TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER JOHNS

AG2023/4538

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

MSS Security Pty Limited T/A MSS Security
and
United Workers' Union
(AG2023/4538)

MSS Security Victorian Enterprise Agreement 2021

Melbourne

10.00 AM, WEDNESDAY, 14 FEBRUARY 2024

Continued from 13/02/2024

PN837

THE COMMISSIONER: Good morning, parties. It's Commissioner Johns speaking. Ms Campbell, will we hear from you first?

PN838

MS CAMPBELL: Yes. Thank you, Commissioner. Can I just confirm that you can see me and hear me.

PN839

THE COMMISSIONER: I can.

PN840

MS CAMPBELL: Thank you very much. Commissioner, thank you for the opportunity to provide submissions in closing on the following day. Just foreshadowing that the way I'm going to address you this morning is to spend a bit of time talking about the two-step process. I will spend more time on the second step, which is the discretion to vary and that's where I will address you on a lot of the evidence.

PN841

THE COMMISSIONER: I think Bell DP called it a three-step process.

PN842

MS CAMPBELL: Sorry. It is a three-step process. The reason that I'm referring to it as two steps is that in this case one of those steps is not controversial.

PN843

THE COMMISSIONER: Contested, yes.

PN844

MS CAMPBELL: But perhaps I think that means that - I believe the non-controversial step is actually step 2, so I'll address you on steps 1 and 3.

PN845

THE COMMISSIONER: Step 3, yes.

PN846

MS CAMPBELL: I'll also address you on the matters that you raised yesterday concerning the Full Bench of the Monash decision, and also the *AMOU v TT* miners' case mainly in relation to that second step. It's probably easiest in a way for me to briefly start with the submissions that I would like to make on uncertainty and ambiguity. You asked me a question yesterday about what the difference between an uncertainty and an ambiguity is.

PN847

The leading case that informs the Commission about this is the Bianco Walling case. Both parties have referred to that case in its submissions, and it is a Full Court case. In that case the Full Court did set out that there was a difference between ambiguity and uncertainty, although said that those two definitions were related. The dictionary definition of 'uncertainty' is set out in that decision and, in

my submission, you can read uncertainty as being something that is somewhat of a lower threshold than ambiguity. What it means is -

PN848

not definitely or surely known; doubtful. 2. not confident, assured or decided. 3. not fixed or determined. 4. doubtful; vague; distinct.

PN849

In my submission, the materials in this case demonstrate that the term in clause 21 is uncertain. You can see that from the words on the face of the agreement itself. Bianco Walling cautions the decision-maker not to undertake a construction exercise at this stage of its decision-making under 217, but you can look at the face of the words and see that it is uncertain. You can also look at the materials that sit behind those words.

PN850

I'm going to address you on the materials and the evidence in a more detailed way when we get to what we're now describing as the third step, but I want to submit in relation to uncertainty it's not a high threshold and the Commission should be satisfied that this aspect of the agreement is uncertain. There is also the principle indicated from Bianco Walling that the Commission should -

PN851

err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention.

PN852

There are rival contentions advanced by the parties in this case as to the meaning of clause 21 and what increase is referred to, so, in my submission, the Commission should clearly be satisfied that the ambiguity exists. I am going to move on now to addressing you on some of the legal aspects of the third test, unless you have any questions about uncertainty that you would like me to address you on.

PN853

THE COMMISSIONER: I do not.

PN854

MS CAMPBELL: Okay. Thank you. So moving on to - I am now describing it as the third test. This is the discretion as to whether the agreement should be varied. I wanted to take the Commission to some of the principles that were observed by the Full Bench in the *Monash University v NTEU* case. I'm sure the Commission has this before it and is well aware of the case, but it is, just for everybody in the hearing room, [2023] FWCFB 181.

PN855

This is a case where Bell DP had found that there was an absence on the material of a common intention or a substantive agreement, having found that there was uncertainty or ambiguity at the first stage. He ultimately determined that he would refuse the variation based on the fact that there was a lack of common

intention or substantive agreement. The Full Bench upheld his reasons, although did make some comments about those reasons that can be of assistance to the Commission in understanding its task today.

PN856

A couple of the principles that I just wanted to address you on so it becomes apparent why the evidence before the Commission is so important, are the significance of a common intention or substantive agreement. It's very clear from the authorities that the common intention and substantive agreement is not an actually held opinion by either the union, the employees or the employer. The Commission's task is an objective one; it looks at the material and then considers what the subjective intention of the people involved would have been based on the material.

PN857

That's not to say that evidence of a person's subjective intention may not assist the Commission to understand from an objective perspective what the subjective intentions of the parties were, and it's right that each of the witnesses in this case have been tested on their subjective intention, but it's very important and it would be an error of law not to apply an objective assessment in coming to a decision about what the common intentions of the parties were.

PN858

Looking at that, it is expressly stated that what happens around the bargaining table may not necessarily indicate an objectively ascertainable subjectively held view. The views of the employer and the employees are relevant. I'm going to address you in relation to this element more so on the AMOU case, but the utility of the amendments are also relevant.

PN859

adding to some of the things that the Full Bench have told us about those elements, a finding of common intention is not one that's likely to be found. It is not the obligation of a party to call employee witnesses in order to show their subjective intentions. That can be objectively ascertained from the material even without direct evidence from each of the employees that supported the agreement.

PN860

It's also important to note - and this was something that Bell DP did not see necessary to do in his case, but it is permissible for the Commission to undertake a construction of the agreement at this stage - not at the uncertainty stage, but at this stage - in order to determine what it is that the parties can be objectively understood to have subjectively agreed to. At 43, the Full Bench then really upholds the factors that I have just taken you through. That was supported by Bell DP.

PN861

Turning now to why it is that MSS says that the variation it seeks ought to be supported. On the materials, the initial subjective intentions of the parties objectively ascertained are that what they believe they were agreeing to was a 4.6 increase on the award. I didn't spend much time yesterday taking the Commission

through the critical parts of the court book where the award and the 4.6 increase are referred to, but that is something that I'm going to take some time doing today.

PN862

Our next point is that a variation does not change the substantive rights of the parties, rather it reflects what it is that the parties intended to agree that was not necessarily effected via the uncertain words that found themselves in clause 21. The proper construction of those words also does - although uncertain - ultimately support the variation that we are seeking. I will address you on why we say that the discretion should be exercised in light of some of the other factors, and I will also address you on the issue that you raised yesterday on 2.10.

PN863

Before moving on from the law, I just wanted to bring again the Commission's attention to the decision of Sams DP. That is an important in our case because the Deputy President in that case talks about whose common intention is the relevant one in this case. In the Monash decision, Bell DP found that there was no commonality between the parties as to the particular words of the agreement in that case. In this case what you appear to have before you is that the union has really not engaged at any stage through the bargaining process in turning its mind to clause 21.

PN864

Sams DP tells us at paragraphs 109 and 110 that the important thing is the people who made the agreement. The people who made the agreement were the employees that voted yes to the agreement, and MSS. The union did not support the agreement in this case and that was the same as the case before Sams DP. He says that there is nothing unordinary about that and there are many cases where a bargaining agent will be vigorously opposed to the approval of the agreement, and in the evidence that has been before you we see that this is one of those cases.

PN865

The Deputy President also explained that mutual intention is not the same as an agreement. You do not have to come to the same view of what the clause means. He says the whole premise of bargaining is that one side will be giving up on one thing in exchange for something else.

PN866

Mutual intention can mean accepting something to which you are opposed.

PN867

The important thing is what was it that these employees were accepting. I think it's probably the appropriate time for me to take the Commission to the court book. Could I take you to page 211. As referred to in our submissions in opening - and I'm aware that there is a lot of material before the Commission, and I could see from yesterday that the Commission is very familiar in the material that there are numerous references to award increases. I just wanted to take you to some key parts of the materials to demonstrate those to show you that it is unassailable that these employees knew that what they were accepting when they voted up the agreement was a 4.6 increase on the award.

PN868

So if I could take you to page 211 of the court book. I just want to contextualise where this appears. This was an enterprise agreement update that was provided on 12 July 2022. In terms of the chronology, this update was provided after the Fair Work Commission decisions concerning the increases to the award and also the increases to the national minimum wage. This document was ultimately relied on and put before the employees when the employer went to the Commission to have the agreement made.

PN869

It is, therefore, a critical document because it explained - I believe it was Masson DP. I hope I've got that right - what it was that the employees knew and understood about this agreement when they voted it up. Just going back to 211 which is before you, now, this is what was before the employees on 12 July 2022. Our offer to employees is this - looking at the second dot point there:

PN870

A further 4.6 per cent increase to wages and allowances effective the first pay cycle in July 2022.

PN871

The next dot point also relevant and provides context to that dot point:

PN872

Wages to increase in line with the Fair Work decision affecting awards from July 2023.

PN873

There can be no doubt in reading this that when your Honour looks at clause 21 you can be satisfied that these employees knew that what they were getting with their wages, a critical aspect of the agreement and a critical thing that employees will be thinking about in voting yes to an agreement, was a 4.6 per cent increase based on the award decision. I should also clarify, supporting this, if you just go to page 213 - this is a 14 July 2022 update - the employees were then provided with existing rates and the increase on the existing rates at July 2022. So not only were they given those percentages, but they were also given how it is that the rates would increase.

PN874

I want to take you to some more of the materials that were ultimately before the Commission. Commissioner, if you could go to page 303, what you see here is an email from Ms Bharti who gave evidence yesterday. She wasn't asked any questions about this email. So she put this email to the Commission in response to some queries that had been raised by chambers. If you go over the page to 304, we have what her understanding was and the understanding that she gave to the Commission. This is at paragraph - it's sort of the third paragraph down in bold where it says:

PN875

The rates table in the EA document refers to the rates at July 2021. There is a further 4.6 increase in rates and penalties from July 2022. The proposed increase from July 2023 is in line with the FWC wage increase.

PN876

Again, we submit to the Commission that you can look at this piece of evidence and objectively ascertain from this that what Ms Bharti was talking about in clause 20.2.1 and what she thought they were agreeing was a 4.6 increase on the award.

PN877

THE COMMISSIONER: Yes, but how does that help me?

PN878

MS CAMPBELL: Because you look at the objective materials to ascertain her subjective intention. Here she is being asked to answer some queries by the Commission and she has said to the Commission, 'This is what this agreement says.'

PN879

THE COMMISSIONER: That is her view of what the agreement says.

PN880

MS CAMPBELL: But what you're doing is you're considering what her view is on the objectively available material.

PN881

THE COMMISSIONER: But this is subjective material.

PN882

MS CAMPBELL: Well, in my submission, what you have to do it - this is material that says, 'Here is my opinion of the agreement', and when you say does that mean that she subjectively held a view, you can be satisfied that she did based on the fact that she said it plain and clear in an email to the Commission where she was seeking that the agreement be effected into law under the processes of the Act.

PN883

I appreciate that that is only Ms Bharti's view, but obviously the Fair Work Act operates so that the view of individuals is attributed back to being the view of the employer. What I'm saying here is that this is MSS's view on what the material was. She may or may not have been wrong or right about it, I appreciate that, but it doesn't necessarily mean as a matter of fact that that's what it said, but that's the whole point of a variation application; you are correcting uncertainty to reflect the views of what the parties believed or intended to make in the agreement.

PN884

THE COMMISSIONER: But this is the employer's agreement. In 2017 it refers to - well, it uses this language and, you know, for the first time in history then we have the national wage decision which splits the national minimum wage increase and the award minimum wage increase. That is known to MSS. They have the

power to fix this in the agreement and to provide the certainty and clarity, and they don't. I mean, why shouldn't I read the agreement against the drafter?

PN885

MS CAMPBELL: I'm going to give you some submissions about how it is that you should read the agreement, but the fact is once you have found uncertainty, that doesn't mean that you can't then at the third stage construe the agreement. This could be said in any 217 application. For example, you know, I think Bell DP was dealing with a particular type of academics. You could have said, well, Monash could have done a better job on that. They knew what they were, they should have put the words in properly, but that's not really the inquiry that the Commission is making. The issue is there is uncertainty and then whether or not you should exercise the variation to reflect the agreement.

PN886

Your line of thinking could only be relevant where you would say, well, MSS didn't take steps to make a change. Therefore, they must have meant the 5.2. The weight of the evidence is against that. There is significant evidence that MSS - - -

PN887

THE COMMISSIONER: No, no, no. What I might say is they had the power to fix this. It's their document and, therefore, in the overall exercise of my discretion - I'm not going to say it's 4.6 or 5.2 - I'm going to do nothing.

PN888

MS CAMPBELL: I suppose doing nothing is still an exercise of the discretion, having determined that the agreement is uncertain. That is something that is open to the Commission, but we would say that in doing that what then happens is we are back with an agreement that does not reflect the intentions of the people who voted it up and who made it into law.

PN889

THE COMMISSIONER: Then go and negotiate with your employees, and fix this. Go and use 207.

PN890

MS CAMPBELL: Commissioner, I'm going to address you on why 207 is not the appropriate remedy in this and I can do that now if it's helpful. You drew my attention to a helpful decision, which is the AMOU case. There what was found was that there was no uncertainty and it was determined by Colman DP that had he been satisfied that there was ambiguity, he would not have exercised the discretion on the basis that the employer could have returned through the 207 process and had a variation ordered under section 21.10.

PN891

That is very different to this case, because in that case first of all no uncertainty, but putting that aside, the Commission didn't find that the parties had a different intention that was not reflected in the agreement. It's not apparent from that case that the parties ultimately signed up to an agreement that was uncertain and that didn't reflect their intention. In that case where there is no uncertainty or ambiguity, and also where the parties are just seeking to make a substantive

change to the agreement, of course it is appropriate to go back under the 207 process. That's not what we're doing here.

PN892

What we are saying here is that under this agreement what we meant and what the employees thought we meant was a 4.6 award increase. The evidence in the document, objectively ascertainable, supports that. When I'm taking you through the evidence before the Commission, that shows that the employees thought they were signing up to a 4.6 award increase. There are a number of reasons why 207 is not appropriate in this case. It's not clear what the outcome of any 207 application would be.

PN893

We are a good 18 months out from bargaining and the 207 application would ultimately be an assessment of what the employees now would like the pay rates to be, not what they believed them to be back at the time that the agreement was voted up. It's a very large workforce. It's a workforce that I think you can take as a matter of judicial notice has some changeover. It would not be the same group of employees who vote on this entitlement that were voting on it back in January 2023. That's why we say it is not inutile to make the variation, and simply referring us off to 207 is not a reason to not exercise the discretion. The whole purpose of 217 - - -

PN894

THE COMMISSIONER: Can I just clarify though, yesterday you told me I couldn't have regard to that in the exercise of my discretion. Do you concede now I can?

PN895

MS CAMPBELL: I would say it's a more nuanced approach than that, and perhaps yesterday I did put it a little bit too bluntly. The Deputy President had regard to this fact in a case where he was unable to find uncertainty and he was unable to find that the parties had a common intention pointing in the other direction. This is not that case and I'm going to spend a lot of time on common intention today. It's mainly because it's the main purpose of what came out in the evidence yesterday, so I would say in this case that is not an appropriate thing to refer to.

PN896

I don't really want to get into whether or not Colman DP was right or wrong to refer to 210 in that case, but we would say that it's just not a factor that bears on the discretion in this case where the terms are so clearly uncertain and they do not reflect what the employees and the employer thought they were agreeing to. In all 217 applications there would always be the option to take the path that you are taking, but it's a different option provided in the smorgasbord of options to employers and employees under the Act. That is why I say it's just not a factor that should weigh heavily on the discretion or that the Commission should refer to in this case.

PN897

Going back to the court book, Commissioner - look, I may come back to some of the other aspects of the discretion after - I just wanted to take you to the materials that were in the FAQs. These obviously are critical materials because they reflect what it was that the employees were being told about the agreement. The agreement was ultimately voted up by 60 per cent of the employees and we say that it's important to look at these FAQs because presumably they had regard to this information in making their decision to vote yes. If you could just go to court book 312.

PN898

THE COMMISSIONER: Yes, I have that.

PN899

MS CAMPBELL: Thank you. Now, you can see that these are the FAQs. Again this is the information that MSS put before the Commission when it sought for the Commission to consider the agreement in its application. If you go to page 313:

PN900

What will our wage increase be each year? Wage and allowance increase rates are proposed to increase as below: 2.5 per cent, FWC 4.6 per cent, FWC, FWC.

PN901

I just draw the Commission's attention to that. There is an equivalent FAQ at page 330 - it doesn't have a paragraph reference - that makes the same point. That is the material that was before the employees when they voted up the material. You asked me to address you on some particular points arising from the witness evidence yesterday and I'm going to just do that now by giving you just an overview of each of the witnesses, and the critical points to the common intention test.

PN902

I want to address a case that appears to be being run by the union - and I'm gathering this through their cross-examination - but that is simply that there was just no common intention whatsoever. The union places a lot of weight on the fact that it did not engage with the meaning of clause 21 and it did not turn its mind to what it meant until right at the very end of the bargaining process. I won't take you to it. We spent a lot of time looking at it yesterday. There was the critical document in the Richardson affidavit, which was provided right before the period of the vote, where the union provided its description of what it saw the wage offer of MSS being. That was provided to union members and I believe the evidence was potentially some other employees.

PN903

Here is where the statements of Sams DP about whose common intention really cut. Employees that voted no to the agreement did not make an agreement with MSS, so the opinions of the UWU to the extent that they represent those of their members who voted no - and it was very clear on the evidence that the UWU did not accept the offer - are limited in the way that they can assist the Commission.

PN904

Unlike in a different case, for example, where if a union did support an agreement but took a different construction and communicated that to their members, where that may assist the Commission in determining what it is that the parties to the agreement had as a common intention. So the union can't run a case that it never agreed or it never considered or that it didn't think about it. What the Commission has to do is look at what was before the employees and MSS at the time, and what they intended the clause to mean.

PN905

The evidence of Ms Bharti yesterday, she was asked some questions about the Fair Work Commission decisions and what she thought that they were. She said that she understood them to be thresholds that applied to awards and to minimum wage employees. I, unfortunately, haven't had the benefit of the transcript at this stage. I'm not sure whether the Commission gets the benefit of that, and you may not.

PN906

THE COMMISSIONER: Not presently.

PN907

MS CAMPBELL: No. Look, this was a matter that seemed to take a lot of significance in the cross-examination, but I think when it's contextualised is possibly not as controversial. She then considered whether or not level 1 employees would be affected by the 5.2 per cent and considered that - my understanding was that the thresholds were met. That doesn't undermine our case about what the objective evidence before the Commission is pertaining to the award and the 4.6. It's really revealing of her subjective processes, I suppose, that she undertook in determining whether this decision was relevant or not.

PN908

Mr Adams's evidence really was unassailed in his statement. He was focused on the better off overall test and the wages being attached to the award. His position was that he hadn't turned his mind to the words and that they had been adopted from the 2017 agreement. His evidence was that everyone understood that it was a reference to modern award minimum wage increase. Now, look, whether he is actually capable of giving evidence on what everyone understood is a question for the Commission, but at least it was enough for you to be satisfied that he understood that it was a reference to modern award minimum wage increases.

PN909

Mr Meechan's evidence - and you asked me to address you on this - was that he really didn't understand the national minimum wage increase and the minimum award increases, and what they were. That doesn't undermine his evidence that what he thought - was getting was the same as the materials I've taken you through and that was an award plus 4 per cent. He gave evidence that he was surprised to hear about the 5.2 per cent when it was first raised with him.

PN910

You asked a question yesterday about the relevance of evidence that comes after an agreement has been voted up, and my submission is that it's only relevant in that a reaction of surprise would indicate that it was a different view to the

subjective view of the person taken at the time of the agreement. We don't put it any higher than that. That's why we say we can look at things that happened after. That was also consistent with the evidence that Ms Bharti gave about her reaction when the matter of the 5.2 was first raised.

PN911

The evidence of Mr Richardson is interesting. I would say that this evidence doesn't really assist the Commission, because Mr Richardson did not support the making of the agreement. He had various reasons for that. He clearly had a lot of issues between himself and his employment with MSS. Mr Richardson did say that he had believed that 5.2 was discussed at the bargaining table and was put in writing. I have not been able to find any record of that - - -

PN912

MR WHITESIDE: Commissioner.

PN913

THE COMMISSIONER: Yes.

PN914

MR WHITESIDE: Apologies. Ms Campbell is incorrectly referring to - - -

PN915

MS CAMPBELL: I'm sorry. It's Mr Watkinson who I'm speaking about and also I have another apology. I think yesterday I may have referred to him as Mr Reardon, so I'm speaking about Mr Watkinson, not Mr Richardson, and apologies about that. They were two very different witnesses and I will come to Mr Richardson.

PN916

THE COMMISSIONER: Can I say - I obviously refer to both of you - I found both Mr Watkinson and Mr Meechan not very compelling witnesses.

PN917

MS CAMPBELL: Thank you for letting me know that, Commissioner. My only response to that would be that - - -

PN918

THE COMMISSIONER: Equally not compelling.

PN919

MS CAMPBELL: - - - their evidence is not critical and as we discussed at the directions hearing - I'm not sure whether you can turn your mind back to that, but this is not a case where the oral evidence is the important thing for the Commission. Really it's the documentary evidence and many facts which are agreed - and Mr Whiteside can correct me if I'm wrong, but I don't think he would disagree about the document trail. We might take different interpretations of how the Commission should construe what those documents say, but there's no real dispute about when or how the documents were communicated.

PN920

The witness evidence really is there to, I suppose, give life to the subjective intention, but unlike some other cases that the Commission would be familiar with determining, it's not a case where you actually have to hold the subjective intention. The subjective intention is appertained objectively. I appreciate that that is a somewhat complicated thing to consider, but that is very clearly the test on common intention. You know, to place too much weight on whether a subjective - whether a subject was actually held may assist the Commission to determine an objective assessment, but it is not what looms large and that's what I'll say about those witnesses.

PN921

Finally, moving to Mr Richardson, there was very little dispute. Mr Richardson accepted the document trail. He said that there was a last minute discussion about what the clause meant between him and the delegates. That didn't appear in any of the materials, but again it's just not that important in circumstances where the union were prosecuting a no vote. They told their members to vote no. We can assume that they did. Some of them may have, but if they did so they must have done so on some of the other material, so that's where we place the common intention within the evidence.

PN922

I just want to raise another thing to the Commission's attention. There are obviously agreed facts in this case. It may appear that the agreed facts are not controversial, but I would urge the Commission to take notice of them. I don't believe that anybody is seeking to step away from an agreed fact in this case, which is a good thing, but I just wanted to bring the Commission's attention to paragraph 23 of those agreed facts which is that the respondent asked whether the applicant intended increases of wages based on award rates. There is no reference in the agreed facts to national minimum wages.

PN923

It's very clear that what happened at the bargaining table was generally around award wages. Nobody at the bargaining table - there is just really no record of anybody turning their minds to the national minimum wage. Now, there is a very good reason for that in context. In my submission, the prominence of the award is relevant to the Commission's objective task because these are award-covered employees. They are not employees that are ordinarily covered by the minimum wage.

PN924

They do not see themselves as employees that are covered by the minimum wage, so when you consider the objectively ascertainable objective intention of those employees, it's not surprising that many of the discussions happened in respect of, 'What are we getting above the award?' It's also not surprising that those employees would not turn their minds to an increase that's connected to the minimum wage. Nowhere else in the award in its context or structure does anything to do with the minimum wage have relevance or prominence.

PN925

Okay, now, let me just find my place in my submissions. I'm just going to address you on - I won't take you to them in the court book, but I've taken you to some of

the - there is a lot of references to the award in the court book and amounts being above the award. I understood Mr Whiteside's argument to be yesterday - or in his written submissions that, well, a 5.2 per cent increase is also an amount above the award. We have made our submissions on the award to say what the employees and the employer were turning their mind to was award increases rather than the national minimum wage increase, so that just contextualises that submission for the Commission.

PN926

I want to address you now on the argument which I'm calling the ships in the night argument. It's not the case that nobody knew what the wages they were going to be paid were. That's a really unfair assessment of the evidence. It is true that the UWU did not accept the wage offer, but a clause can be uncertain but it can also be a case where a clause is uncertain but the common intention is ascertainable, and we say that this is simply one of those cases. It's not a case like the one before Bell DP where there was no evidence of an objectively ascertainable intention.

PN927

Turning now just to some other elements on the discretions that I have not yet addressed you on - if we need to have a further discussion about section 207 to section 210, I'm also happy to answer your questions on that and I'm grateful for the Commission's questions earlier on that. The other aspect of the discretion which is important is whether or not the Commission would be changing the substantive rights of the party.

PN928

We say in this case you do not need to be concerned that you are changing the substantive rights of the party, because there is no substantive right to the 5.2. The employees are being paid on the 4.6, but also the proper construction of the clause - even despite its uncertainty, despite what we have had to go through on the evidence on common intention, and we draw on a lot of that evidence in making the submission - is that on its proper construction what they are to be paid is the 4.6.

PN929

I'm going to take you through some of the Berri principles. I just want to address one thing which I read as being live from Bell DP's decision. Bianco Walling stands for the proposition that a construction should not be undertaken at the first step stage in determining uncertainty. However, it is permissible - and that's my reading of what is said in the Full Bench Monash case - that a construction exercise can be taken at the second step in order to determine what it is that the parties meant. Why is that; because what is said in the agreement assists the Commission to understand what the parties may or may not have meant from an objective perspective.

PN930

In construing the agreement - and I'm going to take you through some of the Berri principles. No doubt everybody here is very familiar with them - the task that the Commission has to do is to look at the text in the context. I have made in my uncertainty submissions some points about why it is that Fair Work Commission

minimum wage increase can mean the award or can mean the construction for which the union contends for. However, my submission is that our construction reflects what it is that the parties thought they were getting. They thought the minimum wage increase referred to the award.

PN931

How do we know that? Well, under the Berri principles we can look at the materials which supported the agreement and the making of the agreement. I've taken you through those in the materials that were before the parties. Nowhere in those materials is the national minimum wage order referred to. Here, just to be clear, it's a little complex because in doing the construction task- as the Commission would no doubt be familiar - that's an objective task, but the proper construction by looking at the extrinsic materials is that the parties believe that that was a reference to the award and its increases.

PN932

That is also supported by a matter that you raised with me earlier, which was that historically these had been the same thing. It was imported from the 2017 agreement where they were the same thing. Yes, Ms Bharti was on notice of the difference and, for whatever reason, determined that the wording should remain 'the national minimum wage'. Maybe that's because she considered those two things to have the same meaning.

PN933

I just want to bring the Commission's attention to another document which is the decision itself. I believe this is at 335 of the court book. This is again material that was put before the Commission. You can be satisfied that the employer had notice of this material. You can see that taking this from the perspective of not a legal expert or an industrial expert, the words used in the second paragraph in this decision, the annual wage review 2021-2023, is to increase modern award minimum wages and then, for national minimum wage, the minimum weekly rate for an adult is then set out.

PN934

I don't read this as suggesting a percentage rate for the national minimum wage. Obviously we don't argue that there is a percentage rate, but the reason I wanted to bring the Commission's attention to this is that it's not as clear-cut as what the union say are minimum wages or minimum wage Commission decisions means. These two different amounts are released in the same decision, so it's understandable that an employer reading this intended that where it referred to the words that are in clause 21, what it believed it was referring to was the increase in the modern award minimum wage.

PN935

There is another aspect of this which is important and that is that the national minimum wage is expressed in a dollar amount. It's clearly not the case that what was being suggested was that it was a dollar amount increase. It's simply a percentage increase argument that is being prosecuted now by the union, but taking an overly literal construction of clause 21 would mean that it increases by the Fair Work Commission minimum wage, and that would be a reference to the dollar amount which just wouldn't make any sense at all. Obviously that's not

something that we would be saying should happen, but it demonstrates the danger of taking a too literal approach to the construction of clause 21.

PN936

I just want to contextualise this submission within the Monash line of authorities. Bell DP in that case was not asked to construe the agreement. That's different to this case. We are saying that the words that are there do assist you in ultimately determining what the common intention of the parties were. I appreciate there is some complexity around the subjective and the objective in this case, but I know you will be familiar with the Full Bench decision and how it is that the Berri principles play into this third stage.

PN937

Commissioner, I'm just going to do a check of my notes. I think they are the things that in addition to what is already in our written submissions and the things that I raised with you yesterday, I wanted to bring to the Commission's attention. Unless there is anything further that I can assist you with, those are the submissions.

PN938

THE COMMISSIONER: Thank you, Ms Campbell. Mr Whiteside.

PN939

MR WHITESIDE: Good morning, Commissioner.

PN940

THE COMMISSIONER: How do I get past the fact that there is not a single document that transpired between the employer and its employees that mentions 5.2 per cent?

PN941

MR WHITESIDE: I intended to address that question in my prepared closing submissions, but I can go straight to that issue if it assists.

PN942

THE COMMISSIONER: I'm happy for you to do it in the order that you wish.

PN943

MR WHITESIDE: Thank you, Commissioner.

PN944

THE COMMISSIONER: Just so long as you address me on it.

PN945

MR WHITESIDE: I do intend to address you on it.

PN946

THE COMMISSIONER: Thank you.

PN947

MR WHITESIDE: And I will take questions on issue, too, but I will keep to my notes.

PN948

THE COMMISSIONER: Yes.

PN949

MR WHITESIDE: It's common ground that there is a three-step test here. I, too, have fallen into referring to the third step as the second step, but I will try to be consistent with Ms Campbell and refer to that as the third step. Given the comprehensive submissions made by Ms Campbell with respect to the relevant principles to those three steps, I don't think it's necessary to go through the principles again.

PN950

THE COMMISSIONER: I understand the principles.

PN951

MR WHITESIDE: So beginning with uncertainty, we would first just touch on the decision in TT-Line that we referred to yesterday, in which Colman DP also addressed the principles holding that:

PN952

The Commission must make a positive finding as to whether the relevant provisions of the agreement are ambiguous or uncertain. The consideration of this question involves an objective assessment of the words in question, considered in their context.

PN953

I intend to return to the TT-Line decision again later in my submissions. Commissioner, the applicant argues that clauses 21.1.3 and 21.2.2 contain either ambiguity or uncertainty, and it appears the focus now has - the argument has shifted somewhat towards an argument that uncertainty is the better argument.

PN954

THE COMMISSIONER: I think that might have been at my invitation yesterday.

PN955

MR WHITESIDE: That is probably the case, Commissioner. It argues that the ambiguity or uncertainty is of course whether the phrase 'Fair Work minimum wage increase' in clause 21 is in reference to the modern award minimum wage or else the national minimum wage order. That's a phrase which it contends is an amalgam of both the national minimum wage order and the modern award minimum wage. The applicant made the submissions yesterday that it continues to contend that the term is in fact an amalgam, because no such term is found in the industrial landscape.

PN956

We would begin by saying that we continue to contend that the phrase 'Fair Work Commission minimum wage increase' is not ambiguous or uncertain. It objectively can be taken to only have one meaning and that on its face it should plainly be understood as being a reference to the national minimum wage, and not the modern award. We continue to submit that it can't be said to be an amalgam

of both the term 'national minimum wage order' and the term 'modern award increase' because again we would say surely an amalgam would at least include the word 'award'.

PN957

We would also submit that in the industrial landscape - which the applicant referred to - the phrase 'minimum wage' is routinely used as a shorthand for the national minimum wage order. The words 'national' and 'order' are frequently dropped in the industrial landscape and in contrast the term 'minimum wage' is rarely, if ever, used to refer to the modern award system. We would also continue to make the submission that the singular 'the' and 'increase', rather than the plural in clause 21, is consistent with the singular national minimum wage order rather than the increases that are ordered to the 121 modern awards determined during the annual wage review.

PN958

Yesterday the applicant drew the Commission's attention to the use of the plural in the schedules. We would say that, firstly, the operative term is really clause 21 and that is the term which the applicant is seeking to vary, whereas the first point to make here is that the schedules deal with the associated but slightly different issue of the timing of the payment of the wage increase, with the reference to the plural 'increases' we say being acknowledgment that the annual wage review in fact involves two decisions in the overall decision.

PN959

That decision is generated in June of each year and so the schedules make it clear that when those two decisions come out, that the pay increase provided for at clause 21 and the schedules are to updated within 14 days of those decisions. So we would submit that the use of the plural 'increases' in the schedules does not provide support textually for the asserted ambiguity or uncertainty that the applicant asserts is in clause 21, but rather suggests that the applicant was in fact aware of the distinction between the modern award and minimum wage decisions which occur in the annual wage review decisions when the predecessor agreement was drafted.

PN960

The applicant also submits that there are textual indicators within the agreement of ambiguity, which it says is referenced in clause 21 to the 2.5 per cent from July which was the rate of increase of both the modern award and the national minimum wage order in that year. Similarly, the applicant points to the 2.5 per cent found in the schedules. As we said in our outline of submissions, we say nothing turns on this given 2.5 per cent - as we all agree - was the increase to both the modern award and the national minimum wage in July 2022, so we would say that offers no guidance.

PN961

We would also submit that the evidence before the Commission from both Ms Bharti and Mr Adams is that while both in their jobs keep abreast of the annual wage review, minimum wage and award decisions. Despite a difference in increase being ordered in May of 2022, eight months prior to the approval ballot, both accept that the applicant took no steps to alter clause 21 to insert the words

'award' or 'modern award' into the clause, the evidence being that during the final months of the bargaining after the annual wage review decision was made nobody at the bargaining table turned their minds to the meaning of the words which are now in dispute.

PN962

We do accept the evidence is that the applicant's HR personnel, Ms Bharti and Mr Adams, did not turn their minds to the meaning of the words 'Fair Work minimum wage decision' and instead had it in their minds that the existing clause 21 was tethered to the annual wage increase. However, we would say those words were developed in 2017. We would say that this subjective understanding held by Ms Bharti and Mr Adams was plainly incorrect, and it can't be sustained on the face of the words actually found in clause 21.

PN963

We would also say that it was apparent from the evidence that Ms Bharti perhaps had a somewhat shaky or vague understanding of the operation of clause 21. We say this is because despite Ms Bharti asserting that she understood the award increase to be the one applicable, the rate of increase to be applicable under cross-examination, she also made the concession that had the applicant employed level 1 employees then the applicant would have increased wages for those employees in line with the national minimum wage order. So, with respect to Ms Bharti, we think she had a confused understanding of the concepts and through that arrived at an incorrect understanding of the existing clause.

PN964

Again, we would say that with respect to what was the intended meaning of the clause which was developed in the bargaining which happened in 2017, there is no evidence before the Commission to indicate that the impugned term was originally intended to refer to the award increase, and both Ms Bharti and Mr Adams accepted they couldn't give evidence as to its original intended meaning. The only witness who was involved in the 2017 bargaining was Mr Watkinson and we do take on board - - -

PN965

THE COMMISSIONER: Mr Whiteside, don't you accept that it might have had an intended meaning in 2017 and by virtue of the negotiations for the 2021 agreement the meaning changed?

PN966

MR WHITESIDE: I guess we don't accept that. We would think something would have to actually happen to change the terms that are there. If there has been a meaning intended - - -

PN967

THE COMMISSIONER: Yes, there were lots of things that happened. There was lots of correspondence from the employer to its employees talking about 4.6.

PN968

MR WHITESIDE: I will come to those materials, but our position is that something more than some explanatory documents would have to happen for an existing clause's meaning to change so dramatically.

PN969

THE COMMISSIONER: All right.

PN970

MR WHITESIDE: The only witness who was involved in the 2017 bargaining was Mr Watkinson, and Mr Watkinson gave evidence under cross-examination - and we accept this was evidence given late, but to the best of his memory the words adopted in 2017 were intended as a reference to the national minimum wage and not the award, and that the change in wording to clause 21 during the 2017 bargaining occurred because the bargaining team had formed the view that pegging wages to the national minimum wage decisions would quite likely result in higher wage increases in the future. His evidence was that they had lost their safeguard rates, they didn't have a lot of bargaining power, so they put it to the company, 'Give us the minimum wage increase. We'll accept that because we might get a slightly higher increase.'

PN971

We accept that when pressed under cross-examination Mr Watkinson - well, he was pressed under cross-examination that he couldn't have possibly known what future minimum wage increases might be. Mr Watkinson stated that he did have the view that more beneficial wage increases were probable if wage increases were tied to the national minimum wage, because the national minimum wage sets wages for the country's lowest paid workers and that higher wage increases are often required to ensure that the minimum wage does keep pace with cost of living fluctuations.

PN972

We do accept the evidence of Mr Watkinson was admittedly vague, it was a bit confusing at times. We submit the evidence was credible and it does make sense if we take a step back in the context of the bargaining which has occurred over the last decade. We would say the Commission should bear in mind that the predecessor agreement to the 2017 agreement - which is itself a variation of the 2011 agreement - like many of MSS's other agreements had provided for set percentage wage increases in each year. Those under the predecessor agreement, those set wage increases were 3 per cent in June of 2013, June of 2014 and June of 2016.

PN973

In contrast, the minimum wage has indeed increased by a rate of more than 3 per cent each year in - 5 and 7 - annual review decisions since 2016. In those two years in which increases of less than 3 per cent were ordered, they were the pandemic years of 2020 and 2021 which of course could not have been predicted. A pandemic couldn't have been predicted during the bargaining in 2017.

PN974

We would also submit that Mr Watkinson denied that his evidence was unlikely or suggestions that he was being dishonest. I don't have the benefit of the transcript to see exactly what was put. The suggestion was that his evidence shouldn't be accepted and he asserted that he was being honest, and he did however make the important concession that this rationale was not - his thinking at the time was not put to anyone in writing.

PN975

Taking a step back, we accept that Mr Watkinson evidence goes no way towards establishing a common intention between the parties as to what was the intended meaning of the clause in 2017. We do submit though that it is evidence of his subjective intention when the clause was first developed - of the meaning of the clause when it was first developed and so should be taken at face value.

PN976

Returning to the issue of ascertaining ambiguity or uncertainty in circumstances where there is both a plain meaning of a term and evidence that some other meaning might be objectively understood by an employer during the bargaining process, in the TT-Line decision Colman DP held that taking into account all the circumstances and adopting a broad approach to the threshold question, the term of the agreement in that matter was still found not to be ambiguous.

PN977

It was with a finding that the term of the matter was clear and while both the company and the union in that case subjectively intended the term to have a different meaning, the company ultimately asked its employees to approve an agreement with a term which clearly operated differently to the subjective intended meaning of the union and employer in that matter. So, Colman DP held that the fact that the company may or may not have made errors in the text of the agreement, a related memorandum and the application of the agreement does not mean the agreement contained ambiguity or uncertainty, going on to state at paragraph 46 that the variation sought by TT-Line in that matter sought -

PN978

to effectuate a substantive change, rather than to give effect to the original agreement. There is no basis to conclude that employees understood or ought to have understood -

PN979

the impugned clause 'was confined to the' employer and the union's subjective intentions 'or contained an error.' We would submit that the reasoning in TT-line is apposite to this matter and the fact that Ms Bharti and Mr Adams held a different subjective understanding and intention with respect to the meaning of a clause - a clause which was developed in 2017 and where no substantial change was made to the drafting of that clause - our submission is that their view was plainly wrong, and not consistent with the words which the employees ultimately endorsed in the ballot that was held in February 2023. We would also note that the authorities are clear that the existence of rival contentions does not in and of itself render a term ambiguous or uncertain.

PN980

Commissioner, I do accept that the decision in TT-Line can be somewhat distinguished from this matter with respect to what was or wasn't communicated to employees prior to the ballot and I appreciate I was put on notice yesterday that I needed to address the issue of the applicant's two written - well, I accept from what Ms Campbell took us through earlier, there are more than two. I think I counted four communications to employees referring to the wage increase on offer in 2022 as being in line with the award increase of 4.6 per cent, and I will address that issue now.

PN981

The applicant places great emphasis on the communications from the employer to its workers. Ms Campbell has taken us to the update that was sent to employees on 12 July which makes a clear reference to the increase on offer, being the award increase or in line with the award increase of 4.6 per cent. Reference has been made to a wage table applying that 4.6 per cent, which was sort of issued as a follow-up on 14 July. Then Ms Campbell has drawn our attention to the FAQ document, which was circulated within a package of explanatory materials during the access period, and has made the submission that this evidence is clear evidence that the employees knew what was on offer and voted to accept that 4.6 per cent.

PN982

Putting to one side our earlier arguments, we do submit that if there was an intended meaning in 2017 when the clause was first developed, we think something would actually have to change to the text in the agreement for its meaning to change. Putting that submission to one side, we do argue that these materials don't provide sufficient evidence to demonstrate an actual common intention between the applicant and its employees that the wage increases were to be line with the award and not the minimum wage increase.

PN983

Before I take you through our arguments in detail, we would also just again make the point that Bell DP observed in the Monash University decision at paragraph 142 that:

PN984

There is a high bar to establish evidence of the parties' actual common intention -

PN985

and that there needs to be 'clear and convincing proof' of that intention. We again make the argument that explanatory materials from July 2022 and January 2023 don't tell us much about the original intended meaning of the clause given that it originated in 2017, and given there is not much in the way of the evidence as to what the intended meaning of that was when it was first adopted before the Commission, but in those - - -

PN986

THE COMMISSIONER: But this is the point that I'm exploring with you. Don't those document communicate to employees what it means now in 2021?

PN987

MR WHITESIDE: They do communicate the understanding that Ms Bharti and Mr Adams had in relation to the operation of the existing clause. We accept that.

PN988

THE COMMISSIONER: Yes. They are saying to the employees, 'This is what it means', and at no stage do any employees say, 'Hang on. No, that's not what it means at all. It means 5.2 per cent.'

PN989

MR WHITESIDE: It's true there is no evidence that employees put that to the employer and again accepting that the agreement is ultimately made between the employer and employees with the union only playing a role as their representative, the union only appears on the evidence to have come to differently understand - or properly consider and differently understand the meaning of the clause very late in the game.

PN990

THE COMMISSIONER: After the agreement is approved.

PN991

MR WHITESIDE: Yes, the same day. Yes, after; on the same day after the agreement was approved. We would say there isn't actually evidence from the applicant that its employees proper grappled with these materials - these explanatory materials. The evidence of Mr Nelson(sic) was not detailed. He clearly didn't understand the difference between the minimum wage - the concepts of the minimum wage being different to the award offer, while the evidence of Mr Watkinson is that he gave little regard to the explanatory materials and clearly he voted no, but he also was focusing on the words in the agreement. We would say that the employees would have been entitled - - -

PN992

THE COMMISSIONER: I think Ms Campbell says that I'm not allowed to have regard to the views of the people who voted no, because I have to have regard to the people who made the agreement, and the people who made the agreement are the people that voted yes.

PN993

MR WHITESIDE: Yes - no, I do take the point and perhaps that's a good place to just briefly touch on the other point Ms Campbell made, which was the extent to which she referred to the ships in the night argument, the extent to which the union's views also - in a context where the union campaigned against the making of the agreement, the extent to which the union's view also assist us here, I would make the submission that that is going too far. I guess I am dealing with a different issue here, but the union doesn't play a role in representing workers', you know, interests in the bargaining and communicating offers that are being put back and forwards.

PN994

I am jumping ahead a bit here actually, but to the extent the union did have a different view and it was communicated in some last minute discussions, we

would say that the union holding a different view, albeit late in the game, would have some bearing on the understanding of the employees who did ultimately vote yes. It's entirely plausible that those employees would also be looking at what the union was communicating, how the union understood the clause to operate or what the offer to be.

PN995

They might say, 'Well, we have had regard to the union's understanding of that and, nonetheless, decided to vote yes', so we do say the union's view just - the mere fact the union campaigns against a yes vote in an agreement does not mean the union's view should be entirely excluded. They are likely to have some bearing on the subjective understanding of the offer that is being put and also the operation of existing clauses. I have digressed there.

PN996

Turning to the materials that were clearly issued - and there's no dispute they weren't issued to the employees - we would say that the employees would have been entitled to have regard to the explanatory materials and then also had regard to the actual words used in clause 21 of the proposed agreement. They would have been entirely entitled to be confused about what was on offer or equally entitled to disregard the explanatory materials as being incorrect or inconsistent with the clause that they're actually being asked to vote for.

PN997

Here we note the applicant has a far from clean record with respect to some of its industrial practices and staff communications, and we have in evidence firstly two quite significant errors that were made during the bargaining process by the applicant. The first was not ensuring employees' base wages don't fall below equivalent award based wages as required by 206, which resulted in the union sending a concerns notice to the applicant in July 2022 that it was failing to make sure agreement base rates keep pace with the equivalent award; a concern which ultimately resulted in the applicant deciding - without an admission - that it would be cautious and uplift the wages.

PN998

So we would say that just demonstrates - I think that is a clear example where the applicant's understanding of its obligations and its sort of general industrial practices, you know, falling into error and not being able up to scratch. Secondly, the applicant allowed 291 ineligible casual employees to cast a vote in the approval ballot and that caused significant approval issues for the approval of the document. It was only when the - - -

PN999

THE COMMISSIONER: How is that relevant to the question that I have got?

PN1000

MR WHITESIDE: What it goes to is that the applicant has form in getting things wrong, so we say if the applicant has form in getting things wrong we can't have confidence that employees didn't look at these materials and disregard them as being incorrect or perhaps confusing.

PN1001

THE COMMISSIONER: Mr Whiteside, 389 employees out of 647 voted in this ballot, 60.12 per cent voted yes; that's 230 employees. Not one of those employees who voted yes who made the agreement with the employer comes before me and says, 'No, I always thought it was 5.2.' Not one warm body out of 233 employees. Isn't that compelling?

PN1002

MR WHITESIDE: The evidence is what it is, Commissioner.

PN1003

THE COMMISSIONER: Yes.

PN1004

MR WHITESIDE: On the issue of the ballot, we would - apologies, I need to find my note here. We would make the point that the agreement - the exact figures of workers that were covered fluctuates a little bit, but we would also make the point that some 644 employees out of a total of - a figure that we come to of 1071 eligible voters - that's from the approval decision - 644 of those employees abstained from voting one way or the other in the approval ballot.

PN1005

That figure is 60 per cent of eligible voters abstained and then of those 647 eligible voters who did cast a vote, only 60 per cent of that voted to endorse the agreement. We would say in circumstances where the threshold is high of establishing - it's a high threshold to establish evidence of common intention - - -

PN1006

THE COMMISSIONER: No. Mr Whiteside, President Bartlett once said in The West Wing, 'Decisions are made by people who turn up.' 647 people turned up and 60 per cent of them voted yes.

PN1007

MR WHITESIDE: Yes, well, we don't argue with that.

PN1008

THE COMMISSIONER: Yes.

PN1009

MR WHITESIDE: Commissioner, I'll move to the third test. I don't think I have much more to say in terms of evidence - well, I'm on the third test, if you like, in terms of - - -

PN1010

THE COMMISSIONER: Yes.

PN1011

MR WHITESIDE: - - - evidence is subjective intention. I just want to refer to the other factors. We continue to say that the variation would give effect to a new and substantive change to the agreement, which is a factor weighing against the making of the variation. We submit that varying the clause to insert the words

'modern award' has the effect of reducing the wage increase for 2022 from 5.2 per cent to 4.6 per cent and on any view that's a substantive change, and this weighs against the making of the variation.

PN1012

We would say that the state of the bargaining is clearly a relevant factor as to whether the discretion should be exercised. Here the agreement expires in less than 18 months' time now. We continue to submit it would be more appropriate for MSS, its employees and the union to address their different views or establish a clear common view about the option of clause 21 in the next round of bargaining. We would say this weighs against the making of the proposed variation.

PN1013

We would say the views of the employees as expressed on behalf of their union should be considered and that the union and its delegates group - the delegates that have given evidence, rather, have stated they oppose the making of the variation and this is one of many factors which weighs against the making of this variation. In contrast, the applicant has tendered evidence that one single employee does support the variation.

PN1014

We would say the timing of the application is a relevant factor. The applicant didn't apply for the variation until 23 November of last year despite it being notified of the dispute as early as June 2023 - or formally notified in June 2023 - and despite the 739 dispute being lodged in October of 2023, so we would say the timing of the application, in particular its delay and the fact - as Mr Adams I think accepted under the cross-examination, the fact that this application is entirely motivated by the UWU's section 729 application, we would say that weighs against the making of the variation.

PN1015

As in the Monash University decision, we would say the variation has the potential for adversity, affect the legal rights that the relevant employees have and that this is a factor weighing against the variation. Finally, as you have touched on, in the decision in TT-Line we note that Colman DP, while finding that the impugned terms in that application were not ambiguous or uncertain, nonetheless directed the employer/employees in that matter to resolve the issue of the meaning of the word through a section 208 application or a 210 application, depending on how you frame it - - -

PN1016

THE COMMISSIONER: Yes.

PN1017

MR WHITESIDE: - - - but a process whereby the employees are asked to - a ballot is held to vary the agreement. We would say that the applicant's submissions that this is inappropriate, the submission seemed to be that the workforce had significantly changed and that their views in February 2023 when the ballot was held compared to now would be significantly different.

PN1018

We would say there is no evidence before the Commission that the workforce has significantly changed and that the evidence is clear that it's a predominantly permanent workforce, and we would say you have to be very - we don't think it's a convincing argument that the workforce has changed so radically between now and the ballot that - - -

PN1019

THE COMMISSIONER: Well, there is just no evidence about it.

PN1020

MR WHITESIDE: Sure - although there is evidence that it is predominantly a permanent workforce which is suggestive of a low level turnover compared to having a highly casualised workforce, but the submission goes no higher than that. So, Commissioner, in summary we continue to oppose the variation sought. We don't agree there is ambiguity or uncertainty that has been established and we don't think there is clear evidence of common intention, and we say the other factors - discretionary factors - weigh against the making of the application. Those are our closing submissions.

PN1021

THE COMMISSIONER: Thank you, Mr Whiteside. Anything in reply, Ms Campbell?

PN1022

MS CAMPBELL: Just some very brief points, Commissioner. I am only going to address things that I haven't already raised with the Commission.

PN1023

THE COMMISSIONER: Well, you should only address things which reply to - - -

PN1024

MS CAMPBELL: Sorry, and that are in reply, but I will do my best not to repeat things that I've already said. Possibly breaching my first rule, just on the matter of whether we say it's ambiguous or uncertain, I just wanted to put on the record that we do seek that it is both. As I explained earlier, you know, we only have to meet one of those, ambiguity or uncertainty, we don't have to meet both.

PN1025

The 2017 agreement is not something that I spent a lot of time addressing the Commission on. I want to just make some legal points about the role that an historical agreement should take in a proceeding like this. We would not want to distract the Commission from its task under 217, which is to consider the mutual intentions of the parties at the time the agreement was made. That's something that you drew to my attention yesterday; it's clear on the authorities.

PN1026

That's not to say that as the *Short v Hercus* case tells us - also Berri deals with it - historical industrial agreements could reveal an intention in a later agreement. It's true that the 2017 agreement contains the same clause. However, there is really

not a lot of evidence around what material or what was before the Commission in the making of that clause. The evidence of Mr Watkinson was not convincing about what he thought it meant, but again it's the same problem for the union. It's not clear that Mr Watkinson supported the agreement in 2017, so his subjective view of what this clause may have meant back there should not weigh heavily.

PN1027

The other historical factor that I want to draw the Commission's attention to about 2017 is 2017 is back in the period where it's undisputed that the national minimum wage increase, or national minimum wage order, and the award increases had been the same. So that's a historical fact, it's not disputed, that you can take into account. That supports our intention that this is a figure that refers to the award. That may explain why it is that those words were used from 2017 and carried over, so that's what I want to say about the 2017 agreement. It is a factor, but it's not a large one, and it cuts both ways on your role in assessing the objectively held subjective views.

PN1028

My next point concerns the nature of the subjective intention held by each of the witnesses. Some points are made about wobbles or confusion in the subjectively held views. This goes back to a question that the Commission asked me earlier about what you are to do with what the witnesses say that they were thinking at the time. These are all just factors that support your objective assessment of what their subjectively held views were, but the fact that Ms Bharti seemed to be some confusion around what it was that she said the 5.2 or 4.6 relates to, does not take away from the weight of the evidence which supported that the employer was saying to the employees, 'Your wages are 4.6 per cent plus the award', so it's just one of things that goes to the contest.

PN1029

Mr Whiteside was addressing you on the uncertainty issue, but there is some caution that needs to be taken in looking too closely at the actual views of the people involved. It's an objective assessment. It's not, for example, like a general protections case where it has to be an opinion that was actually held in the mind of the person and we can stray too closely and give that too much weight, and that would be an error because it would not be an application of the objective test.

PN1030

It seems that the union accepts that it was not until very late in the piece that it came up with this 5.2 issue. That supports the argument that we are making, which is that the people who agreed to this agreement knew that what they were getting was award plus 4 per cent and that that was their objectively ascertainable intention. It's accepted that there was no evidence up until that point of the 5.2 by the union.

PN1031

This brings me back to the conversation we were having earlier about the union had a different understanding at the point that the agreement was made. It seems like they came up with this construction argument, but that's not really the issue. The issue is what employees and who were the employees that endorsed their views. It's not our obligation to call each employee and say, 'Well, what was

your feeling about this?' That's something we could do, but we don't need to because we have the material that was before them.

PN1032

I have showed you the material, but one of the things that Mr Whiteside was conveying was, well, what were the views of the people who voted yes, but they have shown us their answer which is their acceptance through the vote of yes. Yes, it was a 60 per cent number, but that has no bearing. Even if it was a 50, you know, 000.1 per cent number, the agreement has been voted up. There were some sidebar issues raised about the type of employer that MSS is, whether its materials have always been accurate. Those are not really appropriate considerations for the Commission in a case like that and we object to them.

PN1033

There is then the issue of whether or not the employees - I think the word that was used is that employees might have been confused about what they are accepting. That just completely misunderstands the task that's before the Commission. You are looking for an objective assessment. It underestimates the role that employees who vote up an agreement play in this very important industrial landscape when they accept an offer. We don't accept that you need to be satisfied that the employees were not confused about wages.

PN1034

Putting that aside, how could they be confused? With the materials that I took you through, that were before the Commission, the materials that we said to the Commission can satisfy it that the employees understood what they were getting themselves into, there is very little confusion in those materials and they were put in very clear words. I think those are the things that I needed to address the Commission on, so I'm grateful for the time.

PN1035

THE COMMISSIONER: Thank you. Can I thank you, Ms Campbell and Mr Whiteside for your submissions. It's necessary for me to reserve my decision and I do so. We are adjourned.

ADJOURNED INDEFINITELY **[11.39 AM]**