TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE

C2023/7275

s.604 - Appeal of decisions

Appeal by Health Services Union (051V)
(C2023/7275)

Melbourne

10.00 AM, THURSDAY, 15 FEBRUARY 2024

PN1

THE ASSOCIATE: In the matter of C2023/7275, a section 604 application between the Health Services Union and Mercy Hospital Victoria trading as Werribee Mercy Health, for hearing. Thank you.

PN2

VICE PRESIDENT ASBURY: Good morning. Could we start by taking the appearances.

PN3

MR M. HARDING: Yes, Vice President. I seek permission to appear with Mr Andrew White on behalf of the appellant, please, and seek leave to address you seated.

PN4

VICE PRESIDENT ASBURY: Thank you.

PN5

MR S. WOOD: If it pleases the Commission, I seek permission to appear with my learned friend, Mr Pym, for the respondent to the appeal.

PN6

VICE PRESIDENT ASBURY: I take it there's no objection to permission being granted. It's probably one of the few matters everyone would agree on, so on that basis we grant permission for both parties to be represented. We're satisfied that the criteria for doing so are well and truly met, particularly given that this involves the construction of an agreement. Thank you.

PN7

MR HARDING: Vice President, we have filed an outline of submissions and in addition we've filed a response to certain of the matters raised by the respondent. And I understand that reliance on the response is not opposed. And in that event we rely on both those documents to advance the case that we put.

PN8

On the question of leave to appeal, it doesn't appear that that subject is controversial, and accordingly I don't propose to address that in the substantive oral submissions.

PN9

On the appeal that's been raised by the appellant really, your Honour, and Commissioners, Deputy President, the debate is quite narrow in the sense that it concerns the construction of, in particular, clause 29.3(c) and (d) of the relevant enterprise agreement, which has a very long name and is in the court book, or at least the clause is, at appeal book 496 and 497. And suddenly my computer has died. If I can take you – that's better, it's re-awoken.

PN10

The critical issue in terms of the constructional question is identified at (c), appeal book 496, and here the context of course of this clause is in general terms the

payment of wages which is the heading at clause 29. I don't think there's any real dispute between the parties about allowances falling within the connotation of wages.

PN11

So the question really arises that where there is underpayment of a relevant wage term, what does, 'Steps to correct the underpayment within 24 hours' really comprehend.

PN12

DEPUTY PRESIDENT GOSTENCNIK: When does the 24 hours commence to run, Mr Harding?

PN13

MR HARDING: At the point of underpayment.

PN14

DEPUTY PRESIDENT GOSTENCNIK: Well, how does the employer become aware of the underpayment?

PN15

MR HARDING: The employer can become aware of the underpayment through its own processes, and it can become aware of an underpayment through employee notification. There are a variety of ways in which employees – an employer would become aware of the underpayment, and in this case, Deputy President, in fact, it was on the point really by 20 May 2022 because it was aware that it was an allowance that it was responsible for paying and hadn't paid.

PN16

DEPUTY PRESIDENT GOSTENCNIK: But if the employer is not aware that it hasn't been brought to its attention or through its own processes doesn't discover it, you say it's nevertheless obliged to take a step within 24 hours of the underpayment, to correct it, albeit that it doesn't know that it's done anything by way of an underpayment.

PN17

MR HARDING: It's obliged, if the underpayment arises, to take steps that can correct it. And what we say about that – and I think your question is directed to the question of knowledge. How does the employer know and so, therefore, when does the underpayment crystallise in that sense.

PN18

DEPUTY PRESIDENT GOSTENCNIK: Because if an employee raises the issue through (a) - - -

PN19

MR HARDING: Yes.

PN20

DEPUTY PRESIDENT GOSTENCNIK: - - - the employer then either rectifies the error, that is acknowledges and rectifies.

PN21

MR HARDING: Yes.

PN22

DEPUTY PRESIDENT GOSTENCNIK: Or validates the payment, i.e. explains to the employee why it has correctly made the payment.

PN23

MR HARDING: Yes.

PN24

DEPUTY PRESIDENT GOSTENCNIK: So at that point one can understand that the issue comes to the employer's attention, but absent that and absent its own step, it may not come to its attention. So I'm just trying to understand how it is that the obligation to correct an underpayment in circumstances where it's not aware that it has underpaid arises to take a step within 24 hours of something of that which it has no knowledge.

PN25

MR HARDING: Well, but, Deputy President, if you look at (e) of the agreement an unforeseen event outside the control of the employer frustrates the ability to move in accordance with this clause. And it might be that for reasons of, again, outside of the control of the employer it hasn't been able to discern the existence of the underpayment, and in that event roman (v) of (e) may well apply, and turn off the effect of the deed. Likewise - - -

PN26

DEPUTY PRESIDENT GOSTENCNIK: Well, that turns off the effect of the deed.

PN27

MR HARDING: Yes.

PN28

DEPUTY PRESIDENT GOSTENCNIK: But not (c).

PN29

MR HARDING: Well, but one has to read the two things together because, bearing in mind that the preface of (d) is action required under the subclause. And if (d) is turned off, then so is the action.

PN30

VICE PRESIDENT ASBURY: Mr Harding, can I take you back a few steps. You said at the outset that the clause concerns underpayment of wages, and for my part I accept that wages includes allowances. I don't know why that was even a question. I don't understand it was ever disputed. But the issue from my perspective is that the clause concerns underpayments as defined or for the purposes of the clause. It's not a clause at large about underpayments generally. It's a clause about underpayments that are within the meaning of the clause. So wasn't there a threshold issue about whether this was a circumstance in

which the amounts that were claimed were an underpayment of wages for the purposes of this clause?

PN31

MR HARDING: No, Vice President, and I say that because on our case the obligation to pay crystallised at certain dates, and as soon as that money wasn't paid, there was an underpayment. A simple factual question.

PN32

VICE PRESIDENT ASBURY: So you say that to the extent the – because it seems to me that the counts proceeded on the basis of the first question being the first matter that required consideration, when arguably there was a preliminary question which was what kinds of – or what are the varieties or types of underpayment that are caught by the clause, because the employer seems to be arguing that an underpayment required an error on the part of the employer.

PN33

So, you know, 'We haven't paid you nauseous work allowance because we don't think you did nauseous work in that week.' Or, 'We incorrectly thought you didn't do nauseous work in the week or the year in which the payment arose.' Rather than simply a failure to make the payment at all. And it seems to me that the first question arguably should have dealt with was it an underpayment within the meaning of the clause, rather than the question that was posed, which is, are the allowances underpayments under clause 29.3. Arguably the question should have started on the basis that – because that assumes they are.

PN34

MR HARDING: Yes.

PN35

VICE PRESIDENT ASBURY: That question assumes they are, in circumstances where, on my understanding of the employer's submissions, it was submitting they're not underpayments.

PN36

MR HARDING: Yes, I think that they were submitting – I didn't appear at first instance but I believe that's the case.

PN37

VICE PRESIDENT ASBURY: So you accept the employer did submit that at first instance?

PN38

MR HARDING: I think that there was a - - -

PN39

VICE PRESIDENT ASBURY: They're not underpayments that are caught by the clause.

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MR HARDING: Well, they're not underpayments. I don't know about 'caught by the clause' in the sense of whether – the way I understand the case is that there was a debate about the question of whether or not they fell within the concept of wages. I don't know whether there was a debate.

PN41

VICE PRESIDENT ASBURY: I don't know that there was. That's the difficulty that I'm having. As I understand it, this agreed statement of facts seems to have been, 'Yes, we agree, we owe them money.' No question about it. 'On this date we owe this. On that date we owe that.'

PN42

MR HARDING: Yes. Yes.

PN43

VICE PRESIDENT ASBURY: And that was not in dispute. And I don't know that the employer ever argued that they weren't – that allowances weren't caught by the general term of wages. I don't think – if I'm incorrect on that, I don't think they did. I think the union actually made submissions about it, when arguably it didn't need to, because I don't think anyone put it in issue. But, in any event - - -

PN44

MR HARDING: Yes. Well, Mr Wood can probably clarify that, I suppose.

PN45

VICE PRESIDENT ASBURY: But for my part, the first question should have – and I guess, 20/20 vision in hindsight, but the first question should have arguably been, 'Are the allowances underpayments for the purposes of clause 29.3?' Rather than, 'Does wages include allowances?'

PN46

MR HARDING: Yes.

PN47

VICE PRESIDENT ASBURY: The question really was, 'Are these payments underpayments for the purposes of clause 29.3?'

PN48

MR HARDING: That is an underpayment as a result of an error. Yes, I understand that, and there was a debate about the error question.

PN49

DEPUTY PRESIDENT GOSTENCNIK: Yes, and I think at paragraph 34 to 39 of the respondent's submissions below, they deal with that issue.

PN50

MR HARDING: Yes, indeed, that issue was ventilated. If that's the question, is it a character – is it an underpayment due to an error, then there was a debate about that, and our position on it which was dealt with in submissions, is that 'error' is a failure to pay and - - -

PN51

VICE PRESIDENT ASBURY: So 'error' is an omission?

PN52

MR HARDING: Yes, that's right. I mean, 'error' – I think that the Commissioner below took a broad view of 'error'. We certainly made submissions about what the concept of 'error' was below, and we reassert those submissions because the way in which – and just to sort of go back a little bit, Vice President, to deal with the question I think that you were trying to put to me, underpayment in this context takes its colour from its context and, therefore, we are looking then at what underpayment means in respect of the particular obligation that is said to give rise to the underpayment.

PN53

And when one has a look at the clauses of the agreement that deal with the nauseous allowance and the educational incentive allowance, they are frank obligations that require payment on a certain date to a group of persons defined as eligible employees.

PN54

VICE PRESIDENT ASBURY: Which was, in fact, back-payment because some of the payments predated the operated of the agreement. So it was, in fact, back paid of some of the amounts.

PN55

MR HARDING: Well, yes, but so far as the case that we put is concerned, you'll see from our submissions that in paragraph 6 – and bear in mind the agreement started on 20 April – that the obligation arose on the 4th and on the 11th of May in respect of the allowances – the first payment of the first – and, second - sorry, the first nauseous work allowance and, the first – well, the first and second, and then the first and second educational incentive allowance. And then on another occasion - - -

PN56

VICE PRESIDENT ASBURY: It was part of the educational incentive allowance, wasn't it? I thought that was in two tranches, $250 a time on each? It was not $500 all in one - - -

PN57

MR HARDING: No, that's probably right, yes, Vice President.

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VICE PRESIDENT ASBURY: Yes.

PN59

MR HARDING: But the point at which we say (c) was triggered was when the allowances that we rely on weren't paid on those dates because the way in which the agreement reads is that there is a date at which the agreement commences, and then the obligation crystallises with the first full pay period on or after a certain point. I can take you to the clauses if that assists.

PN60

VICE PRESIDENT ASBURY: No, I understand. So what you say is within 24 hours of the first full pay period commencing on or after those dates.

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MR HARDING: Yes, steps - - -

PN62

VICE PRESIDENT ASBURY: And - - -

PN63

MR HARDING: Sorry, Vice President.

PN64

VICE PRESIDENT ASBURY: Yes.

PN65

MR HARDING: We say that what (c) required, then, is that steps were taken that can result in an attainment of correction of the underpayment within 24 hours.

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VICE PRESIDENT ASBURY: Except that means (c) can be triggered when arguably (a) hasn't been.

PN67

MR HARDING: We see there's a submission put against us that is (a) is a precondition. We don't – we disagree with that. We don't say it's a precondition. It's certainly as a fact, a factual means by which an employer might discover that there is an underpayment, is by an employee raising it with them. But the obligation under the agreement falls on the employer. Not the employee.

PN68

The employee is not tasked with the job of enforcing the employer's obligations under the agreement. It is the employer who has the obligations. And on the constructions put against us, if the employer itself discovers that there is an underpayment and does nothing about it, then clause 29.3 doesn't have any application.

PN69

VICE PRESIDENT ASBURY: Well, am I correct in saying that your argument proceeds on the fundamental premise that this clause is a penalty on the employer for not paying an amount that was due and payable on a certain date, regardless of how the employer became aware of it?

PN70

MR HARDING: It is described as a penalty payment in terms, so to that extent I suppose one would say on its face that's exactly what it does.

PN71

VICE PRESIDENT ASBURY: Except a penalty payment – because, again, the difficulty I'm having is it doesn't seem that there was a lot of – and if I'm missing something in the appeal book you can perhaps point me to it, but there doesn't

seem to have been a lot of material below about what the purpose of this clause was, what the context of it was, because, you know, my recollection of clauses of this kind was that it was a penalty because the employee didn't have use of the money that they should have had at a particular point. It wasn't to penalise – my recollection is they came from the circumstances where electronic transfer of funds was introduced instead of payment in cash or - - -

PN72

MR HARDING: That may or may not be correct, Vice President. There's no material.

PN73

VICE PRESIDENT ASBURY: No, and that's the difficulty. But the answer to this is either right or wrong.

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MR HARDING: Yes.

PN75

VICE PRESIDENT ASBURY: And surely the purpose of the call was the context of it, that's a contextual matter. And there's an argument that the clause is not a penalty on the employer in a punitive sense for failing to pay an amount that it was entitled to pay.

PN76

MR HARDING: No. No.

PN77

VICE PRESIDENT ASBURY: Because that's the role of the court.

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MR HARDING: Yes. No. No. No.

PN79

VICE PRESIDENT ASBURY: The penalty is the employee didn't have the use of money that they should have had on and from a certain date, and that's what it's intended to deal with.

PN80

MR HARDING: Well, I don't wish to assume intention in that way, Vice President, and I encourage the Full Bench not to do so. The ordinary meaning of the words in (d) are:

PN81

The employee will be paid a penalty payment of 20 per cent of the underpayment.

PN82

That's the frank obligation that comes from it. Now, that's just another entitlement.

PN83

VICE PRESIDENT ASBURY: But it might be a penalty payment might be a penalty payment for working overtime. It's not a punishment on the employer - - -

PN84

MR HARDING: No. No.

PN85

VICE PRESIDENT ASBURY: - - - for requiring the overtime to be worked. The penalty is because the employee suffers some form of harm from it.

PN86

MR HARDING: Yes.

PN87

VICE PRESIDENT ASBURY: It's not to punish the employer. So why isn't that a contextual matter? The concept of a penalty in an enterprise agreement - - -

PN88

MR HARDING: Yes.

PN89

VICE PRESIDENT ASBURY: - - - is not a fine on the employer. It's not a clause that's intended to say, 'Well, you've had the use of all of this money and you've abused the employees by underpaying them.' It's intended to put the employee in the position of being paid the money at the time they were entitled to be paid it, and the loss of the use of that money. It's not a clause to punish the employer in an exemplary sense, punitive damages sense, which seems to be a concept that's entered into the HSU's submissions.

PN90

MR HARDING: No, I don't think that's right, Vice President. We do not contend that this is some form of punitive damages or aggravated damages or anything of that nature.

PN91

VICE PRESIDENT ASBURY: But the submissions below, they don't specifically use that terminology, but they seem – because when the issue of the quantum of the penalty raised by the HSU was pointed out, that was the response, 'Yes, it's to punish them because they didn't pay people and they should have paid them, and they knew full well they should have paid them.' That seems to be the submission that was put below.

PN92

MR HARDING: Well, the submission I'm putting is that the clause says a penalty payment of 20 per cent. We take it as it is, as it says, in the words that are used. We don't seek to - - -

PN93

DEPUTY PRESIDENT GOSTENCNIK: Akin to a shift penalty.

PN94

MR HARDING: I'm sorry, your Honour.

PN95

DEPUTY PRESIDENT GOSTENCNIK: Akin to a shift penalty, that is the - - -

PN96

MR HARDING: Something of that nature, in the industrial sense. In the way that you might have, indeed, an additional entitlement arising on a certain – an existence of a certain state of affairs. That's all that we say it is. I mean, it's a 20 per cent figure, that is an arbitrary number of 20 per cent. The parties or the makers of the agreement have selected that number. The makers of the agreement have selected that description to apply to that number. We don't need to read anything more into it than that.

PN97

Now, it may serve the purpose of deterrence. It may serve the purpose of compensating to some extent inconvenience arising from not having the money in the hands that the agreement intends. It may be that it's intended also to secure compliance and no more, and that the benefit that the employees get, the additional benefit, an additional term and condition of their employment, is that they are entitled by virtue of that clause to be paid this amount.

PN98

To that end it's simply just another form of remuneration or compensation or however you wish to describe it, arising from the conditions of work – conditions of employment that the agreement applies to this category of employees. In my submission, it doesn't take the Full Bench very far to start speculating about what it is that ultimately lies behind this. My learned friend's trying to encourage you to take the view that it's somehow compensatory, and that that should somehow affect the way in which you would construe the clauses in the agreement.

PN99

We say there's no need for the Full Bench to, certainly without materials, to speculate about it in that way. It is what it is. It says what it says. The ordinary meaning on the authorities is the meaning that one applies subject to context.

PN100

VICE PRESIDENT ASBURY: Well, the context is it's in an enterprise agreement, so if it's not compensating the employee for something, why is it even in the agreement? It's got to relate somehow to some damage or harm that was caused to the employee. And surely the obvious damage or harm was, 'I should have had $350 in my bank account by a certain date and I didn't.' That's the damage that's occurred, or the loss, or what's been compensated for.

PN101

The same as, 'I should have had an extra three hours of rest and I didn't because I worked overtime.' Or, 'I'm being compensated because I have suffered some inconvenience by being called into work when I wouldn't have otherwise worked.' Why is this any different from the context of other penalty payments in the agreement?

PN102

MR HARDING: Well, if you I could backtrack and answer it in a different way, Vice President. I suppose in the context of an award and overtime payment, for instance, which applies penalty rates, often when you're dealing with an award of course the Commission will look at questions of inconvenience as the basis upon which they'd exercise the power is – which that term is inserted.

PN103

So this is an enterprise agreement made by the – bargained for by the parties in the way that the parties choose to bargain for it. And in those circumstances, in the wisdom of the parties who've made the agreement, the term has been inserted. And it might be the case, Vice President, that you would say that the agreement implicitly attaches significance to compliance and compensates employees for non-compliance arising from the failure to take the correctional steps that (c) contemplates, through the application of this additional benefit.

PN104

With respect, that's probably all that can be really said. I mean, otherwise one runs the risk of reading it down based on assumptions about what the parties intended. What the makers of the agreement intended, simply by virtue of its description as a penalty payment.

PN105

VICE PRESIDENT ASBURY: Well, why doesn't the converse apply? Why wouldn't it – to say that industrial parties sat down and negotiated specifically an agreement where an employer could be penalised many, many, many times excessively more than the amount that's being claimed, why would we assume that that's what they specifically set out to do in the context of negotiations about an agreement that's got allowances for – you know, the allowance itself, it's for nauseous work.

PN106

MR HARDING: Yes.

PN107

VICE PRESIDENT ASBURY: So why would we assume that the parties sat down and negotiated some sort of substantial fine or penalty of that kind when a person wasn't paid a particular amount under the award? When the inconvenience – every other payment in the award, or in the agreement – so forget the award.

PN108

MR HARDING: Yes.

PN109

VICE PRESIDENT ASBURY: Every other payment in the agreement of this kind is for an inconvenience of the employee, being on call, working overtime - - -

PN110

MR HARDING: Yes.

PN111

VICE PRESIDENT ASBURY: - - - nauseous work, all of those things. Why should this be treated as a penalty on the employer for failing to pay something, when arguably it's supposed to be an enterprise agreement about matters pertaining to the employment relationship which is the employee being inconvenience because they should have had $350 in their bank account on a certain date, and they didn't.

PN112

MR HARDING: Well, one could speculate about the industrial wisdom that an employer who is bound by this agreement, whether or not they were industrially wise to sign up to it, but they did.

PN113

VICE PRESIDENT ASBURY: Well, did the HSU intend to fine employers massive amounts that were significantly more than the payment that has not been made? And let's face it, I mean, being frank again from my part - - -

PN114

MR HARDING: Yes.

PN115

VICE PRESIDENT ASBURY: - - - if this was a weekly allowance instead of a lump sum paid on a certain date, the calculation surely would be nowhere near what the HSU is claiming for the penalty here. If this was people will be paid $20 a week for nauseous work allowance, it wouldn't be anything like the amount we're looking at, would it?

PN116

MR HARDING: I don't know, Vice President. What I'm suggesting to you is that the parties have chosen the nature of the entitlement, they've chosen the words that they've used to describe it, they've turned there to other circumstances in which there might be a penalty that might be payable in certain circumstances. So if one looks at 29.4(c) – and this pertains to payment on termination:

PN117

If the employee is kept waiting for more than one business day after the employee's date of termination, they'll be paid overtime rates.

PN118

Now, in that circumstance, the makers of the agreement have turned their minds directly to the question of what an employer is liable for, for lateness, and they've characterised it as 'kept waiting'.

PN119

VICE PRESIDENT ASBURY: Yes.

PN120

MR HARDING: So it can't be said that the makers of this agreement have not contemplated the variety of ways in which they wished to stigmatise lateness.

PN121

VICE PRESIDENT ASBURY: Well, I don't know that because it might be that they didn't contemplate anything different than – that they didn't contemplate it and it's just mutual inadvertence to consider how the penalty could be calculated in circumstances where we're talking about a lump sum back-payment.

PN122

MR HARDING: Well, with respect, Vice President, what we're seeking is a late payment from the dates that we have identified in our submissions.

PN123

VICE PRESIDENT ASBURY: And calculated accordingly.

PN124

MR HARDING: Yes, calculated accordingly in accordance with the terms.

PN125

VICE PRESIDENT ASBURY: Yes, I understand.

PN126

MR HARDING: The way – see, the difficulty in the end, Vice President, is one has to confront the language and reconcile it with the words of the clause, and the way that the Commissioner did so below, was to construe the action that deed refers to in a way that imposed very little on the employer, and we say it effectively (indistinct) the effect of (c) and (d). The import of the Commissioner's construction was that as long as the employer sets the ball rolling it can take as long as it likes to correct.

PN127

VICE PRESIDENT ASBURY: And I'm not unsympathetic to that argument.

PN128

MR HARDING: Yes.

PN129

VICE PRESIDENT ASBURY: Because I think it's appalling that people were kept waiting for an amount, and particularly in circumstances, again for my part, where it seems that it replaced an allowance that got removed. So I accept what you say. I'm not debating that it wasn't completely inappropriate for the employer to have taken so long to have paid amounts that were clearly payable. But my question is really based on whether the agreement provision is supposed to punish the employer for that, as opposed to compensate the employee for the loss of the use of the funds that would have been received at a particular time.

PN130

MR HARDING: But then the next question that arises, if that's the case – let's assume for a moment that the Commissioner erred in construing (c) so as to say that it wasn't simply a question of getting the ball rolling, that there had to be an attainment of the objective that the clause prescribes, which is our case, then how one deals with (d) is itself potentially a question of construction. And the issue really didn't get debated, as I understand it, other than in terms of how one calculates the amount.

PN131

But in relation to the question of what the clause in (d) does, it is clear the clause says that if the action is not taken that's the fact that triggers (d), then the employee will be – that is the mandatory obligation. Section 50 of the Act comes into aid there and says, 'You must not contravene that obligation, that mandatory statement of requirement.' Then in that circumstance they'll be paid a penalty payment of 20 per cent of the underpayment. And then the method of calculation is specified.

PN132

There was a debate below for you about how that 20 per cent is to be calculated. I think the respondent's put against us that it's somehow or other calculated on an annual basis. But the words of the clause are pretty clear. What it says is, regardless of how the language of the clause – the language used in the clause adopts to characterise what it intends to do, in its terms it says the amount is 20 per cent. There's no getting around that.

PN133

VICE PRESIDENT ASBURY: And it's from the date the entitlement arose.

PN134

MR HARDING: Yes. Yes.

PN135

VICE PRESIDENT ASBURY: Rather than the date the employer became aware of it.

PN136

MR HARDING: Correct.

PN137

VICE PRESIDENT ASBURY: I understand the submission.

PN138

MR HARDING: And it's calculated on a daily basis. There's no getting around that language.

PN139

DEPUTY PRESIDENT GOSTENCNIK: Mr Harding – sorry.

PN140

MR HARDING: Sorry, Deputy President.

PN141

DEPUTY PRESIDENT GOSTENCNIK: No, you finish your answer and then I'll - - -

PN142

MR HARDING: Then the other part of it is arising until all such monies are paid. Again, another intractable use of words. You just can't get around that. So even if we have this debate about whether it's compensatory in character, whether it's penal in character, or it's some other kind of thing in character, one can't read

down the language that is used to say what the benefit and entitlement is, and how it is to be calculated.

PN143

We say, in effect, the debate about purpose, which our learned friends engage in, particularly by reference to some notion of 'compensatory' is of no constructional significance because it doesn't assist the Commission to work out what it is that's owed in the event that the action, however that's to be construed, is not taken. Deputy President, you had a question.

PN144

DEPUTY PRESIDENT GOSTENCNIK: I did. Can I ask you to turn up the statement of agreed facts, which is at 47 of the appeal book.

PN145

MR HARDING: Yes, I have that.

PN146

DEPUTY PRESIDENT GOSTENCNIK: Yes, and so under paragraph 2(a) the nauseous work allowance, etcetera:

PN147

The first full pay period on or after 1 December 2021.

PN148

Is that date correct, given the second nauseous allowance? That's my first question.

PN149

MR HARDING: I believe it is in the sense that - - -

PN150

DEPUTY PRESIDENT GOSTENCNIK: So the first nauseous allowance was payable after the second nauseous allowance, which is July 2021?

PN151

MR HARDING: I see what you mean. Yes. Well, I think the answer to that is in the terms of the agreement itself, and that's on page 612.

PN152

VICE PRESIDENT ASBURY: What page of the actual agreement?

PN153

MR HARDING: Page 153 of the actual agreement.

PN154

DEPUTY PRESIDENT GOSTENCNIK: Yes, I see. One-fifty-two in my version but - - -

PN155

MR HARDING: Okay. In my version it's 153.

PN156

DEPUTY PRESIDENT GOSTENCNIK: That's all right.

PN157

MR HARDING: But clause 11, if that helps to navigate.

PN158

DEPUTY PRESIDENT GOSTENCNIK: The more relevant one for me on 153 is the senior's allowance. Yes, so - - -

PN159

MR HARDING: So we see the schedule of payments.

PN160

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN161

MR HARDING: Then for theatre technicians at 11.3 there is an additional payment for them, for that category of worker, payable from 1 July 2021 and thereafter.

PN162

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN163

VICE PRESIDENT ASBURY: So the key to it is that it - - -

PN164

DEPUTY PRESIDENT GOSTENCNIK: So it's July, July.

PN165

MR HARDING: July, July. So they're annual payments.

PN166

DEPUTY PRESIDENT GOSTENCNIK: So the first nauseous allowance - - -

PN167

VICE PRESIDENT ASBURY: The theatre technicians got an additional amount.

PN168

MR HARDING: Yes. Yes.

PN169

VICE PRESIDENT ASBURY: So they got what was in 11.2 and they also got what was in 11.3?

PN170

MR HARDING: Yes.

PN171

VICE PRESIDENT ASBURY: Yes.

PN172

MR HARDING: Correct.

PN173

VICE PRESIDENT ASBURY: So the key to it is it's eligible employees.

PN174

MR HARDING: Yes, the key to it is eligible employees.

PN175

VICE PRESIDENT ASBURY: So theatre - - -

PN176

MR HARDING: Well, just I withdraw that. So the key to it is eligible employees for everybody else, but theatre technicians for 11.3 is a specific entitlement for that category of eligible employees.

PN177

VICE PRESIDENT ASBURY: That was in addition to what the - - -

PN178

MR HARDING: Yes.

PN179

VICE PRESIDENT ASBURY: So they got the 11.2 payments.

PN180

MR HARDING: Yes.

PN181

VICE PRESIDENT ASBURY: And in addition they got 11.3?

PN182

MR HARDING: Yes, they were entitled to those payments.

PN183

VICE PRESIDENT ASBURY: Yes.

PN184

MR HARDING: That's right.

PN185

DEPUTY PRESIDENT GOSTENCNIK: So my question, Mr Harding is this, that under the terms of the agreement effectively this operates as a back-payment. Coming back to my question, when does the 24 hours begin to run? So when is the failure to pay, for example, the second nauseous allowance, an underpayment?

PN186

MR HARDING: When it's not paid.

PN187

VICE PRESIDENT ASBURY: So it must be on and from the first full pay period commencing after the agreement was approved for the relevant employees.

PN188

MR HARDING: Correct. Yes.

PN189

VICE PRESIDENT ASBURY: That's on your argument. Not necessarily - - -

PN190

MR HARDING: My argument is when it is not paid.

PN191

VICE PRESIDENT ASBURY: When it should have been, which was - - -

PN192

MR HARDING: When it should have been.

PN193

VICE PRESIDENT ASBURY: From memory, the clause that gives effect to the wage increases says none of them will be paid until the agreement is approved.

PN194

MR HARDING: Yes, and the agreement was approved on 20 April, first full pay period.

PN195

VICE PRESIDENT ASBURY: And it took effect a week later.

PN196

MR HARDING: It took effect on the 20th.

PN197

DEPUTY PRESIDENT GOSTENCNIK: It commenced on 20 April.

PN198

MR HARDING: Yes.

PN199

VICE PRESIDENT ASBURY: Yes.

PN200

MR HARDING: It took effect on the 20th, first full pay period after the 20th was the 4th and the 11th, depending on the pay cycle.

PN201

VICE PRESIDENT ASBURY: Of the employee, yes.

PN202

MR HARDING: Then another, which probably pertains to the theatre technicians. Well, I withdraw that. And then another pay cycle which was 20 July and 27 July.

PN203

DEPUTY PRESIDENT GOSTENCNIK: So when you calculate your version of the penalty payment, the earliest date from which the calculation is made is from the first full pay period on or after the agreement commenced operation.

PN204

MR HARDING: Correct.

PN205

DEPUTY PRESIDENT GOSTENCNIK: Not from the date on which the agreement specifies that payment is due.

PN206

MR HARDING: Yes.

PN207

VICE PRESIDENT ASBURY: And you would say the error on the part of the employer was an omission to make the payment at the point it became due and payable?

PN208

MR HARDING: At the point, yes. So there's two points, I suppose, which is the obligation under the agreement is to pay on or after the first full pay period. That's a frank contravention of the agreement. The time then runs, for the purposes of 29.3, when that is not paid. There is, therefore, as a fact, an underpayment by virtue of the fact that the employees don't have the money.

PN209

They probably coincide but conceptually if one looks at it through the prism of, say, section 50 of the Fair Work Act, the employer – an employer is enjoined not to contravene, a contravention occurs when the obligation is not met. The underpayment concept has a different connotation in the sense that it requires some level of crystallisation. I mean, and there is contextual support for that when have a look at, for instance, in (e) of 29.3 – just bear with me for a moment. There is – (d) doesn't come into effect if there is a dispute.

PN210

VICE PRESIDENT ASBURY: But there can't be a dispute until it's a claim, can there?

PN211

MR HARDING: Well, I don't know about that. I mean, there could be a dispute if, for instance, yes, an employer learns that there is a view that there is a failure to pay, and takes the view that it's not owed. Now, it may not even communicate that.

PN212

VICE PRESIDENT ASBURY: But it may communicate it when the claim is made, but that's not essential.

PN213

MR HARDING: That's right. So, again, I mean, I think that there's some evidence to say in one of the internal communications in the – that an implementation committee was told by one of the members of that committee that employees were saying, 'When's the amount going to be paid? When is these allowances going to be paid? They haven't been paid.' Now, that's internal discussions that weren't shared with the union or its members. They were just internal discussions. But the employer was frankly aware that there is an allowance.

PN214

VICE PRESIDENT ASBURY: I thought the implementation committee was a joint committee. It seems to me the timeline of this is after a year had gone by the HSU raised a dispute and said, 'This hasn't been paid.' So almost a year after, all the amounts hadn't been paid, the wages increases, anything. And went to the Commission and there was a dispute about that. That was resolved except for these allowances weren't. It seems like that's what happened.

PN215

MR HARDING: I don't think it's a year later, Vice President.

PN216

VICE PRESIDENT ASBURY: It's almost – it's a long – it's a significant period. Because the agreement was approved, and the communication about the matter starts almost a year later. The exchange of emails – well - - -

PN217

MR HARDING: I think it was May of 2022 was the first email from a union official.

PN218

VICE PRESIDENT ASBURY: And the agreement was approved in 2021.

PN219

MR HARDING: No, 2022. April 2022. There was an in-principle agreement the year before.

PN220

VICE PRESIDENT ASBURY: Right.

PN221

MR HARDING: That was in May 2021. That in-principle agreement did not result obviously in the agreement being approved until 20 April 2022.

PN222

VICE PRESIDENT ASBURY: Then the communication came in - - -

PN223

MR HARDING: Then the communication came in from the union early May, on 12 May 2022.

PN224

VICE PRESIDENT ASBURY: Twenty-twenty-two. Sorry, my mistake.

PN225

MR HARDING: Maybe if I could put it this way, by reference to some evidence, which always helps. There's a statement from a Ms Kingsley, and the statement commences at appeal book 993. She records some internal events and at paragraph 18 of her statement, which is 995, she says:

PN226

The enterprise agreement commenced on 20 April 2022.

PN227

It was only on 10 May that Ms Horner – this is at paragraph 19 – issued a memorandum authorising implementation. Now, on 10 May there had already been – 4 May had already come and gone. That was the first full pay period. And it was only on 10 May that the employer is authorising implementation.

PN228

She sets out the first authority to implement, itself, is on page 1006 and one can see that under the heading 'Authorisation to implement and pay' it is an authorisation to implement the terms and conditions, including the wage and allowance increases as per the VHAI Bulletin. Now, that is a bulletin prepared by the employer's representative. The representative who negotiated and signed the agreement for the employer and then ultimately applied to this Commission to have it approved.

PN229

That bulletin is dated 13 April. One can see that on page 1008 of the appeal book. The bulletin tells its members that the agreement comes into effect on 20 April 2022. So 13 April the employer is told it's coming into effect. On 20 April it comes into effect. And then very detailed implementation instructions, even including in respect of these allowances and I'll take you to that in a minute, on 13 April. And it's only on 10 May that the employer is authorising payment.

PN230

VICE PRESIDENT ASBURY: So this is the error?

PN231

DEPUTY PRESIDENT GOSTENCNIK: On 6 May.

PN232

MR HARDING: Well, the memo says 6 May. Ms Kingsley in her statement says the memo was sent on 10 May.

PN233

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN234

MR HARDING: One can see the specific allowances referred to in 1035 and 1036 of the appeal book in the implementation. So the employee knows there's new allowances coming into effect. They come into effect on the 20th. The first full pay period on 4 May comes and goes. Nothing. Then we get the authorisation to pay on the 20th. But it's really only on 20 May that specific

action is commenced in respect of the particular allowances with a question – I'm just trying to find that and turn that up for you.

PN235

VICE PRESIDENT ASBURY: Is it the email from the Union to the employer?

PN236

MR HARDING: The email to the employer – and I'll deal with that in a minute, Vice President – is on 12 May.

PN237

VICE PRESIDENT ASBURY: Yes.

PN238

MR HARDING: I think the response was, 'I'll check', and that's all that it was.

PN239

VICE PRESIDENT ASBURY: But the point is the union raised it relatively promptly.

PN240

MR HARDING: Yes, the union raised it, and then the employer itself knew something about this, and that's evident from a document that is on page 1142. You will see that this is a very large document, but in relation to item 11, 'Nauseous Work Allowance', about halfway down the page, the action:

PN241

Prepare a list of employees. Share with ER team so a memo can be prepared authorising the payment.

PN242

A similar statement is made in respect of the educational allowance as well, which is item 16. That, on Ms Kingsley's account, is 20 May. 11 May has gone by; 4 May has gone by. Authorisation comes on 10 May. And then on 20 May they're saying, 'Can we get this going?' And that is a correction – that could be characterised as a correctional step that can attain the correction within 24 hours, which is our case. That didn't happen until August. There are other examples of – the agreement was varied at the end of May, but it didn't affect these allowances.

PN243

VICE PRESIDENT ASBURY: There's some typographical matters.

PN244

MR HARDING: So there was another implementation guide produced by the VHAIA at the end of May or beginning of June. It contained another statement in respect of these allowances, saying these are due.

PN245

Then after the variation there's an email of 3 June, again an internal email. This is on page 1263. It deals with a response that the Association gave about, I think, employees who had resigned and whether they were entitled – or had been

terminated – whether they were entitled to the allowance. Then you've got, 'Next Steps':

PN246

Mike, I understand the above allows you to now prepare the appropriate back-pay reports in line with the dates in the nauseous work allowance and educational incentive allowance clauses. Please then share with ER so a memo can be produced.

PN247

That also could be described as a correctional step. But this is where the words of (c) bite, because so we've got these steps but they don't lead to correction within 24 hours, as the clause contemplates. It just goes off to the Never Never. And that's effectively what the respondents would ask you to endorse. That they can keep taking these correctional steps and do nothing until it suits the employer or it can in whatever way correct it by virtue of the payment.

PN248

Now, I don't say that that's somehow or other an act of intention on the part of the employer. We don't say that at all. We just say that as a fact that is what it contemplates, and that can't be what the clause would do in circumstances where the parties have committed to an enterprise agreement, a clause that specifies the need for action, correctional action, and then assigns and outcome, a consequence, in the event that action is not taken.

PN249

DEPUTY PRESIDENT GOSTENCNIK: Well, on one view the action contemplated – or the correction contemplated by (c) must occur at least in the same pay period as the underpayment, because otherwise I have some difficulty in seeing what work paragraph (e)(iv) has to do. That is, that the penalty doesn't apply in circumstances where the employer agrees.

PN250

MR HARDING: Yes.

PN251

DEPUTY PRESIDENT GOSTENCNIK: So where the employee agrees to further correction until the next pay period.

PN252

MR HARDING: Correct.

PN253

DEPUTY PRESIDENT GOSTENCNIK: Paragraph (b) already contemplates the obligation being met in the next pay period.

PN254

MR HARDING: Yes.

PN255

DEPUTY PRESIDENT GOSTENCNIK: So it can only mean that the correction must happen in that pay period, unless it's agreed it can be deferred to the next pay period.

PN256

MR HARDING: Indeed. You're talking about (e) there, aren't you?

PN257

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN258

MR HARDING: Yes, and I'm just trying to turn up the clause, just bear with me for a moment. So, yes, I mean, (d) has to accommodate both (b) and (c). (b) of course deals with a small correction – a small underpayment. And, (c) a bigger underpayment. I mean, and you're right, on the construction that the respondent puts, (iv) has no real work to do if the employer, all it needed to do was to start a process that has no end. How does the employee exercise that election?

PN259

DEPUTY PRESIDENT GOSTENCNIK: Yes, well, that's right but my point is that paragraph (e)(v) can only operate on (c) because (b) already - - -

PN260

MR HARDING: Does the job.

PN261

DEPUTY PRESIDENT GOSTENCNIK: - - - deals with that issue.

PN262

MR HARDING: Yes, that's right.

PN263

VICE PRESIDENT ASBURY: So essentially on this series of events, I mean, if you take I think it's Ms Kingsley's statement which I'm just looking at, the employer may very well have had an argument to say, 'We've got massive problems with our payroll system', but it doesn't seem – and, again, if I'm wrong I'll stand to be corrected, but that there's any indication that the employer raised that with the HSU. There's plenty of internal problems but with the HSU it was just, 'We'll refer it to payroll.'

PN264

MR HARDING: It might be that it had an argument that (v) was engaged in (e). There is no evidence – I stand to be corrected – there's no evidence before the Commissioner that these were unforeseen or outside the control of the employer. There was some payroll problems to which Ms Kingsley alludes in July due to staffing questions.

PN265

VICE PRESIDENT ASBURY: June and July staffing questions, yes.

PN266

MR HARDING: That's right. But my recollection is that there's no evidence to suggest that those events were unforeseen or outside the employer's control. It may well be – and in circumstances where the employer had notice of the obligation coming into effect as early as 13 April 2022, one might have expected that evidence, if indeed that was to be relied on; but it's not.

PN267

VICE PRESIDENT ASBURY: Well, there was something in Ms Kingsley's statement about a resignation. They're down to four staff as opposed to eight.

PN268

MR HARDING: Yes, but that doesn't mean that – I don't think that goes so far as to constitute evidence that that event was unforeseen from the employer's point of view, or outside its control. I suppose if there's a resignation then it's outside of its control, one might hypothesise, but that's the highest it gets. But there's no attempt on the part of the employer to engage (v).

PN269

But when you look at – and, in my submission, that's what you should do, read (c), (d) and (e) together, one can see quite plainly a scheme under which the agreement says, 'If you're underpaid, the underpayment crystallises, then take steps to – that can correct that within 24 hours.' The correction being within 24 hours, if the step can correct. Otherwise, (d) applies subject to (e).

PN270

So the makers of the agreement have crafted a safeguard, and that safeguard is in (e), and they're the circumstances that the makers of the agreement have contemplated as being the exceptions that qualify the strictness of (c) and (d). You don't need to, therefore, have recourse to a constructional device to lower the bar for the employer, because (e) already does the job in a way that's specific.

PN271

VICE PRESIDENT ASBURY: So really again, to take a step back from all of this, the factual basis is that the union is saying, 'You haven't paid this. You need to pay it.' The employer is aware it needs to pay it.

PN272

MR HARDING: Yes.

PN273

VICE PRESIDENT ASBURY: And leaving aside whether it's individual employees or the union, or whatever, the employer is aware of it and takes no step to invoke anything in (e) by saying, 'We've got these extenuating circumstances whereby we can't. We need a little bit more forbearance' and just keep saying, 'Yes, we're looking into it'.

PN274

MR HARDING: We're looking into it. We're implementing it. There's questions in the evidence from Ms Kingsley, 'Can we now pay it', and those emails go all the way till the end of July. And then we've got 16 August, I think, an email from

Mr Wang, who says, 'I've checked the list of eligible employees, we're in a position to pay', and they pay in August.

PN275

VICE PRESIDENT ASBURY: Yes. So leaving aside the question of whether it's an individual employee who can raise it, or the union can raise it, that's a technical argument. The employer is aware, doesn't take the step to correct, may have had reason not to be able to do so, but doesn't - - -

PN276

MR HARDING: But doesn't engage it.

PN277

VICE PRESIDENT ASBURY: - - – but doesn't engage in the process. So, on your view, should not complain of 'No one raised it with us', when, in fact, the union did and it didn't play its part in engaging in the process.

PN278

MR HARDING: That's right. Well, I don't know about playing its part. What we say about it, Vice President, is simply this. It would be an extraordinary outcome of, on the facts that are outlined in Ms Kingsley's statement, the employer, knowing full well that it's obliged to pay these allowances and doesn't, is excused.

PN279

VICE PRESIDENT ASBURY: Because it says, 'It's not an error it's just, we haven't done it and we didn't - - -

PN280

MR HARDING: It's not an error of because (a) is a precondition and somehow or other it's in the hands of the employee to say, 'Hang on a sec, I haven't got what I'm entitled to have'. And the employer, who may have known for months about the underpayment, is excused in that circumstance.

PN281

VICE PRESIDENT ASBURY: Well, it's equally arguable, isn't it, that if (a) is a precondition, the precondition was met by the HSU saying, 'You haven't paid our members, when are you going to pay them?'.

PN282

MR HARDING: Yes. Well, that's our argument in respect of that email, that that constitutes sufficient notice, from the employer's point of view, of a request and it shouldn't be overly specific, technical, as if somehow or other we're pleading a cause of action. Really, the agreement is intended to confer benefits, rather than deny employees benefits, in circumstances where there is actually an entitlement that has not actually been paid.

PN283

VICE PRESIDENT ASBURY: And the HSU is saying, 'Our members haven't been paid equates, in any event, to employees considering they haven't been paid an amount to which they're entitled. And it's an error because we've had no explanation (indistinct).

PN284

MR HARDING: Yes. Well, the error is that it hasn't been paid. If you had a circumstance in which you had a condition, a wages condition, that had conditional elements associated with it, that might require satisfaction before the obligation arises, before the entitlement crystallises, that might be a different situation. One can see a circumstances in which the error question might have a different answer.

PN285

But here, as I say, underpayment and error takes its colour from its context. Here the allowances are pretty clear, in terms of the entitlement, and there's no - moreover, there is no dispute that the entitlement arose.

PN286

VICE PRESIDENT ASBURY: Yes, I understand your submission, thank you.

PN287

MR HARDING: I did want to just raise one aspect of the Commissioner's reasons that we say demonstrates a constructional error. In the appeal book the decision is at 1838, the aspect of the Commissioner's reasoning which I wish to draw attention to. This is the reasoning that is the culmination of - that culminates in the Commissioner answering the second question, which is the reason we're here really, in the negative.

PN288

It commences on 1857 and proceeds thereafter.

PN289

VICE PRESIDENT ASBURY: Sorry, can you give me the paragraph number?

PN290

MR HARDING: Yes, sorry. I'm going to take you from 107, which is where the Commissioner's reasoning process commences, in respect of 29.3(c). She records, in 108, her persuasion as to the respondent's argument. It identifies a number of dictionary definitions of 'take steps'. We say, in the context of this clause, the dictionary definition in 109 is perhaps the most accurate. It demonstrates that it's about taking measures to attain.

PN291

Then, on the next page, at 112, the Commissioner records the HWU's submission and at 113 says:

PN292

I don't accept this interpretation of the meaning of the words in the clause. If the intention of the clause was to ensure correction of the underpayment within 24 hours, the clause could have simply stated, 'The underpayment must be corrected within 24 hours'.

PN293

Then, at 115, the Commissioner says something about the earlier clause and urgency and then says:

PN294

The urgency here is not to correct the underpayment within 24 hours but to impose an obligation on the employer to act within 24 hours to begin the process of rectification.

PN295

With respect to the Commissioner, that identifies - that wrongly identifies the end part of the process and asks the wrong question. The clause does not say, 'Take steps within 24 hours'. The clause says, 'Take steps to correct within 24 hours'. It's a constructional error to take the 24 hours and give it the work at the beginning here, rather than where the clause says it should be, which is linked to the correction. So the step seeks to obtain an outcome. The outcome is correction within 24 hours.

PN296

Now, what's said against us is that that's an absurd construction because it leads to remarkable - - -

PN297

DEPUTY PRESIDENT GOSTENCNIK: Mr Harding, the point you've just made seems to be inconsistent with footnote 38 of your submissions, where you say, 'For the avoidance of doubt', in fairness, Mr Dowling, before his elevation said - - -

PN298

MR HARDING: It must be right then.

PN299

DEPUTY PRESIDENT GOSTENCNIK: Absolutely. That HWU does not submit the version that requires the money to be in the workers bank account within 24 hours.

PN300

MR HARDING: It's not inconsistent, Deputy President, because that pertains to a fact, which is the money is in the bank account. The obligation is to correct the underpayment. That is, by the employer taking action which has that consequence.

PN301

DEPUTY PRESIDENT GOSTENCNIK: Yes. When is the underpayment corrected?

PN302

MR HARDING: The underpayment is corrected when it no longer exists. We say that inherent in that idea is that, ultimately, that is what it will achieve. The employee will have the money in their hands. But (c) doesn't say, 'You must have the cash in your hands within 24 hours'. It says, 'Take steps to correct within 24 hours'. So the employer is then under an obligation to take a series of steps that will have that outcomes as its effect. We say the money in the bank account is the ultimate effect, but there is not a failure to take action of the kind that (d) refers to.

PN303

DEPUTY PRESIDENT GOSTENCNIK: So if the employer takes steps, within 24 hours, to correct, it does the calculation, it advises the employee but doesn't make the payment for three weeks that's okay, is it?

PN304

MR HARDING: No. I think it's got to set the process in train so, for instance, give an instruction to pay and then it might be that external sources, such as the bank, might delay payment because it takes two days to pay. I think there's some evidence in Ms Kingsley's statement where she says it takes - - -

PN305

DEPUTY PRESIDENT GOSTENCNIK: Then it takes two days for the money to come out.

PN306

MR HARDING: Yes, that's right. It takes two days, but that's the bank's issue, that's not the employer's issue. The employer has done everything it can to correct the underpayment by making sure that the money is going to be put into the hands of the employee.

PN307

This is an obligation on the employer, we don't propose that it extend to third parties. That's why we would have, in (e)(v) which is, 'For unseen circumstances beyond the control of the employer'. So it's not like if the bank takes two, three or four, six weeks to pay.

PN308

DEPUTY PRESIDENT GOSTENCNIK: But does it require the employer to take the step of electronically transferring the funds, within the 24 hours?

PN309

MR HARDING: It certainly would require, we would say, the employer to do what it needs to, at its end, to effect that, yes.

PN310

VICE PRESIDENT ASBURY: But what if the employer says, 'Yes, we understand we haven't paid it, we accept we haven't paid it because we're in the process of calculating back pays for 200 other people as well and we intend to take steps to pay the amount and we confirm that to you', has that met the obligations in 29.3(c)?

PN311

So the employer says, 'We've taken steps, we've issued an instruction to the payroll department, they're in the process of calculating it and we confirm that it will be paid and our expectation is by X date. It will take is this long to calculate it for everybody and by this date we'll pay it'.

PN312

MR HARDING: It might, Vice President, because in that circumstance it would depend on the facts. So I don't wish to say more than that because - but let's just

take a simple situation in which - if they've done all they can to affect the payment, and that constitutes all that they can do then probably yes, because - - -

PN313

VICE PRESIDENT ASBURY: But they might have done all they - I don't know that it requires they take all reasonable steps, or anything like that, they just take all - they take steps to correct the underpayment, which might be, 'We accept you are one of 200 people we owe this money to', or 220 or whatever, I think it was 220, '220 people we owe this money to and we are not going to pay you in advance of the other 219. But we understand we owe the money, we are taking steps to implement it through our payroll systems and we expect it will be done by X date'.

PN314

MR HARDING: Well, if the expectation is within 24 hours, then I would agree with you, Vice President. So that's where the - - -

PN315

VICE PRESIDENT ASBURY: Well, arguably - - -

PN316

MR HARDING: That's where the temporal limit comes in.

PN317

VICE PRESIDENT ASBURY: Yes.

PN318

MR HARDING: So that, again, if the steps that they've taken can achieve - can result in correction within 24 hours, (c) is satisfied. If, having said that, there is some unforeseen matter, beyond the employer's control, that would stand in the way of achieving that 24 hours, then (d) doesn't kick in.

PN319

VICE PRESIDENT ASBURY: So the steps must reasonably provide for the underpayment to be corrected within 24 hours, rather than be taken with - I understand your submission.

PN320

MR HARDING: That's the way we say it works. It's intended to - I think that what's said against us, the begin a process. Yes, all right, to begin a process, but the process has to have a particular character.

PN321

VICE PRESIDENT ASBURY: Well, the quid pro quo might be that if three members of the HSU came forward and said, 'We've been underpaid, we want the money', and the employer says, 'Yes, here's your money and we'll pay the rest of them when we've proceed it, when we've put the full steps in place', then what happens to the other 217? Do they have an argument as well? I mean that's the difficulty. The clause is being applied in a circumstance where it's not one person who says, 'I should have been paid something and I wasn't, it's being applied in the circumstance where it's 220, potentially. And why would it be unreasonable

for the employer to say, 'Yes, we know we owe you the money'. Nowhere has the employer here said, 'No, we don't have to pay that, we don't agree. We owe you the money, we acknowledge that'. The employer never responded by saying, 'We don't owe it, we're not paying it'. So why isn't it sufficient to say to the union, or the employees who raise it, 'We intend to pay it, we're taking steps. These are the steps we're taking'.

PN322

MR HARDING: It might be, Vice President, but that's not the facts of this case.

PN323

VICE PRESIDENT ASBURY: No. But on your argument that had to result in the payment being made within 24 hours.

PN324

MR HARDING: It had to be a step capable of correction.

PN325

VICE PRESIDENT ASBURY: Which basically means, 'Hit send on the advice to the bank that you have to pay this money'.

PN326

MR HARDING: It might.

PN327

VICE PRESIDENT ASBURY: As opposed - well, it must, mustn't it? How else - unless someone's going to open their wallet and produce $350 and hand it to the person, in cash, it has to, doesn't it?

PN328

MR HARDING: It may very well be that someone has to press send. There might be another - I don't know the details of the payroll system that Mercy operates, so it's very difficult to speculate about what is an exhaustive set of steps that would satisfy (c).

PN329

What we say, though, is that on the facts of this case, the events that occurred leading up to payment in August, did not constitute steps capable of resulting in correction within 24 hours. As a fact, that didn't occur, but they weren't even capable of it occurring.

PN330

Now, in terms of construing (c), another set of facts may come along, in which the debate that you've just put to me arises. And we have some questions about just the extent to which that subclause has been engaged or not. But that's not a constructional question, that's a factual question, Vice President.

PN331

VICE PRESIDENT ASBURY: Yes, I understand. But in (c) it's not only they have to take the steps, they have - so accepting, arguably, my provisional view, in any event, is that there's a difference about what the steps constitute and what they

have to result in. But there's a requirement that's also there, to provide confirmation of the correction. So whether you accept the proposal I put or the proposal you put, the second part of the requirement was, in any event. Because no one went back to the HSU and said, 'Listen, we know we owe the money and we're going to pay it, and we're having a bit of an issue and we'll pay it by X date'.

PN332

MR HARDING: Indeed. And it may well be, because of that confirmation - the confirmation is, 'It's going to be paid and here's the date which it will be paid'. Just say, for instance, that they say it's going to be paid and it happens to be 12 hours, and, in fact, the money doesn't get to the bank account for 36 hours, then we have a debate about how five - (e)(v) applies. There relieves the strictness of the employer is not reliable for that, because it's done what it can do.

PN333

If, for instance, it says, 'It's going to take us two weeks to pay this', it's going to have to give some explanation of why that is so that would engage (e).

PN334

VICE PRESIDENT ASBURY: Well, arguably not, because (iv), I mean assume again, for the sake of the discussion, assume it's the HSU or the employer, then all the correspondence from the HSU is replete with, 'We're prepared to be patient, we've been patient, we're not being unreasonable here, just tell us when you're going to pay the money'. It may have been that the HSU would have agreed next pay period or a further period.

PN335

MR HARDING: It may well have agreed that, but I don't wish to suggest that that would, somehow or other, excuse non compliance with the clause, just because the HWU takes a view about that. The terms of the clause are the terms of the clause.

PN336

VICE PRESIDENT ASBURY: If an individual employee can agree to defer the correction of the underpayment until the next - at least until the next pay period, then so could the HSU, on their behalf.

PN337

MR HARDING: Yes. I see what you're saying, Vice President, and I don't think we would quibble with that construction.

PN338

VICE PRESIDENT ASBURY: That mightn't be the actual next pay period from when the issue arises, that might be, 'Hey, we couldn't do it and can we have until the next one?'.

PN339

MR HARDING: You're right to point to that clause because it, again, provides a method by which the strictness of (c) and (d) can be alleviated. In fact, in my submission, that counts in favour of our argument, rather than against it.

PN340

VICE PRESIDENT ASBURY: Yes, I understand. Thanks.

PN341

DEPUTY PRESIDENT GOSTENCNIK: Mr Harding, under the scheme for which provision is made, in clause 29:

PN342

The employer has an obligation to pay wages weekly or fortnightly, as determined by the employer, by electronic funds transfer by no later than Thursday the following pay period.

PN343

That's clause 29.1. So I don't know when Mercy's pay period ends and nor do I know which day it pays its employees. But the employer might, for example - I'll start again. You accept that there can only be an underpayment once the payment is made. So an employer who has a pay day on a Tuesday, not a Thursday, even though it's not paid what it's required to pay on the Tuesday, has not, in fact, underpaid until no later than Thursday.

PN344

MR HARDING: Yes.

PN345

DEPUTY PRESIDENT GOSTENCNIK: So, in some circumstances, it might be the case that the - well, in all cases the 24 hours won't start running until midnight on Thursday, do you accept that?

PN346

MR HARDING: Yes. Otherwise - I mean an ingredient of an underpayment is - - -

PN347

DEPUTY PRESIDENT GOSTENCNIK: Yes. And the obligation, under the agreement, is by no later than Thursday.

PN348

MR HARDING: Yes.

PN349

DEPUTY PRESIDENT GOSTENCNIK: Following the end of the pay period. So getting back to my earlier question, I think you answered my earlier question that the earliest the underpayment arose was the first pay period on or after the commencement of the agreement. It's actually the following Thursday.

PN350

MR HARDING: I see what you mean. Yes, it must.

PN351

DEPUTY PRESIDENT GOSTENCNIK: Do you accept that?

PN352

MR HARDING: Yes.

PN353

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN354

MR HARDING: I'm told that the pay is usually paid on the Wednesday.

PN355

DEPUTY PRESIDENT GOSTENCNIK: Yes. But for the purposes of the agreement, the obligation doesn't crystallise until Thursday.

PN356

MR HARDING: Yes, correct. I think I've covered the ground, in relation to what we say is the bias of the construction put against us, in terms of the impact of it. In fact, I think, in the respondent's submissions, they accept that it imposes very little, in terms of an obligation.

PN357

The idea that all that they need to do is to begin to commence a process, without necessarily any end, for as long as it takes, or it wishes to take, in order to reach a conclusion, and that is - the fact that that is the consequence is a telling reason why it can't be right.

PN358

It would have the effect of obliterating (d) almost entirely. I can't see a circumstance in which it would operate unless the employer takes no action at all, ever.

PN359

VICE PRESIDENT ASBURY: Well, here it's arguable they took some action, they just didn't tell the union that they had.

PN360

MR HARDING: Well, I think that's the point that the respondent relies on. It says as long as it starts something then that's it.

PN361

VICE PRESIDENT ASBURY: That's sufficient. Even, again, with what it starts, the requirement was 'and confirm that's what it's doing', essentially.

PN362

MR HARDING: Indeed, and I think that the respondent says about that is, 'And at some later stage that the employee is told'. Again, they could start this process in, say, on 1 July 2024 and end up completing it on 1 July 2025, or for however period, and some unknown and unspecified time, tell the employee that it's complete.

PN363

Again, that is really kicking the can down the road to a point at which the clause has no bite. It becomes difficult to know - how does the employee know when the process is started? How does the employee dispute, for instance, that this is a

process. It may not even know that the process has commenced. It just renders the whole clause so uncertain as to be of no utility.

PN364

In circumstances where the parties have committed this to enterprise agreement, the authorities tell us that a constructional - a piece of constructional context is that the makers of the instrument have submitted - put it into an enterprise agreement and made it subject to section 50 of the Fair Work Act.

PN365

If a clause was to be rendered so uncertain as to be, in effect, unenforceable it converts an obligation the words must be used in the clause into an aspiration. That is completely inconsistent with the language that the clause uses.

PN366

I think I've probably addressed another aspect of that appeal, which is that the Commission's conclusion that the employer had commenced the process, by virtue of Ms Barrett's email saying, 'I'll check to see whether that pay's been paid', is unsustainable. It's certainly on the conclusion that the Commissioner reached, even if that construction is right, a statement saying, 'I will check', in my submission, does not amount to a correctional step.

PN367

It's important to bear in mind, at the time that email was sent, which was, and I'll just get that date, I think it was before 10 May, the employer had not even authorised payment, or implementation. 6 May. That email was sent on 6 May. I've taken you to a document where the employer says, 'Implement the agreement', that was 10 May. So it seems incongruous to conclude that the employer had commenced a correctional process when it hadn't even authorised its employees, who are responsible for implementation, to do precisely that.

PN368

We say that the earliest possible correctional step was the 28 May document that I have taken you to, in the appeal book. If that's right, even on the respondent's construction, they still haven't complied because they did not commence a step within 24 hours to correct.

PN369

There is an argument raised in the respondent's submissions about the effect of clause 29.2, 29.3(a), and we've addressed that in our responsive submissions. What we say about that, there's an assertion, in relation to the Commissioner's conclusion, that (a) did not constitute a precondition. We've made submissions about that in writing which we rely on. We say that that is not a matter that the respondent can be heard on in this appeal. It hasn't engaged the appeal provision, in the dispute resolution clause, which I think is (d) of that clause. And the issue really is moot because the Commissioner's constructional conclusion, which resulted her in giving a negative response to question 2, did not engage with that constructional question.

PN370

In that circumstance, the agreement spells the consequence, which is that the respondent is bound by the determination of the Commission. This, of course, within a frame in which the purpose of the appeal power being exercised is to correct the error. The only error that is before this Full Bench is an error pertaining to the construction of (c).

PN371

VICE PRESIDENT ASBURY: So you say that even if our view is that (a) effects (c), we're not able to deal with that?

PN372

MR HARDING: Yes. The jurisdiction you exercise, Vice President, is a jurisdiction to correct error. The error that's been asserted is an error pertaining to (c). The respondent joins issue with us on that, but they do say, by reference to the construction that they put to the Commissioner, which the Commissioner accepted. (a) did not form part of that construction, it's an entirely separate point.

PN373

VICE PRESIDENT ASBURY: You say that arises by virtue of the distinct resolution term in the agreement?

PN374

MR HARDING: Indeed.

PN375

VICE PRESIDENT ASBURY: Perhaps if you could - - -

PN376

MR HARDING: I'll just find that. So clause 17 is the relevant clause and when we get to 17.7, this is the arbitration clause, that, 'If the dispute is not settled', this is (a), page 477 of the appeal book, 'the Commission may proceed to determine the dispute by arbitration', when by (c), 'Subject to (d), a decision of the Commission is binding upon the persons covered by the agreement'. Then (d) expresses the exception, which is that there's a right - there's not a right, there is provision for an appeal. An appeal, on the authorities, is an appeal that engages 604 of the Act, as well as the clause. That jurisdiction is a jurisdiction to correct error. And the error that has been enlivened is the one pertaining to (c).

PN377

DEPUTY PRESIDENT GOSTENCNIK: Mr Harding, the proposition that's being advanced is that the Commissioner erroneously construed (c).

PN378

MR HARDING: Yes.

PN379

DEPUTY PRESIDENT GOSTENCNIK: So the appeal, in that respect, is determined by the practice standard. So we must determine proper construction of (c). In order to do so, we read (c), in the context of the agreement as a whole which means, does it not, that we have to form a view about (a)?

PN380

MR HARDING: No, not in the sense of it being an error that engages the - if your question is, as part of the constructional exercise do we have to look at (a) and construe it and determine whether or not it is a precondition. My response to that is, no you don't, because the Commissioner's conclusion was that (c) was to be construed on the basis that it was sufficient to begin a process that within 24 hours. The respondent says, that's right, that's the submission he put to the Commissioner. We say, 'That's wrong, you can resolve that without determining whether or not (a) constitutes a precondition'.

PN381

VICE PRESIDENT ASBURY: The fact that we can, do you say we're required to?

PN382

MR HARDING: Required to - - -

PN383

VICE PRESIDENT ASBURY: Ignore (a). Ignore the issue about (a)?

PN384

MR HARDING: Well, when you say 'ignore it', as part of the contextual question, obviously it forms part of the agreement so you can have regard to (a). But what the respondent is inviting you to do is to intervene and conclude that the Commissioner erred when she decided that (a) did not constitute a precondition. We day, by virtue of (c), the respondent is bound by that conclusion.

PN385

It advances, in the submissions, the proconditional argument as a species of error. I mean insofar as - - -

PN386

DEPUTY PRESIDENT GOSTENCNIK: But doesn't, on one view, if one construes 29.3(a) as a condition precedent, you've got to enter, that's the only way you can enter.

PN387

MR HARDING: Yes.

PN388

DEPUTY PRESIDENT GOSTENCNIK: Then that, surely, also informs the question of when the 24 hours begins? My initial question. That is, 24 hours might be concerned with 24 hours within the period that the employee either made the request or the employer, having considered the request, determines there was an error. So the penalty or the requirement is that, from that point, within 24 hours the employer must take particular steps.

PN389

So it doesn't just effect whether or not they're the only steps but it also effects when - it might effect when the employer is required to take any steps, within

what period. Your position is, and I understand that, your position is that it's from the date of the underpayment. But if the respondent is right about the gateway argument, then that proposition may not be correct.

PN390

MR HARDING: I don't see how that is so, Deputy President, because their argument is that, regardless of the gateway, all that (c) requires is a step to be taken within 24 hours that can ultimately lead to correction. That's the submission that it puts.

PN391

DEPUTY PRESIDENT GOSTENCNIK: But your proposition, your proposition is that even if the respondent's argument is correct, it did not comply. That's what you put earlier, with the 24 hours.

PN392

MR HARDING: Yes, but even if - that's right, by reference to the facts. But the argument that's being put against us, in relation to (a), is that (a) is a precondition to the entire process.

PN393

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN394

MR HARDING: So the argument, as I understand it is, that if there was no employee request, then clause 29.3 simply has no work to do.

PN395

DEPUTY PRESIDENT GOSTENCNIK: I do understand that, and your answer to that is, 'Well, it doesn't have to be an employee request, it can be the union request', if that's right, is it?

PN396

MR HARDING: Yes.

PN397

DEPUTY PRESIDENT GOSTENCNIK: But even then, you say the employer didn't comply because your proposition hangs off the 24 hours commencing from the date of the underpayment, as opposed to the date on which the employer has concluded that it has underpaid.

PN398

MR HARDING: Yes, I understand that. So if - - -

PN399

DEPUTY PRESIDENT GOSTENCNIK: So (a) might be material in determining that question also. When does the 24 hours begin to run? Because it doesn't say when it beings to run, well, as I interpret it.

PN400

MR HARDING: No. I suppose, maybe I could clarify. We say that (c) is enlivened by the underpayment, and I'm standing - - -

PN401

DEPUTY PRESIDENT GOSTENCNIK: That's your principal position.

PN402

MR HARDING: That's the principal position.

PN403

DEPUTY PRESIDENT GOSTENCNIK: Your alternative position is, if (a) is a precondition and it's satisfied by the union making the request.

PN404

MR HARDING: Yes, I understand that. But even if the respondent's position is, that the respondent's position still is that (c) is to be construed as meaning, 'A step commences within 24 hours'. Now, whether (a) is a precondition or not, that is the construction that it presses for (c).

PN405

DEPUTY PRESIDENT GOSTENCNIK: Yes, but you want us also to determine the amount.

PN406

MR HARDING: Yes.

PN407

DEPUTY PRESIDENT GOSTENCNIK: To determine the amount we must know - we must know whether there's been compliance with (c), and that requires us to determine, does it not, when the 24 hours begins to run?

PN408

MR HARDING: Well, we say that (d) supplies the answer to that, because provided there's an underpayment that's crystallised, as a fact, then (d) says, 'It's calculated on a daily basis for the date of the entitlement arising'.

PN409

DEPUTY PRESIDENT GOSTENCNIK: Yes. Assuming that (c) hasn't been complied with.

PN410

MR HARDING: Assuming that hasn't been complied with. I get that.

PN411

DEPUTY PRESIDENT GOSTENCNIK: Sorry. Yes.

PN412

MR HARDING: What we say, though, is you don't need to determine that (a) is a precondition in order to resolve the constructional debate between the parties, because the constructional debate of the parties is premised on the strictness, really, of (c). And whether the 24 hours commences from the point at which the employer begins a process that they say ultimately leads to correction, at some point in the future, or whether it is, as we say it is, a series of steps that can or is capable of correction within 24 hours; that's the constructional debate really, in terms of how the language operates.

PN413

True, it is, that (a) forms part of the context, but you don't need to decide that it constitutes a precondition to the whole of the operation of a clause in order to absolve that constructional debate, which is the error that has been ventilated and enlivened (d) of the dispute resolution procedures.

PN414

DEPUTY PRESIDENT GOSTENCNIK: I understand. Yes.

PN415

MR HARDING: The respondent has made some submissions as well, about the jurisdiction of the Commission, and the calculation of penalty on rehearing. We've addressed - I think we'll leave the issues around jurisdiction to reply, we've dealt with them in our written submissions in chief. In terms of the calculation of penalty, we rely on our written submissions for that.

PN416

Just bear with me for a moment. I've nothing further, at this stage.

PN417

VICE PRESIDENT ASBURY: Mr Wood.

PN418

MR WOOD: Thank you, Commissioner. Can I deal with two preliminary issues? The first is jurisdictional. We've got nothing to add to what we've said in writing and we frankly accept the authority that One Tree represents against the argument that we put.

PN419

The second preliminary matter is to properly set out what the nature of the dispute, as notified by the union, was, what was the dispute before the Commission, at first instance, and what the dispute is now. Because, although exercising the appellate power of this tribunal, the jurisdiction is to deal with a dispute.

PN420

The Commission may arbitrate the dispute and on this appeal you can confirm, quash or bury the decision that was made, in arbitration of the dispute, or you can make a further decision in relation to the matter, that is the dispute, that was the subject of the appeal. So one has to look at the dispute.

PN421

So where does one go? One goes to the application that's in appeal book 11. It's dated 21 September 2022 and, in essence, what the union sought was that the Commission order that the respondent, Mercy, pay to all full-time eligible employees and all full-time and part-time eligible employees, for the purposes of clause 11.1 and clause 17.7 of section 2 of the agreement, the penalty payments that they said were payable.

PN422

Now, we've just been through those two clauses and seen that they operate in relation to a variety of employees. For example, clause 11.1 says that, 'An eligible employee is an employee employed in the following classifications' and there's about 20 of them. And as the Full Bench pointed out to my learned friend, not only is there a number of eligible employees, or a number of classifications eligible employees that the clause 11 allowance operates in a discriminatory fashion. I don't mean that in any value judgment sense but just that some people are not eligible employees and some people who are eligible employees, for example theatre technicians, get two, under clause 11.2 and 11.3.

PN423

Then, similarly, for clause 16 - sorry, I think I said clause 17.7, I meant 16.7. For clause 16, the eligible employees are referred to at clause 16.7. Not all theatre technicians, you'll see only grade 1 theatre technicians are entitled to the educational incentive allowance. And you'll recall a question you asked my learned friend, Vice President, about what the payments were for the education incentive allowance, you'll see that there was one of $500 early on, from the operative date of this agreement, but you had to be employed as at 13 May 2021. And thereafter, the table in 16.2 applies.

PN424

Now, if I ask the tribunal to go to appeal book pages 14 and 15, you'll see the table that the union put in the application, which describes the relief that they seek. You see, at 15, you see a reference to the tables and then the amount of the penalty will depend upon the amount of days the penalty was paid late and the total can be payable to a particular employee, depending on whether that employee was paid their allowance on 24 or 31 August.

PN425

Then if you go to clause 2.1(1), because that is the relief, do you see that 2.1(19) on appeal book 14:

PN426

> *The HWU claims that Mercy Hospitals must pay, under clause 29.3(d), the following underpayment penalties to employees who are eligible for the respective allowances expressed in the table below.*

PN427

That mimics the claim, at 2.1(1) earlier in the application. There's no relevant difference. You'll see there's a table for each of the allowances. And then at 2.1(6) there's a reference to the differential way in which the allowances operate, in relation to different classifications of employees.

PN428

The short point we make by going to that is that this dispute, as the union is entitled to frame it, relates to a number of allowances, payable at different times to different employees, who add up to about 220 employees, not all of whom are members of the union. That is important later on.

PN429

At the first instance stage, we indicated to the union that we had thought that their characterisation of the dispute was wrong. That what, in fact, was happening was that there were three requests, by three members of the union, who came forward to give evidence, and the union was acting as their representative. They said, 'No, you're wrong, that's not what's going on. We are acting as party principal, we are in dispute with you, Mercy, in relation to a broader class of persons than the three people who give evidence' the two theatre technicians and Mr Hodges, was a patient services assistant.

PN430

Now, as it turns out, neither of the three witnesses were entitled to the educational allowance, under clause 16, so there was no evidence about that, but the dispute was still framed in that way. So when Gostencnik DP asked my learned friend to go to the statement of facts, you'll see the statement of facts is as unclear as the application because it leaves something very important unsaid, that is, who are the eligible employees and what are the allowances that were payable to them and at what time were they payable. Some of those questions have now been teased out in the submissions today, particularly by Gostencnik DP to my learned friend.

PN431

But we have to remember, and there's no criticism of the union about this, that they could have modified the dispute, the Full Bench decision in SER [2017] FWCFB 1702 at 15 says:

PN432

The union has the capacity to narrow the dispute, or expand it, beyond what's put in writing.

PN433

That opportunity was not taken up. In the appeal submissions, they maintain the relief they sought in the application. That is, they want an order that Mercy pay, to all the eligible employees, 220 of them, the penalty payment for each of them, in relation to each of the allowances that they say is due. No criticism of that, but that's what the matter is that is before this Full Bench. This is not a question of the construction of clause 29.3(c) in isolation, this is a dispute where the union has always sought, and continues to seek, an order in determination of the dispute, by arbitration, to deal with the dispute finally, because that will get rid of the dispute because you'll have a resolution.

PN434

So for my learned friend to say, as he said in answer to the Bench, that there are some issues about the construction of the clause that are not in issue is not true, because of the way they've framed the dispute.

PN435

Now, that is not to say that on need not find error. One has to find error. The Full Bench can't just decide, 'I'm going to make another decision'. In order to - it's not a hearing de novo, you don't just treat the Commissioner in the first instance's decision as if it counts for nought, like a Magistrates Court case, in a criminal sentencing case. It's not like that, you have to find error.

PN436

My learned friend has said, 'I can find you error', and he might be right, he might be wrong about that. If he does find error, then the whole dispute is for you for determination and you have to make sure that when you come to decide whether you make the order that my learned friend wants you to make, and has always wanted you to make, that all integers that are preconditions to the making of that order, in relation to all 2220 employees, are met, otherwise you'll have made an error.

PN437

So what we say, in relation to that issue, that is, assuming - let's assume my learned friend can point at some error - - -

PN438

DEPUTY PRESIDENT GOSTENCNIK: Isn't it open to us to simply conclude that that aspect of the Commissioner's decision, which concerned subparagraph (c) was incorrect and remit it back to her for determination?

PN439

MR WOOD: Of course you could. Of course.

PN440

DEPUTY PRESIDENT GOSTENCNIK: Hence, we wouldn't have to decide all of the - - -

PN441

MR WOOD: You wouldn't. That's one of the ways you could determine the issue, of course you could, but - - -

PN442

DEPUTY PRESIDENT GOSTENCNIK: I'm not suggesting we will.

PN443

MR WOOD: No. Of course. And that's a perfectly orthodox way in which - - -

PN444

DEPUTY PRESIDENT GOSTENCNIK: In which case, that would be consistent with what Mr Harding's urging us to do.

PN445

MR WOOD: Exactly. Exactly. But it would also be consistent with what I'm saying, that there would have to be some organ of this tribunal that deals with the dispute, finally, by way of arbitration. Now, of course, there's some cases, of course, we don't deal with it finally, for discretionary reasons, but this is a case where you need to deal with it finally. You need to get a resolution and someone needs to do that, on all elements.

PN446

Now, there are a number of points we make, by way of construction in aid of our argument to defeat the union's claim that there should be an order, finally made, in relation to 220 employees, binding on Mercy. The first is one that we put below,

and Gostencnik DP identified it, it's at paragraphs 34 to 39 of our submissions below, appeal book 964. It's one that didn't find any favour with the Commission below and it's one that we haven't articulated, in writing and developed it in our submissions on appeal. But, nevertheless, you have to work out whether it's right or wrong and it's simply that argument that was had between the Vice President and my learned friend, about whether an error must be a mistake or is it insufficient for it to be an error for a mere delay to have occurred without a mistake occurring. Now, I lost on that point below. We haven't agitated it, in any serious way, in submissions here before the Full Bench, but it's an issue that arises. That's the first point.

PN447

The second is, let's assume we aren't wrong about that and there were underpayments that were due at certain times. That requires an examination of each of the position of each of the employees, in relation to each of the allowances. Now, if I could ask the Full Bench to look at appeal book 973 to 975, you'll see that here, and there's a bit of complication about this, but I hope it will make sense and it goes some way to answering the questions that at the very end Gostencnik DP asked my learned friend.

PN448

These are the three witnesses that gave evidence. Now, remember each of them, at 975 to - 973 to 975, each of them are not entitled to the education allowance, under clause 16, so you won't find any reference to that here because none of them are entitled to it. And you'll see that Mr Hodges was not entitled to what you might call the second nauseous work allowance, because he wasn't a theatre technician. So he wasn't entitled to the payment, under clause 11.3, but he was entitled, because he falls within the classifications in 11.1, to the first one.

PN449

Now, just dealing with Mr Hargraves(?), can I just work across the table and just explain what this means. Remembering that the Commission below, referring to Ms Kingsley's witness statement, identified when the various pay periods were but Ms Kingsley's reference to the pay period finished on Wednesdays. So if you look at each of the dates that Ms Kingsley refers to, which are extracted by the Commissioner below, at paragraph 18, you'll see that the various allowances for the employees were due on the Thursday after the pay periods ending 4 May, 11 May, 12 July and 27 July.

PN450

That becomes important because, at the very end of the submissions, you'll recall Gostencnik DP said, 'Hang on, that's not right because of clause 29.1, the payment is actually due, at the very latest, midnight on Thursday following'. So it's not 4 May and 11 May and 12 July and 27 July, it's midnight the day after each of those days. Those are the dates we've adopted in this table.

PN451

So you'll see, in the reference to the following Thursday, do you see that in the forth column? The following Thursday, for Mr Hargraves, of the first nauseous work allowance, was payable on 12 May, by midnight. There might be some dispute about the next column, this is an evidential issue. We say the first request

that was made was on 11 July, I could be wrong about that, it might be earlier and there might be debate about it. It was paid on 31 August and so the delay in payment, from the date the entitlement arose, and it has to be the date the entitlement arose for the reasons that the Vice President said, because the purpose of the clause is compensatory. You're paying someone for the time that they're out of money, not compensating then from the time they made the request, but your obligation arises from the time of the request.

PN452

The compensation is for the full time they're out of money, so it's 111 days. Then you work out the two constructions. On the union's construction, that's a $16,000 payment for being out of funds of $350 and on our construction it's something akin to the value of the loss of money, $39.00. Sorry, that was unfair to say, $350, that's all three payments, that's $1050, that gets you $16,977.

PN453

Now, the Commission below, if you look at the fifth column, the date of the request, did not make any factual findings in relation to any of the employees. Now, partly that was a result of her construction of the clause and partly the lack of evidence produced by the union. But for none of the 220 employees will you find any finding as to when the date of the request, in relation to a particular allowance which was then due and payable, had been made by or on behalf of that employee. Nowhere. You have to do all that yourself, or someone has to do it.

PN454

In saying that, we fully accept the Vice President's point that, of course, the request can be made indirectly. Of course it can be made by an agent. Of course it can be made informally. Of course a union can make the request that's required under - to set off the process, in clause 29, by - sorry. Of course a union can set that process of, in relation to its members. There may be a great deal of informality about it. Maybe you don't even have to describe who the employee is, when you're making that request. Maybe you do, maybe you don't.

PN455

It might be enough to say, as Mr Riley does in one of the pieces of correspondence, 'We want to tell our members what's happening with these allowances', that might be enough.

PN456

Now, that then leads to the next point that we wish to make. That is, that clause 29.3(a) is a precondition, is a gateway, as Gostencnik DP said, to the obligations that form part of the rest of clause 29.3. It's very easy to see why. Because you have to have a request, under clause 29.3, as the first step. The next assessment to be made is, is there an underpayment and is it less than 5 per cent or greater than 5 per cent, that's a point of decision that the clause requires the reader or the user of the clause, or someone who wants to rely upon the benefit of the clause, that's something that they're required to undertake, that assessment.

PN457

Then once that bifurcation occurs, is there an underpayment of less than 5 per cent, then the obligation is, you must correct that underpayment in the next pay period. You must correct it. It will be corrected, if it's less than 5 per cent.

PN458

If it's not less than 5 per cent, it exceeds 5 per cent, then the obligation is less onerous. It's not that you must correct, it's that you'll try to correct. You will take steps to correct. And not in the next pay period, but within 24 hours. The obligation there is a combined obligation. That is, it's an obligation to try, not to do. My learned friend wants to break it up and say it's an obligation to try and to do. No. The obligation in (b) is to do, the obligation in (c) is to try.

PN459

Then what do you have to try, within 24 hours after receiving a request also to do, you have to provide confirmation to the employee of what - not of the steps, of the doing, of the correction. Now, it might be good practice to also inform the employee of the steps, but that's not the legal obligation that's required by clause 29.3.

PN460

The Commissioner below rejected the submission that there was a precondition, found in clause 29.3, for an employee to make a request to start the process in the rest of clause 29.3, and that's found at paragraphs 97 to 100. It is - sorry, I said 97 to 100, 96 to 100, at appeal book 1856. The Commissioner below said:

PN461

If a worker things -

PN462

At paragraph 99:

PN463

they have not been paid correctly, they can ask for what is, in their view, the correct payment. The existence of an underpayment is one of fact -

PN464

That's true,

PN465

it doesn't rely upon the employee raising it as an underpayment to make it so.

PN466

Also true. It doesn't change the fact of the underpayment, but what the clause does is require an employee to raise it so the employee can deal with it. It doesn't change the fact of the underpayment, the underpayment is either the underpayment or not, but it triggers the employer's obligation to assess whether the underpayment is real or not, to assess its value and then to do one of the two things, fix or try to fix.

PN467

We would say, respectfully, that that decision, at paragraphs 96 to 100, that part of the decision or, more correctly, the part of the reasons for the decision are wrong and that there has to be a request.

PN468

Now, there has to be, given the three elements of this request. There has to be a request by or on behalf of all 220 employees, in relation to whom the union seeks an order. If they seek an order in relation to a smaller group, then the need for a request by or on behalf of that smaller group is minimised. But they've sought a dispute, pitched a dispute, asked the Commission to resolve a dispute in relation to 220, there has to be a request by or on behalf of each of those 220.

PN469

Second, and this is a point that Gostencnik DP made, the request has to come after the underpayment has arisen. There can't be any request for a rectification of an underpayment prior to the underpayment arising.

PN470

Now, on the evidence of the three employees who gave evidence, that's no earlier than 12 May, midnight on 12 May. On the evidence of Ms Kingsley, that is in relation to some employees within the class of 220 who are not - didn't come forward to give evidence, it's no earlier than midnight on 5 May, a week earlier, the earlier pay period.

PN471

Thirdly, of course it's the case that if the request is made by the employee, the other requirement, in clause 29(a), that they consider themselves to have been underpaid will be met. It's going to be a very easy evidentiary burden to meet. That is, if you, as an employee, go to the employer and say, 'I request you fix that underpayment', you've proved that you consider, just by making the request, that you've been underpaid. The request deals with the jurisdictional requirement, or the precondition, in 29(a), that the employee considers themselves to be underpaid . There's no problem with that, it's just proved by the request.

PN472

So then we come to the evidential issue, which is completely unresolved. When the union was speaking to Mercy, at various stages, both in writing and in the agreement implementation committee, and saying we want these allowances to be paid either on behalf of all eligible employees or on behalf of our members, or on behalf of everyone or, more colloquially, when are they going to be paid, were they making a request on behalf of some or all of those employees? Well, it's obvious that they were making them on behalf of the people who gave evidence because they say as much, the three of them, there's no issue there.

PN473

It's probably the case they were making them on behalf of all their members, there's very little need for evidence about that. We don't know who those members are though, there's no reference to them, no reference to which allowances they were entitled to. But is it true to say they were making that request in relation to each 220 employees, in the sense required by the courts? Of course they were, industrially. Of course they were saying, 'When's everyone

going to get their money?', but is that a request? Maybe it is. It seems to be a long way removed from the normal principles that one would apply to a person, an obligation on an individual person to make a request to allow someone, who's not their agent, not their union, who's not authorised, to make a request on their behalf. But, yes, it's just the say the union's pitched the dispute, because it's so broad. That's what's causing this particular issue.

PN474

DEPUTY PRESIDENT GOSTENCNIK: If paragraph (a) is not a gateway, what other work does it have to do?

PN475

MR WOOD: I don't know.

PN476

DEPUTY PRESIDENT GOSTENCNIK: It states the obvious, doesn't it, the employee can ask it's employer to fix an underpayment.

PN477

MR WOOD: How is the employer supposed to deal with it? You've got to get some notification that the employee thinks they've been under paid. That's the point at which clause 29(b) and (c) operate. That is - let's say, all right, let's say there was an obligation to pay people by 12 May. Let's say the request, someone says, 'I've been underpaid', on 30 June. 'I've looked through all my accounts for this year and it doesn't seem like I was paid on time, or at all, and I was due on 12 May'. What's the employer's obligation then?

PN478

The employer's obligation is, if it's less than 5 per cent, if that amount is less than 5 per cent, then you have to pay that in the next pay period after the request, after you've been asked. If the underpayment is more than 5 per cent, you've got to take steps. You've got to try, within 24 hours, to do something with the aim of trying to fix the underpayment. You've got to try within 24 hours and then when the underpayment is made good, you've got to confirm it. That's how the clause operates. That's what it does. It's the temporal trigger for the obligations in 29(b) or (c). Otherwise, an employer would always be in breach of this, in an unknowing fashion. They wouldn't know. It has to be the request triggering. And you see it, in 29(a), because, as you said, Gostencnik DP, to my learned friend, 'Look what 29(a) says, 29(a) says, immediately rectify the error from the employee, rectify it or justify it'. That is, what's what the employee must do, tell me to rectify it or validate it.

PN479

Then the next step - - -

PN480

DEPUTY PRESIDENT GOSTENCNIK: It probably doesn't even say that. It says, 'The employee may request the employer that the employer rectify or validate it'. It doesn't actually oblige the employer to - - -

PN481

MR WOOD: No, it doesn't. That's true. That's true, I probably overstated it.

PN482

DEPUTY PRESIDENT GOSTENCNIK: Which is what's behind my question, is that if it doesn't have a gateway purpose I'm struggling to see what other - it doesn't confer a particular right that the employee doesn't already have.

PN483

MR WOOD: I agree. If you look at it sequentially, look at the way the clause operates. (a) leads to (b) or (c). If (b) or (c), depending on the route you go down, above 5 per cent, less than 5 per cent, if those actions aren't taken then (d) operates. That's the way it works. Request, make good, try to make good, if you haven't made good or tried to make good, then you've got to pay the penalty, from the date of the underpayment. The obligation in (b) and (c) is from the date of the request, and the obligation, if it's compensatory, and I agree with my learned friend, is to pay, is to make good, under 29.4(d).

PN484

Then can we move to the next point, which is the heart of the constructional issue which grabbed the attention of the Commissioner. It's just one of the constructional issues on the route to resolving the dispute, but it's the heart of the one. This is the question of what does clause 29.3(c) mean.

PN485

VICE PRESIDENT ASBURY: Sorry, Mr Wood, before you go off 29.3(a), can I just - I'm just not quite sure where we landed - where you were landing with that. So in the circumstances where the unions raised the issue generally, and, arguably, on behalf of members, doesn't the principle also apply that we need to construe this agreement in a way that makes industrial sense. Even if the union only had three members and none in the group, it would be nonsensical for the employer to say, 'Yes, yes, we'll fix it for you, but we'll just pretend, nothing to see here, for everybody else'. You know, that, arguably, by raising it, and the union, whether you say it's a party, whether it's bound by the agreement or not, it's well established a union's got an interest in ensuring an agreement is in force. Not only for members but generally. So can we - is it accepted by you, by raising it, whether it raised it for one member, three members, because of the nature of the claim, it was really saying, 'You had to pay it to all of the people within these parameters, and you haven't'.

PN486

MR WOOD: I think that's a very fair assessment of the evidence. It's just a question of industrially that's what they're saying. What is the impact of that, under clause 29.3?

PN487

VICE PRESIDENT ASBURY: Or on the remedy.

PN488

MR WOOD: On the remedy, exactly. So could you make an award and say, if you found the request was made in relation to members and if you found in favour

of my learned friend that the penalty payment should be made to all members in relation to whom the union may request on whatever - - -

PN489

VICE PRESIDENT ASBURY: Why would we do that? For my part, why would be make it - if we went that way, why would we confine it to members?

PN490

MR WOOD: Because you wouldn't have jurisdiction to go further, unless you found that the non members had also made a request.

PN491

VICE PRESIDENT ASBURY: But that's the proposition I'm putting. By coming to the employer and saying, 'We have one, two, three or 23', however many members, 'who are in this category, we now -' so raising the request arguably brings it to the employer's attention.

PN492

MR WOOD: Yes.

PN493

VICE PRESIDENT ASBURY: Surely it wouldn't be suggested that we should pluck out the union members from the - - -

PN494

MR WOOD: Unless there's some authority. It's just basic sort of principles of individual agency. Unless the 200-odd non members, or however many there are, have said to the union, 'We want you to represent them', and it can be very - it can be implicit in the way that - there might be some evidence of that. You can't make an order, in relation to Mercy, in circumstances where - it's just a function of the way in which the dispute has been phrased. If it was phrased much more narrowly, then these evidential issues wouldn't arise, but there's just no evidence of any - now, is it true to say that the employees probably want the union to do this? Probably. Probably. But there's just not even one skerrick of evidence that there's any authority of the union to speak on their behalf, to institute this process.

PN495

VICE PRESIDENT ASBURY: Does it require that authority?

PN496

MR WOOD: It requires at least de minimis evidence or some piece of evidence, somewhere, that this group - sorry, the non member class of this group, because the evidence, in relation to the membership is almost non existent, but it's there and it's sufficient to make an order, in relation to the members.

PN497

VICE PRESIDENT ASBURY: So is there a difference between - it's not - the unions - so what you're saying is, because the outcome of the dispute that the union is seeking is a penalty or a payment to be made to individual persons who did not receive the payment when they should have, that that is different from a claim that says, 'You still haven't paid it'.

PN498

MR WOOD: If - - -

PN499

VICE PRESIDENT ASBURY: 'And we want it paid'.

PN500

MR WOOD: If the order was there was a declaration, for example, that would be slightly different. But if you're going to make an order, you're sitting as a court, in effect, in this, that's what you're doing. You're exercising not industrial arbitral functions but functions we know in the common law as commercial arbitration. That is, you sit as if you're a court and you make an order, as if you're a court, resolving the dispute, according to what are the rights, not what should be the rights. So you've just got to apply those principles.

PN501

VICE PRESIDENT ASBURY: But what are the rights is that every employee who wasn't paid the amount is entitled to receive a payment and you're saying it's because they haven't made - they have to specifically make a request or there has to be something capable of being construed as a request on their behalf.

PN502

MR WOOD: Yes. Now, is that to say that if an order was made, in relation to three employees, say, that Mercy wouldn't pay everyone else, just as industrial common sense? I'm just talking about a very narrow point about, as you've correctly identified, Vice President, the nature of any order that could be made, in resolution of this dispute, in circumstances where there's no evidence, beyond three or, at best, the members that they may request, that's all.

PN503

VICE PRESIDENT ASBURY: Yes, I understand. Yes.

PN504

MR WOOD: Then turning to the next point, which is the construction of clause 29.3(c). The first point to make, and it's one that is very important that's come up here today, and it came up before the Commission below. That is, there was criticism, and I think fully justified, by you, Vice President, where you said that the steps that were taken were inappropriate. Mirabella C said, 'It doesn't reflect well upon the people who were administering the implementation of this new agreement', and that, as a criticism of public administration, that may be justified, it may not be. But that's not the question. The question is, what is the legal obligation imposed by 29.3, because they're not necessarily the same.

PN505

That leads to the second point, which is, how does one go about construing an agreement like this? My learned friend kept saying you can't - you've got to confront the language, you can't get around the language. That's all true, you need to look at the text. But the cases say, and this is from the High Court, in Amcor, and from Madgwick J, in Kucks, you've got to have a sensible outcome. You've got to, quoting - you've got to have a sensible industrial outcome. It's got to operate fairly. It's got to avoid unjustness. You've got to, and this is Madgwick J,

in Kucks, which is an award case not an agreement case, but the principles applied by the High Court in the agreement cases, 'You've got to strive for meanings which avoid inconvenience or injustice. You've got to avoid absurdity.'

PN506

Now, my learned friend falls back to the language, but the time is well past where we just got out a dictionary and looked at words in an agreement and said, 'The dictionary means this, therefore this is the meaning of the agreement'. You've got to give it a sensible, industrial construction, which then leads to point 3 on this question of what does the obligation in 29.3(c) require, and one you identified, Vice President, what is the purpose of it?

PN507

Now, is the purpose identified in the language of this clause? No. It doesn't say, 'The purpose of this is to compensate. The purpose of this is to deter', but you have to, by looking at all the interpretative tools you're allowed to look at, make some determination about what you think the purpose of this was. Was it, as my learned friend says, to secure compliance? To punish, as was said below, or is it to compensate?

PN508

Now, we have identified, in our submissions, a very large range of contextual indicators to suggest that this is a compensatory regime, not a regime for punishment. Now, we could be wrong about that, it might be that it was intended to punish. But the objective theory of construction is that you, as the people construing this, have to try and strive for, essentially, industrial outcome. You have to try and work out what was intended. Now, in our respectful submission, its obvious that the provisions are compensatory, not punitive. Now, I've set it all our in writing.

PN509

That leads to the fourth point, which is the history. Oftentimes history is helpful. The history here, when you track back through the clauses, doesn't reveal a lot but it does tend to suggest what you said, Vice President, is the case. It's not at all clear, it's not obvious, but it does tend to suggest that in a non cashless society the waiting time provisions, where people are required to wait for their cash, have been replaced by provisions which compensate them for being out of funds in a post electronic transfer age. I could be wrong. That might - - -

PN510

VICE PRESIDENT ASBURY: We only tracked back to the previous agreement didn't we?

PN511

MR WOOD: In the submissions we've gone back to the various agreements. They don't really help but they're quite equivocal. We can point at some things and my learned friend can point at some things. We've gone all the way back to a Tasmanian decision of 1987, which itself was equivocal. But perhaps we didn't go far enough. Perhaps there was a Full Bench decision that we should have found, a test case that dealt with this issue and perhaps we just haven't done sufficient amount of research. But at least our historical researches

have not proved anything definitive. But we would say, broadly suggestive of the approach, the purpose that the Full Bench should find animated the persons who made this agreement.

PN512

That leads to the fifth point, which is our construction of this clause is very straightforward and it accommodates the purpose that we say animated the makers. That is, the people who made this agreement know that there's a penalty regime in the Act. They know there's a capacity for interest in the Act. They know there's compensation in the Act. They know all these things.

PN513

So what were they doing in putting clause 29.3(c) in, after 29(b)? They were saying, 'We want some facility in this agreement to make sure things happen quickly. Not necessarily the finalisation of a rectification but things start to happen very quickly when an underpayment is notified to you'.

PN514

VICE PRESIDENT ASBURY: Well, if you go back to the form F17 that was filed with the agreement, the explanation of the terms was attached and the explanation of the term, in relation to that agreement, or that provision, was 'Amended existing terms to provide a detailed method by which alleged underpayments are examined are corrected'. That's what the explanation was. I can't see on my - it seems to suggest that certain terms, from section 2 and section 3, were merged. I haven't looked at that in any great detail, and then it just goes on. And I can't see a significant difference between the predecessor and this one, in terms of this clause.

PN515

MR WOOD: There's not. There's not a lot. There's not a lot. And if you go back to - I think the earliest one we went back to, 1997, it - at some point there was a change. If you have a look at clause 29.4(c), do you see that clause there, which is the traditional waiting time clause, which now just applies on termination, which is the one you saw in the Tasmanian case in the 80s and I presume was the sort of clause that was prevalent. That sort of clause was, over time, replaced, for underpayment, with the sort of clause in 29.3. And it happened gradually, over a period and it's very hard to specifically point to some change where you can say that parties were ad idem about the purpose of the change. It's just very difficult to do. In some cases you can.

PN516

DEPUTY PRESIDENT GOSTENCNIK: Mr Wood, can I just ask you this? On your construction (a) is a gateway?

PN517

MR WOOD: Yes.

PN518

DEPUTY PRESIDENT GOSTENCNIK: The reference to 'the next pay period', in (b), is a reference to the next pay period after the employer acknowledges that the employees request is correct?

PN519

MR WOOD: Yes, your Honour.

PN520

DEPUTY PRESIDENT GOSTENCNIK: And the 24 hours, the steps required, is also after that point in time?

PN521

MR WOOD: That's right. And it might be that acknowledgement is not required, it's just that you make the request and if you approve the request - - -

PN522

DEPUTY PRESIDENT GOSTENCNIK: If, as a matter of fact, there was an underpayment that the rectification obligation starts from the moment of the request.

PN523

MR WOOD: The receipt of a request, yes, exactly. That's the way we say the clause operates. And it's very important, my learned friend criticises and says there's not a huge obligation, in clause 29.3(c), that you merely have to set a process in train, within 24 hours, a process that will ultimately rectify the error. Well, that's what 'trying' means. That's - there's plenty of things that we try at that we don't achieve.

PN524

VICE PRESIDENT ASBURY: For my part, Mr Wood, I struggle with the proposition that where the word 'try' isn't really used.

PN525

MR WOOD: Well, take steps.

PN526

VICE PRESIDENT ASBURY: Take steps.

PN527

MR WOOD: Take steps means try.

PN528

VICE PRESIDENT ASBURY: Well, I don't know that it does.

PN529

MR WOOD: Well, I mean it says - - -

PN530

VICE PRESIDENT ASBURY: You know, at the risk of - and I don't want to be quoting Yoda, but, 'Do not try. Do' - but arguably, you know, when you're talking about people's wages you can't just say, 'Well, we tried very hard to pay it and we couldn't do it.' Surely one would read into that in the context that this is dealing with the entitlements to be paid an allowance that's not an insignificant amount of money for employees in the context of their overall package. It's not an insignificant amount of money. They're entitled to be paid it, and the steps have to surely be steps that will result in it being paid.

PN531

MR WOOD: They have to be real steps. They have to be genuine steps. They have to be directed towards obtaining the outcome, but without sort of getting into too much of a Star Wars sort of debate, there is a distinction between doing and trying set up in the clause. (b) is doing. (c) is trying.

PN532

VICE PRESIDENT ASBURY: That's for making the payment - - -

PN533

MR WOOD: Of course.

PN534

VICE PRESIDENT ASBURY: - - - within a particular period of time. (c) is saying you have to take steps to correct the underpayment, and I accept - accepting for the sake of the discussion - that it's the steps that have to be taken within 24 hours, not the payment of the money, or a step that will directly result in the payment of the money. Surely they have to be steps that, at some foreseeable point, will result in people being paid money that they're owed.

PN535

MR WOOD: Of course. They have to. There has to be.

PN536

DEPUTY PRESIDENT GOSTENCNIK: And, on one view, that period must be before the next pay period.

PN537

MR WOOD: I don't think that's correct, Vice President.

PN538

DEPUTY PRESIDENT GOSTENCNIK: Well, then what work does (e)(v) have to do?

PN539

MR WOOD: It just operates in relation to clause 29.3(b).

PN540

DEPUTY PRESIDENT GOSTENCNIK: Well, it can't, because that already tells you that you have to do it by the next pay period.

PN541

MR WOOD: Well, if you think about it this way. If you go through the process, there's a request. There's an assessment that's less than 5 per cent. The underpayment is not corrected in the next pay period, (b). You're then into (d). (d), if you don't take the action in (b) - and you haven't - in the next pay period, you have to make the penalty payment, except - - -

PN542

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN543

MR WOOD: Except where you fall within (e)(iv), where there was some agreement to defer the correction of the underpayments until the next pay period, because that's the way. That's the way it operates.

PN544

DEPUTY PRESIDENT GOSTENCNIK: Yes, but you're reading that to be the next pay period after the next pay period when their payment was due?

PN545

MR WOOD: Yes. Exactly. It certainly doesn't operate in relation to (c).

PN546

DEPUTY PRESIDENT GOSTENCNIK: But can't it operate also in relation (c)?

PN547

MR WOOD: Well, because (c), the drafters of (c) have decided not to oblige the employer to either correct, nor to correct within the next pay period. Neither of those things are part of the obligation in (c), in contrary to section (b).

PN548

DEPUTY PRESIDENT GOSTENCNIK: But it would seem an extraordinary outcome if there was some, that there's an obligation to at least correct it in the next pay period, what might be described as a minor underpayment, yet a whopping big underpayment, an employer can take its sweet time provided it has taken a step.

PN549

MR WOOD: The converse is also true. That's one view of the construction. The other view is that you need more time when it's a bigger underpayment. If it's a smaller underpayment you can do it quickly, and you have to do it within the next pay period, but if it's big, you need some time, but you have got to start within 24 hours. Now, both of those are rational approaches to dealing with large underpayments.

PN550

Remember, also - and we lose sight of this - remember, also, that the employees are fully protected by the statute in relation to any long underpayment. They're well able to go to court and to get fully compensated for the wrong done if the delay is too long. This is simply a quick method of compensating employees for being out of funds, and for the longer it takes, the employees get fully compensated.

PN551

DEPUTY PRESIDENT GOSTENCNIK: Have any penalty payments been made?

PN552

MR WOOD: No.

PN553

DEPUTY PRESIDENT GOSTENCNIK: So are we going to have a dispute about this afterwards, about an underpayment of penalty payments?

PN554

MR WOOD: Well, one would hope not, Deputy President, assuming of course - and you will see the difference for Mr Barbante. The difference is 17,000 versus $40, so if the outcome is $40 I'm sure we won't have a dispute from our part of the bar table.

PN555

DEPUTY PRESIDENT GOSTENCNIK: Well, you might get a request tomorrow from 230-odd employees for payments, underpayments of $18,000 or whatever it is.

PN556

MR WOOD: And subject to instructions, I assume that Mercy would pay them the value, to compensate them for the time they have been out of funds, which of course, ended in 24 or 31 August. That's all I think we need to say about clause 29.3.

PN557

We make the point, as we have, that the obligation to take steps is a not very onerous obligation. It is simply to do something with a view to the attainment of some end, and we move then to the next question of whether those steps were sufficient.

PN558

This is a very hard question to answer because remember that you have to look at each of the requests in relation to the employees, in relation to each of the allowances, because it wasn't until the request of 11 July of the first agreement implementation committee meeting. I'm sorry, the second one on 25 July, where every employee within the class had become entitled at that point, one of them I think a day earlier, to every allowance at all times between 12 May and the second agreement implementation committee meeting of 25 July. There were some employees who, in relation to some allowances, had not been underpaid.

PN559

Now, you can imagine, in just thinking about that period of time, at the beginning of the class of 220, almost none of them had been underpaid; in fact, none of them had been underpaid as at 12 May, and by the end all of them had been underpaid, and at various times some of them had been underpaid and some hadn't.

PN560

So for some of them, in relation to some allowances, there was no underpayment and no request could be made to fix an underpayment in relation to those employees, and that's why we focus on the later time because that is the most clear and you can see - and the Full Bench has read - that steps were taken during that period; in fact, they had started to be taken from at least 30 May, but they weren't done efficiently. They weren't done in a way that very quickly made good the underpayments.

PN561

There was the whole period of June and July where there was detail. It's all in Ms Kingsley's statement where there was back and forth between Payroll and HR, where there's questions about whether an employee needs to be still employed or whether it's enough that they were once employed. Who exactly are the employees within each of the classifications? How much do they pay? Are some of them part-time or some of them full-time? You just see it all in Ms Kingsley's affidavit. Should that have been done earlier? Of course it should have been done earlier, but was it taking steps to correct the underpayment? Yes, it was.

PN562

VICE PRESIDENT ASBURY: And on your argument, the confirmation that was required to be provided under 29(3)(c) was not of these steps that were being taken, but of the corrections?

PN563

MR WOOD: Which was done, at the very latest, by 24 August and 31 August, but that particular issue becomes a serious factual issue that it's really best done by - if we get to that stage - a single member, whether the Commissioner at first instance or a member of this Full Bench.

PN564

Then, lastly, the penalty. At paragraph 30 there's no factual findings about penalty and we have set down eight reasons by way of construction that our view of the way in which penalties should be calculated should be preferred. Our learned friends haven't really responded in writing to that. I'm not critical of that, except for one point, and I think they're right about that. Only one point they made, that they say, I think they're correct to say the 20 per cent, the associated banking or other fees, penalties incurred by the employee as a consequence of the error, where those fees exceed the 20 per cent penalty payment could operate in relation to clause 29.3(b).

PN565

I think that's fair because you could have a situation where there's an underpayment of $150 or so, and that could outweigh. That might not be enough for the 20 per cent to compensate it and so you would have to be compensated with the payment of any associated banking or other fees or penalties, but other than that, there's nothing in their submissions on penalty which we need to say anything about orally. It's all in writing, and you can see the way it works out in the calculations. Just excuse me. Unless there's any questions from the Full Bench, those are our submissions.

PN566

VICE PRESIDENT ASBURY: No, thank you. Thank you, Mr Wood.

PN567

A reply?

PN568

MR HARDING: Yes. Just a few matters. My learned friend made some submissions based on the authorities pertaining to how one construes enterprise

agreements on the objective theory of construction and drew your attention to at least the observations of Madgwick J in Kucks, which of course, is in the materials both parties have put in and it's a famous case, but of course, we would draw attention to the second paragraph of his Honour's observations, the constructional observations which is on page 184 of the report, and he says in that second paragraph that:

PN569

> *The task remains one of interpreting a document produced by another ... A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award.*

PN570

Now, that's the task that this Full Bench is performing and in those circumstances the question of purpose has to be derived from the words of the agreement viewed in context, rather than by reference to some anteriorly derived notion of what might be sensible, appropriate, just or otherwise, and to a large extent the submissions, we say, that pertain to how one characterises the clause, that the respondent draw the Commission into a speculative debate about purpose which are largely of no assistance unless it arises directly from the text and directly from the context of those words viewed against the agreement as a whole.

PN571

VICE PRESIDENT ASBURY: And the statute.

PN572

MR HARDING: And the statute. Yes. Exactly, and one aspect of that statute, of course, is that the makers of the agreement have sought approval of this instrument to be enforceable under the Fair Work Act and to ensure, to that end, that it conveys effective terms and conditions of employment, with the injunction contained in section 50, though can't contravene.

PN573

VICE PRESIDENT ASBURY: But also in the knowledge that the statute has a regime for if they are thus contravened what happens?

PN574

MR HARDING: The statute definitely has that in the Act. There's no question about that, but here we're dealing with a separate entitlement prescribed by the agreement that pertains to underpayment and so it ought not be viewed as some kind of substitution for the court's authority to impose a penalty for contravention if exercising its own jurisdiction. That jurisdiction is converted by section 50 and that's the frame within which the court exercises its powers.

PN575

Here, the Full Bench is construing a term of the agreement. They can have regard to the fact that there's a penalty regime, but the Commission can't know how the court might approach the exercise of that authority in the abstract, and in any event, the penalty might apply to the contravention that arises from a failure to pay. As I have said earlier, this clause arises in respect of the conditions that it

specifies, and in that sense, it provides its own source of rights independently of the obligation to pay the allowance.

PN576

Much has been made of this question of the gateway - as I think it's been referred to in 29.3(a) - and I think, Gostencnik DP, you said, 'What purpose can it serve other than as a gateway?' Well, with respect, Deputy President, it doesn't have that purpose in a way that qualifies the whole clause. It provides, it might be thought, an obvious statement of what an employee may do, but then enterprise agreements often provide obvious statement of what an employee or an employer might do. I think there's one in this agreement too in relation to a whole range of other subject matters.

PN577

DEPUTY PRESIDENT GOSTENCNIK: Judging by its size I suspect there's more than one.

PN578

MR HARDING: Yes. Indeed. Enterprise agreements are replete with parenthood statements about one thing or another. I think I changed my language quickly there.

PN579

VICE PRESIDENT ASBURY: You did.

PN580

DEPUTY PRESIDENT GOSTENCNIK: And even that is controversial, Mr Harding.

PN581

MR HARDING: Yes. Good. It might be that (a) is viewed in that way, but the difficulty of viewing it in the way that the respondent does is that it does result in uncertainty. We get an argument that's put against us now that, 'Look, the request frames the nature and crystallisation of the entitlement', which drives us into a situation which the individual employee and their entitlement when it crystallises has to be identified.

PN582

It also drives a question about whether the HWU has agency to even start the process under clause 29, despite the fact - or under the dispute resolution clause, more particularly - despite the fact that the agreement defines the HWU as a party.

PN583

It has rights to raise matters under the dispute resolution clause, and it has - and I don't think there's any criticism from the respondent for that - but it does so in its capacity as a representative and its capacity as a party that is covered directly by the enterprise agreement, but what's been put against us is that it's not good enough for the HWU to raise the fact that there has been an underpayment unless it's accompanied by a specific request by an employee under (a), which has the effect then of narrowing the entire entitlement, which means in that event that if an employee who complains and makes a request under (a) says, 'I might have

been underpaid', and the employer accepts that in relation to that person there is underpayment, they have the benefit - and there's a failure to take steps under (c) - they will have the benefit of (d) and none of the other employees who may be in the same situation have that benefit, even though, by virtue of raising it, the employer is then on notice that there has been an underpayment in respect of that particular employee which could give rise to a similar outcome arising in respect of others. It leads to anomalous outcomes which are entirely avoided by the construction that we propose.

PN584

There's a textual basis for why it's not a gateway and that's because (d), the preparatory words to (d), make it clear that if the employer does not take the action required under subclause (b) and (c), then these are the consequences and they're set out in (d). (d) is triggered by a failure to act under (b) or (c), not by the request under (a).

PN585

My learned friend says, 'Well, look, essentially just read the clause as a whole', and then say, based on the words that aren't there, that an employee request completely governs an outcome in circumstances in which neither (b) or (c) expressly link the concept of underpayment to the request.

PN586

Really what (a) does is to say, if the employee considers they have been underpaid - and I accept that in those circumstances that consideration doubtless occurs after the underpayment falls due given the language that's in the clause - they may request that the employer rectify or validate the payment. The clause is complete. The employer has triggered something and the words may confer a discretion on the employee to ask the employer to do one or the other thing.

PN587

The other anomalous consequence is the one that the vice president pointed out where it's a single employee, or maybe two or three, has triggered (a). The employer is then in a situation in which it knows that there's been an underpayment, and even if HWU comes along and says, 'But hang on, there's a number of other employees who are affected', the employer can ignore that with no consequence under 29.3.

PN588

My learned friend then characterised (b) as an obligation to do a thing will be corrected, and (c) as an obligation to try. It is incongruous to construe a clause with potentially significantly greater consequences financially as simply an obligation to try where the obligation in (b), which pertains to an underpayment of less than 5 per cent, is to be corrected in a specific time and is complete when that occurs.

PN589

I think the submission was, 'Well, you know, it makes sense to think that a larger underpayment might take more time to correct than a smaller one.' Well, why is that so? Why should that assumption be made?

PN590

All that (c) does is to apply a criteria that delineates between (b) or (c). It doesn't deal with a situation in which it is more difficult or less difficult in order to achieve a correction, and indeed, I have already identified that (v) of (e) provides for a circumstance that turns off (d) if there is unforeseen events beyond the control of the employer that preclude it from complying with the actions, but on my learned friend's construction, that doesn't really matter, and in any event, the words 'to try' don't correspond with the language that's in (c). The obligation is to take steps to correct. That's not try. That's take steps to correct.

PN591

Finally and briefly, it can't be right that the deferral election that is prescribed by (b)(iv) pertaining to an employee, where an employee agrees to defer the correction until the next pay period, can only apply to (b) given that the words in (d) refer to actions required under subclause (b) and subclause (c), and by virtue of (e), all of those exceptions, qualifications, defences turn off (d). They have to be construed as applying to both situations, not one of them. Excuse me. Thank you. Nothing further.

PN592

MR WOOD: I just noticed the time. Can I just say something quickly about Kucks, Vice President?

PN593

VICE PRESIDENT ASBURY: About; I'm sorry?

PN594

MR WOOD: The Kucks' case my learned friend referred to.

PN595

VICE PRESIDENT ASBURY: Yes, and if you need to respond, you can respond.

PN596

MR HARDING: Yes. Thank you.

PN597

MR WOOD: There's sort of a little bit of Goldie Locks about this. When Madgwick J says in Kucks, 'Don't use anteriorly derived notions of what is fair', what he is saying is don't come on to the bench, don't construe this as you would in normal industrial arbitration where you come on to the bench with an anteriorly derived notion of what was fair, because you're trying to settle a dispute and work out - - -

PN598

VICE PRESIDENT ASBURY: There's a following paragraph from that which would be - - -

PN599

MR WOOD: Exactly. Exactly, which I was just going to come to.

PN600

VICE PRESIDENT ASBURY: Yes, which is often ignored.

PN601

MR WOOD: Exactly. Exactly. Now, the way we used to construe contracts was to not worry about the outcome, just get the dictionary and be literal. That was the sort of, the other side. The middle road we now take is to say, look, have a look at the text. Have a look at the context. Try and work out from the text and context what the purpose is, but then if there's a fair outcome and an unfair outcome, choose the fair outcome.

PN602

That's not, as Madgwick J says, coming on to the bench with an anteriorly derived notion of what would be fair. It's using the modern interpretive tools, text, context, and purpose derived from text and context, to work out which one of two constructions should be preferred.

PN603

VICE PRESIDENT ASBURY: Well, you can reasonably strain for a construction that avoids absurdity or words to that effect.

PN604

MR WOOD: Exactly. What the courts are saying is we're well and truly literal, and that's the only submission that we made. We're not saying, 'Come in here and ignore the text, the context and just do what's fair.' We're saying if there's two outcomes, after applying the appropriate interpretive techniques, pick the sensible industrial outcome, which is what the High Court has instructed us to do.

PN605

VICE PRESIDENT ASBURY: Thank you.

PN606

Do you want to say anything in response to that?

PN607

MR HARDING: I'm not sure, in the end, we're that far apart on this issue to be frank.

PN608

VICE PRESIDENT ASBURY: No.

PN609

MR HARDING: I don't know how we would be.

PN610

VICE PRESIDENT ASBURY: You might be in loud agreement.

PN611

MR HARDING: Well, I think we are. I think if we're saying construe the words in context and according to purpose, then we're ad idem.

PN612

VICE PRESIDENT ASBURY: It's just that you have different notions of what's fair.

PN613

MR HARDING: We do, and that's my point, Vice President. We have quite different notions of what is fair, and in those circumstances, that should be - you ought to exercise caution in a way that's sort of - - -

PN614

VICE PRESIDENT ASBURY: Preferring one or the other.

PN615

MR HARDING: Ultimately you have to decide, based on how the principles come out of the courts, how one construes this. All I'm saying, by reference to what Madgwick J said in Kucks, is that interpreting existing words is different from what should be in an award, and that's effectively what he says. If we're on the point that construing means text and context, we don't have a disagreement.

PN616

VICE PRESIDENT ASBURY: I understand. Thank you.

PN617

Thank you for your submissions. We will reserve our decision and issue it in due course.

ADJOURNED INDEFINITELY **[1.05 PM]**