree with 'many employees', but there are often cases where an employee would enter in their clock-in time, so they're actually saying, 'Hey, I worked an hour' as their clock-in times, rather than what they've actually done. So they might have done the five minutes, but they've actually entered in an indication that they've worked one hour.

PN207

But, in your statement, you say you observed this practice being used numerous times by numerous employees?---Correct.

PN208

So would it be fair to say that this practice was quite common?---Yes.

PN209

Did it appear, based on your analysis, that these entries were not amended by payroll, that is, the entries where employees have entered minimum payments and then claiming for TOIL, despite the exceptional reporting practice being in place?---The exceptional reporting for this particular item was not in place, so it slipped through the cracks.

PN210

Okay. But, did it appear, based on your analysis, that these entries were not amended by payroll?---Correct.

PN211

Thank you. Does the payroll team or HR provide managers with advice around payroll issues?---Yes, and, historically, there may have been a lack, but it is getting better, particularly in the last few years, that management are becoming well-versed on what is the company policies and standing, so it is definitely improving.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN212

Okay. In terms of checking off the timesheet, does it first get reviewed by the relevant manager and, following that, reviewed by payroll?---Correct.

PN213

Now, Mr Kendall, I would like to put some matters to you, if that's okay. First, I understand you have read Ms McCulloch's statement since you respond to her statement in your own statement?---Mm.

PN214

Would you say you are familiar with her statement or would it be helpful - I think you do have a copy in front of you?---It depends what the question is, but - - -

PN215

That's okay. It might be good to open up to that page. I'm not too sure where that sits. Just before you entered the room, Ms McCulloch provided verbal evidence that she and her manager had received advice from the payroll team at the beginning of 2022 that minimum payments apply when claiming for TOIL and, in addition to that, Ms McCulloch also tendered an email from early 2022 where a member of the payroll team appears to provide advice that employees should enter minimum payments when accruing TOIL. Commissioner, would it be okay if I were to approach - - -

PN216

THE COMMISSIONER: I will have my associate show the witness A1.

PN217

Take your time to read that, Mr Kendall?---Yes, thank you. Okay, I've read it. It doesn't quite say what you've suggested, but did you have a question relating to it?

PN218

MR ELLIS: I believe it states - the question that was asked was around if someone has a 15-minute phone call, what they would do in those circumstances, and the advice that was provided by payroll was to record actual times worked in the clock times but record the minimum one hour against the TOIL accrual code?---So from payroll, there's only one email, which is about the middle message, it says, 'If there is a minimum payment period applicable' - sorry, 'If there is a minimum payment applicable' - so it doesn't say that all cases there is a minimum payment applicable, it just says if there is one, and it doesn't mention the classification in the response from payroll. So the top email, where it mentions AO5 and PO5, there's no reply from payroll to that one.

PN219

The top email, sorry, Mr Kendall, is the initial email. You will see that's sent - - - ?---Sorry, it's the other way around.

PN220

Yes?---My apologies.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN221

So they are responding to a question around it, so, even in the email from payroll, they acknowledge that it would be - the example they are working off is where someone has done 15 minutes' work and they are saying to record one hour of TOIL accrual?---Do you mind if I just read it one more time in the correct order?

PN222

Yes, of course, go for it?---Okay, I understand what you are saying now.

PN223

Yes, okay. So in your statement at paragraph 17, Mr Kendall, if you can refer to that, you state that you have no knowledge of the payroll team amending timesheets to ensure minimum payments were complied with when employees claimed to TOIL?---Mm-hm.

PN224

However, based on your review of the email I have just provided you and the outline of the verbal evidence I have given you around Ms McCulloch's evidence, would it be fair to say that payroll was providing managers and employees with advice that minimum payments should be complied with for employees accruing TOIL instead of overtime?---Well, this one - this email is still not to my knowledge and it is still not correct advice from what I understand, but it certainly - there is certainly an email here, yes.

PN225

THE COMMISSIONER: Just before you go to that, Mr Kendall, the email is March 2022?---Yes.

PN226

Your statement seems to clarify, at about 21, 22, 23, that it wasn't until about July or August 2022 that the business took the approach that it did. Is that fair to say?---Sorry, could you repeat those dates to me again, please.

PN227

Have a look at page 124 of your statement?---124, yes.

PN228

It seems to me, around your paragraphs 21, 22 and 23, it was around about July or August 2022 that the business began to take the approach that it is now taking. Is that fair to say?---I would say that's fair to say, yes. Well, sorry, it's what it should have always been, but, with different individuals - - -

PN229

My question was it began to take the approach that it is now taking - - -  
?---Holistically and ensuring that it - - -

PN230

- - - in communicating to employees that, 'This is how we now do things'?---Yes, confirming to everyone at that time.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN231

Confirming?---Yes. So - - -

PN232

Confirming what earlier direction?---So if there's any misunderstanding across the broader business, at that point in time, the understanding was aligned.

PN233

Well, where had they earlier been instructed to do as they were instructed in July or August 2022?---I wouldn't know, sorry.

PN234

Right. So are they being given a new direction, to the best of your knowledge?---I don't know if it's a new direction, no.

PN235

You joined when?---What's that, sorry?

PN236

You joined the business when?---I joined in - - -

PN237

Late January 2021?---Correct.

PN238

So you don't know whether, before that, employees were told to do what they were then told in July 2022?---That's right. I'm not sure.

PN239

Right. The point Mr Ellis is making is that, in March 2022, Deb from payroll says, 'Record the minimum one hour against the TOIL accrual code'?---Yes, I can see that now. I never instructed her to do that and it was never asked of me, so I didn't know about this email at all and, by looking at it now, I know that it is incorrect information.

PN240

But your evidence is that that is what employees were doing up until about mid-2022; is that right?---Some employees, yes.

PN241

All right, thank you.

PN242

MR ELLIS: Mr Kendall, could it be the case that the common historical practice you identified, where it was common practice for employees to enter minimum payments when claiming TOIL, that this was a product of payroll or HR providing employees advice to enter minimum payments when claiming TOIL?---I have not seen any advice other than this email that you have just sent - given me.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN243

Mr Kendall, based on your statement and Ms McCulloch's statement, it appears Seqwater stopped providing its employees advice to include minimum payments when claiming for TOIL in around mid-2022?---Mm.

PN244

Were you simply notified that this would be the correct practice?---What do you mean 'simply notified'?

PN245

Were you a part of the decision to change that practice?---No, I didn't make the decision, no, but that more comes from our people and culture department, yes.

PN246

Okay, thank you. Just coming back to your statement, Mr Kendall, you refer to an email from Melissa Williams dated 21 July 2022?---Mm-hm.

PN247

That is at paragraph 23 of your statement?---Yes, I have it in front of me.

PN248

In the email, she states:

PN249

*Employees should only log the clock-in and clock-out times for remote response work.*

PN250

And instructs them to enter specific pay codes for that work on the understanding that payroll will ensure the minimum payments are complied with?---Yes.

PN251

In this email, does she advise that minimum payments will no longer apply when employees accrue TOIL instead of overtime?---No.

PN252

Your statement also includes an email sent by you on 3 August 2022. Does this email advise that minimum payments will no longer apply when employees accrue TOIL instead of overtime?---Where is that? Page 135?

PN253

It's the one that's marked - it's page 135 and marked PSK3?---Okay, thank you. Sorry, I will just quickly review it.

PN254

Yes, have a read of it?---Sure, so this is obviously giving instruction for employees at a lower classification that receive a payment.

PN255

Does it state that anywhere in the email?---No, but it's using pay component codes, so it - you know, the remote response codes are the paying codes.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN256

These specific pay codes outlined in your email and the email from Ms Williams, in their current state, do they ensure that employees receiving minimum payments were applicable?---The email itself doesn't ensure payments.

PN257

No, sorry, do the pay codes ensure that employees receive minimum payments, where applicable?---The pay codes by themselves for a remote response, no. After review from payroll, as per our exceptional reports, that's when we ensure that people receive the correct remuneration.

PN258

When developing these new pay codes and this new practice around entering remote response work, for example, or other such work where minimum payments applied, was consideration given to those who accrued TOIL and not overtime pay?---Sorry, could you repeat that question?

PN259

When developing these new pay codes and the overall new practice of entering payroll information for remote responses and other such work where, you know, minimum payments are applicable, was consideration given to those who accrued TOIL and not overtime pay?---They have their own exception report where we look at higher classification people working overtime to ensure that they are accruing TOIL.

PN260

With this new system, did you give consideration to how people who accrue TOIL would be impacted?---What do you mean by how they would be impacted?

PN261

People who accrued TOIL previously were receiving minimum payments. The change that was implemented is a significant change, and was it considered, when implementing this new practice, how these people would be affected?---I wouldn't say we've implemented a new practice. We have just implemented a new checking process to make sure that people are entering it correctly.

PN262

Okay. And were they considered when entering this new checking process?---Yes, by way of their own exception report.

PN263

Then why does neither your email of 3 August 2022 or Ms Williams' email of 21 July 2022 address this issue and the impact it will have on those employees who choose to accrue TOIL? I mean - - -?---That's a great question.

PN264

- - - it was a significant change, which had a significant impact on their remuneration?---Mm-hm.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN265

This is something that should have been communicated to them when the change went through, surely.

PN266

MR MURDOCH: Can I object? This is going from a statement to a question. It's becoming very long, and it really needs to be rephrased.

PN267

THE COMMISSIONER: No, I don't think so.

PN268

THE WITNESS: Yes, I've got this one. Our EA has a lot of complexity. We are looking to address that in the next EA. Now, if we were to put every nuance of the EA into communications to the broader business, it would only confuse a lot of people in how to enter in their timesheets. Now, particularly with remote response, knowing that every remote response case will be reviewed by the payroll person individually on a case by case basis, as well as both TOIL accrual and paid overtime employees, we are confident that, as long as that core information is in there - how much did they work and the first pay component identifying how much - like it matches to how much they've worked - that's enough to give us information to correctly pay the employees. So that's why the communications are more narrow in scope.

PN269

MR ELLIS: But, Mr Kendall, the change is a significant change. It should have been communicated to those employees who previously were receiving minimum payments when accruing TOIL?---As I said, I don't believe it's a change, it's more an additional checking process.

PN270

THE COMMISSIONER: Well, let's have a look at Ms McCulloch's schedule at page 44 of her statement. Do you have that in front of you?---I do.

PN271

On 13 September 2022, she takes a three-minute phone call. She is now paid \$2.18 and she previously would have been paid \$72.68?---Yes, I did review - I do recall reviewing the statement, so the figures might be slightly different, but neither here nor there, but, yes, I agree with you, that's correct, so she would have received that in addition to any on call allowance that she would have received.

PN272

I understand that, but she has previously put down and received \$72.68 because she's claiming the one hour minimum?---Sure.

PN273

But because of the new rules that the business has adopted, because it thinks it's right, she is now going to get \$2.18?---I would say that she's been overpaid in the first instance.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN274



Okay, well that brings me to - do you want to ask questions about that, Mr Ellis?

PN275

MR ELLIS: Did you seek recovery of those overpayments?---No, no. So, throughout the whole remuneration practices review, any overpayments in good faith, we have decided to leave it.

PN276

Was that communicated to the employees?---No, no.

PN277

Okay?---Well, not from our department anyway.

PN278

Mr Kendall, I just want to come back to a particular issue, which is Ms Williams' email of 21 July doesn't address the impact or the change in practice on people who accrued TOIL, and I want to put something to you, Mr Kendall, and I put to you that Seqwater did not contemplate employees who accrue TOIL when implementing this new practice and in developing these new codes, despite minimum payments previously applying to employees who claimed TOIL?---We have considered the TOIL accrual, but every change that we make in timesheets, every single one, we will notify the employee and manager and tell them what we've changed and why. So any time there has been a change, the employees have been notified, so if there ever was a case where someone has entered in the timesheet in a manner that is not consistent with our interpretation, they would have been told exactly when, why and how it's been amended.

PN279

But this change in practice wasn't communicated in the All Staff email sent by Melissa Williams when talking about the change in practice that was brought in?---The underlying message that I believe is in Mel's email is for the clock times to reflect what someone truly works and then payroll to review and make sure the entitlements are paid correctly.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN280

Mr Kendall, I put to you that Seqwater did not contemplate employees who accrue TOIL when implementing this new practice, and I also put to you that this lack of contemplation is why Seqwater changed its position on minimum payments and their application on TOIL, not because Seqwater formed an alternate view on the matter, it was because Seqwater had gone too far down the rabbit hole with the new system and this would have resulted in Seqwater having to undertake significant reconciliation to address the issue?---I disagree with you, especially about Seqwater not taking reconciliation or anything like that. Being part of the remuneration practices review, we have provided beneficial assumptions every which way, and we still do in practice every day in payroll, and as far as not wanting to go down the avenue of not doing calculations for reconciliation or anything like that, I have been in the position where I've done many calculations on every facet of the last three EAs as part of this review, so I certainly do not

agree that Seqwater is not wanting to correct something if Seqwater believes that it should be corrected.

PN281

Well, Mr Kendall, I put to you, in implementing this change, that Seqwater didn't contemplate employees who accrue TOIL in implementing this new practice?---I disagree still.

PN282

Thank you, Commissioner, I have no further questions for Mr Kendall.

PN283

THE COMMISSIONER: All right. Anything arising?

PN284

MR MURDOCH: No, may it please the Commission.

PN285

THE COMMISSIONER: Mr Kendall, do you think the employees up until mid-2022 who were claiming the minimum period of say an hour or two, depending on the time of day, were doing the wrong thing?---I do believe that, that's right, but there are also employees that were applying it correctly before then as well. I would say - I couldn't give a percentage, but there would be a majority of people still doing it correctly. We just - what I know is payroll has never topped anyone up. Sorry, in the sample that I tested, which I have put in my statement as well, which is for the 2019 EA period, there's been no instance where payroll has increased someone's TOIL accrual along the lines of what Ms McCulloch had entered her accruals in previously. Now, if there's any centralised understanding of EA interpretation, you would think that would be payroll, so there would be any sliver of evidence that payroll has topped it up or had that understanding.

PN286

Well, Deb had that understanding, didn't she?---It seems like she has, but Deb has never, in my sample period for the 2019 EA, topped anyone up. Deb is human as well, so - - -

PN287

But employees were, for how long, a year and a-half - it was December 2020, wasn't it - so for a year and a-half, employees, if they have claimed the minimum one hour or two hours, they have been receiving it. Is that because they are doing the wrong thing?---Yes, and also there wasn't enough controls in the payroll space to pick that up.

PN288

When your people and culture team come to you and say, 'This is not right', what was your reaction?---I've actually always known since I read the EA in the first instance that it's time worked because it says it plainly.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN289

Since when you joined in 2021?---That's right. The first thing - - -

PN290

You have always known that, have you?---The first thing you do when you join the payroll team is get an understanding of the EA and read as much as you can, and that's one of the first things that I was doing, so, 'Okay, that's unusual, I haven't seen that before, that TOIL accrual is for actual time worked', but it is quite clear.

PN291

So did you think people like Ms McCulloch were inappropriately claiming moneys they weren't entitled to?---After we starting investigating and put in the process, yes, I did think that.

PN292

Didn't you just now say as soon as you joined?---Yes, but I hadn't seen them - like seen a case within the timesheets. You know what I mean, like as soon - - -

PN293

No, I don't?---So when we process the payroll, we do use these exceptional reports, which we're not looking at any individual timesheet by itself on each given day; data is run over the whole lot. So since there was no report that specifically looked out for TOIL accruals on remote responses, those cases never jumped out at us.

PN294

Really? Even when they're rounded to one hour and two hours, they didn't jump out to you?---Correct, correct.

PN295

You thought that all those employees getting those moneys must have worked exactly one hour or two hours?---It does look a bit strange, but, at the end of the day, we go, 'Okay, the manager's approved that they've worked one hour, so you have to take this value that the timesheet is correct.'

PN296

But you thought that those employees must have worked one hour or two hours?---That's how we processed it, yes, but when you see many one hours after another, it doesn't look right. What are the chances that every one of their remote responses was exactly one hour, which gave rise to the communications to say, 'Hey, your clocking times, they have to reflect what you actually worked so we can pay you correctly.'

PN297

But a low level employee can claim that, but a high level employee can't?---There's many clauses that exclude and include different classifications throughout the whole agreement, so it's not unusual to have a cohort that gets treated differently.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN298

No, but your evidence is that the high level employees get treated differently because there's some tie-back to 6.5.5? That's what you believe?---That's the allowance, is it?

PN299

No. We'll go to - - -?---Sorry, yes, the TOIL accrual, yes.

PN300

Pages 16 and 17, you think high level employees aren't entitled to claim a one-hour or two-hour payment or TOIL because there's a tie-back to 6.5.5; that's what you believe?---I believe that, yes. Remote - - -

PN301

And you have believed that all along, have you?---Yes, yes, remote response is in excess of OTEs, it's overtime in its nature, and 6.5.5 says these classification employees, when they get overtime, they get TOIL accrual instead at time worked.

PN302

There's nothing in 6.7.4 that says that this doesn't apply to high level employees?---No, but it is overtime.

PN303

My question is - - -?---Sorry.

PN304

- - - there's nothing in 6.7.4 that says that the minimum one hour doesn't apply to high level employees?---I agree with you there, yes.

PN305

But you and people in your business have decided that that's what it means?---Because another clause indicates that overtime is to be treated differently.

PN306

Right. So, again, since you joined, you believe that high level employees are not entitled to claim a minimum of one hour?---Correct.

PN307

But nothing was done by you until somebody else in mid-2022 said, 'This is an issue'?---That's when the communications came out, but that's right, there was a lot of work to be done in the space, especially with the remunerations practices review, so it's just one of the things on the list.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN308

Did you make any recommendations that these employees have been overpaid and should be challenged?---Not any recommendation to be challenged or recover overpayments. We were in a period of time where we were looking at a lot of the application of many of the previous agreements as part of the remunerations

practices review and it was pretty much a blanket, we're not seeking to recover any overpayments.

PN309

That wasn't your call, though, was it?---No, definitely not.

PN310

How do you know that a final call on that has been made?---That would be from the people and culture department.

PN311

So you don't know?---I do know that they said, 'No, we're not seeking to recover overpayments.'

PN312

Who has told you that?---James Shepherd in our industrial relations section of people and culture.

PN313

He's told you, 'We're not recovering from people who have sought overpayment'?---Correct. And that's in many cases, not just remote response. We're being very generous with that.

PN314

Are you?---Mm. When you look at some of the - - -

PN315

Has this been communicated to relevant employees, do you know?---I can't recall. I do know that letters for the remuneration practices review did go out to employees, but I can't recall if they said, 'Hey, you've been overpaid, but we're not going to seek to recover that.' I couldn't say that first hand.

PN316

Do you think Ms Williams' communication might have been helpful if something like that had been communicated to employees if they're suddenly - - -?---Perhaps, yes.

PN317

- - - no longer getting the moneys that they used to be getting?---Yes, I certainly think that if you said to all the employees, 'Hey, we're not going to recover any overpayments', it would certainly bring a lot of goodwill, so, yes, I do agree with you there, that it would have been a good thing to say.

PN318

Right. And at page 135, when that email is sent by you to people, they are meant to understand that 'any minimum engagement where applicable' means only if you're a low level employee?---Yes. I suppose the biggest thing we were trying to get across with that email is item number 1, their clock times reflect actual work hours, which is what was not happening in the business.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN319

I don't think there's any issue from the union that, you know, people could record their actual clock hours?---Mm.

PN320

Great information to know?---That's right.

PN321

But their position is that they are also entitled to the one hour?---Mm.

PN322

But you, at 3, you just say 'where applicable', but you don't seek to provide more information to high level employees to say, 'But that's not you, you don't get it'?---I agree in item number 2, I could have written in TOIL accrual for applicable classifications to make it - the information appropriate for all employees. So I do agree with you there that I could have improved this email.

PN323

All right. Anything arising, Mr Ellis?

PN324

MR ELLIS: No, thank you, Commissioner.

PN325

THE COMMISSIONER: Anything arising, Mr Murdoch?

PN326

MR MURDOCH: No, Commissioner.

PN327

THE COMMISSIONER: All right. Thanks, Mr Kendall, you are now excused from giving evidence?---Is it okay if I take a seat in the audience?

PN328

That's fine, thank you?---Do you want that one back as well?

PN329

No, just leave that there in the witness box, thanks?---Thank you.

**<THE WITNESS WITHDREW**

**[11.16 AM]**

PN330

MR MURDOCH: Commissioner, the other statement that is relied upon by the respondent is the statement of Susan Siaosi and that's at tab 9 in the bundle. She is not required for cross-examination and could I seek that statement be tendered?

PN331

THE COMMISSIONER: Yes, I will admit that, given that you didn't require any cross-examination there, Mr Ellis, so I will include that in the court book.

\*\*\* PAUL STANLEY KENDALL

XXN MR ELLIS

PN332

That means that all of the material in the court book by way of evidence is admitted and I will mark the court book DCB1.

**EXHIBIT #DCB1 COURT BOOK**

PN333

That's the evidentiary case, parties. Do you wish to provide any further oral submissions?

PN334

MR ELLIS: Yes, Commissioner.

PN335

THE COMMISSIONER: Do you wish to have a break at all before we do so?

PN336

MR ELLIS: If that's okay, Commissioner.

PN337

MR MURDOCH: Yes.

PN338

THE COMMISSIONER: How long would you require?

PN339

MR ELLIS: Ten minutes, Commissioner, if that's okay.

PN340

THE COMMISSIONER: We will come back at 11.30. How does that sound?

PN341

MR MURDOCH: Yes, thank you.

PN342

MR ELLIS: Sounds good.

PN343

THE COMMISSIONER: All right, thank you. We will adjourn.

**SHORT ADJOURNMENT**

**[11.17 AM]**

**RESUMED**

**[11.31 AM]**

PN344

THE COMMISSIONER: Thank you. We will have closing submissions from you first, Mr Ellis, thank you.

PN345

MR ELLIS: Thank you, Commissioner. In summary, first reverting back to the first issue for determination concerning clause 6.5.5 and if it applies automatically to high-salaried employees, we say the clause is not ambiguous, as the respondent

suggests. The wording of clause 6.5.5 is plain: TOIL will be accrued by high-salaried employees in circumstances where there is agreement between Seqwater and the relevant employee. Whilst clause 6.5.5 and clause 6.5.6 offer employees the ability to accrue TOIL, it cannot be said that clause 6.5.6 has no work to do, as the respondent suggests. Each clause clearly provides a different class of employee the ability to claim TOIL and each clause therefore serves a purpose.

PN346

The partial repetition of clause 6.5.5 in clause 6.5.6 is explained by virtue of these clauses historically being separated on account of them being applied differently in the past. In particular, clause 6.5.6, as it is now, used to require the union to provide agreement that employees who are not high-salaried employees accrue TOIL. In the 2013 agreement, reference to the union was removed. With regard to clause 6.5.5, that has largely remained the same over the life of these agreements.

PN347

THE COMMISSIONER: You agree, Mr Ellis, at 6.5.6, the references to 6.5.4 should read 6.5.5?

PN348

MR ELLIS: That's correct, yes.

PN349

THE COMMISSIONER: Thank you.

PN350

MR ELLIS: I think that's an error of past drafting.

PN351

THE COMMISSIONER: Yes.

PN352

MR ELLIS: Look, whilst it would be ideal for clauses 6.5.5 and 6.5.6 to be amalgamated, it's not necessary for this to occur to understand how these clauses operate. In our view, Commissioner, the existence of the words 'by agreement between Seqwater and the affected employee' in clause 6.5.5 make it patently clear that there needs to be agreement between the relevant employee and Seqwater in order for that worker to accrue TOIL instead of receiving overtime pay. As demonstrated in her evidence, Commissioner, Ms McCulloch did not provide agreement to Seqwater that this occur, nor was agreement sought from her.

PN353

THE COMMISSIONER: So if agreement isn't given by the employee, do they get the payment at 6.5.3?

PN354

MR ELLIS: They receive overtime pay.



PN355

THE COMMISSIONER: At 6.5.3?

PN356

MR ELLIS: Yes, correct, Commissioner. Commissioner, high-salaried employees should not accrue TOIL automatically upon claiming for overtime, as the respondent suggests, as the words 'by agreement between Seqwater and the affected employee' would have no work to do if the respondent's interpretation of the clause were accepted, and that would actually give rise to a legitimate ambiguity. In our view, Commissioner, TOIL should only be accrued by high-salaried employees where there is agreement between the relevant employee and Seqwater.

PN357

On the issue of minimum payments, the respondent's interpretation of these provisions is completely at odds with the well-understood purpose of minimum payments and the parties' clear intention that TOIL be treated as another form of payment. The relevant clause that provides for minimum payments should not be interpreted in a vacuum divorced from industrial realities, in particular the reality that minimum payments have historically existed to protect workers from being exploited and to minimise disruption to their personal lives. This reality is demonstrated in the case law which we have outlined in our written submissions.

PN358

In addition, these provisions should not be interpreted without consideration being given to the fact that TOIL and overtime hold the same value under the enterprise agreement. When TOIL is paid out, it is paid out at the relevant overtime rates. If minimum payments are not complied with when TOIL is claimed, absurd situations would arise when TOIL accruals are converted to payments. In such situations, one employee, who is not a high-salaried employee or someone who does not elect to receive TOIL, could receive one hour of overtime payment for performing remote response work after performing only 15 minutes of work whilst an employee performing the same work, who is a high-salaried employee, could receive only 15 minutes' overtime pay once that TOIL accrual has been cashed out. This absurdity can only be remedied by minimum payments applying when employees accrue TOIL.

PN359

Commissioner, from our perspective, it is clear that the minimum payment provisions in the agreement exist to protect workers, even those who elect to receive TOIL, and the respondent has a duty to ensure these minimum payments are complied with.

PN360

At various times over the years, it is apparent, based on the evidence put forward by Ms McCulloch and Mr Kendall, that it was accepted practice that minimum payments apply when employees receive TOIL. Payroll provided employees and managers this advice and employees and managers complied with it. It was clearly an accepted practice within the organisation that employees receive minimum payments when claiming for TOIL.

PN361

The respondent appears to have changed its position on this issue after payroll updated its pay practices and implemented new pay codes for remote response work and other such work which attract minimum payments. This was done, as you know, in the middle of 2022. It is unclear if this practice changed because the respondent overlooked those employees who accrued TOIL when implementing this new practice or whether the respondent made a deliberate decision to change its practice for other reasons, such as refusing its TOIL liability or due to inaccurate advice.

PN362

In any event, the respondent has failed to duly compensate the applicant and many of her colleagues in circumstances where they have been required to undertake work by way of recall, call-out or remote response work and it has done this through its failure to comply with minimum payments when employees claimed for TOIL.

PN363

Commissioner, the respondent must comply with minimum payments when an employee elects to receive TOIL instead of overtime pay. Minimum payment provisions exist to protect workers and the interpretation put forward by the respondent does not provide this protection. Further, consistent with the wording of clause 6.5.5, high-salaried employees should have the option to decide whether they accrue TOIL at all. The respondent's view on both these issues is not correct.

PN364

Those are my submissions, Commissioner, thank you.

PN365

THE COMMISSIONER: Thank you, Mr Ellis. Mr Murdoch.

PN366

MR MURDOCH: Yes, thank you, Commissioner. You have obviously had an opportunity to read the respondent's written submissions, so I wasn't planning to go through them in chapter and verse but rather to deal with what seem to be the more important issues between the parties.

PN367

It is plain, of course, from the cases that have been referred to in respect of construction of enterprise agreements in both parties' submissions that the answer to both of the questions that are posed for the Commission revolves around construction of the enterprise agreement and, therefore, that is where the focus of my oral submissions will be.

PN368

In terms of question 1, the relevant provision to be considered, of course, primarily is clause 6.5, and that is contained at page 87 of the bundle. If I can ask you to turn to that, please. In my respectful submission, again consistent with the approach that is set out in the relevant authorities in respect of construction, the construction exercise that is before the Commission, of course, begins with the words of the provision itself.

PN369

Now, if one tracks through clause 6.5, first, when one goes to clause 6.5.1, that provides for the ability of Seqwater to require an employee to work reasonable overtime and notification requirements. Then, if one goes to 6.5.2, it provides the employee with various bases to refuse the working of overtime. 6.5.3 ought to be regarded as the default position in respect of the payment of overtime, and that can be seen from the fact that it's introduced with the phrase, 'Except as otherwise provided in this clause.' So, if the exceptions as otherwise provided don't apply, one applies clause 6.5.3 and, as one sees, the default position is that people are paid for their overtime at the rate of time and a-half for the first three hours and double time thereafter.

PN370

Then 6.5.4, that deals with when the clock's set, as it were, in regard to calculating overtime for each day, and then 6.5.5 is one of, but not the only, exception that is provided in the clause to what I have referred to as the default position back-up in clause 6.5.3.

PN371

The respondent's position, and I will develop the basis for this, of course, as I go through the submissions, but the respondent's position is that clause 6.5.5, being an exception to clause 6.5.3, is a carve-out from the provisions of 6.5.3 in respect of the class of employees that is identified in the clause, and the class of employees that is identified in the clause is the class of employees that are referred to in the first four lines, that being:

PN372

*...an employee in receipt of salary equal to or in excess of the first increment in AO Level 8/1, PO level 5/1 and TO MS2.*

PN373

Now, one might paraphrase the classifications referred to there and refer to them as higher paid employees as opposed to the people who aren't in receipt of those levels can be paraphrased as lower paid employees. So the situation is that if one is within that class of higher paid employee, the carve-out in 6.5.5 applies.

PN374

The primary position that applies in respect of those higher level employees is that that is set out in 6.5.5, that being that, upon them claiming for overtime, they are given time off equivalent to time worked, et cetera, and then there's various other contingencies that are provided for in (b), (c) and (d), and by 'contingencies' I mean situations that apply where a claim for the purposes of 6.5.5 has been declined and other factual situations as described in (c) and (d).

PN375

Now it can be accepted that the last two lines in 6.5.5 create a difficulty or an awkwardness in respect of the submission that is made by the respondent, but, in the respondent's submission, firstly, those last two lines in 6.5.5 do not have the effect that in order for 6.5.5 to apply, the higher paid employees need to agree to its application.

PN376

The reason for that is that, in distinction to what our friend says in respect of the way we approach the clause, there is ambiguity in respect of the way in which this clause is set out and, because there is ambiguity, the Commission is entitled, in my submission, based upon the authorities, to look at the history of the provision and also to look at the relevant extrinsic material in respect of what was said about how this would operate at the time that the relevant predecessor agreement, that being the 2013 agreement, came in.

PN377

Why, in my submission, there is ambiguity is because, if one reads 6.5.5 as the applicant would have it, one ends up in this situation where one has 6.5.5 requiring the higher salary employees to agree in order for the matters in (a), (b), (c) and (d) to apply and that's, on the applicant's construction, the effect of 6.5.5, but, when one goes to 6.5.6, there's a further, separate, distinct clause that does, on the applicant's case, the same work in respect of lower paid employees.

PN378

Now, even allowing for the fact that, as the cases inform us, enterprise agreements aren't drafted by civil lawyers and one has to take a robust approach in respect of their construction, it, with respect, is more than passing strange that an agreement would, in separate clauses in respect of separate classes of employees, provide for exactly the same situation. That is the effect of the operation of 6.5.5 and 6.5.6 if one were to accept the construction that is pressed by the union.

PN379

THE COMMISSIONER: You say that 6.5.5 is ambiguous because of 6.5.6?

PN380

MR MURDOCH: It is ambiguous because of 6.5.6 and because of, I accept, the inclusion of the 'and by agreement between Seqwater and the affected employee'. That's what gives - - -

PN381

THE COMMISSIONER: Where's the ambiguity there?

PN382

MR MURDOCH: The ambiguity is that you've got - one has two clauses doing the same work in respect of the separate classes of employee. That's just something that doesn't make any industrial sense at all and suggests strongly that each clause does in fact have different work. That's what demonstrates the ambiguity because, otherwise - and I am not posing the question for the Commission to answer - why would the remit be set out in this way with the same work being done in respect of different classes of employees by two clauses *seriatim*?

PN383

THE COMMISSIONER: The suggestion is that the 6.5.6 is newer and it earlier required agreement with the union. So that's now gone. Where is the ambiguity in 6.5.5 'and by agreement between Seqwater and the affected employee'? What am I to do with those words?

PN384

MR MURDOCH: It's not so much a question of what the Commission is to do with the words, it's a question of what is the work of those words and, in my submission - and I do want to take you to the extrinsic material in a moment - - -

PN385

THE COMMISSIONER: But you only get there, Mr Murdoch, if there's ambiguity.

PN386

MR MURDOCH: No, I can take the Commission to it to demonstrate ambiguity as well. So I can do that.

PN387

THE COMMISSIONER: Well, yes, but Berri is we only get to the extraneous material if there is ambiguity.

PN388

MR MURDOCH: I can take the Commission to extrinsic material to demonstrate the ambiguity.

PN389

THE COMMISSIONER: All right.

PN390

MR MURDOCH: But, in my respectful submission, I don't need to because the two clauses - and this is where the ambiguity comes from - 6.5.5 and 6.5.6, on the union's construction, just don't sit together because they are both doing the same work.

PN391

THE COMMISSIONER: What if it does mean, 'You high level employees, by agreement, can get TOIL and now, under this agreement, you lower level employees, you can get the same deal by agreement'?

PN392

MR MURDOCH: If it does mean that - and I'm not asking the Commission the question - but if it does mean that, why, one asks, wouldn't one have one clause that deals with them both rather than two clauses that deal with the same issue?

PN393

THE COMMISSIONER: But what if that's how they actually read?

PN394

MR MURDOCH: I'm sorry?

PN395

THE COMMISSIONER: What if that is how they read?

PN396

MR MURDOCH: Well, if that is how they read, that's what creates the ambiguity because - - -

PN397

THE COMMISSIONER: All right. So the employer is happy to give to lower level employees a choice of whether or not they receive overtime payments or TOIL; is that right?

PN398

MR MURDOCH: Well, that's - - -

PN399

THE COMMISSIONER: That's at 6.5.6.

PN400

MR MURDOCH: That's 6.5.6.

PN401

THE COMMISSIONER: They are happy to do that?

PN402

MR MURDOCH: Yes.

PN403

THE COMMISSIONER: But they are not happy to do that for higher level employees?

PN404

MR MURDOCH: Well, it's not so much a question of not being happy, it's a question of applying what's in the agreement.

PN405

THE COMMISSIONER: Well, they have taken that away from the higher level employees, have they?

PN406

MR MURDOCH: Well, when the Commission says they've taken it away, they have adopted - - -

PN407

THE COMMISSIONER: There is no choice?

PN408

MR MURDOCH: They have adopted an approach and the evidence in this case is that that approach has been adopted for a very long time. They have adopted an approach of applying 6.5.5 to the higher level employees.

PN409

THE COMMISSIONER: All right.

PN410

MR MURDOCH: Absent agreement.

PN411

THE COMMISSIONER: Okay. And 6.5.6 is, 'If the employee and the employer agree, you low level employees can choose either' - - -

PN412

MR MURDOCH: Yes, that's so. So - - -

PN413

THE COMMISSIONER: Right. But not the higher level employees; they don't get a choice?

PN414

MR MURDOCH: On the respondent's construction, that is so, and that's why there's two clauses, one that applies to lower level employees, giving them the choice, and one that applies to higher level employees, not giving them a choice.

PN415

THE COMMISSIONER: So, again, what do the words, 'and by agreement between Seqwater and the affected employee' at 6.5.5 do?

PN416

MR MURDOCH: For the purposes of this agreement, nothing, because they are a relic.

PN417

THE COMMISSIONER: I should ignore them, should I?

PN418

MR MURDOCH: You should because they are a relic left over from previous iterations.

PN419

THE COMMISSIONER: Were employees told that when they were asked to vote on the agreement?

PN420

MR MURDOCH: Well, when employees were asked to vote on the agreement, they were apprised of a position, and the position of which they were apprised was that the higher level of employees, the carve-out would apply.

PN421

THE COMMISSIONER: Where is that in the material?

PN422

MR MURDOCH: That's in Ms Siaso's material.

PN423

THE COMMISSIONER: Relevant to the 2019 agreement?

PN424

MR MURDOCH: Relevant to the 2013.

PN425

THE COMMISSIONER: I'm not interested in that, am I?

PN426

MR MURDOCH: No, well, with respect, the Commission ought to be interested in it because that was when the relevant change was made.

PN427

THE COMMISSIONER: When did these employees who voted in the 2019 agreement get told that?

PN428

MR MURDOCH: Well, it's relevant to the construction exercise for the Commission to consider what employees were told when the material changes were made to the agreement.

PN429

THE COMMISSIONER: Well, some of those employees might not have been there and my question to you is: are the employees told about this when they are asked to vote on the 2019 agreement?

PN430

MR MURDOCH: There is no evidence before you to that effect.

PN431

THE COMMISSIONER: No.

PN432

MR MURDOCH: But - - -

PN433

THE COMMISSIONER: It's not in the F17, not in the material provided to employees.

PN434

MR MURDOCH: I haven't checked the F17, but - - -

PN435

THE COMMISSIONER: I have just checked it now.

PN436

MR MURDOCH: But what I'm saying to you is there's no evidence to that effect.

PN437

THE COMMISSIONER: No. So you're relying on what some long-serving employees might have understood, and we don't know how many of those are still around in 2019; is that what you are saying?

PN438

MR MURDOCH: Well, what I'm relying upon in terms of the construction exercise is what employees were told at the time the clauses were changed, and they have remained the same since. I accept what the Commission is saying in respect of there not being evidence of people being told of this construction in



2019, but what there is is evidence of people being told about the construction that would continue to apply when the provision was materially changed.

PN439

THE COMMISSIONER: Yes, but we got there because I said, 'What am I to do with the words "and by agreement between Seqwater and the affected employee" and am I being asked to ignore them?'

PN440

MR MURDOCH: Yes.

PN441

THE COMMISSIONER: And that is because?

PN442

MR MURDOCH: That is because of the ambiguity, because of the ambiguity that is created by including them, and it is because of the extrinsic material in terms of the development of this agreement over time - the development of this agreement over time - and what the employees were told when the material changes were made in 2013.

PN443

THE COMMISSIONER: So if there was an agreement that said, 'Casual employees will get a cool room allowance of \$7 an hour, permanent employees will get a cool room allowance of \$7 an hour', isn't that like this clause? How would you say, 'Well, only one of those employees, because why would you have something that says the same thing?'

PN444

MR MURDOCH: Well, in the Commission's example, the Commission, with respect, is providing an example in respect of classes of employees that are usually dealt with differently in enterprise agreements. Casuals, it's not unusual, in fact it's regular for casuals - - -

PN445

THE COMMISSIONER: Okay. All right - - -

PN446

MR MURDOCH: - - - to be dealt with differently, whereas here - - -

PN447

THE COMMISSIONER: Okay, let's say employees at levels 1 to 4 will get a cool room allowance of \$7 an hour and employees at levels 5 to 9 will get a cool room allowance of \$7 an hour.

PN448

MR MURDOCH: Why would anyone - again I am not asking you to answer the question - but why - - -

PN449

THE COMMISSIONER: If that's what was put - - -

PN450

MR MURDOCH: Why would anyone provide for that in an agreement?

PN451

THE COMMISSIONER: What if they did?

PN452

MR MURDOCH: Why would someone sit down and draft an agreement like that?

PN453

THE COMMISSIONER: You know that all sorts of matters come before the Commission, Mr Murdoch.

PN454

MR MURDOCH: It could only be - it could only be - in my submission, such a curious situation - - -

PN455

THE COMMISSIONER: In that situation, would one of those groups of employees not be entitled to the allowance, would they?

PN456

MR MURDOCH: No, no, it could - - -

PN457

THE COMMISSIONER: Right.

PN458

MR MURDOCH: No, that's not so, and can I say the example the Commission is putting is somewhat different to what's here, but the point that I'm making is why would anyone - anyone - draft a clause like - draft two clauses seriatim like that?

PN459

THE COMMISSIONER: Well, why would 6.5.5 not survive with respect to the agreement but 6.5.6 does?

PN460

MR MURDOCH: When the Commission says 'survive'?

PN461

THE COMMISSIONER: Well, you have asked me to ignore the words 'And by agreement between Seqwater and the affected employee' because you say 6.5.6 makes no sense when it's provided to the lower level employees. Why would the agreement in 6.5.6 survive - - -

PN462

MR MURDOCH: Because - - -

PN463

THE COMMISSIONER: - - - but the agreement in 6.5.5 not survive?

PN464

MR MURDOCH: Because, on our construction, there's always been the capacity for the lower level employees to be on that arrangement by agreement - there is nothing unusual about that - whereas it's never been the case, on our submission, that the higher level employees have required agreement.

PN465

THE COMMISSIONER: Isn't that a similar clause? Isn't that the applicant's submissions, Mr Ellis, that this clause is not new, 6.5.5?

PN466

MR ELLIS: Yes, 6.5.5, Commissioner, has remained the same throughout the entire life of the agreement, and with regards to 6.5.6, as it is now, my friend is asking, 'Well, why are there two clauses here?' and there are two clauses because 6.5.6, as it is now, used to require agreement with the union, so it's a product of historical drafting as to why they are in separate parts of the agreement.

PN467

THE COMMISSIONER: Thank you, I just wanted your clarity. Mr Murdoch, as I understood it, the applicant was contending that 6.5.5 is not new.

PN468

MR MURDOCH: 6.5.5 is not new, but 6.5.6 is different, different both in terms and effect - - -

PN469

THE COMMISSIONER: Yes, but I thought - - -

PN470

MR MURDOCH: - - - from what applied historically.

PN471

THE COMMISSIONER: - - - you submitted just before I asked the question there - - -

PN472

MR MURDOCH: Yes.

PN473

THE COMMISSIONER: You said that it's not the same as earlier agreements, but it is, isn't it?

PN474

MR MURDOCH: Sorry, which clause?

PN475

THE COMMISSIONER: 6.5.5, relevant to the higher level employees, it's not new, is it?

PN476

MR MURDOCH: It's not new, but the operation of it needs to be read in respect of the historical 6.5.6 and the current 6.5.6. I think it would assist if I took you to how the clauses were before they were changed.

PN477

THE COMMISSIONER: Well, again, I come back to my question of why then would you say the new 6.5.6 in this agreement has preferential longevity over 6.5.5 in that, for lower level employees, the 'By agreement between Seqwater and the employees' lives, but it does not live in 6.5.5?

PN478

MR MURDOCH: Because lower level employees, it's always been - it's always been the case that they can opt in by agreement.

PN479

THE COMMISSIONER: With the union?

PN480

MR MURDOCH: No.

PN481

THE COMMISSIONER: Are you sure about that?

PN482

MR MURDOCH: Well, I am. I am sure about that because that's why I want to take you - that's why I want to take the Commission to the previous iteration of the agreement.

PN483

THE COMMISSIONER: Sure. Okay, let's do that.

PN484

MR MURDOCH: Yes. If you could go, please, to paragraph 19 of the - the shorthand way of doing it is to take you to paragraph 19 of the submissions of the respondent.

PN485

THE COMMISSIONER: At 110?

PN486

MR MURDOCH: I beg your pardon?

PN487

THE COMMISSIONER: At 110?

PN488

MR MURDOCH: Yes. Now, if the Commission goes to paragraph 19 - and I should say this has been set out in more detail in annexure B, but, for present purposes, I only need to take you to paragraph 19 - paragraph 19 sets out the 2009 CA provisions. Now, accepting that what is 6.5.4 there is now 6.5.5, et cetera, you will see that 6.5.4/5, that's the same, but then if you go to 6.5.5, now 6, it provided further that:

PN489

*By agreement between Seqwater and the relevant union, employees in receipt of salaries less than that prescribed may, upon claiming...*

PN490

So under the old iteration of the agreement, there were, in my submission, three categories or three situations. There was what was provided for in 6.5.4, which was the capacity for - the higher level employees, they were in automatically. That's 6.5.4, now 5. There was then - - -

PN491

THE COMMISSIONER: What do you mean 'they were in automatically'?

PN492

MR MURDOCH: No agreement required.

PN493

THE COMMISSIONER: Sorry?

PN494

MR MURDOCH: No agreement required.

PN495

THE COMMISSIONER: But you have underlined there 'And by agreement between Seqwater and the affected employee.'

PN496

MR MURDOCH: Yes, and that's because what's underlined there under that iteration of the agreement, that's what gave the non-high level employees the capacity to agree. So the work of 6.5.4 under the old agreement was that the higher level employees, the clause would apply to, and for the lower level employees, they could agree with Seqwater for it to apply to them. So there were two tasks, or two pieces of work, done by 6.5.4 under the old agreement. Then there was the third category, which was provided for in 6.5.5, that being that, provided further by agreement between Seqwater and the relevant union, the lower level employees could be the subject of - - -

PN497

THE COMMISSIONER: Hang on. At paragraph 18 of the respondent's submissions, the 2019 agreement, at 6.5.4, had the higher level employees.

PN498

MR MURDOCH: Yes.

PN499

THE COMMISSIONER: And the words were in there 'And by agreement between Seqwater and the affected employee'?

PN500

MR MURDOCH: Yes.

PN501

THE COMMISSIONER: Identical to the 2019 agreement?

PN502

MR MURDOCH: Yes.

PN503

THE COMMISSIONER: And you say that that 'And by agreement between Seqwater and the affected employee' had no work to do back in 2009?

PN504

MR MURDOCH: No, no, I'm saying it did have work to do in 2009.

PN505

THE COMMISSIONER: So employees, high level employees, had to make agreement with their employer to access TOIL instead of being paid overtime?

PN506

MR MURDOCH: No, no, no. The 'And by agreement between Seqwater and the affected employee', that picked up and provided the capacity for lower level employees to themselves agree. It gave them the capacity to agree. So you had one clause, 6.5.4, that dealt with higher level being there automatically and lower level - - -

PN507

THE COMMISSIONER: What does 'being there automatically' mean?

PN508

MR MURDOCH: No agreement is required.

PN509

THE COMMISSIONER: Is that what you say that means?

PN510

MR MURDOCH: Yes.

PN511

THE COMMISSIONER: In 2009?

PN512

MR MURDOCH: Yes.

PN513

THE COMMISSIONER: And is that how the employer treated it? We don't know, do we?

PN514

MR MURDOCH: Well, that's the way it worked.

PN515

THE COMMISSIONER: So these words have been in here for now 14 years with no work to do?

PN516

MR MURDOCH: The words did have work to do because - I'll be careful when I say 'the words' because I want to ensure that what I am inferring are the words - - -

PN517

THE COMMISSIONER: Well, the words are, 'And by agreement between Seqwater and affected employees.'

PN518

MR MURDOCH: Yes, so under the 2009 agreement, that provided the capacity for lower level employees to themselves agreeing.

PN519

THE COMMISSIONER: What, at 6.5.5?

PN520

MR MURDOCH: 6.5.4, those underlying words. That's the work that it did.

PN521

THE COMMISSIONER: But 6.5.4 is the high level employees, isn't it?

PN522

MR MURDOCH: It dealt with both. It provided - in the non-underlined part, and by that I'm saying in the part that was not affected by 'And by agreement between Seqwater and the affected employee', the part that referred solely and specifically to higher level, that did the work of, higher level employees this clause applies to. Then the underlined words provided the capacity for lower level employees, as distinct to higher level employees, to be subject to the clause by their own individual agreement. So a lower level employee may themselves agree to be the subject of the paragraphs in the then 6.5.4.

PN523

THE COMMISSIONER: So, in 2009, the rules for high level employees are contained in 6.5.4?

PN524

MR MURDOCH: Yes.

PN525

THE COMMISSIONER: And the rules for low level employees are contained in 6.5.5?

PN526

MR MURDOCH: In 2009, there were three scenarios. The first scenario was, if you are a higher level employee, agreement is not required for the clause to apply. That's the first - that's scenario 1.

PN527

THE COMMISSIONER: How?

PN528

MR MURDOCH: And that's provided for in 6.5.4. Then there's - - -

PN529

THE COMMISSIONER: How is no agreement required? It says, 'And by agreement between Seqwater and the affected employee.'

PN530

MR MURDOCH: That's because the 'And by agreement between Seqwater and the affected employee' ought to be read as 'Doing the work of providing the capacity for the lower level employees to agree.'

PN531

THE COMMISSIONER: Because their rules are in 6.5.5, where it says, 'Provided further that by agreement'?

PN532

MR MURDOCH: Because another - - -

PN533

THE COMMISSIONER: I'm not sure what you mean, Mr Murdoch.

PN534

MR MURDOCH: I'm sorry?

PN535

THE COMMISSIONER: I'm not sure what you mean.

PN536

MR MURDOCH: Well, I will start again and I'll just work through - I will just work through the three scenarios. The first scenario, higher level employees. The higher level employees' agreement was not - this is the submission as to what the construction should be - higher level employees did not require agreement to meet the subject of 6.5.4. That's the first scenario, or the first group.

PN537

The second is lower level employees could - and this is nothing to do with the union - but lower level employees, off their own bat and in their own right, could agree, and that was provided for by the 'And by agreement between Seqwater and the affected employee.' So they are the two scenarios that applied to 6.5.4.

PN538

The third scenario that was provided for by 6.5.5 provided, further to 6.5.4, provided further that, by agreement between Seqwater and the relevant union, lower level employees could be the subject of the clause. So it provided the capacity in respect of the lower level employees for, independently of the lower level employees themselves agreeing, for the union to agree.

PN539

That's the three scenarios that applied and, therefore, when the change was made, when one goes to paragraph 21, which sets out the clauses in the 2013 agreement, and one sees what the change was, when one goes to 6.5.5, the reference to 'the union' in 6.5.5 has been changed to providing for agreement between Seqwater and the employee, but what's happened is that the words that previously did that



work, on the respondent's submission, 'And by agreement between Seqwater and the affected employee' were left in, and that's the error, in my submission, that has led to this current conundrum and, once one accepts that, it becomes plain that those words ought not be given work to do under the present iteration of the agreement. So that's the historical pathway.

PN540

But the second point that, in my submission, confirms that the construction that is being relied upon by the employer is correct is what the employees were told at the time of the 2013 agreement coming in. Can I ask you in that respect - and this is the second limb of the extrinsic material argument - can I ask you to go Ms Siaosi's statement, please. That's at page 153 in the bundle. What has been reproduced at page 153 is, as is described, '2013 Enterprise Bargaining Agreement Update' and you will see that the subheading there is 'Proposed Agreement: Clauses remaining the same.' The first paragraph:

PN541

*This list provides a brief overview of the key entitlements which have not changed.*

PN542

If you then go down to the bottom of the page, the second paragraph from the bottom, under the heading 'Penalty Rates and Overtime', and I will just pause to let the Commission read that paragraph.

PN543

THE COMMISSIONER: I have read it, thank you.

PN544

MR MURDOCH: Then you will see the last sentence:

PN545

*Employees in receipt of salaries equal to or in excess of AO8...*

PN546

et cetera:

PN547

*...are to receive time off in lieu...*

PN548

Clause 6.5.3 and clause 6.5.4. It doesn't say anything there about there being a need for agreement. What it is saying is that nothing - under this new agreement, nothing has changed in respect of the higher level employees: if they are a higher level employee, they receive time off in lieu. That's the second point that we rely upon to demonstrate that this notion that the old 6.5.4 was somehow doing this work of requiring agreement in respect of the higher level employees just isn't correct. It didn't then and it doesn't now, and it wasn't - - -

PN549

THE COMMISSIONER: So we don't know why those words are there?

PN550

MR MURDOCH: I beg your pardon?

PN551

THE COMMISSIONER: We don't know why those words are there?

PN552

MR MURDOCH: Well, I would - I've just sought to explain why those words were there originally, and it would seem that they have just been - that they have just been left there and that's an historical relic of when the changes were made back in 2013, and that's something, of course, which, going back to our discussion a little bit earlier, happens from time to time and, in my submission, with respect, it's far more likely that, when one looks at how the three - I beg your pardon - the two clauses worked and ought to be construed under the 2009 agreement, that that's just been left in, as opposed to forming the view that there's some conscious approach on the part of the employer to maintain two clauses dealing with different classes of employees that say the same thing.

PN553

So, it doesn't matter which way one looks at it, there is awkwardness, but, in my respectful submission, the answer to the awkwardness is able to be explained when one looks at this diverse situation, whereas, with respect, there is no answer to the awkwardness that's presented by the applicant's construction.

PN554

THE COMMISSIONER: Well, under the 2009 agreement, isn't it the case that the higher level employees, arguably, could have reached that agreement between themselves and the employer and there was a protection for the lower level employees in that they needed the union to agree on their behalf?

PN555

MR MURDOCH: Well - - -

PN556

THE COMMISSIONER: I mean that's the distinction, isn't it, between the two clauses?

PN557

MR MURDOCH: Well, that's a distinction, but, accepting that this was as recent as 2013, it's equally open and, in my submission, the preferential construction, to form the view that there was the capacity for lower level employees, for their own personal circumstances, notwithstanding the view of the union, if they wished to partake of such an arrangement, to partake it.

PN558

THE COMMISSIONER: Sure, it's a good thing, but that - on the face of it, it looks like between 2009 and 2013, for some reason, in 2009, the union tied it up to say it had to be with them. In 2013, employees get a say.

PN559

MR MURDOCH: Well, again, in my submission, that's not - that is - I suppose this goes back to the ambiguity point. That is a construction, but it's not the one that one would naturally apply in respect of the 2009 situation because, firstly, one has this situation where, as the Commission acknowledged, why shouldn't - why shouldn't the lower level employees have to be - I withdraw that. Why should the lower level employees have to be reliant on an agreement with the union if they, themselves, through their own circumstances, wanted to partake of the arrangement and agreed to do so? That's what the words - under the way the clauses were back then, that's what those words, that's what those words 'And by agreement between Seqwater and the affected employee' did. They provided the lower level employees with that capacity.

PN560

THE COMMISSIONER: Yes, and do you say then that, once that's done in 2013, that evaporates the 2009 rights of the higher level employees because it's the same? Is that what you are saying?

PN561

MR MURDOCH: No, well, the 2009 employees, they never had - it was never by agreement with them. They were - - -

PN562

THE COMMISSIONER: So you say.

PN563

MR MURDOCH: Well - - -

PN564

THE COMMISSIONER: I'm not sure how you convince me of that, though, Mr Murdoch.

PN565

MR MURDOCH: Well, I will do my best. In my submission, more than me doing my best, we go back to the clause 6.5.4 as it was in the 2009 CA, dealing with - dealing with the high level employees:

PN566

*The provisions will apply to an employee in receipt of salary and, by agreement between Seqwater and the affected employee.*

PN567

It's providing for two categories. 'It will apply to you and it can apply to you by agreement.' That's how it worked and, therefore the 'And by agreement between Seqwater and the affected employee', that is just a relic of the past which never had the effect - never had the effect - of the higher level people being required to agree, and we know that from what was said to them in respect of what's not changing in 2013.

PN568

THE COMMISSIONER: Well, we don't know if that notice to employees is correct. It's something that was issued by the employer. It doesn't make it correct.

PN569

MR MURDOCH: Well, it's something that - it's something that the Commission can take into account in undertaking the construction exercise because it's - - -

PN570

THE COMMISSIONER: I can also take into account all the F17s that were put in all these various agreements, and did the employer ever say, 'Well, this applies to this group and this doesn't apply to that group?' Were they silent on it?

PN571

MR MURDOCH: Well, we don't - - -

PN572

THE COMMISSIONER: What did they tell the employees when they voted? I mean, was there ever genuine agreement?

PN573

MR MURDOCH: Well, one thing we don't have here is, noting that this was sent out to all of the employees, this document that is attached to Ms Siaosi's statement, which plainly says, 'This is what's not changing', and one of the things that's said to all of the employees by the employer that's not changing is that the higher level employees are under the arrangements in 6.5.4.

PN574

It doesn't say anything about agreement, and there is no evidence before the Commission - and the union was, of course, involved in the negotiations back then - nothing has been put before you to demonstrate that the union got hold of that and said, 'No, no, no, that's wrong, that's wrong, this is a change, this is a change, you previously could only be a part of this by agreement.' So that's a major change. So there's nothing to suggest - nothing to that effect.

PN575

So it's more likely, and the Commission ought to infer that what the employer was saying was what was understood to be the case.

PN576

THE COMMISSIONER: Disputes come before the Commission all the time because, more often the case, a union says, 'Hang on, we've looked at this, we're a few years in' - or even a few weeks in - 'and we don't think this is right.'

PN577

MR MURDOCH: I accept that, but the point being that, on the evidence that's before you, there's a statement from the employer in the context of the 2013 agreement as to what is not changing and that is consistent with the construction that the respondent is putting to this Commission as being how 6.5.4 applied back under 2009, and it explains - once one puts all of those pieces together, it explains what the effect of 'And by agreement between Seqwater and the affected employee' was historically, and it explains why, now, it ought not to be given the meaning that is sought to be applied to it because it never had that effect and ought not be given that effect now.

PN578

THE COMMISSIONER: I understand that is your submission.

PN579

MR MURDOCH: Yes. So, in respect of the second aspect of the questions, again, in my submission, the resolution begins with the words of the provision. If one goes to clause 6.6 and clause 6.7, one of them provides for a call back, one of them provides for a call out, and they respectively - and by way of example, I will refer to clause 6.7.3 - they respectively refer to a minimum payment, and the minimum payment that is referred to in 6.7.3 is the minimum payment of three hours for each call out at the prescribed overtime rate.

PN580

Now, in my submission, and I don't ask you to open it up now, but we have referred to what was said by Bissett C in the Re Australian Payroll case that there is, of course, a conceptual difference between a minimum payment and a minimum engagement, and a minimum payment is a concept that is relevant to paid overtime, that being where you are performing overtime and being paid for it, and that is, of course, a very different situation from what's the case here, which, if one accepts that 6.5.5 applies, it's not a situation, of course, where someone is being paid for performing overtime, what they are receiving is time off in lieu, which is a different concept, of course, to payment. They are receiving time off and, because they are receiving time off, the minimum payment doesn't apply because the concept of minimum payment doesn't relate and doesn't translate to having time off.

PN581

THE COMMISSIONER: Were high level employees ever told that?

PN582

MR MURDOCH: I beg your pardon?

PN583

THE COMMISSIONER: Were high level employees ever told that when they were asked to vote in the agreement?

PN584

MR MURDOCH: There's no evidence before the Commission in respect of that.

PN585

THE COMMISSIONER: It doesn't say an employee who is lower than blah, blah, blah.

PN586

MR MURDOCH: Where's that, I'm sorry? If the Commission is referring to - - -

PN587

THE COMMISSIONER: Yes, for example - - -

PN588

MR MURDOCH: No, it doesn't, and that's because, going back to the construction exercise, that's a general provision and that general provision has to be read in respect of - that general provision in 6.6 and the general provision in 6.7, they have to be read in relation to how overtime is dealt with in respect of the different classes of employees under 6.5.

PN589

THE COMMISSIONER: All right. So 6.7.4 and Ms McCulloch's example, how far into 6.7.4 do we get before it doesn't apply to her?

PN590

MR MURDOCH: I'm sorry?

PN591

THE COMMISSIONER: Well, does 6.7.4 apply to Ms McCulloch?

PN592

MR MURDOCH: 6.7.4 does apply to Ms McCulloch.

PN593

THE COMMISSIONER: Yes, and how far in - and what doesn't apply to her? The bit about, 'You will get paid a minimum payment of one hour'?

PN594

MR MURDOCH: That's so, because that's a minimum payment.

PN595

THE COMMISSIONER: Right, and - - -

PN596

MR MURDOCH: It's a different concept to time off.

PN597

THE COMMISSIONER: So employees are expected to understand that, are they?

PN598

MR MURDOCH: Well, industrially, they are different concepts. It's a different concept. It's not - that there is referring to what happens when you receive a payment, not what happens when you receive time off in lieu. Sorry, I didn't mean to talk over you.

PN599

THE COMMISSIONER: Yes, and employees are meant to understand that someone like Ms McCulloch, being a high level employee, doesn't get a minimum payment of one hour, even though she did for a year and a-half, but then she didn't?

PN600

MR MURDOCH: Well, employees are expected to understand that because that's referring to payments and, if you are under clause 6.5.5, you are not receiving payments, and so that, in my submission, is a perfectly understandable outcome in respect of the higher level employees who are the subject of 6.5.5.

PN601

Insofar as it might be said - and there were some questions around this - that, well, you know, if a lower level employee does the same call-out, they get paid X and if a higher level employee does the call-out, they get time off in lieu in respect of Y and that is somehow unfair or that's somehow - and there's some sort of industrial awkwardness in it, well, in my respectful submission, as the Commission would well know, there's nothing unusual - nothing unusual at all - about higher level employees' entitlements, particularly in respect of overtime, being different from lower level employees. That, industrially, is not unknown, so the fact that it might be different doesn't mean that it's unfair.

PN602

THE COMMISSIONER: Should employees know that when they are voting on an agreement?

PN603

MR MURDOCH: Well, in my submission, it's something that is able to be discerned from the agreement itself.

PN604

THE COMMISSIONER: But it wasn't by the employer until mid-2022.

PN605

MR MURDOCH: Well, and again, not wanting to reply back to the Commission, a comment made by the Commission, but, just as there are disputes before the Commission every day brought by unions in respect of something that had gone through the keeper, as it were, at an earlier point in time, again it's not unusual - not unusual - particularly in the context of an employer, that - - -

PN606

THE COMMISSIONER: No, but they expect employees to know when they vote on it.

PN607

MR MURDOCH: Yes.

PN608

THE COMMISSIONER: And then it's a light bulb moment for them in mid-2022?

PN609

MR MURDOCH: Well, it's not unusual at all for employers, particularly in the context of a wide-ranging review of the correct way for entitlements to be provided, to change a view in respect of something.

PN610

THE COMMISSIONER: Yes.

PN611

MR MURDOCH: Particularly large organisations.

PN612

THE COMMISSIONER: Yes, but again I come back to employees were meant to know this, were they, that a higher level employee doesn't get a minimum one hour, that they should know that when they are voting on the agreement?

PN613

MR MURDOCH: Yes, and so, too, ought the employer. I'm not suggesting some different standard.

PN614

THE COMMISSIONER: And the evidence is the employer didn't.

PN615

MR MURDOCH: The evidence is that the payroll system didn't - I withdraw that. The evidence is that the way in which it worked was that the employer paid on the basis of the hours that were put in by the employee. That's the evidence, and this is not said in any critical way and there's definitely no suggestion of any impropriety on the part of the employees, but where an employee put in the minimum amount, that was what was paid. Again, that's not unknown, where something wrong is put on a timesheet, for it just to be paid, particularly in large organisations.

PN616

Unless you have any further questions for me, they are the oral submissions on behalf of the respondent.

PN617

THE COMMISSIONER: Thank you, Mr Murdoch. Yes, Mr Ellis.

PN618

MR ELLIS: Thank you, Commissioner. Just in response to some of the points raised by my friend, the respondent has made submissions that the words in clause 6.5.5, as it is now, 'By agreement between Seqwater and the affected employee', in the 2009 version of the agreement, they suggest that those words extended the option for employees who are not high-salaried employees to access TOIL, so what they appear to be suggesting is that, you know, that's how it operated.

PN619

We say that that interpretation is not correct. We say it is incorrect because clause 6.5.6, as it is now labelled now, existed to address this very issue, to provide employees other than high-salaried employees the entitlement where the relevant union agreed. 6.5.5, as it is labelled now, specifically stipulates at the beginning of the clause that it is only to apply to high salary employees; it doesn't apply to other employees outside of that.

PN620

If my friend's submissions were to be accepted in any way, the clause would need to say 'or by agreement with the low salary employees.' It does not state that. If the respondent's interpretation were correct that clause 6.5.5, as it is now, applies to low salary employees, when they brought in the 2013 agreement and wanted to



extend that option to low-salaried employees, they simply would have removed clause 6.5.6.

PN621

A further issue, from our perspective, 6.5.5 has remained the same since 2009 and if the respondent wanted to amend it, they have had plenty of time to take these steps. My friend says that the words 'by agreement' are a relic. Well, if their interpretation were accepted, the words 'by agreement between Seqwater and the affected employee' would have no work to do, and this is inconsistent with one of the cases they actually rely on in their own submissions, which is the *AWU v (Indistinct)* decision, which states that phrases in an agreement must have work to do.

PN622

My friend asks why there are two clauses that operate in a similar way. Well, that's largely, as I think you know, Commissioner, a product of historical drafting where the 2009 clause 6.5.6, as it is now, required agreement with the relevant union and 6.5.5, as it is now, has remained the same.

PN623

With regards to the extrinsic material, Commissioner, again, going back to the Berri decision, that should only be admitted where there is an ambiguous clause. The clause is quite clear from our perspective. It requires agreement by Seqwater and the relevant employee and, you know, the email itself that was sent, that's only one man's opinion on how that clause is interpreted. It is not indicative of what the bargaining parties considered when they were going through the process.

PN624

Just on the issue of minimum payments, Commissioner, my friend says it's important, the distinction between minimum payments and minimum engagements. We do not say the difference is important for the purpose of this dispute. In fact, the National Retail Association Limited decision that we refer to in our submissions clearly stipulates that these types of provision that are quite similar, the National Retail Associated decision states:

PN625

*The minimum engagement period does not preclude shorter periods of work provided payment for the minimum period is made.*

PN626

So that's kind of in line with how the respondent is saying minimum payments should work, but we will put that to one side for now, but, as noted in the *Polan v Goulburn Valley* decision:

PN627

*Minimum payments exist to protect employees from their employers taking advantage of them.*

PN628

That's how these provisions should be interpreted. They should be interpreted in a way that provides Ms McCulloch here with the appropriate accrual of TOIL when she's called up in the middle of the night to perform 20 minutes of work in circumstances where that's causing a significant disruption to her life. She should at least receive that one hour minimum payment in the form of TOIL, if that's what she elects, or in the form of overtime pay, given how we see the construction of clause 6.6.5. On the issue of minimum payments, the evidence establishes that there has been a long-running practice where these have been complied with when employees have claimed TOIL.

PN629

We have no further submissions on this issue, Commissioner, thank you.

PN630

THE COMMISSIONER: Thank you, Mr Ellis. There's nothing further, parties? No? I am happy for you to take instructions, Mr Murdoch.

PN631

MR MURDOCH: I beg your pardon, Commissioner?

PN632

THE COMMISSIONER: Do you wish to state anything further?

PN633

MR MURDOCH: No, thank you.

PN634

THE COMMISSIONER: No? All right, well, thank you, parties, thank you for your representation, gentlemen, and your instructors. Thank you.

PN635

My decision is reserved. Thank you.

**ADJOURNED INDEFINITELY**

**[12.38 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

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