



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CROSS

C2024/130

s.739 - Application to deal with a dispute

Mr Cameron Webb

and

**Aurizon Operations Limited, Aurizon Operations Limited
(C2024/130)**

Aurizon NSW Coal Operations Enterprise Agreement 2021

Sydney

4.29 PM, WEDNESDAY, 14 FEBRUARY 2024

Continued from 12/02/2024

PN1

THE DEPUTY PRESIDENT: Yes. Can I take appearances, please.

PN2

MR J HART: Good afternoon, Deputy President. If it pleases, Hart, initial J, for the applicant.

PN3

THE DEPUTY PRESIDENT: For the respondent?

PN4

MR D WILLIAMS: Yes, Deputy President. Williams, initial D, continuing my representation for the respondent, with Mr Walthall, initial T.

PN5

THE DEPUTY PRESIDENT: Any objections to permission being granted on this occasion?

PN6

MR HART: Not on this occasion.

PN7

THE DEPUTY PRESIDENT: Permission is granted for you to appear, Mr Williams.

PN8

MR WILLIAMS: Thank you.

PN9

THE DEPUTY PRESIDENT: How do the parties wish to proceed with this today?

PN10

MR HART: Deputy President, we have a couple of witnesses that are going to be called and required. I propose to start with some general opening remarks and get into it.

PN11

THE DEPUTY PRESIDENT: Well, do you go first?

PN12

MR HART: Yes.

PN13

THE DEPUTY PRESIDENT: I mean we're not here at your request, are we?

PN14

MR HART: It's our application, as far as I understood it, unless I'm mistaken.

PN15

THE DEPUTY PRESIDENT: We'll proceed on that basis. Do you want to be heard on that, Mr Williams?

PN16

MR WILLIAMS: No, Deputy President. The last occasion was our jurisdictional objection, so we went first. But this time it's the dispute itself and Mr Hart should go first.

PN17

THE DEPUTY PRESIDENT: Okay. Mr Hart, I'm in your hands.

PN18

MR HART: Thank you, Deputy President. As you may recall, from our last time, this dispute concerns our request for Mr Webb to be provided with an investigation report, stemming from incidents in an investigation that occurred on or about 8 or 9 January this year and there was, latterly, confirmed, by way of a letter issued on 23 January, as a show cause letter to Mr Webb.

PN19

There has been some correspondence back and forth between the parties, over that intervening period, to attempt to acquire the investigation report and your Honour will have received our form 52 today, with respect to those matters, seeking an order for the production of materials and records. We can deal with that separately or concurrently with today's session, notwithstanding that they're both, effectively, the same matter that's being posed in the form 52 and the matter that's before you, in terms of substantive hearing this afternoon.

PN20

If I can start by putting it this way, the dispute was clearly, and continues to be, about matters arising under the agreement, pursuant to clause 12. In particular, the dispute concerns whether the respondent has complied with its obligations to afford Mr Webb with procedural fairness and due process that we say remains on foot and is provided by clause 12.1 of the agreement and that provision, in its entirety, should have application throughout the residual elements of clause 12, whether it's through clause 12.1 or clause 12.2 and 3 and 4 and sub appendices to that clause.

PN21

You can't divorce or dissociate the requirement to afford procedural fairness or due process simply because, as the respondent has put in submissions, that the investigation has moved to a different phase. That it is now currently at an outcome phase, as opposed to an investigation phase. Our submissions are, Deputy President, that at all times the overarching provisions required under 12.1 requires that the parties, in particular the respondent as the employer, must afford Mr Webb, or employees in general, with the rights to procedural fairness and due process.

PN22

THE DEPUTY PRESIDENT: Yes.

PN23

MR HART: Deputy President, just by way of an administrative issue, one of our witnesses, or our witness, Mr Wright, who I understand is required for cross-examination, is currently online. I'm not sure how you plan or wish to deal with this, but I'm happy to conclude my opening remarks and then move directly to Mr Wright, if there's no objections.

PN24

THE DEPUTY PRESIDENT: Yes. Call Mr Wright.

PN25

MR HART: Very good. If I just finish a couple of other points that I wanted to make, with respect to what we say the dispute is about. The respondent makes out the case or submits that, ultimately, there's a confidentiality provision that is on foot, and that resides at clause 12.2 of the agreement. They say, in their submissions, that clause 12.2 effectively puts the scuppers on the release of any materials associated with the disciplinary investigation for the investigation itself.

PN26

We say that that can't simply be the case. That, at all times, the employee who is subject to an investigation must know the substance and the case against them are meant to be able to attest that those issues associated with the investigation and the outcome of the investigation.

PN27

THE DEPUTY PRESIDENT: Why would I be considering the application of clause 12.2 when, in the decision that I published on 5 February, I've dealt with that?

PN28

MR HART: I agree with you Deputy President. We are struggling to understand the submissions by the respondent but I just felt it was prudent to circle off and close off on that particular issue while I had your Honour's attention.

PN29

On that basis, if it's convenient, I'd like to call Mr Wright.

PN30

THE DEPUTY PRESIDENT: Yes. Yes.

PN31

MR HART: I call Mr Wright.

PN32

THE ASSOCIATE: Please state your full name.

PN33

MR WRIGHT: Steven Wright.

<STEVEN WRIGHT, AFFIRMED

[4.35 PM]

EXAMINATION-IN-CHIEF BY MR HART

[4.35 PM]

PN34

MR HART: Mr Wright, thank you for attending today and being available for examination. Can I just take you to the statement that was prepared, your affidavit, that was prepared today, dated 14 February. You have it in front of you, I presume?---Yes, I do.

PN35

Thank you. That document contains nine paragraphs and you say that that is a true and accurate statement, to be best of your belief and knowledge?---That is correct.

PN36

Thank you. I just have some ancillary questions that I wish to put to Mr Wright, with the indulgence of the Commission and the respondent. Mr Wright, can you just tell, for the Commission's benefit, how long you've been employed by the union?---I've been with the union since 2006, 18 years come January this year.

PN37

And in your time working for the union, have you been involved in negotiating enterprise agreements?---Yes, I have.

STEVEN WRIGHT

XN MR HART

PN38

And, specifically, have you been involved in the negotiation of the 2021 Aurizon Enterprise Agreement, that's relevant to this matter?---Yes, that's correct. I was a lead negotiator of that agreement.

PN39

To the best of your recollection do you have - with respect of clause 12 of the agreement, to the best of your recollection, do you have – are you able to tell the Commission what, if any, discussions were had, in respect of the disciplinary procedures outlined in that clause?

PN40

MR WILLIAMS: I object, Deputy President.

PN41

THE DEPUTY PRESIDENT: What's the basis of the objection?

PN42

MR WILLIAMS: The witness is being asked to give a subjective recollection about the discussions which the witness had, in negotiating this enterprise agreement. It's very clear, from Berri and numerous other decisions, that the evidence of one party in the negotiation of an enterprise agreement is not admissible to the issue of what the interpretation of the agreement should be.

PN43

The terms of the agreement, once they're concluded, of course are concluded by agreement between the employer and a majority, an undefined majority of employees. And the view or beliefs or recollections of the bargaining representatives is irrelevant to the interpretation of the agreement.

PN44

So this derived evidence, firstly, couldn't help you and, secondly, it would be most unfair for my client today for you to - to have you receive evidence from one side of the equation, unnotified and not foreshadowed, when it has no opportunity to respond to it or put any evidence in response to it, even if either party could persuade your Honour its relevance.

PN45

THE DEPUTY PRESIDENT: Mr Hart - - -

PN46

MR WILLIAMS: That's not relevant.

PN47

THE DEPUTY PRESIDENT: Mr Hart, do you have anything to put?

*** STEVEN WRIGHT

XN MR HART

PN48

MR HART: Yes, thank you. What will become evident, throughout the course of this afternoon, Deputy President, is the witness statement from Mr Mitchell Morgan. And at paragraph 21 of that statement Mr Morgan appears to allude to knowledge of the passage of the enterprise agreement and the provisions, as they're interpreted by the respondent. We say that it's relevant to put the question that I've put to Mr Wright, to assist the Commission understand, firstly, what the extent of the discussions were and Mr Wright's recollections as to the subjective intentions of the parties at the bargaining table.

PN49

THE DEPUTY PRESIDENT: Paragraph 21 of the statement, you say?

PN50

MR HART: Of Mr Morgan's statement.

PN51

THE DEPUTY PRESIDENT: Yes?

PN52

MR HART: Where he - the last sentence, where he states, 'I also believe we have committed to no less than this to our employees, in our enterprise agreements, by the concept that investigations are confidential'. And I'm presuming that's a reference back to clause 12.2 of the agreement. In any event, he's making - - -

PN53

THE DEPUTY PRESIDENT: Okay. Is that sentence going to be pressed, Mr Williams?

PN54

MR WILLIAMS: It's pressed, in the sense that it's Mr Morgan's belief and it helps to explain his reticence to provide a report. It doesn't help at all to interpret the clause and we don't press it on that basis.

PN55

THE DEPUTY PRESIDENT: Well, I reject the question but I also indicate that I'm currently seeing no relevance to that sentence but I'll hear from you at an appropriate time, Mr Williams. Mr Hart?

PN56

MR HART: Thank you, Deputy President. Mr Wright, on the basis of the respondent's objections I have no further questions at this time.

PN57

THE DEPUTY PRESIDENT: Okay. Any cross-examination?

PN58

MR WILLIAMS: Yes, briefly, Deputy President, thank you. Thank you, Mr Hart. Thank you, Mr Wright.

CROSS-EXAMINATION BY MR WILLIAMS

[4.39 PM]

STEVEN WRIGHT

XXN MR WILLIAMS

PN59

MR WILLIAMS: Deputy President, and Mr Hart, I'm going to ask Mr Wright a couple of questions, by reference to some correspondence which is in evidence, or will be in evidence. It's Attachment 2 to Mr Morgan's statement, paginated page 9, and it's an email exchange between Mr Hart and Mr Morgan. Mr Wright, the witness, however, is copied. Now, if it becomes necessary, of course, we can provide Mr Wright with a copy of the correspondence, but I have a brief question and I think it'll be sufficient if I just read it to him, but we'll see how we go.

PN60

Mr Wright, you're aware that once the allegations have been made against Mr Webb, he asked the union to assist him in his response and the processes, you're aware of that?---Yes, I am.

PN61

And you're aware that Mr Hart had written to Mr Morgan, of my client, on 8 January, requesting some information, and I will read the email to you, but are you generally aware that Mr Hart had been in communication with Mr Mitchell, in relation to a request for information?---Yes, I was.

PN62

I'm just going to read you an email from Mr Hart to Mr Mitchell, dated 8 January 2024, sent at 6.07 pm.

PN63

Hi Mitchell,

PN64

Regrettably you have not responded to my direct question about whether (complainant name redacted) has provided audio or video footage obtained on 15 December 2023.

PN65

Do you have a recollection of Mr Hart making that - saying that to Mr Morgan, in an email about that time?---I do.

PN66

So you're aware that on behalf of the union, and on behalf of Mr Webb, Mr Hart was asking Aurizon whether or not (complainant name redacted) had provided evidence, in the way of audio or video footage?---Correct.

PN67

You're aware that the allegation which (complainant name redacted) had made, in relation to Mr Webb, was one of an assault in the workplace?---I'm not sure of it being an assault. There is some conflicting information in regards to that. Having dealt with the case, initially, (complainant name redacted) did actually ring me, in regards to receiving some representation from the union, in which she advised me that she was waiting on a date for an interview with an independent investigator. I informed her that the union would provide some assistance and - and to let us know of the date that that was required. (complainant name redacted) went on to tell me that some of the information that she provided to the company, in regard to that assault, or - - -

*** STEVEN WRIGHT

XXN MR WILLIAMS

PN68

Well, Mr Wright, reading from your statement, you say that in the discussion you had, (complainant name redacted) advised broadly of the nature of the complaint against Mr Cameron Webb. As I understood the complaint, it involved an allegation that Mr Webb had slapped (complainant name redacted) on the bottom, during a work Christmas party, held on 9 December 2023. That's your evidence, isn't it?---Well, that's correct. That's - Ms - - -

PN69

So you understand - - -?---Sorry?

PN70

You understand - - -

PN71

THE DEPUTY PRESIDENT: Mr Williams. Mr Williams, please let the witness finish his answer.

PN72

MR WILLIAMS: Sorry, Deputy President.

PN73

THE WITNESS: During that conversation I was aware of the allegation that - that - of Mr Webb slapping (complainant name redacted) on the - on the backside. However, during the conversation she told me that he - he grabbed her on the backside. So I'm - I wasn't aware of her statement, I was only going on the information she provided me.

PN74

MR WILLIAMS: Well, in your statement, I'm not talking about there's a difference between a slap and a grab, but let's assume there is, why in your statement, therefore, do you say:

PN75

As I understood, the complaint involved an allegation that Mr Webb had slapped (complainant name redacted) on the bottom.

PN76

?---Well, that's - that's the information that I was aware of.

*** STEVEN WRIGHT

XXN MR WILLIAMS

PN77

Yes. So you understood that (complainant name redacted), sorry, (complainant name redacted) had alleged that Mr Webb had slapped her on the bottom, at a Christmas party?---Well, I spoke to (complainant name redacted) for roughly 30 seconds on the phone and - and I wasn't sure of the conflict of the information that she provided. I didn't go into detail of the information, but I knew, from the issue with Mr Webb, because I didn't want to have the conflict. I was going to advise my colleague in Sydney, when (complainant name redacted) actually contacted the union for representation, I was requesting my colleague, who's based in Sydney, as I'm based in Newcastle, I was asking him, my colleague, to then represent (complainant name redacted) when we received information of the interview that she was requesting some representation for.

PN78

Because she's also a member of your union, isn't she?---I believe so, yes.

PN79

And that was why she called you, to get your help?---Well, she called the union to ask for help and, as I said, because of the - the fact that I'd been assisting Mr Webb and talking to Mr Hart about the issue, I did - I felt it was a conflict of interest to deal with the matter and I - I informed (complainant name redacted) that I would get some representation when she advised us of the date that was required.

PN80

Did you tell her that Mr Hart, on behalf of the union, was inquiring about whether or not she had provided audio or video footage, did you tell her that?---No, I didn't. I didn't mention that to (complainant name redacted) at all.

PN81

Did you mention that you were already representing Mr Webb?---No, I didn't. I told her that if she required any representation to let me know of the dates and I would arrange it through the union.

PN82

Yes, you - -?---My intention, as I said, was to allow - to advise my colleague and get my colleague to represent them because I personally felt it was a conflict of interest.

PN83

Well, I'm not surprised. Did you - did it occur to you that she might be quite concerned to learn that having approached the union for assistance you were already acting for, or representing, the - - -?---She didn't know that.

PN84

Excuse me. The person who has been accused of assaulting her?

PN85

MR HART: Objection.

PN86

THE DEPUTY PRESIDENT: In what respect, Mr Hart?

PN87

MR HART: Mr Williams is asking Mr Wright to put himself in the shoes or the mind of the complainant and understand what her - subjectively she was thinking or her concerns may be. He can't possibly do that.

PN88

THE DEPUTY PRESIDENT: Mr Williams, can you address that objection but also address, for my purposes, the relevance of your questions?

*** STEVEN WRIGHT

XXN MR WILLIAMS

PN89

MR WILLIAMS: Well, first. The relevance of the question - sorry, the answer to the objection is, I'm not asking the witness to put himself in (complainant name redacted)'s mind, I'm asking him whether it occurred to him that it was possible that she might be concerned that her own union was representing the person who had been accused of assaulting her. And, with respect, the relevance of it is, with respect, very clear because you're being asked to provide an investigation report which has been created with input from, no doubt, (complainant name redacted) who accuses a co-worker, now represented by the union, of assaulting her in the workplace when it must be obvious that there's a real - firstly, a real conflict and Mr Wright sort of understands that, but that the complainant might be most concerned that her - the person she accuses of assaulting her is going to be provided with a report which may contain confidential and sensitive information that she's provided.

PN90

THE DEPUTY PRESIDENT: Hold on, provided to who?

PN91

MR WILLIAMS: Provided to the independent investigator.

PN92

THE DEPUTY PRESIDENT: People that are members of the same union, is it remarkable that they approach the same union?

PN93

MR WILLIAMS: It's not remarkable that they approach the same union, Deputy President, but it is remarkable - - -

PN94

THE DEPUTY PRESIDENT: One official of the union feels some disquiet because he'd already spoken to the other side and therefore, as I'm understanding it, extricated himself. Number 3, why is it relevant?

PN95

MR WILLIAMS: It's relevant because the union seeks your assistance in providing - in requiring my client, who's conducted a confidential and independent investigation, to provide a copy of that investigation report, which has been prepared following allegations of assault in the workplace by one employee to the employee who was accused of that assault when it must be obvious that the interests of (complainant name redacted) would be potentially seriously prejudiced by that.

PN96

The conflict which Mr Wright refers to exists, but with respect to him, it's not reconcilable.

PN97

THE DEPUTY PRESIDENT: I just couldn't disagree more.

*** STEVEN WRIGHT

XXN MR WILLIAMS

PN98

MR WILLIAMS: Well, I can make a submission about that later, Deputy President.

PN99

THE DEPUTY PRESIDENT: Yes. But I just don't see the relevance. Well, I want to give you every opportunity, Mr Williams, so ask your question.

PN100

MR WILLIAMS: Thank you. I will.

PN101

Mr Wright, I think you confirmed to me that you did not advise (complainant name redacted) that you were representing Mr Webb?---Correct.

PN102

Do you think that might have been information that she might have needed to decide whether or not she would accept your offer of representation by the union?---No, not at all. At no time did I inform (complainant name redacted) that I had spoken to Cameron, or knew anything about the issue. I was professional in telling her that if she required - she rang up to ask for representation and I advised her that I would get representation for her, when she told us the date that she required it. At no time did I say we wouldn't represent her. At no time did I say I would represent her. I told her the union would provide representation once we understood the date that it was required.

PN103

Mr Wright, have you told your member, (complainant name redacted), that you've asked Aurizon to hand over the investigation report?---No, I haven't spoken to her. I spoke to her for about 30 seconds, on the - the date was 11 January 2024, at 1.20 pm, and I didn't - I didn't know, at the time, I didn't tell her anything about the - the investigation or the current process. I spoke to her, she asked me for - that she'd been interviewed or she told me that she's already been interviewed by HR, Aurizon HR and she was told that in the coming weeks she would be required to have an interview with a private investigator, and that's when she said that she would like representation. I then responded and said that when you can find out the date that you require the representation to let me know and then I'll - I'll ensure that you get union representation at that interview. That's it. I didn't tell her that I was going to get my colleague from Sydney to do it. I didn't tell her that I was going to do it. I didn't mention any of that.

PN104

But have you told her, subsequently?---No. I haven't spoken to her since 11/01/2024.

PN105

So we can take it that you haven't consulted with her, in relation to how she would feel about the investigation report being handed to Mr Webb?---No, I haven't spoken to her at all.

*** STEVEN WRIGHT

XXN MR WILLIAMS

PN106

And you understand that having made an allegation of assault in the workplace, against Mr Webb, she might be fearful of him?---That could be so, but I'm not sure.

PN107

And that she might be greatly concerned by the prospect that an investigation report, in which she had participated, might be handed over to Mr Webb?---I don't know. I can't - I can't - can't say how she feels at all. I don't know the woman personally, I only know her as a member of the union.

PN108

In the information provided by Mr Hart, he has - he has explained the union's purpose in seeking the report, in the following terms:

PN109

It is crucial that Mr Webb is able to interrogate the evidence that arose and is relied on to substantiate all three allegations against him and for him to make a sound, rational and fulsome response to the show cause letter.

PN110

Now, that must include, in whatever 'interrogation' means, that must include refuting information provided by the complainant, (complainant name redacted), would you agree?---No, I don't agree.

PN111

No? You don't say that any part of your purpose in seeking the report, despite what I've just read to you, is to seek to criticise, or respond to, or deny evidence that (complainant name redacted) gave to the investigation?---No, I don't believe that. I believe that we, as a union and as a representative of the employees that are members of our union, we try to ensure the confidentiality within the investigation. If I'm dealing with an employee, or one of my members that has a conflict with another employee, another member of the union, we don't conflict, we don't confer with our colleagues, we allow each colleague to do their job, as they're required. We believe that in the obtaining of the information gives our member the opportunity to respond to the allegations put on the table, with all the information provided.

PN112

Mr Wright, you must know that we're here because (complainant name redacted) has made an allegation that Mr Webb assaulted her in the workplace. You know that, don't you?---I do know that.

PN113

And you also know that Mr Webb denies that occurred, don't you?---I do know that. Correct.

*** STEVEN WRIGHT

XXN MR WILLIAMS

PN114

Well what could the purpose of the response be, other than to try and persuade Aurizon that (complainant name redacted) is mistaken or, in fact, a liar?---Well, the evidence that's provided, we need to have the opportunity to put the matter forward that the employee suggests that it wasn't - or our member suggests that it didn't take place. We've got to have that ability to be able to represent that member.

PN115

Well, you have another member who says it did take place, Mr Wright, how - - - ?---And my colleague would deal with that appropriately.

PN116

Well, how would her interests be protected by what the union is doing now?---Well, her interests would be protected by the colleague, in confidentiality in talking to the other colleague without me being part of it.

PN117

But you could understand why (complainant name redacted) would be concerned that you're asking for documents with the obvious purpose to try and persuade Aurizon that she's mistaken or a liar. You must understand her concern about that?---I'm not suggesting that she's a liar and I'm not suggesting it didn't happen. What we're suggesting is that the member, our member that we're representing, denied that it happened. He should be afforded the right to have a look at the evidence and dispute any evidence put forward, as with (complainant name redacted). If (complainant name redacted) has made an error, or made any judgment in her statement, my colleague will deal with that accordingly. My colleague - - -

PN118

But with respect to that, you're in an impossible situation aren't you? You can't properly represent both members' interests in a situation like this, you just can't do it.

PN119

MR HART: Objection, your Honour.

PN120

THE DEPUTY PRESIDENT: Yes, what's the objection?

PN121

MR HART: The question is being put and answered by Mr Wright has given evidence to say that he would not be the one involved in directly representing (complainant name redacted). We submit that the question has been asked and answered and we should move on.

PN122

THE DEPUTY PRESIDENT: Anything you want to say, in response, Mr Williams?

PN123

MR WILLIAMS: Well, I think it's a pretty important issue which I'm entitled to pursue, but I'm prepared to ask a different question.

*** STEVEN WRIGHT

XXN MR WILLIAMS

PN124

THE DEPUTY PRESIDENT: All right. Deal with the - there's an objection to your question, do you press it or withdraw it?

PN125

MR WILLIAMS: I withdraw it.

PN126

THE DEPUTY PRESIDENT: Okay. Move on.

PN127

MR WILLIAMS: Thank you. Mr Wright, what would the union do if (complainant name redacted) had asked you to file a dispute, or make a dispute in her behalf, seeking to prevent Aurizon from handing over the investigation report to Mr Webb?

PN128

MR HART: Objection?---That was what my colleague - - -

PN129

THE DEPUTY PRESIDENT: What's the basis of the objection?

PN130

MR HART: Mr Williams is asking Mr Wright to speculate on a hypothetical what may have occurred in the future. There's no evidence here that that - any of

the substance of what Mr Williams has put has occurred or will occur, therefore the relevance of the question, we submit, is not relevant to the purpose of this afternoon.

PN131

THE DEPUTY PRESIDENT: Any reply, Mr Williams?

PN132

MR WILLIAMS: Yes, Deputy President. I'm going to make a submission that it would be inappropriate and, potentially, perverse for you to - if you have the - the jurisdiction to, for you to order that my client provide a copy of this investigation report to - to the union, who supports Mr Webb, including because the union - (complainant name redacted) is also a member of the union. It appears she sought assistance. It appears she hasn't been consulted and her interests just seem to be being trampled, in favour of Mr Webb's, in circumstances where the conflict, which is obvious, cannot be reconciled. And to provide the union, on behalf of Mr Webb, but obviously not on behalf of (complainant name redacted), with a copy of that report, with the stated, not just the obvious, but the stated objective of interrogating the evidence, including, no doubt, her evidence. It's just beyond the pale.

PN133

THE DEPUTY PRESIDENT: Nothing further?

PN134

MR WILLIAMS: Nothing further.

*** STEVEN WRIGHT

XXN MR WILLIAMS

PN135

THE DEPUTY PRESIDENT: I reject the question. The evidence is clear that, as in any union dealing with disputes between members, there appears to be a method of dealing with the confidentiality. Dealing with hypotheticals is of no use. And insofar as it might be suggested that the complainant, I've always tried to avoid using her name, is in the union's camp somehow, I think it would be missing the point of if that was put. So I reject the question.

PN136

MR WILLIAMS: I accept your ruling, Deputy President.

PN137

What is your intention? What is the union's intention, as far as you're aware, Mr Wright, if the Deputy President grants you access to the report?

PN138

MR HART: Objection.

PN139

THE DEPUTY PRESIDENT: What's the basis of the objection?

PN140

MR HART: Mr Wright has already given evidence that he is not the officer with carriage of this matter, it's been delegated across to me, pursuant to his witness statement, at paragraph 8. Sorry, I withdraw that, at paragraph 4, and pursuant to his further evidence this afternoon. I am the person with carriage of this matter. Mr Wright has no further carriage and no further dealings with this matter. The question being put to Mr Wright, as to what he may hypothetically do with the request is irrelevant, for the purpose.

PN141

THE DEPUTY PRESIDENT: Any response, Mr Williams?

PN142

MR WILLIAMS: That's an objection without substance, Deputy President. Mr Wright is the locomotive committees organiser. He's plainly involved in the process. It appears he's giving instructions to Mr Hart, and that would be the appropriate division of function between them. He must be able to answer the question as to what the union intends to do with the report.

PN143

THE DEPUTY PRESIDENT: Okay. I'll allow the question.

STEVEN WRIGHT

XXN MR WILLIAMS

PN144

THE WITNESS: Well, unfortunately, I'm not in carriage of the - of the case, and Mr Hart is the industrial officer, he's the one in charge of the delegation. I've got nothing further to - to add to the case. As I said, I initially had Cameron ring me and ask for representation, which we provided. He had a meeting to be held in Wollongong and wanted a representative to be with him. I passed that on to Jason, as Mr Hart is based in Wollongong and Mr Hart has taken over the role of looking after Mr Webb, as they are in the same locality. I haven't had any further dealings with Mr Webb since that and I have had no further dealings with the respondent either.

PN145

MR WILLIAMS: Can I at least ask you this question then, Mr Wright, in light of that answer. Mr Hart's explained the purpose, I've read it once, but I'll read it again:

PN146

It is crucial that Mr Webb is able to interrogate the evidence that Aurizon has relied on to substantiate all three allegations against him.

PN147

Do you accept that the purpose of the union includes to interrogate the evidence that Aurizon has relied on?---Well, it would be a disservice to our member if we didn't follow through on all the allegations and the appropriate material provided.

PN148

I don't have any further questions, Deputy President, thank you.

PN149

THE DEPUTY PRESIDENT: Any re-examination?

PN150

MR HART: Very, very briefly.

PN151

Mr Wright, in terms of - sorry, I withdraw that. No further questions. Thank you.

PN152

THE DEPUTY PRESIDENT: Okay. You're free to go, Mr Wright, thank you very much?---Thank you, Deputy President.

<THE WITNESS WITHDREW

[5.01 PM]

PN153

THE DEPUTY PRESIDENT: Is Mr Hart required for cross-examination?

PN154

MR WILLIAMS: Deputy President, there's nothing.

PN155

THE DEPUTY PRESIDENT: Pardon?

PN156

MR WILLIAMS: No, Deputy President, nothing.

STEVEN WRIGHT

XXN MR WILLIAMS

PN157

THE DEPUTY PRESIDENT: Thank you. Well, we'll mark Mr Wright's statement as exhibit A1 and Mr Hart's as exhibit A2.

EXHIBIT #A1 WITNESS STATEMENT OF MR WRIGHT

EXHIBIT #A2 WITNESS STATEMENT OF MR HART

PN158

THE DEPUTY PRESIDENT: Have you got anything further, Mr Hart?

PN159

MR HART: I have nothing further at this time. I believe Mr Mitchell Morgan is required for cross-examination.

PN160

THE DEPUTY PRESIDENT: Okay. Well, we're into your case then, Mr Williams.

PN161

MR WILLIAMS: May it please, Deputy President. I call Mr Mitchell Morgan. He's not with me, but we just ask him to dial in.

PN162

THE DEPUTY PRESIDENT: Okay. Tell me one thing, I note an authority came in just recently, *AMAU v Newcastle Ports*, can you advise me what the relevant parts of that decision are?

PN163

MR WILLIAMS: Deputy President, I gave you the Newcastle Ports Corporation case for completeness. The only authority I'm going to refer to, in submissions, is the Lend Lease one, that's the Full Bench one, it's the more relevant one, and limited to what the Full Bench said, at paragraph 22. It's relevant only to the breadth of your discretion.

PN164

THE DEPUTY PRESIDENT: Okay. So you're not going to be referring to any parts of this decision?

PN165

MR WILLIAMS: I will not be, no.

PN166

THE DEPUTY PRESIDENT: Okay.

PN167

THE ASSOCIATE: Please state your full name.

PN168

MR MORGAN: Mitchell Keith Morgan.

<MITCHELL KEITH MORGAN, AFFIRMED [5.04 PM]

EXAMINATION-IN-CHIEF BY MR WILLIAMS [5.04 PM]

PN169

MR WILLIAMS: Mr Morgan, can you state your full name, for the Commission, please?---Mitchell Keith Morgan.

PN170

Thank you. And, Mr Morgan, you're employed by Aurizon Operations Limited, as regional operations manager for operations located in Wollongong, is that correct?---That is correct.

PN171

Mr Morgan, have you made a statement in relation to the matter before the Commission today?---I have made a statement, correct.

PN172

Do you have a copy with you?---I do have a copy of the statement with me, and the annexures.

PN173

Good. Now, there's a statement of 21 paragraphs with, I think, five annexures?---Correct, 21 paragraphs, five annexures.

PN174

Thank you. And, Mr Morgan, are the matters of fact set out in that statement true and correct, to the best of your knowledge and belief?---That is correct.

PN175

Thank you. I tender Mr Morgan's statement, Deputy President, and I don't have any further questions for him.

PN176

THE DEPUTY PRESIDENT: Any objections, Mr Hart?

PN177

MR HART: No objections.

PN178

THE DEPUTY PRESIDENT: That will be exhibit R1.

EXHIBIT #R1 WITNESS STATEMENT OF MITCHELL MORGAN

PN179

THE DEPUTY PRESIDENT: Any cross-examination?

PN180

MR HART: Yes.

PN181

THE DEPUTY PRESIDENT: Yes. Please proceed.

*** MITCHELL KEITH MORGAN

XN MR WILLIAMS

PN182

MR HART: Thank you.

CROSS-EXAMINATION BY MR HART

[5.05 PM]

PN183

MR HART: Mr Morgan, you've been with Aurizon since April 2013, according to your witness statement, at paragraph 1, that's correct?---That is correct, Mr Hart.

PN184

And you joined in what capacity, at that time?---I joined as a train driver, in 2013.

PN185

And you remained as a driver until your current position, is that correct?---No, in 2015 I became a supervisor. In 2017 I became part of the customer team and then in 2020 I joined this role, April 2020.

PN186

Thank you?---I've been in this role nearly four years.

PN187

Can you describe what the operations role is, with respect to your position?---Yes. I'm accountable for the safe, efficient, reliable delivery of services, coal services, in the Illawarra region, looking after the Wollongong Depot.

PN188

Thank you. In paragraph 9 of your statement you say that the report - that an investigation report was prepared by an investigator. For the record, that investigator was Kieran Plasto(?), is that correct?---That is correct.

PN189

Similarly, at paragraph 7 of your statement, if I can take you to that, you record that both Mr Webb and myself attended a meeting, on 9 January, with the external investigator. And, again, just for the purpose of the record, can you confirm that that investigator was Kieran Plasto?---I'm aware that both yourself and Mr Webb attended the meeting with the external investigator and I believe that investigator to be Kieran Plasto.

PN190

In your letter, dated 23 January, and also annexed at Annexure 3 of your statement, you wrote that, and if I can just wait for you to get to your statement. Let me know when you're ready?---Sorry, the statement or the annexure?

PN191

In your letter – sorry, thank you. In Annexure 3 of your statement you write, and it's located in the middle of the page, or the bottom part of the middle, underneath paragraph 3, there's a paragraph there, which starts:

*** MITCHELL KEITH MORGAN

XXN MR HART

PN192

These findings were made by an independent and impartial investigator, weighing all the evidence before him, including both your verbal and written responses. I have reviewed and accepted the findings.

PN193

Can you see that?---I can. Yes.

PN194

Did you organise for Mr Plasto to be engaged as the external investigator?---No, I did not.

PN195

Who did?---It was the Aurizon People Advisory Team.

PN196

And, as operations manager, were you required to, effectively, sign off on the expense or the approval of Mr Plasto's appointment?---I think the funds would have gone against my budget, but the process - a new process, actually released by the organisation in December 2023, was that matters of this nature would be investigated by an independent party. I believe the decision was made, based on

recent changes to legislation, in 2023. Not - the legislation didn't say that it had to be investigated, sorry, the legislation changes prompted Aurizon to review how the dealt with the matters, sorry.

PN197

I see. Have you previously, in your position as operations manager, engaged Mr Plasto to conduct as an external investigator?---No, I have not.

PN198

So to the best of your knowledge, he's never been used previously, by Aurizon, to conduct external investigations?---Not that I'm aware of, but I'm not privy to the broader organisational engagement.

PN199

I see. Just taking you back to your - your statement, at paragraph 1, where you've disclosed that you started working for Aurizon, back in April 2013, and then you're current position, as operational manager, at 2022 - 2020, I beg your pardon. Has it been the case - have you ever worked with Mr Plasto, either indirectly or directly, prior to this investigation?---I don't believe I have. I am aware that Mr Plasto was employed by Aurizon, around a similar time, but I don't believe I've ever crossed paths with him in my - in my dealings.

PN200

What do you understand Mr Plasto's capacity or position was, with Aurizon?---I believe he was in a human resource role.

*** MITCHELL KEITH MORGAN

XXN MR HART

PN201

Do you recall or do you know the period of service he worked with Aurizon, or was engaged by Aurizon, as an employee within the Human Resource Department?---I couldn't tell you, no.

PN202

Would it - you wouldn't disagree then if presented with - with the CV of Mr Plasto that he had been engaged by Aurizon between May 2014 through to November 2016?---I - I couldn't comment, sorry. Sorry, I couldn't confirm.

PN203

You don't - - ?---Yes, I don't know. Yes.

PN204

But you know that he was an employee at some point in time?---I believe him to be an employee of Aurizon at some point, yes.

PN205

Would you accept that, given his previous employment with Aurizon, in the operations division, that a perception might exist that he was not independent or impartial, in the circumstances of conducting the investigation?---I don't think I would agree.

PN206

You don't accept that a perception might arise, in Mr Webb's mind, for example, that Mr Plasto may be not independent and not impartial, given his previous employment with Aurizon?---I can't draw conclusions that - sorry, I can't comment on the conclusions Mr Webb may draw. But I do now that Mr Plasto was engaged as a third party independent investigator.

PN207

It wouldn't be unreasonable for Mr Webb to perceive, potentially, that Mr Plasto had a conflict of interest, would it?---Again, I can't comment on how Mr Webb would perceive that. All I can comment on is that Mr Plasto was engaged as an independent investigator.

PN208

Okay. I put it this way to you then, do you accept that Mr Webb would be within his rights to perceive that there may be a conflict of interest, through Mr Plasto's engagement?---I would say that Mr Webb does have that right.

PN209

So you agree that he may have that perception?---I agree he may have that perception but I can't comment on - on his perceptions.

*** MITCHELL KEITH MORGAN

XXN MR HART

PN210

Thank you. In terms of the customary practice of not providing the report, you say, in your witness statement, let me take you to it, that it hasn't been your custom and practice to provide investigation reports, during your time as an employee with Aurizon, and that's at paragraph 18(a) of your witness statement. Do you have knowledge of whether any other of your colleagues has ever provided an investigation report, throughout the investigation disciplinary process?---I'm not aware and I don't believe it to be a practice.

PN211

Did you make inquiries to determine whether it was a practice previously conducted?---I have had conversations around the matter and I've not had anyone come to me to say that they have, or would or do.

PN212

With whom did you have those conversations?---People from the People Advisory Team.

PN213

Who would they be?---Am I supposed to give names, in this instance?

PN214

Yes.

PN215

MR WILLIAMS: I formally object. Obviously if it's relevant names can be given, but I object, on the basis that it can't be of any assistance and would seem to be unnecessary for individuals to be named.

PN216

THE DEPUTY PRESIDENT: All right.

PN217

MR WILLIAMS: Mr Morgan has advised the advice is received, that's the relevant part. The level of engagement people have given is not relevant to that.

PN218

THE DEPUTY PRESIDENT: What do you have to say, Mr Hart?

PN219

MR HART: It's relevant to the extent that if it was Joe Bloggs the cleaner that works in the People Advisory Team, and I don't mean to put it as low as that, but if it was someone without a capacity or some technical expertise to provide the advice then, of course, we're entitled to know the qualifications and the relevant experience of the individual providing that advice to Mr Mitchell.

PN220

If it's the case that Mr Mitchell's evidence will be that, in fact, it was someone quite senior who has some experience and some qualifications, we would accept that as evidence. But if it's the case that it's someone, as I put, the cleaner, and I don't mean to be derogatory about it, but if it was the case, as I put, then, of course, we should be entitled to know the extent of the advice that Mr Mitchell is relying upon and the calibre and quality of the advice.

PN221

THE DEPUTY PRESIDENT: Do you want to be heard, Mr Williams?

*** MITCHELL KEITH MORGAN

XXN MR HART

PN222

MR WILLIAMS: Yes, I do, Deputy President. To what purpose? To what purpose to assist you in resolving the matter that's before you would it be relevant for Mr Hart to interrogate, to a third party, the so called quality of the advice he's received? Mr Morgan has come here to give evidence about his how concern and his own practice. He's answered the question which says that he had discussions which led him to believe that that's a practice across the organisation. Well - - -

PN223

THE DEPUTY PRESIDENT: If you look at 18(b), 'Investigators typically seek'. A lot of these examples in paragraph 18 are broader than Mr Morgan's experience. It's put as a practice.

PN224

MR WILLIAMS: He can be asked questions about that, about his basis of that belief. But there's no relevance to some inquiries, collateral inquiry, into the qualifications and experience of those who have given advice about it.

PN225

THE DEPUTY PRESIDENT: Anything further?

PN226

MR WILLIAMS: No.

PN227

THE DEPUTY PRESIDENT: I'll allow the question.

PN228

MR HART: Thank you.

PN229

THE DEPUTY PRESIDENT: You'll need to ask it again for Mr Morgan, he's probably - - -

PN230

MR HART: I'll do my best. Insofar as you sought advice, my question was, who did you seek advice from? To recap, your evidence is that you sought advice from the People Advisory Team. My question to you is, who was that person or persons in the Advisory Team that you sought advice from?---Sure, and if I can respond with titles, it was people ranging from advisor, manager to head of.

PN231

Thank you. Insofar as the disciplinary process, which includes an investigatory component, do you accept that investigations conducted into alleged conduct was run under the provisions of clause 12 of the agreement?---Sorry, do I believe that the investigation was run under clause 12 of the agreement?

*** MITCHELL KEITH MORGAN

XXN MR HART

PN232

No, it's a bit more narrow than that. Do you accept that the investigations conducted into the alleged conduct was run under the provisions of clause 12 of the agreement?---This investigation?

PN233

Yes?---Yes, I believe it was.

PN234

Do you accept that, as part of that disciplinary process, it also includes an investigatory component in determining whether a case exists against an employee, or not?---I'm sorry, you'd have to repeat that one for me.

PN235

As part of the disciplinary process, which includes an investigation or investigatory component, to determine whether a case exists against an employee, you would accept that the disciplinary process includes that investigation component?---You might have to dumb it down a bit more for me. So the investigation is conducted in line with clause 12 but includes the investigation - - -

PN236

That's right. Let me break it down for you?---Yes. Sorry.

PN237

Clause 12 sets out, among other things, a process which includes how an investigation is to be conducted, you accept that?---Yes.

PN238

You accept that investigations also can include suspension from duty?---Correct.

PN239

Do you accept that they can also be - employees can be placed on alternative duties?---Correct.

PN240

And you also accept that part of the disciplinary provisions of clause 12 contains disciplinary outcomes, which can include a verbal warning and written warning?---Correct, yes.

PN241

You need to answer?---Sorry. Yes. Yes.

PN242

And it also can include a temporary reduction in position?---Correct.

PN243

Also a suspension from duty, with or without pay?---Correct.

PN244

Or it can ultimately lead to a dismissal?---It may.

*** MITCHELL KEITH MORGAN

XXN MR HART

PN245

The disciplinary provisions at clause 12 also contain options for an employee who disagrees with the outcome of an investigation, doesn't it?---I believe, yes, if the employee disagrees with the determination, unless it is dismissal, they may dispute, under clause 54 of the EA, which is dispute settlement procedure.

PN246

For the purpose of my question, do you accept that, broadly, clause 12 contains a number of elements to it. One is an investigation process, two is an investigation, three is a disciplinary outcome and four is a grievance, save for where someone is being dismissed. You accept that that's all wrapped up into one disciplinary process, don't you?---I would say that that is wrapped up into clause 12 and the subclauses relate to each step of the process. But, just to clarify, I believe the subclause relating to disputing the outcome, the outcome may be disputed, under clause 54, unless it is deemed that termination is the appropriate or the necessary outcome.

PN247

To the best of your knowledge, then, Mr Mitchell, you would agree with the proposition that, effectively, clause 12 deals with, in its entirety, disciplinary matters covered by the enterprise agreement and disciplinary matters are not covered anywhere else in the agreement, save for an appeal, under clause 54 of the agreement?---Yes. So investigations into disciplinary matters fall under clause

12. I will also say, Aurizon does have - it does have, you know, grievance procedures that it follows, at a corporate level. But in relation to this, clause 12 is what we're referring to, of the agreement.

PN248

So, really, the question I'm putting to you is this, Mr Mitchell. Nowhere else in the agreement is contained procedures that set out how a disciplinary matter or investigation is to be conducted, is it?---Not that I'm aware of.

PN249

To the best of your knowledge, clause 12 really just deals with disciplinary matters, in its entirety?---I believe so.

PN250

Thank you. If I can take you then to the provisions stated at paragraph 18(d) of your statement, which relate to clause 2 of the - to 12.2 of the agreement. You say that, at clause 18(d), that clause 12.2 of the agreement:

PN251

Disciplinary inquiries and investigations shall be confidential.

PN252

In your mind does that mean that all investigations are to remain confidential, including to the person for whom it affects or is concerned?---Yes. The investigation is supposed to be confidential.

*** MITCHELL KEITH MORGAN

XXN MR HART

PN253

Are you suggesting that at no time that Mr Webb, for instance, being the subject of an investigation, would be entitled to see provisions, subject to clause 12.2 of the agreement, any report or investigation or disciplinary matters arising from an investigation?---I would say that the report, if there was an investigation report, it is to remain confidential. I would say that there are provisions in clause 12 that allow for sufficient information to be provided to, in this instance, Mr Webb, to enable him to respond to either allegations or to, in this instance, a show cause letter. But I believe the investigation is to remain confidential.

PN254

Do you accept that records could be required to be produced in any civil proceedings, don't you?---I believe so. I do believe that that would then be - and I apologise for the faux pas, but would that be a different jurisdiction, would it be court ordered to be presented?

PN255

I'll come to that, you're pre-empting my next question. Do you accept then that your proposition that you put forward, that is, it's a blanket immunity, effectively, from Aurizon providing the reports or investigation details to Mr Webb, or employees in general. You accept though that, subject to an order from a court or a tribunal, that ultimately Aurizon, as the respondent, would be required to produce that material?---If it was under a court order, I do believe so. But in this instance I believe we're working under clause 12 of the EA and clause 2.2 says

that, 'Investigations and inquiries shall remain confidential'. I believe that the people involved in this matter, from complainant to respondent to witnesses, they are covered by the agreement and therefore complying with the agreement is necessary at this time.

PN256

Did you make any promises or assurances to the witnesses in these proceedings, at the time that they prepared witness statements, in respect of the investigation?---I don't know if I made promises. I would say that people certainly had caution about coming forth because of the potential for matters to become non confidential. Reassurances would have been made, at the time, to say that matters will remain confidential throughout the process.

PN257

What reassurances did you make?---That matters would remain confidential and that would extend to each person that has been engaged to participate in the process has been reminded themselves, directly, that all matters must remain confidential.

PN258

You accepted, a moment ago, that, ultimately, on order of a tribunal or court, that the documents in question could be released. And pursuant to that, those orders, what assurances, if any, did you give to the witnesses to safeguard their confidentiality of their witness statements?---Unfortunately, when it comes to court orders, I don't believe I gave any assurances.

*** MITCHELL KEITH MORGAN

XXN MR HART

PN259

Did you tell them, for example, that, subject to a court order, their witness may become known or may be distributed to Mr Webb, on this occasion?---No, I don't believe I did.

PN260

So in terms of general promises, you weren't able to provide them with any information concerning that particular aspect of the eventuality of their report or their statements becoming known?---Not in relation to court orders, not, but I would say that, you know, my employees are well versed in the agreement, they often raise it with me in various capacities. I think it is their clearly, in clause 12.2, that inquiries and investigations will remain confidential and in giving - in engaging all of the people involved in this matter, reminders were given that all matters must remain confidential.

PN261

Did you, in asking witnesses to provide statements, direct them or request them to provide statements?---In this instance it was a combination of.

PN262

So would it be fair to say that, as you say, a combination of direction or request, where they were directed to provide a statement you believed that was a lawful and reasonable direction by yourself to provide to them?---I believe it was.

PN263

Did any of those witnesses object to providing a statement, on the basis of being directed?---Not that I'm aware of.

PN264

Did any of them object to providing a statement on request?---Some certainly did express concern and I think that goes to the heart of the problem here is that some people had concern that matters may be, you know, may not maintain their confidentiality. I think that certainly played a part in some people having caution.

PN265

So in circumstances where someone was requested to provide a statement, did they decline?---In what capacity, sorry?

PN266

The logic that I'm trying to apply here is, did they first - did you firstly make a request and then the witness said they would prefer not to and then you directed them to provide a statement, is that the sequence of events that occurred with the witness or witnesses?---In some instances - well, in all instances a request was made, in some instances caution was expressed and those - in those instances a direction was given to provide evidence in the matter.

PN267

And if they refused to provide, on directly, what would have the consequence have been?---I, fortunately, didn't have to go down that path.

*** MITCHELL KEITH MORGAN

XXN MR HART

PN268

Well, I'm asking you to speculate, given you're a manager. Clearly, there's options open to you if someone refuses a lawful and reasonable direction, what would have the consequence have been to that person?---I think it depends on, as all things, a case-by-case matter as to what becomes, you know, reasonable. I haven't actually experienced someone saying no, full stop, so I have not had to consider that.

PN269

Okay. Deputy President, and Mr Mitchell, thank you for your time. I have no further questions.

PN270

THE DEPUTY PRESIDENT: Any re-examination?

PN271

MR WILLIAMS: No re-examination, Deputy President, thank you. May the witness be released?

PN272

THE DEPUTY PRESIDENT: Just one question, or two, Mr Morgan. In proceedings previously, and this goes to some questions that Mr Hart asked you. I think it was accepted that if a factual scenario follows, from these proceedings, and it results in the termination of Mr Webb, and if he challenges that in an unfair

dismissal proceeding, then it's the position of Aurizon that if there's a call for production of the investigation report, it will be produced?---Yes.

PN273

Okay. If the report was to be produced, but the names of witness, other than the complainant and Mr Webb, were redacted, so, firstly, redacted, and that report was only provided to Mr Webb's representatives, but not to Mr Webb, would that provide the confidentiality required?---I don't believe it would. I - I have heard from the complainant, they provided me a statement to say that they reached out to the RTBU, and I believe the complainant to be a member of the RTBU, they reached out to the RTBU for information - sorry, for support. From the report I've received, the individual from the RTBU started asking direct questions about the particulars of the case, specifically who, what, where, when. Even asked for transcripts of reports of interviews that had been undertaken to date. Based on that, I - I don't feel comfortable providing a report, even with complainant and respondent names redacted because in the report there are other - I guess there's other information that could potentially lead to the identification of people, including location, activity, shifts, time of day, date, et cetera. So I don't think it's unreasonable that people could be identified.

PN274

Well, the only way that that information could flow to Mr Webb is that an officer of the RTBU did not comply with my confidentiality requirements, correct?---I don't know if the information flowed to Mr Webb.

*** MITCHELL KEITH MORGAN

XXN MR HART

PN275

No. I'm dealing with the future?---Okay. Yes, sorry.

PN276

So assuming the report is redacted and assuming then that it's provided to an officer of the RTBU who has given an undertaking to maintain confidentiality over that document, and not disclose whatever might be concerning. That obviates the concerns in relation to confidentiality, does it not?---I would say so, yes.

PN277

Thank you. Any questions arising from my questions, Mr Williams?

PN278

MR WILLIAMS: Yes, one question.

RE-EXAMINATION BY MR WILLIAMS

[5.31 PM]

PN279

MR WILLIAMS: Mr Morgan, based on the discussions that you've had at various times in the (indistinct) with witnesses, and also the complainant, what's your assessment of the likelihood, or otherwise, that those individuals would be concerned, even by the provision of a redacted copy to an official of the union?

PN280

THE DEPUTY PRESIDENT: You're taking too many steps, Mr Williams. Doesn't the issue of redaction have to have been raised with these people, for them to express a view about it?

PN281

MR WILLIAMS: Well, Deputy President, you've surprised me with a question of the witness about a potential future scenario, so that might be where we're getting ahead of ourselves. But without having - - -

PN282

THE DEPUTY PRESIDENT: (Indistinct) scenario, I think I mentioned it before, the first time this matter came before me, did I not?

PN283

MR WILLIAMS: Well, we're in a formal process now.

PN284

THE DEPUTY PRESIDENT: We're trying to deal with a dispute in - in compliance with the obligations under the Act, for speed, efficiency and the like.

*** MITCHELL KEITH MORGAN

RXN MR WILLIAMS

PN285

MR WILLIAMS: Deputy President, with respect, you asked a narrow question, in relation to confidentiality. I want the witness, and I press my question, I'd like the witness to comment on the possibility that despite that, that issue of confidentiality, despite how that might play out as between the Commission, the RTBU and Mr Webb, whether or not Mr Morgan would, in his experience and having regard to his discussions, might anticipate that his other concerns, related to the state of mind of the people actually involved in this, and also the impact of that disclosure, on whatever redacted term, confidentiality terms, might have on future participation in investigations.

That's - - -

PN286

THE DEPUTY PRESIDENT: And what I put to you was it was a loaded question with a number of concepts that seem to be bigger, for example, than the one I used. That the whole question of redaction had been put to these people.

PN287

Now, if that's the case, then lead the evidence. But if it's hypothesis of what they might do if, maybe, in the future it was raised with them, then I'm wondering what the utility of the question is.

PN288

MR WILLIAMS: I do press the question, Deputy President.

PN289

THE DEPUTY PRESIDENT: Deal with them bite by bite.

PN290

MR WILLIAMS: Mr Morgan, you have expressed some concerns, in paragraph 18 of your statement?---Correct.

PN291

In paragraph 18(c) you express the concern:

PN292

Because of this -

PN293

That's a relationship back to paragraph (b):

PN294

it is possible, in future instances, that some witnesses may not be comfortable in providing information which is adverse to their co-workers.

*** MITCHELL KEITH MORGAN

RXN MR WILLIAMS

PN295

Mr Morgan, I accept, and the Deputy President is quite correct, the question I'm going to ask you is somewhat in the abstract, in that there are no such identified people. But dealing with your own concern, as a responsible manager, if the order or the outcome of this proceeding was that a copy of the report, perhaps in redacted terms, and perhaps subject to confidentiality, was given to Mr Webb's representative, in this case the RTBU, would you maintain that concern, in relation to the possible impact on future processes that you've referred to in subparagraph (c)?---Absolutely. And three and a half weeks ago I started a trainee school at the depot, with a 75 per cent participant rate of females in the 18 to 39 age demographic, and with that intake I now have about 20 per cent of my depot falling in the female demographic, aged between 18 to 39, which is the demographic of the complainant. And in light of the recent - well, the legislative changes last year, around bullying and harassment in the workplace and psychological safety, which Aurizon has taken very seriously, we're trying to build a culture where people do feel psychologically safe to speak up when they encounter bullying and harassment in the workplace, or witness bullying and harassment in the workplace. And my concern is that if, you know, arising from this matter, the precedent is set that even redacted reports will be provided to anyone, but, you know, outside of - well, anyone, I think it - it sends a challenging message for me and the organisation to be able to promote a culture where we would like to, you know, create a psychologically safe space for people to speak up against bullying and harassment.

PN296

And could I, for completeness, directly you to subparagraphs (f) and (g), on the same page. Would the Deputy President's hypothetical proposal that the report might be provided in a redacted and confidential way, to a representative of the RTBU, do you think that that outcome - that your concerns would remain, as expressed in subparagraphs (f) and (g), if that was the outcome?---Absolutely.

PN297

Thank you?---And that extends beyond the 20 per cent that fall in the demographic of the complainant, and I think anyone in the depot, and potentially wider, would have hesitation and reservation.

PN298

That is all I have, Deputy President. There might, obviously, be cross-examination arising out of that.

PN299

THE DEPUTY PRESIDENT: Anything further, Mr Hart?

PN300

MR HART: Nothing further, thank you.

PN301

THE DEPUTY PRESIDENT: You're excused, Mr Morgan. Thank you for coming and giving evidence?---Thank you, Deputy President Cross.

<THE WITNESS WITHDREW

[5.37 PM]

PN302

THE DEPUTY PRESIDENT: Thank you. Is that the conclusion of the respondent's evidence?

PN303

MR WILLIAMS: That's our case, Deputy President, thank you. Yes.

*** MITCHELL KEITH MORGAN

RXN MR WILLIAMS

PN304

THE DEPUTY PRESIDENT: I've made some inquiries of my associate and urgent transcript can be requested and provided to the parties, if that is something the parties would wish to avail themselves of. Is the provision of transcript and then a provision of submissions, or - - -

PN305

MR HART: Deputy President, we're ready to proceed. But may I say, for my part, I would appreciate that protocol. That would be of assistance of to me.

PN306

THE DEPUTY PRESIDENT: All right.

PN307

MR HART: There are some matters. Of course, Mr Webb's in an unresolved disciplinary process and it needs to be resolved quickly. But I'm assuming that urgency, you mean within a day or two we could get the transcript?

PN308

THE DEPUTY PRESIDENT: Yes. I think you might have noticed the turnaround on my last decision.

PN309

MR HART: I certainly did. It's late in the day and it's a very important matter for my client, Deputy President. I would prefer to take advantage of your offer and perhaps come back once the parties have absorbed the transcript.

PN310

THE DEPUTY PRESIDENT: Now, I was told transcript in one day. Our transcript people try to comply with this, but it might be that it goes to two days, so we just need to factor that in. It would then be a case of an outline of submissions, or do you just want to make oral submissions? I don't want to take up too much time, or put too much pressure on the parties, but it's important I understand, when I raise with you, Mr Williams, the issue, having only just received authority, the new authority, I'm keen to understand it, so that I was in a better position to understand the submissions you are putting to me. Now, you kindly clarified that, particularly Lend Lease, at 22, and would appear at paragraph 23 as well, that's fine. But I just - from my past, I hate attending hearings without having full knowledge of what's going to be put, so that I can be of most assistance to the parties. So can a timeframe be, if we can look at aiming to get you transcript by close of business on the 16th, that's Friday, then, Mr Hart, how quickly could you get something on?

PN311

MR HART: Subject to the time that we get the transcript, Deputy President, if it's late in the afternoon, I'd push for something by Tuesday the 20th, but if it comes through to us by Friday morning, I'd aim to have something to you by Monday, close of business, the 19th.

PN312

THE DEPUTY PRESIDENT: Why don't you take close of business on the 20th.

PN313

MR HART: Yes.

PN314

THE DEPUTY PRESIDENT: Then, Mr Williams, close of business on the 23rd.

PN315

MR WILLIAMS: That's acceptable, thank you.

PN316

THE DEPUTY PRESIDENT: Do you need a reply, Mr Hart?

PN317

MR HART: If we do, we'll attend to it, but I don't expect so.

PN318

THE DEPUTY PRESIDENT: Do you wish to address then, briefly, in person or by Teams? I'm just looking for a time. The week of the 26th is, unless we do a 4 o'clock again. 4 o'clock on Tuesday the 27th?

PN319

MR HART: Yes, that's acceptable. Yes.

PN320

MR WILLIAMS: Yes, I can do that. I think - that will be fine, Deputy President, and we can be efficient. I imagine half an hour each would do us.

PN321

THE DEPUTY PRESIDENT: Well, the basic fact is, if you do a written submission that should refine the process. That's on the basis that there be no action, in relation to Mr Webb, until publication of a decision?

PN322

MR WILLIAMS: That would have to follow, Deputy President. I'm just taking a formal instruction. Yes, I have that instruction. No problems.

PN323

THE DEPUTY PRESIDENT: On that basis, if I adjourn the matter until 4 pm on Tuesday the 27th, and we have the time for submissions. That will be flexible if there is a problem with transcript, but we'll do our best to make sure there's compliance.

PN324

MR HART: Thank you.

PN325

THE DEPUTY PRESIDENT: This matter is adjourned until 4 pm, AEDT, on 27 February. Thank you very much.

ADJOURNED UNTIL TUESDAY, 27 FEBRUARY 2024

[5.42 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

STEVEN WRIGHT, AFFIRMED..... PN33

EXAMINATION-IN-CHIEF BY MR HART PN33

CROSS-EXAMINATION BY MR WILLIAMS PN58

THE WITNESS WITHDREW PN152

EXHIBIT #A1 WITNESS STATEMENT OF MR WRIGHT..... PN157

EXHIBIT #A2 WITNESS STATEMENT OF MR HART PN157

MITCHELL KEITH MORGAN, AFFIRMED PN168

EXAMINATION-IN-CHIEF BY MR WILLIAMS PN168

EXHIBIT #R1 WITNESS STATEMENT OF MITCHELL MORGAN..... PN178

CROSS-EXAMINATION BY MR HART PN182

RE-EXAMINATION BY MR WILLIAMS PN278

THE WITNESS WITHDREW PN301