



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER JOHNS

C2022/7210

s.739 - Application to deal with a dispute

**Australian Salaried Medical Officers Federation
and
The Royal Children's Hospital T/A The Royal Children's Hospital
(C2022/7210)**

**AMA Victoria - Victorian Public Health Sector - Medical Specialists Enterprise
Agreement 2018-2021**

Melbourne

10.24 AM, FRIDAY, 24 FEBRUARY 2023

Continued from 10/02/2023

PN1

THE COMMISSIONER: Good morning, parties. Mr Ryan, can you hear me?

PN2

MR J RYAN: I can hear you very well, Commissioner. Thank you. I apologise for the muck-up. I attended the Commission rather than staying in my office on a good computer connection for a Teams meet.

PN3

THE COMMISSIONER: No, that's all right. I am physically in the Commission; I am just online.

PN4

MR RYAN: Yes.

PN5

THE COMMISSIONER: Mr Harrington, good morning.

PN6

MR N HARRINGTON: Yes, good morning. I'm here, I seek permission to appear – I can't recall whether that has been granted or not because we have been before you. Perhaps you haven't granted that yet, so - - -

PN7

THE COMMISSIONER: Yes, look, I don't know that I have dealt with it. Mr Ryan, any objection?

PN8

MR RYAN: None, Commissioner.

PN9

MR HARRINGTON: It's just a ground of efficiency, Commissioner, because it's a jurisdictional objection today. That's all we're dealing with and there are some technical matters that we might need to take you through.

PN10

THE COMMISSIONER: Yes. I grant you permission pursuant to section 596.

PN11

MR HARRINGTON: Thank you.

PN12

THE COMMISSIONER: Just some preliminary matters. A digital tribunal book has been prepared. Is there anything missing from the digital tribunal book, Mr Ryan?

PN13

MR RYAN: No, Commissioner.

PN14

THE COMMISSIONER: Thank you. Mr Harrington?

PN15

MR HARRINGTON: No, that's very good of you to have prepared that. Thank you. That's fine.

PN16

THE COMMISSIONER: What I propose to do is mark as exhibits each of the documents as per the index at the front. For example, the form F10 application will be exhibit 1.

EXHIBIT #1 FORM F10 APPLICATION

PN17

The respondent's outline of submissions on jurisdiction will be exhibit 4 and so forth.

EXHIBIT #4 RESPONDENT'S OUTLINE OF SUBMISSIONS

PN18

The next matter I just want to confirm with the parties, clause 11.7(b) of the agreement provides that:

PN19

The Fair Work Commission member that conciliated the dispute will not arbitrate the dispute if a party objects to the member doing so.

PN20

Is there any objection to me arbitrating the matter, Mr Ryan?

PN21

MR RYAN: None whatsoever, Commissioner.

PN22

THE COMMISSIONER: Thank you. Mr Harrington, any objection to me arbitrating the matter?

PN23

MR HARRINGTON: No objection, Commissioner.

PN24

THE COMMISSIONER: Thank you. All right. They are the preliminary matters I wanted to deal with. Any preliminary matters from you, Mr Ryan?

PN25

MR RYAN: No, Commissioner.

PN26

THE COMMISSIONER: I understand though you want to cross-examine Ms Kwas; is that correct?

PN27

MR RYAN: Yes, Commissioner.

PN28

THE COMMISSIONER: All right. Thank you. Any preliminary matters from you, Mr Harrington?

PN29

MR HARRINGTON: No, and I can't interfere with Mr Ryan's desire to cross-examine. I didn't think we were going to be going into evidence in that way. I thought the statements would simply be tendered. Ms Kwas is online and she is my only witness so I will be calling her first up. I don't think there needs to be an order for witnesses out in the circumstances.

PN30

THE COMMISSIONER: Yes.

PN31

MR HARRINGTON: Given that there seems to be some perceived contest on the evidence, I'll listen to that cross-examination carefully. I might have to cross-examine Mr Ryan. That's not my preferred course, because he is the advocate here today, but if I have to do it, I'll have to do it.

PN32

THE COMMISSIONER: Yes, of course. All right. In those circumstances – look, unless you have a pressing desire to make some opening statement, Mr Harrington, I have read the submissions and I don't know that I need to hear an opening statement, but it's a matter for you.

PN33

MR HARRINGTON: No, because I've filed some outline of submissions and a detailed reply.

PN34

THE COMMISSIONER: Yes.

PN35

MR HARRINGTON: Those are the arguments and I will address you on those, of course - - -

PN36

THE COMMISSIONER: Yes, of course.

PN37

MR HARRINGTON: - - - but I don't need to open. Perhaps I should go straight into calling Ms Kwas and I'll just place the Commission on notice that it's tab 5, page 27, and then - - -

PN38

THE COMMISSIONER: And tab 20.

PN39

MR HARRINGTON: - - - tab 20, page 77; the statements can be located there. Ms Kwas is online. I hope she has a copy of her statements nearby, but I'll just check that because I wasn't aware she was going to be

cross-examined. Perhaps we can call her in, Commissioner, and we can deal with it then.

PN40

THE COMMISSIONER: Yes. Ms Kwas, I can see you online. Do you have your camera available or not?

PN41

MS KWAS: I do, Commissioner.

PN42

THE COMMISSIONER: Very good. Do you have a copy of your two statements there with you?

PN43

MS KWAS: Yes, I do. I have got a copy of the court book in front of me.

PN44

THE COMMISSIONER: All right. Let me administer the affirmation to you.

<KATHRYN KWAS, AFFIRMED [10.29 AM]

EXAMINATION-IN-CHIEF BY THE COMMISSIONER [10.29 AM]

PN45

THE COMMISSIONER: Can I take you to your first witness statement, which is exhibit 5 in the tribunal book, dated 3 February. Do you have a copy of that there with you?---I do.

PN46

Are there any amendments you would like to make to the witness statement?---No, there are not.

PN47

Are its contents true and correct?---They are.

PN48

Would you have me rely upon this witness statement as your evidence in these proceedings?---Yes, thank you, Commissioner.

PN49

Thank you. That is exhibit 5 in the proceeding.

**EXHIBIT #5 WITNESS STATEMENT OF KATHRYN KWAS
DATED 03/02/2023**

PN50

Can you please then turn to your supplementary witness statement, dated 10 February 2023. Do you have a copy of that there with you?---If you can direct me to the page number, that would be - - -

*** KATHRYN KWAS

XN THE COMMISSIONER

PN51

Page 77 in the digital tribunal book?---Thank you. I do.

PN52

Are there any amendments you would like to make to that statement?---No, thank you, Commissioner.

PN53

Are its contents true and correct?---They are.

PN54

Would you have me receive that as your evidence in these proceedings?---Yes, thank you, Commissioner.

PN55

Thank you. If you wait there, I think Mr Ryan has some questions for you.

PN56

MR RYAN: Thank you, Commissioner.

CROSS-EXAMINATION BY MR RYAN

[10.31 AM]

PN57

MR RYAN: Ms Kwas, can I take you to page 28 of the court book?---Yes, I have that page in front of me.

PN58

Paragraph 14 of your witness statement, you identify the email sent on 14 February 2022 and that is marked as KK2. You see that reference at paragraph 14?---I do.

PN59

Good. Could I take you to page 33 of the court book?---Yes, I have that in front of me.

PN60

And that is the email sent on 14 February 2022?---Correct, yes.

PN61

In that email you state the position of the respondent in relation to the local agreement. Is the position you state there unique to Dr Mayne or is it a position applying to all the employees covered by that local agreement?---At that point in time I understood that to be applicable to Dr Mayne. That was the inquiry that I was making. It was in relation to a matter that she had raised.

PN62

That is at that point of time. Is the position stated as being the respondent's position - is that a position that you apply uniformly to all medical imaging specialists covered by that local agreement?

*** KATHRYN KWAS

XXN MR RYAN

PN63

MR HARRINGTON: I object, Commissioner, on the grounds that that question does not pertain to the jurisdictional objection because that question pertains to future hypothetical matters; will it apply in the future. That is not relevant to this dispute.

PN64

THE COMMISSIONER: Mr Harrington, I heard him say, 'Does it apply', not, 'Will it apply.'

PN65

MR HARRINGTON: I may have misheard, but it's still traversing ground beyond the dispute as framed back on 14 February.

PN66

THE COMMISSIONER: Ms Kwas, I think I might have you dial off for a moment - and we'll dial you back in a minute - whilst we have this discussion?---I leave and then join back in?

PN67

Yes, my associate will join you back in?---Great. Thank you, Commissioner.

<THE WITNESS WITHDREW

[10.33 AM]

PN68

THE COMMISSIONER: Mr Ryan, I suspect you're going here because you're trying to establish it's a collective dispute.

PN69

MR RYAN: Yes.

PN70

THE COMMISSIONER: Yes, I think that's the purpose of the question, Mr Harrington. It's not going to the substantive matter, it's going to jurisdiction.

PN71

MR HARRINGTON: Well, on that, that's clearly the purpose of the question. I accept that premise.

PN72

THE COMMISSIONER: Yes.

PN73

MR HARRINGTON: But the problem with the premise itself is that when one looks at the email of 14 February and what is raised there, it is concerned with calculation of payments upon termination. There is no evidence before you that any other imaging specialist been terminated recently, is on the cusp of being terminated and, therefore, is in dispute. That comes to the crux of – this is a jurisdictional objection, I accept that, but that's the point. It's about Dr Mayne. I think you understand our position on that.

*** KATHRYN KWAS

XXN MR RYAN

PN74

There is no extant or current dispute with any other medical imagining specialist at this point in time because the dispute as fairly described is one of a medical imaging specialist has ceased employment; that's Dr Mayne. Dr Mayne says, 'I wasn't paid what I should have been paid. It hasn't been calculated correctly. I'm an ex-employee.' There is no other employee in that position at this point in time.

PN75

THE COMMISSIONER: Mr Ryan?

PN76

MR RYAN: That's his argument. I'm looking at what is the evidence of this witness at that point in time, which is 14 February 2022. I'll take the witness to the language of her email and ask her questions specifically in relation to the language she has used at that point of time in relation to that email.

PN77

THE COMMISSIONER: Well, the language of the email just speaks for itself, doesn't it, Mr Ryan? You can make a submission about what it means, but I can read it.

PN78

MR RYAN: Okay, yes, it does speak for itself.

PN79

THE COMMISSIONER: Yes, so I don't know that I'm going to be assisted by further questions about the email of 14 February.

PN80

MR RYAN: Okay. I'm happy with that. This is one of those 'out of an abundance of caution' – we have asked too many questions and sometimes it is too many, too many, so - - -

PN81

THE COMMISSIONER: Yes.

PN82

MR RYAN: I will leave it though, Commissioner. The other questions I have of the witness relate to a different part of the material.

PN83

THE COMMISSIONER: All right. If I can ask my associate to bring Ms Kwas back in, please.

<KATHRYN KWAS, RECALLED

[10.37 AM]

CROSS-EXAMINATION BY MR RYAN, CONTINUING

[10.37 AM]

*** KATHRYN KWAS

XXN MR RYAN

PN84

THE COMMISSIONER: Ms Kwas, welcome back. Mr Ryan has some further questions for you?---Thank you, Commissioner.

PN85

MR RYAN: Ms Kwas, can I take you to page 39 of the court book?---I have that in front of me.

PN86

This is exhibit KK5 and it is your email to me, dated Wednesday, 9 March 2022; that's correct?---That's correct.

PN87

You're on the right one, yes, okay. That was in response to an email from me to you on 3 March 2022, which is also set out on page 39 of the court book?---Yes.

PN88

THE COMMISSIONER: Is this where you say you constructed the form F10?

PN89

MR RYAN: Yes.

PN90

THE COMMISSIONER: Yes.

PN91

MR RYAN: Ms Kwas, you note in your email that – you say, 'Thank you for providing the form F10.' Did you read the form F10 between 3 and 9 March?---Yes, I did.

PN92

So your response on 9 March was a response to having read the F10?---Yes.

PN93

The F10 itself is attached to the material in the court book. Could I ask you to turn to page 58 of the court book, Ms Kwas?---I have that in front of me.

PN94

That is the first page of the form F10. If I ask you to turn over to page 61 - - - ?---Yes.

PN95

- - - that is within the form F10. I take you to section 2 on that page, which is titled 'About the dispute' and section 2.1 'What is the dispute about?' If you have regard to what is there, did you understand at that point of time that the form F10 was raising a collective dispute?---I understood that that's what you had written in there; that's what you were proposing. Again this was a draft form F10, but in my mind the dispute was still squarely about Dr Mayne given she was the only one that was disputing her entitlement at that point in time. There was no one else that had resigned and raised this matter.

*** KATHRYN KWAS

XXN MR RYAN

PN96

But you understood that the position being put - or the position that had been put to you on 3 March, which was when the form F10 was supplied to you, was that AMA was identifying a collective dispute?---I understood that that's what you wrote in there and that's what you were proposing to file. I didn't understand that it was an actual dispute at that point in time. I think you did say it was a draft form F10.

PN97

Thank you. If I take you back to your response on 9 March - which is page 39 of the court book?---Yes, I have that.

PN98

If I take you to the email at the bottom of page 39, which is the email from myself to yourself, there is a third paragraph in that that says:

PN99

If there is any possibility of resolving this issue before I file the application with the FWC, then please contact me.

PN100

Did you consider that request or that matter?---I did. I believe I sought some instructions at the time from our then executive director of human resources – or people and culture, I should say.

PN101

Your response, as I understand it – and correct me if I'm wrong, but your Wednesday, 9 March, email, the second paragraph says:

PN102

Regrettably our positions remain different and RCH maintains there is no entitlement to the supplement payment on accrued leave paid out on termination.

PN103

That was your response to the question or the issue raised in the 3 March email, 'Is there any possibility of resolving this issue' – am I understanding that that's how the response should be read?

PN104

THE COMMISSIONER: Sorry, Mr Ryan, the language of the email just speaks for itself.

PN105

MR RYAN: Okay. Thank you. I have no further questions.

PN106

THE COMMISSIONER: Yes. Thank you, Mr Ryan. Mr Harrington, anything arising?

*** KATHRYN KWAS

XXN MR RYAN

PN107

MR HARRINGTON: No re-examination, thank you.

PN108

THE COMMISSIONER: Ms Kwas, can I thank you for your attendance here today. You're now excused as a witness. You are welcome to stay online to observe the remainder of the proceedings.

<THE WITNESS WITHDREW

[10.43 AM]

PN109

THE COMMISSIONER: Mr Harrington, as I understand it that's all your evidence in the matter.

PN110

MR HARRINGTON: That is it, thank you, Commissioner.

PN111

THE COMMISSIONER: Yes, thank you. Do you require Mr Ryan for any cross-examination?

PN112

MR HARRINGTON: I do not require him for cross-examination.

PN113

THE COMMISSIONER: Thank you. We receive Mr Ryan's witness statement, which is exhibit 12 in the proceedings.

EXHIBIT #12 WITNESS STATEMENT OF JOHN RYAN

PN114

So that concludes all the evidence in the matter. We will have some short oral submissions in closing. Mr Harrington?

PN115

MR HARRINGTON: I note the emphasis on 'short', Commissioner. I have got the message. Commissioner, obviously I rely upon the two submissions that have been filed by Royal Children's Hospital and of course I rely upon the statements of Ms Kwas that have been marked tab 5, tab 20, exhibit 5, exhibit 20, and I comment briefly just on that cross-examination.

PN116

Two things: Ms Kwas was very clear and very helpful in her evidence about her understanding of the nature of the dispute that was notified to her and I accept that's her subjective understanding of the nature of the dispute. You will make an objective finding as to the nature of the dispute, Commissioner, but it lends some weight as it were to this jurisdictional objection that Ms Kwas both stated how she understood the communications about the dispute and that it was a dispute by a single employee, Dr Mayne, represented by ASMOF in the post-employment period and nothing else was put.

*** KATHRYN KWAS

XXN MR RYAN

PN117

Secondly, it is also noteworthy that no opportunity was taken by Mr Ryan to cross-examine Ms Kwas in relation to the purported agreement for the parties in a united manner to take the matter to the Commission, because that was one of the elements of his witness statement suggesting that there was such an agreement. Now, our first proposition or submission on that is parties agreeing that something should go to the Commission doesn't strictly create jurisdiction, particularly in this private arbitral jurisdiction on section 739 looking at the agreement.

PN118

More to the point, to the extent that Mr Ryan on behalf of ASMOF in opposing the jurisdictional objection, he did not take any opportunity to challenge the reply statement of Ms Kwas that she says – and I refer here at page 77 of the tribunal book at paragraph 6 of the reply statement of 10 February:

PN119

At no time did I say yes or agree with the idea that the matter should be referred to the Commission. I deny that I stated words to the effect that I agreed that the matter should be referred to the Commission. I did not agree. From my perspective it was completely up to the AMA and Dr Mayne if they wished to take the matter to the Commission.

PN120

That was never challenged and, more importantly, KK6 – tribunal book 79 - Ms Kwas in a very methodical and organised fashion sent herself a contemporaneous file note, and it's not challenged that this file note was contemporaneous, 28 February 2022 at 10.40 to 10.50 there had been a phone call, a discussion with Mr Ryan, and at 11.25 this note – email note as it were – was recorded:

PN121

KK advised difference of views. Decision made some time back while on leave that do not pay out on termination because not part of remuneration. JR –

PN122

that's Mr Ryan –

PN123

thinks that Dr Mayne wants to press the issue. Needs someone independent to tell her she is wrong or someone to tell RC they are wrong. JR advised open to any discussion, otherwise will start preparing F10.

PN124

There is nothing in that contemporaneous note where Ms Kwas records, 'I agreed with JR (Mr Ryan) that the matter should go before the Commission and should be resolved in a private arbitral setting', so that evidence is unchallenged. Commissioner, as you say, you've read the materials filed by Royal Children's Hospital, particularly the outlines of submission. The primary submission is that as at February 2022 there was no dispute in existence between Royal Children's Hospital and ASMOF.

PN125

There was no dispute capable of forming a notification of a dispute under the agreement to the Commission because to the extent there was – and I put the term loosely – a dispute, it was a former employee, Dr Mayne, who was contending via her union, ASMOF, that she had not been paid the correct termination entitlements. There had been an improper calculation. She had not received all the money she says she should receive. In that sense it was an underpayment claim and I'll take you to the earlier communications from Mr Ryan at ASMOF which clearly make out and make reference to an underpayment claim.

PN126

If there were a dispute that was capable of notification, Commissioner, it was not funnelled through – if I can use that expression – the disputes settlement process mandated by clause 11. The steps were not taken properly, so this Commission does not have jurisdiction where a party has not complied with a disputes clause. Further, Commissioner, just as a broad based statement at the start here, I think you accept that the Commission cannot act in an advisory capacity.

PN127

It needs a real live dispute arising under the agreement where there is compliance with a dispute settlement process before you get to the Commission. The Commission then engages with the parties to identify the matter in dispute and then it seeks to resolve it. That is the jurisdiction of the Commission, because section 739 makes it clear that that is what the Commission's role is.

PN128

The Commission can't say to the parties, 'Thank you for apparently or purportedly using clause 11 and then filing a form F10, and wanting an answer to a question that you both are vexed by. Here is the Commission's advice to you.' It can't act in that capacity because the Commission's jurisdiction is only activated by the fact that the parties are objectively in fact in dispute and there has been compliance with the dispute settlement process contained in the relevant agreement.

PN129

Now, I will take you very briefly to the facts and the Kwas statement, the first statement, which is tab 5. If I could very briefly take you there, Commissioner, and that is at page 27. You will see, at paragraphs 3 to 5, Dr Mayne was employed from about 2004. Dr Mayne gave notice of the termination of her employment – as in she resigned – on 29 September 2021 and Dr Mayne's resignation took effect on 29 December 2021. None of that is put in contest. Those facts you can accept and proceed upon.

PN130

Then it is contended by Royal Children's Hospital at this jurisdictional objection that no complaint was made by Dr Mayne whilst she was an employee, so up until 29 December 2021. I use that term again rather loosely; I said no complaint was made. That is true, no complaint was made and Dr Mayne obviously is not called today, but more importantly no process was activated under clause 11 of the agreement.

PN131

Dr Mayne and/or representative and/or her union, ASMOF, did not come to Royal Children's Hospital prior to the final date of employment on 29 December 2021 and say, 'I'm worried about my termination payment calculation. I want to notify to you that this needs to be - - -'

PN132

THE COMMISSIONER: Sorry, Mr Harrington, do we know was she given like a pre-assessment of her termination payment was going to be or - - -

PN133

MR HARRINGTON: I don't - - -

PN134

THE COMMISSIONER: Otherwise, how would she know? She would finish her employment, look at her final pay slip and say, 'Oh, gee, I haven't been paid that supplementary allowance.'

PN135

MR HARRINGTON: I can't answer that from the bar table because I don't know the answer, so I'm not going to make it up. I just don't know the answer to that, what she received, and there's no evidence from Dr Mayne as a witness before you in the jurisdictional objection saying, 'Here is what I got', or, 'Here is what – I didn't get anything and then I just got a piece of paper or an email on the day I finished.' None of that is before you.

PN136

I don't say Royal Children's Hospital has been a bit tricky about that because we've taken the jurisdictional objection on the grounds that we have taken it, but if in response to the jurisdiction objection Dr Mayne wished to contend, 'How could I have activated the dispute process because I didn't know?' - and that might be a relevant matter - that's not the way this has been run by ASMOF today or Dr Mayne today. That point is not being run against us.

PN137

What I can say in a broader sense is that it was not until late January – I think it was 31 January – that Dr Mayne raised an issue or a concern with the payroll department. So she has been out of employment, say, for 33 days. It's more than a month at this point. It's the end of January and that is - on my instructions and from what I've read in the brief – the first time that something is said, so it's really quite a number of weeks post-employment.

PN138

I'm looking at the documents that F10 attaches and attachment (b) to the F10 are the email correspondence between Mr Ryan and the Royal Children's Hospital, probably the most important email. It's the first one, too, February 2022, subject 'Termination pay for Dr Valerie Mayne', so this is the first time that ASMOF has raised the issue on behalf of the former employee but probably its current member – we assume current member. In the middle of that email of 2 February 2022 it says this:

PN139

In late January, Dr Mayne received a payment from RCH but the payment is significantly lower. Dr Mayne spoke to payroll about her concerns.

PN140

So to answer your question in the broader sense, we know that much in terms of the evidence before you. That reinforces the submission of course that I'm making today, Commissioner, that it's as an ex-employee that Dr Mayne first raised a concern or said, 'I have a problem', and it was on 2 February that Mr Ryan wrote that first email. That, in my submission, is an insuperable hurdle for ASMOF and Dr Mayne here today; that the first complaint or, if you like, the first notification of any sort of dispute, happened four to five weeks post-termination.

PN141

I also place emphasis on this submission, Commissioner, that as the witness Ms Kwas said before - and it was pretty important evidence - when this was raised with her by Mr Ryan at ASMOF her focus, her consideration, her understanding was that was ASMOF coming to RCH on 2 February complaining about the termination payments and their calculation to its single only member at that point, Dr Mayne. It was not put on a broader basis.

PN142

Again if we go back to attachment (b) to the form F10 – and this is tribunal book page 16. I took you to that before. This is John Ryan, Wednesday, 2 February – subject 'Termination pay' and you will see that down the page:

PN143

The issue concerning Dr Mayne's pay involves the payment of supplementary payment.

PN144

Then this line three lines from the bottom:

PN145

I would appreciate RCH making prompt restitution of the unpaid amounts due to Dr Mayne.

PN146

If this is the commencement under clause 11 of the dispute - and that's what we understand it to be because this is attachment (b) to the form F10 – is this is, 'We're in dispute and I'm notifying the dispute on behalf of our member, Dr Mayne', the gravamen, the essence of the dispute is the union on behalf of Dr Mayne wants prompt restitution of unpaid amounts due to Dr Mayne. It's a single employee dispute, but it's a single employee dispute in respect of an ex-employee. Correspondence follows thereafter, some of which you have been taken to, but that is in a candid way the nature of the dispute.

PN147

Can I then move on to – leaving to one side 2 February – the submission I make is the form F10 is telling in and of itself. Now, again I lay emphasis on a later email, I think it early March, and you quoted it in the cross-examination. Mr Ryan on behalf of ASMOF has constructed – to use his

word, constructed – a collective dispute to try and get the underpayment issue of one employee, an ex-employee, before the Commission and that is his language. Mr Ryan is betrayed by his own candour in that sense.

PN148

The form F10 is telling, because I've taken you to attachment (b) to the form F10 and that sets out the email correspondence. That in itself sets the parameters of the dispute, save for this: that Mr Ryan as a person very experienced in this jurisdiction, who understands concepts of jurisdiction itself because he sat as a Commissioner – and this is my submission, Commissioner – Mr Ryan knows he has got a real problem. He is acting for an ex-employee with an underpayment claim in relation to termination payments and he's trying to construct it, turn it into something else. He knows he has got a big problem and he is betrayed by his own candour in that email to say that he has constructed it otherwise.

PN149

The next part of his argument in opposing this jurisdictional objection is to say, 'Well, we agreed – RCH and ASMOF – that it should go to the Commission.' That is effectively abandoned because he didn't even cross-examine Ms Kwas about that contentious agreement and the evidence about that, so that can't be right; but it can't be right technically otherwise. You can't create jurisdiction by agreement when your jurisdiction is created by the terms of your enterprise agreement and the Commission has its jurisdiction by operation of section 739.

PN150

There are other interesting issues that arise. The form F10 was in draft form and you were taken to that; draft form back in March. It was not filed in the Commission, as I read it, until 31 October. Now, that is not necessarily a matter that loses you jurisdiction in this Commission, I accept that proposition. It's not like you're trying to get an injunction 10 months after you were sacked. It's not like an equitable concept of delay is in play.

PN151

The form F10 has a date of 31 October 2022 and I assume it was filed around about that day, but the heat of the disagreement, if you like, started on 2 February and by mid-March there was a suggestion of going to the Commission. Now, the delay of effectively eight months is curious, but it is what it is; it's a fact. The problem there for ASMOF today is how can ASMOF come to this Commission and say, 'We rely upon 11.5' - which I will read out to you, tribunal book page 8, 11.5:

PN152

Disputes of a collective character. Disputes of a collective character may be dealt with more expeditiously by an early reference to the FWC. However, no dispute of a collective character may be referred to the FWC directly without a genuine attempt to resolve the dispute at the workplace level.

PN153

Well, if this is a dispute of a collective character it was not prosecuted expeditiously, so I don't know how ASMOF can contend before the Commission

that it gets some sort of traction under 11.5, because 11.5 then carries the caveat in that second sentence that even if it is a dispute of a collective character you have still got to genuinely attempt to resolve at the workplace level. Now, to genuinely attempt to resolve it, Commissioner, there are, so to speak, steps that must be gone through and at 11.2 those steps are set out. There is a reference there to the involvement of the doctor in those steps.

PN154

What we can say is this, or what we contend is this: come 29 December 2021, Dr Mayne was no longer a doctor as defined because she did not work for us any further. She had finished work, she had resigned. Come 2 February 2022 when ASMOF sends its first email - Mr Ryan sends his first email – he is probably acting on behalf of a member, but she is not a doctor as defined and she has not participated in any dispute resolution process. So the question – and I put it a bit rhetorically – is what steps were taken by ASMOF in the dispute resolution process in respect of the capital D doctor? None; there were none.

PN155

There is another problem with the invocation of jurisdiction and the evidence before you. We have taken the objection. This was ASMOF's opportunity to adduce any evidence - any relevant evidence - that there were other imaging specialists as of March 2022, as of October, the filing of the form F10, or even as of now that have a real live extant dispute with RCH over the calculation of payment of termination payments.

PN156

There is no evidence before you at this jurisdictional objection in respect of the 'collective dispute' that other members of ASMOF who are currently employed are dissatisfied and in dispute, and there is a reason for that that there is no such evidence because - - -

PN157

THE COMMISSIONER: Because they haven't been terminated yet.

PN158

MR HARRINGTON: No one has been terminated. You smile, Commissioner, but that's the critical point because if they have not been terminated or they're not on the cusp of termination, then there is no dispute. Thus, if I'm correct in that analysis, what you're being asked to do as the Commission is to give an advisory opinion. When it happens in the future, if it does happen, that someone resigns or is terminated, the Commission says you must calculate it in this manner in respect of termination pay for annual leave and long service leave.

PN159

That's what is being sought here and Sams DP – and this is in our reply submissions – was very careful and clear in his analysis saying the Commission in a private arbitral context doesn't give advisory opinions, doesn't deal with hypotheticals and we know the Commission doesn't make declarations at large as to past breaches or future rights. It doesn't do any of those things.

PN160

It does what the parties have empowered it to do where there is a dispute in fact - objectively ascertained by the Commission on the evidence – arising under the agreement. Right now the Commission, when it ascertains the contours and nature of that dispute, usually assists the parties to construct a question to answer and the Commission will then answer that question because it will resolve something that is real; a real live dispute.

PN161

The Commission will not and must not and will fall into jurisdictional error say, 'Here's an interesting question that the union is thinking about. It's a bit unhappy about what might happen in the future and the Commission is going to help the parties by just saying, "If in the future you happen to go down this pathway, here is how the Commission thinks you should deal with the matter".' That is not the function or role of the Commission in this particular invocation of its private arbitral jurisdiction.

PN162

So the submission put generally is that in the circumstances the Fair Work Commission today as presently constituted by you, Commissioner, should be inexorably drawn to these findings that the dispute that has been allegedly notified in the form F10 is notified by ASMOF in respect of one ex-employee, Dr Mayne, and that the dispute in the form F10 as filed on 31 October, many, many months after the discussions took place about this issue, is purely hypothetical, theoretical or academic.

PN163

Now, Commissioner, would it assist you further at this stage for me to take you through the formal legal submissions in my submission documents? There are two of them. I know you have read them and - - -

PN164

THE COMMISSIONER: I have read them. I don't need you to take me to them. What I would be interested in you taking to me, if you still intend to rely upon it, is the decision in *Unions New South Wales v New South Wales*.

PN165

MR HARRINGTON: Yes, that's a very recent decision and when it was notified to me that it had been handed down on 15 February 2023, it's a really discrete point because I think it's a very pithy description by the High Court. It was dealing with the concept of federal jurisdiction, but I'm taking you to paragraph 13 of the plurality in that decision and this submission is made just by way of analogy but to assist you on the definition of 'jurisdiction'. The High Court, or at least a number of judges, said this:

PN166

The judicial power of the Commonwealth is vested by section 71 of the Constitution in the High Court, and such other federal courts as the Parliament creates or vests with federal jurisdiction. 'Jurisdiction' is the 'generic term' for the authority to adjudicate.

PN167

Then it goes on:

PN168

Federal jurisdiction is the authority to adjudicate – the authority to exercise the judicial power of the Commonwealth.

PN169

Now, what I rely upon is that very pithy, nice explanation of, in a generic sense, what is the term 'jurisdiction', what does it mean. It's the authority to adjudicate and your authority to adjudicate, Commissioner, comes from the parties themselves because they have reached an agreement in their enterprise agreement that in a setting of a dispute that they can't resolve, a dispute arising under the agreement, there is a dispute resolution process and the parties at clause 11 has specifically empowered the Commission at 11.7 to arbitrate.

PN170

If, when conciliation is complete, the dispute is not settled, either party may request the FWC to proceed to determine the dispute by arbitration.

PN171

11.7(b), as you have already raised with us, either party can object. (c):

PN172

If the dispute resolution procedure results in a finding by the FWC that a breach of the savings provision –

PN173

and it goes on. Your jurisdiction, the authority for this Commission to adjudicate, is found in 11.7, that arbitration clause, and your jurisdiction is also of course given to you by the parliament because you're a statutory tribunal under section 739; disputes dealt with by the FWC. The critical subsection that RCH relies upon today in section 739 is the FWC must not make a decision inconsistent with Act or instrument:

PN174

Despite subsection (4), FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

PN175

Meaning you are only empowered, you only have the authority to adjudicate that which the parties have agreed to send to you as the Commission and that's what section 739(5) provides, and we provide an authority on that. Here there must be a dispute in existence arising under the agreement for you to have that authority to adjudicate and with the greatest respect to you, Commissioner, and the Commission, you don't have that authority to adjudicate where a single now ex-employee complains in the post-employment period about an underpayment claim and the union raises that in those terms by an email of 2 February.

PN176

Then, when that issue can't be resolved, what the union does and is candid about to the Royal Children's Hospital is to 'construct' a new or different dispute that is

apparently collective in nature; but it's not because there's no evidence of who that collective is and how they are in dispute with the RCA to this point in time.

PN177

Commissioner, I've got other notes but unless I can assist you further, there are three points that we raise in our outline of submissions and there are six points in reply, but to reinforce that last submission I was making there was no collective dispute on 2 February 2022, there was no collective dispute on 3 March 2022 and there was definitely no collective dispute on 31 October 2022.

PN178

If there were, there's no evidence adduced before you today from Dr Mayne or, more particularly, anybody else, including Mr Ryan, as to how the collective is actually in dispute with Royal Children's Hospital in respect of calculation of termination payments and to quote from Mr Ryan's 2 February email 'underpayment claims'. There are no extant underpayment claims. Unless I can assist you further, those are the submissions, Commissioner.

PN179

THE COMMISSIONER: Thank you, Mr Harrington. I have been greatly assisted. Mr Ryan?

PN180

MR RYAN: Thank you, Commissioner. Mr Harrington has made great play of the fact that I did not challenge the evidence of Ms Kwas in her supplementary witness statement and the material that is supplied therein, and I haven't. To be very blunt about this, Commissioner, the evidence that I've put in is my personal recollection and therefore my subjective view of the world at that point of time. Ms Kwas' evidence is her subjective view of the world at that time.

PN181

To the extent that there is any differences in our subjective views as to whether or not we had an agreement, I am more than happy to defer to Ms Kwas' evidence because, if nothing else, Ms Kwas' evidence makes very clear that certainly up to February 2022 there was no agreed position between the parties that there was a collective dispute.

PN182

I'm quite happy to accept that up until the communication – or the position adopted by Ms Kwas, which is at page 79 of the court book, that as of 28 February 2022 there was no agreement that there was a collective dispute and there was no acceptance by the respondent that there was a collective dispute.

PN183

THE COMMISSIONER: Mr Ryan, it seems to me that even if both parties agreed it was a collective dispute and both parties agreed that I had jurisdiction, that might be interesting but it's not determinative of whether or not I have jurisdiction. The parties can't say, 'You've got jurisdiction, Commissioner.'

PN184

MR RYAN: That's right, yes.

PN185

THE COMMISSIONER: So none of this evidence really matters at all.

PN186

MR RYAN: Well, it does, Commissioner, in the sense that at some point you have to decide whether as a matter of fact there is or is not a dispute between the parties and is there a dispute within the meaning of clause 11 of the enterprise agreement; so is it a dispute within that process.

PN187

THE COMMISSIONER: Yes, I accept I have to decide that.

PN188

MR RYAN: Okay, then - - -

PN189

THE COMMISSIONER: But your view about it as the witness and Ms Kwas' view about it aren't determinative of that issue at all.

PN190

MR RYAN: No, but they assist. What we do rely upon, Commissioner, and what the evidence of Ms Kwas given today in cross-examination, is at the very least by 3 March a dispute was identified to Ms Kwas from the applicant identifying a collective dispute. That's what the applicant identified in the proposed form F10.

PN191

That issue in dispute was identified and the issue of resolving that dispute was clearly put to the respondent. The respondent replied on 9 March – page 39 of the court book – to say that there was a dispute and it's implied because of the statement:

PN192

Regrettably our positions remain different and RCH maintains that there is no entitlement to the supplement payment on accrued leave paid out on termination.

PN193

At that point we say there is sufficient factual material before the Commission to determine that there was an issue in dispute. The issue in dispute was whether or not there was an entitlement arising under the local agreement and the local agreement is set out at page 33 of the court book. It's there in full. Was there an entitlement under that local agreement or not?

PN194

The applicant on 3 March 2022 says there was an entitlement, the respondent on 9 March 2022 says there's no entitlement. That, in our submission, is sufficient for you to determine that factually there is an issue in dispute.

PN195

THE COMMISSIONER: But, Mr Ryan, the Macquarie Dictionary defines 'collective' as 'relating to a group of individuals taken together'.

PN196

MR RYAN: Yes.

PN197

THE COMMISSIONER: Who are the members of this group who have this dispute? I know that the former employee, she is in dispute, but who are the other members of this group who are actually in dispute? As I sit here today on 24 February 2023, who are the actual people who formed this group? I don't know who they are. There is no evidence of who they are.

PN198

MR RYAN: They are members of AMA, ASMOF, employed as medical imaging specialists.

PN199

THE COMMISSIONER: How can they be in dispute with their employer about this issue?

PN200

MR RYAN: Because the AMA and ASMOF as the two representative organisations can raise that collective dispute on their behalf.

PN201

THE COMMISSIONER: But who are the members of the group? I don't know who they are. There is no evidence of there being a group.

PN202

MR RYAN: Well, okay, the evidence as I say it is to be found in the communication from Ms Kwas on 14 February 2022 which says, 'The local agreement entitles specialist payment', so there is a collective. There is an identification that there is a collective.

PN203

THE COMMISSIONER: Who are the other people who are being denied it?

PN204

MR RYAN: Well, anyone who is a medical imaging specialist.

PN205

THE COMMISSIONER: As we sit here on 24 February, no one else is being denied this and they can't be denied it because they haven't been terminated yet.

PN206

MR RYAN: No, no - - -

PN207

THE COMMISSIONER: They haven't been notified of their termination. There is no one who is a member of this group other than Dr Mayne.

PN208

MR RYAN: No, that's not correct. They are being denied it because the statement – and this is the position adopted by the respondent on 14 February 2022 – - -

PN209

THE COMMISSIONER: When it comes to terminating their employment the Royal Children's Hospital might have a different view; who knows? It's entirely hypothetical and speculative about what may happen in the future if doctors are terminated – sorry, medical imaging specialists are terminated. It's entirely speculative. As I sit here on 24 February 2023, I am struggling to see who comprises this group now.

PN210

MR RYAN: The group are the medical imaging specialists employed by the Royal Children's Hospital and who are entitled to the term of the supplement payment agreement that exists in relation to that group.

PN211

THE COMMISSIONER: Yes, but currently they're employed and when they go on annual leave or they take long service leave, they get the supplementary payment, so there is no dispute there. The group can't exist until sometime in the future.

PN212

MR RYAN: No, there is an issue in dispute there because RCH say that they're not entitled to the payment. RCH says they are not entitled - - -

PN213

THE COMMISSIONER: They get given the payment.

PN214

MR RYAN: But RCH says they are not entitled to the payment on leave, whether it's leave taken or leave paid out on termination.

PN215

THE COMMISSIONER: But they get paid it, so there's no loss.

PN216

MR RYAN: No, no, but there's no entitlement - - -

PN217

THE COMMISSIONER: There is nothing for them to dispute.

PN218

MR RYAN: Commissioner, there is definitely something to dispute. If they have no entitlement it can be taken away from them. If there is an entitlement, then it's an enforceable entitlement because it's a protected and - - -

PN219

THE COMMISSIONER: When it's taken away from them, come before me. There's no loss. You know, if the hospital is saying they don't have an

entitlement but they're paying it, these people don't have a loss. There is nothing that they have lost.

PN220

MR RYAN: They have lost the right. That is what RCH has taken away - - -

PN221

THE COMMISSIONER: They haven't lost - - -

PN222

MR RYAN: No, they have lost the right. Just because a grace and favour payment – this is in the notional sense of what RCH is doing – is being given, that's not an acknowledgment of the existing entitlement that flows to these doctors pursuant to the terms of the local agreement. They have lost an entitlement.

PN223

THE COMMISSIONER: Well, there is no utility in the proceeding. Even if they have lost that right, they actually suffer no economic loss. There's no utility.

PN224

MR RYAN: But there is a utility because it would avoid the unilateral removal of this payment at a future date by some manager at RCH simply saying, 'Well, we've decided if we don't have to pay it, we won't.'

PN225

THE COMMISSIONER: Well, Mr Ryan, by that submission you have conceded that this is all about something that might speculatively, hypothetically happen in the future.

PN226

MR RYAN: But it's not what is happening in the future, it's what has happened in the past and what is happening at the present. RCH - - -

PN227

THE COMMISSIONER: Well, to the extent there has been a breach of the agreement in the past, trot off to the Federal Circuit Court.

PN228

MR RYAN: No, Commissioner, we trot off to the Fair Work Commission. Clause 11.7(c) specifically was put in there to address these sorts of issues. If there is a local agreement that is not being properly honoured by the employer, which is where –

PN229

if a dispute resolution procedure results in a finding by the Fair Work Commission that a breach of the Savings provision of this Agreement has occurred, the parties agree that the order of the Fair Work Commission under this subclause 11.7 will be to restore all rights and entitlements affected by the breach to the state which would have prevailed if the breach had not occurred.

PN230

The breach we say is very clear; it is the denial of the entitlement. Giving it as a grace and favour payment is not an entitlement. The breach is very clearly that the local agreement would have or should have as part of it an entitlement to the payment. The hospital says no. Now, that's a breach that can be dealt with under 11.7(c).

PN231

THE COMMISSIONER: All right. Anything further?

PN232

MR RYAN: No, Commissioner.

PN233

THE COMMISSIONER: Thank you. Mr Harrington, anything in reply?

PN234

MR HARRINGTON: Commissioner, is there any matter that you require me to address you on because the only submission I have is I note my learned friend's various submissions where he has used the word 'if', if they have the entitlement, and the 'if' – and you picked up on that when you replied to him when he used the word 'if' in responding to you, he has conceded that it's hypothetical in nature and it is.

PN235

Just on the 11.7(c) submission that was just made, 11.7(c) brings a property invocation of jurisdiction that there is an extant, live, real, not hypothetical dispute. That's when you get to 11.7(c). You can't get to 11.7(c) because you've got a speculative hypothetical dispute that you fear might arise in the future. Those are the submissions unless I can assist further, Commissioner Johns.

PN236

THE COMMISSIONER: Thank you, Mr Harrington, thank you, Mr Ryan, both of you for your submissions. I've been greatly assisted by them. It's necessary for me to reserve my decision and I do so. The Commission is adjourned.

ADJOURNED INDEFINITELY

[11.25 AM]

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