TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT HAMPTON
COMMISSIONER PLATT

C2023/2154

s.604 - Appeal of decisions

Jonathan Mitchell v University of Tasmania
(C2023/2154)

Brisbane

10.00 AM, MONDAY, 19 JUNE 2023

PN1

THE ASSOCIATE: The Fair Work Commission is now in session for matter C2154/2023, a section 604 appeal listed for hearing before the Full Bench.

PN2

VICE PRESIDENT ASBURY: Good morning, could I start by taking the appearances, please? For the appellant?

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MR M MITCHELL: May it please the court, Michael Mitchell, lawyer, for the appellant. I also have the appellant, Jonathan Dougal Mitchell in the room with me.

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VICE PRESIDENT ASBURY: Thanks, Mr Mitchell. And the respondent?

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MS S MASTERS: Good morning, Vice President, Samantha Masters appearing on behalf of the respondent in this matter. I have in the room with me James Catchpole, who is appearing as junior counsel in this matter. I also have in the room Kate Chamberlain. Kate's a legal practice student who is just sitting in for the appeal. Also online, for the respondent, we have Juanita O'Keefe, who is the Deputy General Counsel for the respondent.

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VICE PRESIDENT ASBURY: Thank you. Well, given both parties are seeking permission to be legally represented and it would appear there are some matters of complexity which would allow the appeal to be dealt with more efficiently, we're satisfied that permission for the parties to be legally represented should be granted and we grant that permission. Thank you.

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I can also indicate that we've had the benefit of the detailed written submissions that the parties have filed and this is an opportunity for the parties to speak to those submissions and take us to any particular matters that you would like to emphasise. So perhaps if we can start with the appellant, Mr Mitchell. Sorry, you're on mute, Mr Mitchell.

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MR M MITCHELL: Thank you, your Honour, I'm now there. Is it convenient if I address members of the Bench as your Honour?

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VICE PRESIDENT ASBURY: Whatever you - it's not strictly required because none of us hold that position, but whatever's convenient for you, Mr Mitchell.

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MR M MITCHELL: It's a habit I've got into, if it please the Commission.

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VICE PRESIDENT ASBURY: That's fine. Thank you.

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MR M MITCHELL: So I will speak to the appellant's submissions and hopefully avoid - well, I will avoid merely regurgitating them, although there will be some repetition there.

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The appellant's submissions start with whether permission to appeal should be granted, and a summary of those points is given in the six subparagraphs to paragraph 1. I would observe, also, that further in the submissions it becomes apparent that there are a number of issues of law that get thrown up by this appeal and, in my submission, it would be expedient for the Full Bench to deal with them.

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Just briefly, I refer to the finding of Coleman DP, that:

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A consultation clause must or should contain an express provision in order to prohibit an employer from proceeding with a significant change. If the employer does not comply with consultation requirement the meaning of any orders it considers appropriation, in section 595(3) of the Fair Work Act (the Act).

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And then:

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The issue or the nature of consultation.

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I'd add there, it will also come up - it also comes up, in this appeal, the nature of this particular type of consultation clause. It is a fairly common one but it's, by no means, not the only type and, in particular, in the Mt Arthur case, which dealt with somewhat similar circumstances, the consultation clause there in the enterprise agreement was one based on the model clause. As the Full Bench put it:

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There the consultation starts with the making of a definition decision to implement a significant change or major change.

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Whereas we say that this clause, in its language, requires the consultation to occur and be completed before the decision is made.

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Another issue that arises in the public interest is the issue of whether an employee who claims lack of consultation need only show that he lost the possibility of a different outcome, as opposed to the reasonable likelihood of a different outcome. We'll be going there to the High Court decision instead which, as Coleman DP correctly, with respect, stated, applied to different facts. But looking at that, the Full Bench in Mt Arthur held that the principle instead also applies to

consultation and the - also the decision of the Full Court of the Federal Court, in QR Limited, which holding, in effect, that the likelihood of success of the consultative process is simply irrelevant. That's the way I would summarise that.

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Moving on to 1.5, the situation - I write there that it's not been covered in the cases, to my knowledge, yet it's likely to occur again, where the employee raises a dispute, based on failure to consult under an enterprise agreement, refers the dispute to the Commission for conciliation and/or arbitration. After that the employer dismisses the employee, on the sole basis to comply with the very direction, which is the subject of the dispute.

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Now, I'd add to that that I would submit that such a situation will occur again, unless the Full Bench deals with it. I'd say, with respect, the decision of Coleman DP acts as a green light for employers to deal with disputes over lack of consultation in this way. That in certain cases they may say, 'The matter's before the Commission, but we'll implement the significant change', or major change it's called, in some enterprise agreements, 'We will implement that change anyway and we'll terminate your employment for failure to comply with it'.

PN24

VICE PRESIDENT ASBURY: Mr Mitchell, sorry to interrupt you, but is this a somewhat unusual case, given that it's already gone through an appeal and that a lot of water has gone under the bridge since that occurred? I mean, ordinarily, a dispute is lodged before a dismissal takes effect. As I understand it, by the time the matter got before the member who first dealt with it, prior to the first appeal, the university was contending that it had already dismissed Mr Mitchell but hadn't done so in writing, then, subsequently, confirmed the dismissal in writing. So is this a different scenario?

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MR M MITCHELL: I'll answer two points in your question, your Honour.

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The university, at first, contended that the dismissal had really taken place on 15 March. Now, Lee C found against them on that and, as far as I know, the university is not now contending that Mr Mitchell was actually terminated on 15 March.

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VICE PRESIDENT ASBURY: Right.

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MR M MITCHELL: That, in fact, it occurred on 18 March. It wasn't something I came prepared to argue today, but I can, if necessary.

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In our submission, the facts are or have been determined that, on the, I think it was, 15 February 2022 Mr Mitchell raised a dispute, under the enterprise agreement, as to lack of consultation. On 15 March he referred the dispute to the

Commission, again, pursuant to the dispute resolution clause of the enterprise agreement. He continued to do work for the university after that, so he wasn't just sitting at home doing nothing, and on 18 March he was formally terminated.

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I respectfully agree this is an unusual case. The amount of time that's been take up since then is exceptional, but the fact is, there was five days before that.

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Now, whether it matters, one could point to a case where in case A, a worker is terminated after he has raised the dispute but before he has referred it, or, in case B is terminated after he has referred the dispute but, in my submission, that's not the case here.

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I would submit, in any case, that he important factor here, the really distinguishing factor, which I don't think has arisen in any other that I've seen, is that his termination was solely on the grounds of a failure to comply with the significant change. There are a number of other cases I've seen which have been complicated by the fact of the worker being terminated on other grounds, before the dispute resolution process was resolved.

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VICE PRESIDENT ASBURY: Mr Mitchell, I'm terribly sorry to interrupt you again, Hampton DP has got a technical difficulty with his laptop and he just needs to restart it, so I'm very sorry, we might just stand the matter down for a few minutes while that occurs and come back on the line. Sorry about that.

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MR M MITCHELL: Absolutely.

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VICE PRESIDENT ASBURY: You might just have to backtrack to that through, so if you could just bear that in mind, when we get back on the line. Thank you.

PN36

MR M MITCHELL: Certainly. Certainly. Thank you, your Honour.

SHORT ADJOURNMENT **[10.18 AM]**

RESUMED **[10.22 AM]**

PN37

VICE PRESIDENT ASBURY: Thanks, Mr Mitchell. I think you had gotten to the point where you were saying that there's a distinguishing factor in this matter where you assert that the appellant was dismissed solely on the ground of failing to comply with the direction that should have been the subject of the consultation?

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MR M MITCHELL: That is correct, thank you, Madam Vice President.

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Yes, and I have not, myself, been able to find another case like this, which I suppose one could say is because no other employer has attempted it, in the past. That may or may not be so.

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Yes, so I'll move on now to the specific grounds of appeal - - -

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VICE PRESIDENT ASBURY: Sorry, before you move on, Mr Mitchell, can I just also confirm that, as I understand it, the decision by Lee C that was subject of the first appeal involved an interlocutory decision. So, as I understand it, the appellant in that first proceeding, if I can refer to it as that, applied for an interlocutory decision to prevent the termination being carried out while the matter was on foot, and that was dismissed by Lee C, in an interlocutory decision. There was no appeal of that interlocutory decision, as I understand it?

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MR M MITCHELL: I think - I'm going by memory at this point, your Honour, but when the proceedings were failed, on 15 October - I'm sorry, on 14 March 2022, the orders sought were an order that consultation take place and an order preventing the respondent from dismissing the appellant.

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VICE PRESIDENT ASBURY: Yes. It was an immediate order forbidding the respondent from taking any action which may exacerbate the dispute, until the resolution of the matter, by arbitration. Then, on 21 March, Lee C says, in his decision that he made an interlocutory decision where he declined or me made an ex tempore decision, on an interlocutory basis, where he declined to make the orders sought.

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MR M MITCHELL: Yes. Now, there's not dispute that the appellant was terminated on 18 March. I'm just trying to recall if there may have been a hearing that day, on 18 March, but that, in any case, I think the termination had already occurred.

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At any rate, by the time the matter was later dealt with, by Lee C, the appellant was seeking an order that consultation take place and an order that he be reinstated. So I think it was a case that events had overtaken the original interim orders sought, in the form F10, the termination was a fact and that what was now being sought, when the matter came again before Lee C, I forget the exact date, but this was after 21 March, what was being sought was an order to reinstate the appellant.

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VICE PRESIDENT ASBURY: Is this, perhaps, unusual, Mr Mitchell, because in the ordinary course of events a person - and applicant, in that circumstance, would make an unfair dismissal application, upon being dismissed?

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MR M MITCHELL: it may well be, your Honour, that if the - I know that there are three or four other cases that I've seen where a termination, after the event, has complicated dealing with an application of this nature, where the reason for termination has been a redundancy or some other factor. At least some of those have come before the Commission, on an unfair dismissal basis.

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As I say, this was a different situation. This is, we say, and this will be relevant later, when looking a the claims or the findings by the Deputy President, of a situation being too remote. We say that the termination was intimately bound up with the very stratum, if you like, of the dispute itself.

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VICE PRESIDENT ASBURY: Or arguably, though, the appellant had at least two other options. One was to make an unfair dismissal application and the second one was to make a general protections application alleging that he'd been dismissed because he engaged in a process, under an enterprise agreement.

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MR M MITCHELL: Your Honour, he may well have - it may have been theoretically possible for him to do so. The first thing I would say to that is that he was before the Commission. He was before the Commission seeking an order, direction, however you like to put it, that the employer engage in the consultation which he said it had not engaged in. It had not even attempted to engage in, from his perspective. The appropriate course was to deal with that there.

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It was also necessary that it be dealt with as a precursor to an order for consultation to take effect. Unless he was reinstated, there'd be no point in making orders for consultation.

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I'd add one other thing too, that I don't think the evidence supports - I'm not locking my client into this, but I don't think the evidence supports a contention that the university terminated him or took adverse action against him because he had a workplace right.

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The university terminated him, and they were really very careful to make this clear in their letter of termination, that he was being terminated for failure to get vaccinated. I can't think, off hand, of any evidence that would exist that says that the university terminated him because he had a workplace right or because he exercised it. I might be wrong about that, but - - -

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VICE PRESIDENT ASBURY: Okay. Well, assuming that's the case, he still had an option to make an unfair dismissal application and seek reinstatement.

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MR M MITCHELL: He could, if he wanted to start separate proceedings covering the same subject matter, that is true.

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VICE PRESIDENT ASBURY: Or he could have filed a protective application, on the basis that he was protecting his position in the event that he - by seeking the consultation and then making an - because reinstatement is exactly the remedy you can get for an unfair dismissal application. It's not usually the remedy that one seeks by way of a dispute settlement process.

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MR M MITCHELL: Yes. Well, this - indeed, we say this is part of what has affected the reasoning of Coleman DP. We say that has wrongly looked at other specific jurisdictions of the Commission and, in effect, said, 'Well if something's provided for under that jurisdiction, you can't get it under this jurisdiction'. What we're saying is that that's not right. Subsection 595(3) says that:

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The Commission, on such an application, has an -

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If you like:

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unfettered right to make whatever orders, provided that they are appropriate to resolve the dispute and that they don't contract the Act or an enterprise agreement.

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But there's nothing to stop the Commission, on this sort of application, making orders that may also be available to it, under other matters. It would be similar to pointing out that - well, I'll just leave that there, that summarises our response to that.

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

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MR M MITCHELL: May it please the court.

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We'll move on to the particular grounds of appeal and I did realise, after writing it that, in fact, many of these grounds could be grouped together, so I'll do that a bit further along.

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Now, ground 1, this would normally be part of one of the other grounds of appeal, but it does appear that the Deputy President has, effectively, held that if clause 12 of the enterprise agreement is to prohibit the respondent from implementing the significant change before consultation is completed, it has to expressly say so.

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Now, we say that this is an error in construction, that the language of clause 12.2 of the enterprise agreement is mandatory in requiring the consultation take place before a proposed change is introduced.

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Now, we've referred to the words 'will' and 'shall', in clauses 12.2(a) and (c), and also, in particular, clause 12.2(f), which refers to the employer having to give feedback to the worker or workers on how it took the consultation received from them into account in making its decision. So our contention is that there may not be a separate subclause to this effect, but it is quite clear that the construction of this consultation clause requires the consultation to be carried out, to be completed, before a decision is made to implement the significant change.

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Now, on ground 2, this is a point that is almost incidental, but the fact is that the Deputy President did hold that the scope of clause 15.3, clause 15 is the dispute resolution clause in the enterprise agreement, and it is the clause which says that:

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No action should be taken to exacerbate the dispute before it is referred to the Commission.

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Now, normally it would not be something that we would need to consider here, because the matter now is before the Commission, but the fact is that the Deputy President, we say, didn't take - he seems to have held that clause 15.3 didn't apply at all to this situation and, as we point out, the employer was taking adverse - sorry, the employer was taking action likely to exacerbate the dispute even before it was referred to the Commission. That is, for what it's worth, a breach of clause 15.3.

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Now, ground 3, we then come to clause 15.4. The - - -

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VICE PRESIDENT ASBURY: Sorry, can you just take us to where the Deputy President dealt with 15.3, in the way that you're saying?

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MR M MITCHELL: May it please the court, it's paragraph 25 of the decision. Now, in paragraph 25 the Commissioner says:

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First, the scope of clause 15.3 does not extend to the subject matter of the present dispute. The vaccination requirement was not a change in 'work staffing or the organisation of work'.

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Whereas we say that you've go to read further, to the words:

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Nor will any party to the dispute take any other action likely to exacerbate the dispute.

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VICE PRESIDENT ASBURY: So you say 15.3, the various matters in subclauses (a), (b), (c) and (d) are read separately so that 15.3(b) can refer to:

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A dispute about change work staffing or the organisation of work, and any other dispute arising under the agreement.

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MR M MITCHELL: Yes, I take your Honour's point. I don't think that - I think I actually was going further than that. Just excuse me for just a moment. I thought I had this open and I did not.

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VICE PRESIDENT ASBURY: So 15.3(b). So wasn't the point that if that prevents anything from happening it's about a change of work staffing or the organisation of work, if that is the subject of the dispute, 'nor will any party to the dispute', and the 'dispute' refers to a dispute of the kind in (b). That was the Deputy President's finding. So are you - well, essentially, the effect of what he was finding. So do you way that was wrong, that he should have read the second part of the sentence as applying to any dispute?

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MR M MITCHELL: Just excuse me for a moment, please, your Honour.

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Yes. Yes. Your Honour, what he has said - clause 15.3 deals with a dispute that comes under the ambit of clause 15. He says - clause 15.3(b) only says that:

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You must not change work staffing or the organisation of work, if that is the subject of a dispute.

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But we say, no, it goes further than that. The words 'nor will' is saying that there'll be no action taken by either party likely to exacerbate the dispute. So, yes, there is a clear difference in the construction of clause 15.3(b), between the Deputy President and what the appellant is saying.

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The Deputy President perhaps, by implication, is - well, I don't know because he didn't refer to the second part of clause 15.3(b), so I don't know, with respect, whether he saw the second part, after the word 'nor' as being somehow subordinated to the first part or if, perhaps, he overlooked it.

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But at least - - -

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VICE PRESIDENT ASBURY: I accept it's not mentioned, but there is a fairly long line of authority in Fair Work Commission decision that says, 'A statement that's simply to the effect that work will continue in the normal manner', for example, is not a mandatory requirement that the status quo is maintained before the dispute. Clearly, the Deputy President, the effect of what he's said, I accept he doesn't specifically deal with the sentence in 15.3(b), but I think the effect of what he's said is that that clause, 15.3, is generally confined to a dispute of the kind, well, a dispute about work.

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MR M MITCHELL: Yes. Well, the difficulty with that is that the first part says, 'Management shall not change work staffing or organisation of work'. The second part refers to any party. Now, my client can't change work, staffing or organisation of work, yes, but - - -

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VICE PRESIDENT ASBURY: Okay, so effectively you're saying that the Deputy President has misconstrued 15.3(b) and should have had regard for the fact that that clause applied - the second part of the clause applied to any dispute.

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MR M MITCHELL: Yes. I think - yes. Yes. Look, I think that sums it up as well as I could put it, if it please the Commission.

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VICE PRESIDENT ASBURY: Okay. I understand your Commission, thank you.

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DEPUTY PRESIDENT HAMPTON: Mr Mitchell, and, firstly, apologies for the interruption earlier, the laptop just decided to reboot itself in the middle of a hearing, very unhelpful.

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But I think one of the issues, on 15.3, is the import of 15.3(c). That is

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> *The (indistinct) shall not be referred to the Commission by any party to the dispute until the internal dispute resolution process has been completed.*

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To speak for myself, that would tend to suggest a wider import than merely change to work staffing or organisation of work, because that appears to apply to all disputes under the internal dispute resolution process.

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But, as I said, that's only my preliminary views and I'm clearly only speaking for myself.

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MR M MITCHELL: Yes. Your Honour, that - taking that also further, there's subclause (a):

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Work shall continue in the normal manner.

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Which, again, would imply that there shouldn't be changes to work continuing.

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DEPUTY PRESIDENT HAMPTON: I think the difficulty with that though is that refers to 'work', which, perhaps, if it does take you back to the first line in (b) but, nevertheless, as the Vice President's already indicated, that phrase has generally not been applied to prevent parties taking actions that they are already able to do.

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MR M MITCHELL: Sure. I take your point, your Honour.

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DEPUTY PRESIDENT HAMPTON: Thank you.

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MR M MITCHELL: Yes. So I'll move on from that, if I may.

PN104

In ground 3 the Deputy President held that the respondent's non compliance with clause 15.4 was inconsequential. We say that that's not the case. A failure to engage in informal dispute resolution always has consequences, the most obvious being that if it had occurred it may be that this dispute could have been dealt with before it even went to the Commission.

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Now - - -

PN106

VICE PRESIDENT ASBURY: Mr Mitchell, I accept that there are disputes whereby the Federal Court has said, and take the QR dispute, for argument's sake, the QR matter that you referred to earlier, where there's quite a long statement, I guess, on the meaning of consultation. That dispute was about a general change, with respect to work arrangements for the entirety of the workforce and the company did engage in consultation but it was found not to be meaningful consultation because it didn't occur in a way that allowed for people to have a say about how the change that the company was contemplating might have been implemented. But isn't that a matter of discretion?

PN107

I mean the Deputy President here found that this is a safety matter. It was in the consequences of a pandemic. The university was trying to take steps to protect the many, as opposed to, you know, balancing the rights of the few. Why isn't it a matter of discretion for a member of the Commission to say, 'As a matter of discretion, I find that consultation would not have likely changed the outcome of this matter', because the appellant would have stuck to his position and the university would have stuck to theirs. It wasn't going to let him work from

home. It wasn't going to let him enter the premises unvaccinated, so therefore why isn't it within the Deputy President's discretion to make that finding really in the way of utility?

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MR M MITCHELL: Well, your Honour, I haven't actually come to that point yet.

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VICE PRESIDENT ASBURY: Okay.

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MR M MITCHELL: I do have quite a bit to say about that. The only point we're saying, at this stage in the submissions, is that it's simply not open to the Deputy President to say that a failure to engage in informal dispute resolution, which was mandated by the enterprise agreement, cannot be called inconsequential. It's very important because it can stop these things going any further.

PN111

If you take the attitude that the university did, where it didn't even, I think by admission of its counsel in the hearing below, the university didn't even think about its obligations, under the enterprise agreement, during the supposed consultation phase. But if it had, we may not be here now.

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Now, ground 4 I think can be dealt with among the others.

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Ground 5, we say the Deputy President erred in holding that the deficiencies in the respondent's consultation process did not render the vaccination requirement unreasonable.

PN114

Now, this is bound up with the submissions on the following grounds as well. But in going now to paragraph 6.2, the Full Bench, in the Mt Arthur appeal, set out the principles applying to consultation obligations, under industrial instruments and that, of course, was also a case of a vaccination mandate.

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It includes that management -

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And I should observe here, the Full Bench, in Mt Arthur, it first looked at the issue of consultation, under work health and safety legislation. It found that there was very little law on the issue and so it looked, for guidance, to the principles applying to consultation, under enterprise agreements. Thus the Full Bench's remarks are applicable to both.

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As it happens, in the Mt Arthur case, the enterprise agreement clause was modelled on the model clause and therefore provided that consultation could occur, in fact had to occur, after a decision was made, and therefore the Full

Bench opined, obiter, that the workers probably wouldn't have succeeded on that ground. But that's by the by.

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Now, the Full Bench held that:

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Management must, here, consider and take into account the views of workers.

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Which did not occur in this case. The Full Bench observed:

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We note, however, the respondent did not invite the employees to contribute scientific medical or safety data, or inform them that such information may influence its assessment and recommendation for COVID vaccination as a workplace entry requirement. Further, any such information would not be the only relevant information that might be obtained by the respondent.

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In fact, we say there is a huge deficit here that they didn't - the university wasn't interested in the industrial effects of this and didn't invite consultation on it.

PN123

I'll go into this in more detail shortly, but I've just got on my notes here, one of the points was that Mr Mitchell wasn't on the Tasmanian campus. The main issue that's stated by the university for why it was looking at a vaccine mandate, one that was not required by government ordinance, was that the borders of Tasmania were going to open shortly and there would be a change in the level of risk within the whole community. The university did not invite - did not, in fact, allow any possibility of submissions, that is consultation, on how this related to the New South Wales campus, where Mr Mitchell was. There was no opening of the borders coming up, the risk situation in New South Wales was what it always had been and would continue to be.

PN124

There was also no invitation to consider the duration that such a mandate might last for and how that would affect, for instance, working from home. That's thrown into relief in this case, because we know, on the evidence, that by July, the following July, seven months later, the university was no longer enforcing a mandate on campus. People who were known to be unvaccinated were freely going onto campus.

PN125

Mr Mitchell's evidence is that he was working, effectively, from home. There doesn't seem to have been any consideration and, importantly, no invitation to - I'm sorry, no consultation as to whether provisions relating to working from home could be dealt with in a certain way.

PN126

I'm just moving on now to the following, where I summarise grounds 6, 8, 19, 15 and 24, it's really the same issue. I refer there to error in holding that the respondent engaged in substantive consultation, that there was real and substantive consultation about the scope and effect and then deal with it, but it is really the same point.

PN127

Now, the respondent asked a very limited series of questions in a survey prior to the decision being taken to implement the proposal, and that occurred - well, it was notified to everyone on 9 December 2021. The only thing that could be called consultation was the sending out of the email with, I believe, five questions on it.

PN128

None of those questions concerned the effect of the proposal on workplace conditions or employee entitlements, nor did they concern the difference between the Tasmanian workplace and the New South Wales workplace, where Mr Mitchell, in fact, worked. Nor did they ask for consultation or submissions or thoughts from working from home, whether exceptions might be made for that.

PN129

In fact, four of the questions, I think I'm saying rightly here, all but one of the questions didn't allow anything actually to be written, they were multiple choice questions.

PN130

Now, the fifth question did allow the appellant to write his own answer, but it was only on the issue of vaccine safety. Now, vaccine safety is an important part of this but it's by no means the only issue.

PN131

Now, we furthered that the answer that he did write was never passed on to the university executive team which made the decision on implementing the proposal. It was read by Mr Arnold, he discussed it with his team but he never passed it on to the people who were actually making the decision on implementing the proposal and how it was to be implemented.

PN132

Now, I should add, at this point, it's a point I'm going to come to a bit later, but there seems to be an assumption in the reasons of Coleman DP that the only possible outcomes of consultation were either mandate or no mandate, that it was a binary choice. We say that's not the case. Relevantly to Mr Mitchell's situation there could have been a number of areas on which the university could have nuanced how a mandate was introduced. I've already referred to some of those, particularly how it affects him working from home. Therefore, of course, there's a number of ways in which he could have responded to it or, for that matter, that he could have said if the university had replied to his concerns, even the concerns that he wrote about the one limited factor that he was asked, which was vaccine safety, if they'd replied to that who knows how he might have reacted, but they never did.

PN133

Now, I'm dealing, of course, at this point with the situation prior to the decision being made on 9 December. I'll come a bit later to the suggestion that consultation could occur after that.

PN134

What we say is that the respondent never replied to the appellant's response to the survey. The university executive team never even saw it, and it didn't reply in the terms required by clause 12.2(f)(i), which mandates that the employer must give the worker or workers feedback on how what they said was taken into account, nor was it replied to in any other sense.

PN135

So we say the appellant was not allowed meaningful input into the decision, which is the meaningful input is the expression that's being used, for instance, we refer there to WorkPac Mining. It's similar - similar expressions are used in the Mt Arthur decision.

PN136

Now, in 7.2, I move on to the point 'after', after the decision as made on 9 December 2021, Coleman DP said - he effectively said a defect in consultation or default in consultation can be cured by later consultation.

PN137

Now, our submission to that, firstly, is, no it can't be. Clause 12 of the enterprise agreement is quite clear that the consultation must take place before the decision is made. If, as in this case, the university didn't even think about its obligations, under clause 12, then the proper response, as soon as it was alerted to this, and it was alerted, verbally, by my client in December 2021 and he formally raised the issue, in writing, in January 2022 and by February 2022 he had formally raised a dispute as to lack of consultation.

PN138

What the university should have done was say, 'You're right, let's now consult. We'll rescind the decision, at least as to how it affects Mr Mitchell, let's to the consultation', but they doubled down. In fact, at that stage they were denying that there was even an obligation to consult. They also tried the argument of saying, 'The time to talk about that has passed', but it hadn't.

PN139

Now, we know, from the example of Sunders DP dealing with the matter, in Mt Arthur. After the Full Bench found that adequate consultation had not taken place it was remitted down to Saunders DP. He supervised the conduct of consultation. Apparently there was quite a bit of dispute involved there, between the parties, as to what was consultation and whether it had occurred and, of course, there was not just one worker, there were many workers there. Even so, as I counted, from his judgment, the entire supervised consultation process took nine days, and it was done.

PN140

Now, I must emphasise here there is absolutely no basis for considering that a consultation process between Mr Mitchell and the university would have been hostile or fraught with argument, there's just no basis for that, because all we have to do on is that he set certain things out in writing at different points and no one ever responded to it. It is quite likely that if the consultation had been conducted it would have been over in a few days but the fact is they didn't do it.

PN141

Now - sorry, I'll return to my point there, about the suggestion that consultation could occur after the decision was made. We say it couldn't be. But even the consultation that did take place, it doesn't actually amount to consultation. Mr Mitchell made a proposal to work from home while being unvaccinated. The fact is, it was never responded to. There's no indication it was ever considered. The first time it was responded to, I believe, was in the letter terminating him.

PN142

He made a response to a show cause letter. Well, we say a response to a show cause letter cannot, by its nature, amount to consultation, as required by clause 12, it's a completely different animal. In any case, there is no evidence that what he wrote in the show cause letter was ever passed on to the university executive team, nor to anyone to whom the university executive team had properly delegated the role of consultation, under clause 12.

PN143

This issue was raised by myself, in written submissions, for the hearing before Coleman DP. The other side were on notice of it. They could easily have called Ms By(?), the person who dealt with the termination process, to give evidence that she passed on information that was given to her to the university executive team to some how try and cure the deficit in clause 12, but she was not called. In any case, it appears to be quite clear that the issue of consultation, under clause 12, just was not on the table at that stage.

PN144

DEPUTY PRESIDENT HAMPTON: Mr Mitchell, it does strike me, though, that what the Deputy President was doing here was not whether or not the consultation actually cured, in the sense that the university hadn't failed to follow its consultation obligations, in a sense that was already conceded, at least by the time he was dealing with it. What he was trying to grapple with was whether or not the whole context meant that the direction was unlawful or unreasonable, I think, was the focus of the discussion. So it seems to me that when you talk about post decision consultation not correcting the implementation of the policy, well, look, in a sense, that's not really the point because that was already conceded.

PN145

What's being considered, in this part of the decision at least, whether or not the post decision factors that, 'Look, in the end, actually the consultation didn't make a difference'. It seems to me that's the point of the discussion here, not trying to post facto correct the consultation but to decide whether or not it made a difference.

PN146

Now, I appreciate you have a different proposition as to whether or not that approach should be adopted at all but, just using the framework of the Deputy President's approach at the moment, it seems that's what's going on here, not sort of retrofitting the consultation back into the original obligation.

PN147

MR M MITCHELL: I would agree with that characterisation, Mr Deputy President, I'd just add there that I think it appears to me that Coleman DP's reasoning was influenced by at least one decision which was brought under unfair dismissal jurisdiction. I think it might have been the case of Sommerville, I'm not sure. But that, again, gives rise to a difficulty because under unfair dismissal, where the Commission is considering solely the issue of fairness of a dismissal, it is - well, in fact, they are required to consider what consultation took place on that issue, on the issue of dismissal before it occurred. That may well have led him down that path, with the greatest of respect. But, yes, we say that that's not the issue here. Please the court.

PN148

On to ground 7 and this, again, is one that really shades into the same overriding issue. We say that the Deputy President erred in holding that the respondent only failed to comply with subclauses (v) and (vii) of clause 12.2(c), in the enterprise agreement.

PN149

Now, from a formal perspective, we say that this is an error of law. Now, it's probably more important to look at the - I'm sorry, I withdraw that.

PN150

We say that this this is an error of fact. I'll be looking, shortly, at the implications of this but, nevertheless, we say that this is clear and objective error, this is not a matter of discretion. I probably didn't fully cover that, the previous issues that I was talking about, I think there's a couple there that are errors of fact not of discretion but, anyway, I will deal with this now.

PN151

Now, the respondent, in her submissions, my friend, in her submissions, has referred to the requirements of clause 12 as 'technical requirements'. I think a slightly different term, 'procedural requirements', was the way they were referred to by Mr Collinson, in the matter below.

PN152

We say, right at the outset, the particular requirements of clause 12 are not merely procedural or merely technical, they are specific obligations imposed by the enterprise agreement. So we say that the enterprise agreement can be broken down, broadly, into two issues of consultation that it imposes.

PN153

First, there is a general obligation to consult and that must be construed in the way, for instance, that the many cases have done. There are also specific requirements that are part of the consultation. Some of those specific

requirements, no doubt, would also be part of a general consultation meaning at common law, but they also stand on their own as obligations that were imposed on the employer.

PN154

Now, we refer specifically to subclause 12.2(c)(i) of the enterprise agreement, 'The nature of the proposed change has to be stated'. Now, it referred to preventing unvaccinated and unexempt persons from entering the Tasmanian campus. It did not say that they would be prevented from working for the university in any capacity whatsoever, which was what was actually imposed. So that, we say, is a clear breach of (i).

PN155

Subclause 12.2(c)(iii):

PN156

The survey did not set out the expected effect on affected employees, and measures to identify and mitigate any adverse effects.

PN157

At that stage I believe the evidence shows, I can't think of the exact reference here, but I believe the university was already aware that it was looking at about 80 terminations, or 80 people ceasing to work for the university. I think that figure is mentioned at some point.

PN158

It seems clear that they had expected that there would be terminations. Now, they needed to be saying that, they needed to be saying how this was going to occur, why it was going to occur and how it may be dealt with and invite consultation on that issue.

PN159

Mr Mitchell, no doubt, would have been saying at that point, if he'd been given the opportunity in the survey, 'Well, look, I can actually do most of my work from home', noting that at that point what he was dealing with, it had been asserted the nature of the change was to stop people coming on campus. So he would be able to say things like, 'Well, the New South Wales campus is different to the Tasmanian campus. My situation is different to the situation of some other employees'.

PN160

Now, going on, subclause 12.2(c)(iv), they're required to formally state the consultation period, it wasn't there. 12.2(c)(v), the proposed implementation timelines, I think in the particular context there, were not stated. 12.2(c)(vi) did not set out existing and proposed organisational structures where structural change is proposed. Well, that's really the same point as (iii) where the respondent's - it looks like I have given the reference, the respondent, in fact, expected significant termination and/or working from home as a result of the proposed changes, it just wasn't mentioned.

PN161

Subclause 12.2(c)(vii), 'No university contact for feedback and questions was provided'. As I say, the appellant was restricted to answering four multiple choice questions and providing written comment on just one issue, vaccine safety.

PN162

Finally, 12.2(f):

PN163

The respondent did not explain, in writing, which is what it's required to do, how the feedback received from the appellant, on the proposal, was taken into consideration.

PN164

Now, let's say, well, this is not surprising if, in fact, as I believe Mr Collinson conceded below, the university just hadn't considered its obligations, but there they are.

PN165

Now, moving on to ground 10:

PN166

The Deputy President erred in holding that the appellant was able to put forward his views and arguments in response to a show cause letter and that such response was relevant to consultation.

PN167

Now, I appreciate the point raised by Hampton DP, just to - I'll just check that I've covered everything here. So we're saying, 'Look, this is 4 March 2022, the university executive team have made the decision to implement the proposal of 9 December'. I do expand a bit more on the difference between this sort of response and a consultation.

PN168

He's facing immediate termination of his employment. He is explaining his immediate intentions and the reasons for them, not his approach to consultation. That becomes important later when Coleman DP infers, from his answers to show cause, that Mr Mitchell wasn't open to change his mind. But the nature of a response to a show cause letter, which he prepared entirely himself I might add, he had no legal advice to do that. He is trying to prevent being terminated that day, the next day, two days later, whatever, it just can't be used as a substitute for that consultation.

PN169

VICE PRESIDENT ASBURY: Mr Mitchell - sorry, you go ahead, Hampton DP?

PN170

DEPUTY PRESIDENT HAMPTON: Mr Mitchell, look, it just strikes me, just in the real world though, that if there was ever a point where a worker would say, 'Look, I am open to options', or, 'I am open to having a vaccination of some description', at the point of losing your job, would be the very time he would, presumably, raise that.

PN171

MR M MITCHELL: Your Honour, I suggest, with respect, that that puts the cart before the horse a little. What should be happening is that the university first consider what he's got to say on any relevant issue and then the university (a) explain whether it's prepared to change any detail - well, not any detail, but any part or how it's going to implement the proposal. So as I said before, this is not a binary issue, it's not between vaccination mandate or no vaccination mandate.

PN172

The university might, for instance, after considering what he has to say, say, 'Well, all right, in your case we'll allow you to continue to work from home', because that's feasible.

PN173

Then after that - I'm sorry, as well as that, the university may well reply to his concerns on vaccine safety and say, 'Look, we don't think you've got this right. We don't think the safety issues are as bad as you think, here's why'. Then he's got to consider how he responds to it, that's part of the consultation process. It is quite possible that Mr Mitchell, on hearing what the university had to say, may give ground on his position.

PN174

VICE PRESIDENT ASBURY: But, Mr Mitchell, you're assuming that this is the kind of change that to be reasonable an employer has to engage in some kind of scientific debate with its employees about whether something's safe, in the context of, we have, as has been found in very many decisions of the Fair Work Commission, there is a national authority, the Therapeutic Goods Administration, that is responsible for making decisions about what is safe and not safe. So the employer could have simply said, 'Here's a link to the Therapeutic Goods Administration website, or the ATAGI website, go and read the material because we already have and we're not going to engage in a debate with you on scientific matters'.

PN175

Had the respondent done that, speaking for myself, I would have said, 'That is entirely reasonable' because there's no basis for employers wanting to implement a safety requirement to have to engage in two and fro debate with people about their personal views on vaccination safety or things that they've gotten off the internet, or whatever else they want to engage with. The employer is entitled to say, 'We rely on the advice from the government appointed experts'. And I think if you read anything in Mt Arthur Coal, it's that that kind of advice is just not - it's not debateable.

PN176

The Full Bench, in Mt Arthur Coal and every other Full Bench ever since and every Commission decision that's got any substance and must be followed, has not made any findings to the contrary about what the Full Bench said in Mt Arthur Coal about the efficacy of vaccinations as the most effective way to control the contagion and the spread of the COVID-19 virus.

PN177

So for my part , in any event, I don't know that the university was required to engage in a back and forth debate with Mr Mitchell about his views on the safety of the COVID-19 vaccination.

PN178

The other point I'd ask you to address is, in 12.2(g), which you referred to, what is the - where does the vaccination policy come in, in that definition? Where do you say it fits in to 12.2(g)? Which one of those is it?

PN179

MR M MITCHELL: If I can start with your first point and then perhaps be reminded about the second.

PN180

VICE PRESIDENT ASBURY: Yes.

PN181

MR M MITCHELL: Your first point, I respectfully submit, covers about four, but the short answer is, does the university need to do back and forth? Well, it didn't do back and it didn't do forth. That's the situation we're dealing with here. The university never attempted to respond. It invited Mr Mitchell to write what he thought about vaccine safety, that was the only thing it invited. It didn't invite anything in detail form him about any other aspect of this decision. In particular, whether it applied in New South Wales as well as Tasmania. Whether it applied in the same way. Whether it could be dealt with by him working from home. It did invite comments on vaccine safety, it chose to do that. There's no evidence - well, it certainly did not reply, there was no response, and it does appear that what he wrote was never put up to the university executive team anyway. They couldn't reply because they didn't know about it.

PN182

VICE PRESIDENT ASBURY: I don't know that that was the evidence. As I understand it, the evidence was that the university had a person who did have regard to the comments that were made and prepared some form of summary about them, I think is referred to in the Deputy President's decision.

PN183

MR M MITCHELL: Absolutely.

PN184

VICE PRESIDENT ASBURY: Yes, so someone extrapolated the commentary and, you know, the fact - - -

PN185

MR M MITCHELL: Absolutely.

PN186

VICE PRESIDENT ASBURY: So there was evidence it was considered, but I accept there was no evidence that the appellant was informed that it had been considered.

PN187

MR M MITCHELL: Your Honour, I'd go further than that and say the evidence is quite clear that the issues raised by Mr Mitchell were not passed on. Mr Arnold tells us what he passed on to the university executive team and it does not include anything raised by Mr Mitchell. It's therefore perhaps - well, not at all surprising that there was never any feedback to him.

PN188

Now, if I can develop that a bit further, in relation to the question that you asked, would it be acceptable for the university or the employer, in its response, to point to particular issues, particular statements by, I think ATAGI is where you were intending to go.

PN189

VICE PRESIDENT ASBURY: Or the Therapeutic Goods Administration, which approves vaccinations for administration in Australia.

PN190

MR M MITCHELL: I think the predecessor to the Therapeutic Goods Administration approved Thalidomide, with respect, your Honour, which my mother missed out on taking by one month. But I would have - I would submit that the issue is ATAGI and what it says about vaccine mandates and vaccine safety.

PN191

Yes, it could have responded to that. That would have been, at least, the start of a very good response by saying 'Okay' - well, we don't know how many people actually replied to that question about vaccine safety, we know there was at least one other person who had issues because Mr Arnold says that he met with them personally. But a useful response to anyone like that would be, 'Look, we've got these points here, written on public websites, but you may not have seen them, please have a look at those'. But the university didn't do that. It made no attempt to - as to whether that would be sufficient, I mean I can't say as I sit here, but it certainly would have been a start.

PN192

VICE PRESIDENT ASBURY: Given the appellant had sent a 33 page document, setting out his views on vaccination, as is recorded in the decision, I doubt referring him to the appropriate administrative authority to regulate vaccination in Australia and to declare it is safe for administration is going to change anything, Mr Mitchell, for my part.

PN193

MR M MITCHELL: Well, I would submit, your Honour, that there is simply no basis for such an assumption. He served a 33 page document as to why he should not be terminated. When he was asked by the university, way back on 23 November 2021, to answer a question about vaccine safety, he gave about a dozen lines and then spent the next two or three months trying to get a response. That's the situation here.

PN194

VICE PRESIDENT ASBURY: Yes, I understand your submission.

PN195

MR M MITCHELL: I think, Madam President, I think your question was about 12.2(g), is that right?

PN196

VICE PRESIDENT ASBURY: Yes, where this fits in to 12.2(g), because I think that was a finding the Deputy President made as well, that it's not - this is not a matter that fits into 12.2(g)(ii), or (i).

PN197

MR M MITCHELL: I don't think he made any such finding. I thought that it was accepted by the Deputy President that this is a significant change and as accepted by all the parties.

PN198

VICE PRESIDENT ASBURY: Yes, but that was for the purposes of the operation of the clause generally. You made a point, just before, about 12.2(g), and I'm just asking you to say where this fits into it.

PN199

MR M MITCHELL: Deputy President, my point was about 12.2(f).

PN200

VICE PRESIDENT ASBURY: Well, the 12.1:

PN201

Consultation requirement is about the rights of employees to be consulted on matters which directly affect them in their employment.

PN202

And I accept the introduction - for my part, I accept the introduction of a vaccination mandate is a matter that directly affects employees in their employment. Then 12.2 deals with undertaking a significant change and having a representative. Then 12.2(f) talks about some additional requirements.

PN203

So let's assume, for the sake of the discussion, that you said that (f) talks about, 'As soon as practicable after the -', because my difficulty here is that there's been a general acceptance that the change is caught by clause 12. Arguably, it's caught by the preliminary matters that they're entitled to be consulted on matters which directly affect them in their employment. But I'm struggling with where the definition in (g), because I accept that this is not the model consultation term, because the model consultation term refers to where a definition decision has been made to introduce a significant change, and then it has a definition of 'significant change'.

PN204

But this term talks about consultation generally and the rights of employees to be consulted on matters which directly affect them in their employment, and I accept

that and that there are rights to be consulted. But I don't know - I'm really struggling with the proposition that this fits anywhere into the significant change definition, in (f) and (g).

PN205

MR M MITCHELL: Your Honour, firstly, as I understand it, there is no dispute between the parties that the decision to implement a vaccine mandate is a significant change, for the purposes of clause 12. As I understand it, Coleman DP did not suggest otherwise either. He also accepted that the decision to implement a vaccine mandate was a significant change, for the purposes of clause 12.

PN206

VICE PRESIDENT ASBURY: So the university contended that the introduction of the vaccination policy was not a significant change and that, therefore, clause 12 did not require the university to consult. Then it conceded:

PN207

In light of the decision in Mt Arthur Coal this had, in fact been a significant change

PN208

And that clause 12 was not engaged. But there was, perhaps, an alternative proposition that it was a change that affected people within the provisions in clause 12 but it didn't come within the definition in (g).

PN209

MR M MITCHELL: Well, as I sit here now, this issue, I would not have thought even arises on this appeal, that in - I'm sorry, I'm not sure I understand the question.

PN210

VICE PRESIDENT ASBURY: Well, clause 12.1 says:

PN211

The university recognises the rights of all of its employees to be consulted on matters which directly affect them in their employment.

PN212

Which I accept is not - that is a broad provision that could go beyond 'a significant change'. It's anything that directly affects them in their employment. Then the rest of the clause goes on to deal with 'significant change', and I'm simply observing, I can't, for the life of me, see where the definition in (g) of 'significant change' - because normally it says, 'the termination of their employment', but it doesn't seem to say that.

PN213

MR M MITCHELL: Well, we would say, as a matter of construction, clause 12.2(g) sets out the meaning of 'significant change', which is a term used in clause 12.2, and that, no doubt, is why the university, at first denying, and this is not university lawyers, this was university HR people, first deny that this was a significant change. But they later, presumably when they had legal advice,

dropped that objection and conceded that it was a significant change and therefore clause 12.2 applied to it and Coleman DP accepted the same thing.

PN214

VICE PRESIDENT ASBURY: Okay.

PN215

MR M MITCHELL: I'm sorry, excuse me for a moment, please.

PN216

I will move on to ground 11.

PN217

The Deputy President erred in holding the relevance of a failure to consult to the reasonableness of a direction depends on whether the consultation could reasonably have been expected to make any difference to the outcome.

PN218

Now, this, we say, is a clear issue of law. The Deputy President distinguished the High Court decision in Stead. The High Court talks about a person being denied the mere possibility of a different result. The Deputy President, I don't think, realised, with respect, that the Full Bench, in Mt Arthur, had said that:

PN219

The principle in Stead applies also to consultation'. It's not for a worker to have to demonstrate the likelihood of achieving a different outcome in consultation, rather the mere possibility of a different outcome is enough.

PN220

Then, in fact, the Full Court of the Federal Court, in QR Limited, goes further and says that:

PN221

The purpose of a consultation clause is simply to ensure that consultation occurs. It's not concerned with the likelihood of success of the consultation process.

PN222

So we say that, on this point, this is a clear error of law, in his Honour's reasoning.

PN223

Ground 12, this is related:

PN224

The Deputy President erred in finding that it was most improbable that Mr Mitchell was going to change his mind.

PN225

Now, as per the previous point, even if it was most improbable that's not a reason, in our submission, for a finding against Mr Mitchell. It's only the possibility that there could be a change.

PN226

But, in fact, as we say, that finding, that it was most improbable that he would change his mind, is just not open on the evidence, to the Deputy President. He based his view almost entirely on Mr Mitchell's response to a show cause letter, in which he's setting out reasons why his employment should not be immediately terminated.

PN227

Ground 13:

PN228

The Deputy President erred in finding that this is not a case where one can identify an additional fact, idea, argument or proposal that one party might have presented to the other that could realistically have led to a different outcome.

PN229

Now, we say there's a number of errors of reasoning involved in that. One is the belief that it was simply a binary proposition, that it's either a vaccine mandate or no vaccine mandate. But there were many issues as to how such a mandate would be imposed and the effects that it would have on the conditions and entitlements of workers.

PN230

The only reason given for workers to consider, for imposing a mandate, which ATAGI had not required, was the opening of the borders in Tasmania. That's fine, as far as it goes, but there was clearly a difference with New South Wales and consultation on that would have been useful. It could have led to different circumstances; the issues of working from home. This, again, is compounded by the fact that what workers were told about, in the survey being held, was a proposal to exclude people from campus. They weren't told or given any opportunity to consult on a proposal to exclude workers from any employment with the university whatsoever and, in particular, to stop them working from home.

PN231

As I say there, the way that the consultation is supposed to work, in relation to clause 12, is that both sides have the opportunity to consider what the other has to say. Mr Mitchell clearly had concerns about vaccine safety. They were actually invited to be raised but there was never any response to them. One cannot say that he may have changed his mind after either the university amending or nuancing the particular proposal or the information it gave.

PN232

Now, moving on to ground 14:

PN233

The Deputy President erred in holding that the agreement does not prohibit implementation of the relevant change.

PN234

Okay, this has actually been covered earlier, and I'm sorry, this should have been part of the same appeal ground, I think it's ground 1. We say that the wording of clause 12 is mandatory and so what the Deputy President has done here is misconstrued the requirements of clause 12.

PN235

Ground 16:

PN236

The Deputy President erred in holding that where the Commission arbitrates a dispute regarding the application of the terms of an enterprise agreement, the Commission is restricted to only making orders that determines how the agreement applies and, in particular, the Commission is not entitled to make orders for compensation of the type sought by the appellant.

PN237

Now, we submit that the effect of sections 595(3) of the Act, when taken together with section 739(4) and (5), they make clear that:

PN238

The only restriction on orders that the Commission may make when settling such a dispute is that they must be appropriate to the dispute and they must not be inconsistent with the Fair Work Act or a relevant industrial instrument.

PN239

Now, this may well contrast with the decision before the implementation of the Fair Work Act, when there were broader restrictions on orders that could be made, but we're dealing now with the current statutory regime.

PN240

The appellant raised the dispute as required by clause 15 of the enterprise agreement. He referred the dispute to the Commission, again in accordance with the dispute resolution clause. The respondent then terminated his employment on the ground of failure to obey the direction which was the subject of the dispute and that had the effect of pre-empting the Commission's role in settling the dispute. In effect, it was a breach of clause 15.5 of the enterprise agreement - well, not 'in effect', it was.

PN241

Orders to rectify the respondent's pre-emption of the Commission's role were not only reasonably incidental to the dispute, but necessary in order to properly resolve it. So, we are saying that when the appellant filed his application referring the dispute to the Commission on 15 March, if it had been heard that day the proper orders for the Commission to make were simply directing the university to engage in consultation as required by clause 12 of the enterprise agreement.

PN242

If it had done so, then it could have proceeded to implement the decision depending on what may have come out of the consultation. After the appellant was terminated on 18 March, the situation changed somewhat. It would have been necessary to reinstate the appellant to his employment and then order that

consultation should take place. By the time the matter came for hearing at first instance of the arbitration before Coleman DP, the appellant had been in other employment for eight months. His earlier temporary employment on a casual basis – on a short term basis – had changed. That is, by 24 February 2023 he was given permanent employment.

PN243

It was no longer appropriate that he be reinstated and, therefore, the directions sought or the orders sought to settle the dispute had evolved as the circumstances had evolved - seeking compensation for the unlawful termination, I guess is the expression to use - to compensate him for the loss of his employment between 18 March and whatever date it was in July when he obtained alternative employment. Also, exemplary damages to mark the seriousness of the respondent's conduct in pre-empting the decision of the Commission by terminating him. Moving on, ground 17, as I have said, that is dealt with already. Ground 18 is the issue of remoteness - - -

PN244

COMMISSIONER PLATT: Sorry to interrupt, can I just take you back to the claim seeking wages and exemplary damages. Isn't that an option that would be available to the applicant if he was able to go to the court under breach of an enterprise agreement?

PN245

MR M MITCHELL: It probably would be, yes, yes, if it please the court.

PN246

COMMISSIONER PLATT: Thank you.

PN247

MR M MITCHELL: I suppose the one thing I can add to that is, as we have said here, we submit that just because a remedy is available under one head of the Commission's jurisdiction does not prevent it being available under other heads.

PN248

DEPUTY PRESIDENT HAMPTON: Mr Mitchell, perhaps while we've interrupted you, so effectively you're saying that the Commission can and should in this case have awarded compensation that is for lost income, damages and penalty; is that correct?

PN249

MR M MITCHELL: That is the way we put it before Colman DP. There was a head of compensation which was simply reimbursement of the period from the date he was terminated until the date he obtained fresh employment. We were asking for general damages for the effect of the termination and the circumstances surrounding it, and also asking for an exemplary amount, as well.

PN250

DEPUTY PRESIDENT HAMPTON: That sounds not just available to the court, but it sounds a lot like the exercise of judicial power. Now, I appreciate what you say about the broad compass of our capacity to make orders, but you would also

be very familiar with the difference between the Commission's arbitral powers – that is, it's powers that it exercises about private arbitration, that's the general term that's used – as against the role of the court.

PN251

Again, I accept that you point to at least one Full Bench decision where what was described as compensation was ordered, although in that case that compensation was effectively to give effect to the fact that the Commission found that the instrument in that case had been incorrectly applied, so the consequence of that was to give effect to the underpayment of wages that effectively arose. It just strikes me though that compensation and damages which includes the notion of some sort of penalty would be a significant departure from the Commission's approach in this area.

PN252

I, firstly, want to put that to you and, secondly, where would the line then be drawn between the role of the Commission settling a dispute about the proper application of an agreement and the role of the courts in enforcing and penalising for breaches?

PN253

MR M MITCHELL: Yes, yes. Thank you, your Honour. This is a major issue which is potentially thrown up by this case which would have to be resolved one way or another. I start by saying that the nature of remedies conferred by an arbitrator must be according to arbitral power, not judicial power.

PN254

We'll take the wording of section 595(3). It refers to orders made by a Commission, but I would submit that it is quite clear that though the Act may use the terminology of 'orders', those orders are not like orders of the court because they can only be made under arbitral power and that's what the Act is assuming or saying; so you can call them orders or determinations or decisions or whatever.

PN255

The nature of the arbitral power is that the parties are deemed to have come before the Commission by consent and asked the Commission to settle their dispute sitting as an arbitrator. I say 'deemed'; just the point that my client is not a party to the enterprise agreement but he is deemed to have entered into that referral of the dispute to the Commission.

PN256

The making of an order that Mr Mitchell be compensated for loss of his wages and entitlements at a period when we say the Commission should find that he should not have been dismissed, well, we say that by its nature clearly within arbitral power. The basis on which it may be different in other cases, but the fact that such orders by their nature can be arbitral, should not be in dispute. Secondly, orders for general damages, again we say that it's clear from many decisions that such orders for general damages can be arbitral by their general nature.

PN257

DEPUTY PRESIDENT HAMPTON: Mr Mitchell, the authorities you've cited for that are all general protections matters where the Commission is effectively empowered by the statute to sit in for the court. Is there another example where the – has done that in any jurisdiction that's not expressly authorised?

PN258

MR M MITCHELL: Your Honour, with respect, I don't think that's how general protections is set; how it is described.

PN259

Under, for instance, the unfair dismissal jurisdiction there is no power to order general damages. Under the general protections legislation there is a power to order general damages. I don't think there's any suggestion that that power is a judicial power.

PN260

DEPUTY PRESIDENT HAMPTON: No, no, I'm agreeing with you. I'm agreeing with you. The problem is that I don't think, therefore, the authorities using that jurisdiction help us at all here. That's exactly my point.

PN261

MR M MITCHELL: Well, in the case of this jurisdiction the power to make orders is unfettered. There is nothing - - -

PN262

DEPUTY PRESIDENT HAMPTON: But they can't be judicial and what you're putting sounds very judicial to me, and a long way from anything the Commission has ever done in this area.

PN263

MR M MITCHELL: I can't comment about a long way from what the Commission has done. It may well not have come up under the Fair Work Act and, without going into it in detail, I think there are reasons why it could not have been done under the Workplace Relations Act.

PN264

DEPUTY PRESIDENT HAMPTON: Yes, I agree with you. There is no question about that. There was a direct statutory bar on that.

PN265

MR M MITCHELL: Yes. I think your Honour has nailed the key point here which is the unfettered nature of the power to make orders in section 595(3), which says it may make any orders appropriate to resolve the dispute. I think the way Colman DP saw it, with respect, is that unless there is a specific power to order general damages, then that power cannot be there, whereas our submission is that the power conferred under section 595(3) to make the orders it considers appropriate to resolve a dispute do cover anything that is not prohibited to the Commission.

PN266

So what it has to consider is, 'Is these orders we're being asked to make appropriate to the resolution of this dispute and do they do anything that is not permitted by the Fair Work Act or by the enterprise agreement?' Now, an example of that may be the situation with the bullying jurisdiction where it has been pointed out in cases that you cannot use an unfettered power in order to subvert the requirement of the anti-bullying jurisdiction, that there must be a finding – I think it is a finding on the balance of probabilities or something like that - the bullying has occurred.

PN267

As the Commission pointed out - there have been a couple of cases on this now – that does actually still allow for, in effect, interim orders to be made, but there is a clear intention in the Act that orders to deal with bullying will only be made if there has been a finding that bullying has occurred. So, from my perspective, where I'm coming from, those cases do not cause an issue with what I'm saying.

PN268

The Commission certainly should not make orders that are inconsistent, whether by expressly or necessary implication, with another part of the Act, but there is nothing in the Act to suggest that orders for general damages are only to be made on a general protections claim when section 595(3) says any orders that are appropriate to resolve the dispute.

PN269

VICE PRESIDENT ASBURY: Except when the parliament enacted the sexual harassment orders provisions, it did it in similar terms to the general protections consent arbitration, which is essentially the parties have to specifically consent to the matter being arbitrated. As Deputy President Hampton said, when the Commission does that it's exercising similar powers to that exercised by the court in awarding pecuniary penalties such as general damages.

PN270

Otherwise, even in the unfair dismissal space the Commission has got no power to award anything of that kind and it would be surprising if the Commission embarked on an exercise of awarding damages and, you know, general damages, et cetera, in a dispute provision where it can't do it in any other provision other than it's specifically allowed to do so in the sexual harassment space and the general protections space when the parties consent to the Commission arbitrating the dispute.

PN271

MR M MITCHELL: Yes, well, if there be a concern of opening the floodgates, as they may say, our submission is that the making of an order for general damages will probably rarely arise in this section 739 jurisdiction.

PN272

VICE PRESIDENT ASBURY: Why, Mr Mitchell, because it is not uncommon that when a dispute commences – between a dispute commencing and a dispute concluding, employment does end.

PN273

MR M MITCHELL: Yes, and I - - -

PN274

VICE PRESIDENT ASBURY: Why isn't it subverting the unfair dismissal provisions where a dismissed employee has got the capacity to file an application for an unfair dismissal remedy?

PN275

MR M MITCHELL: I'm sorry, I've lost my track of the first thing that you said, with respect, Deputy President.

PN276

VICE PRESIDENT ASBURY: Why wouldn't it open the floodgates, because it's not uncommon that - - -

PN277

MR M MITCHELL: That's right, that's right.

PN278

VICE PRESIDENT ASBURY: - - - between a dispute starting and a dispute finishing - we wouldn't have had so many cases about it and Full Bench authorities if it wasn't quite common for it to occur.

PN279

MR M MITCHELL: Yes. Every case that I'm aware of where this has occurred, the termination of the employee has been on different reasons to the consultation issue. The employee has been terminated for redundancy or for cause other than a failure to obey the direction and this raises a wider issue. What we are submitting is that in an appropriate case the Commission has the power to make any orders it sees fit which includes to deal with, in this case, pre-emptive action. This actually goes to the root of the Commission's power to regulate a consultation dispute before it.

PN280

I believe that the reason this has never arisen before in the cases is because no one has ever dared do it. For instance, in the Mt Arthur case where the employer was very careful to make clear that any actions it took were provisional until it got – that is, actions to terminate employees – that it wouldn't take actions to affect their employment(sic) until the Commission had dealt with the dispute.

PN281

VICE PRESIDENT ASBURY: Mt Arthur was an entirely different proposition because the horse had not bolted from the stables before the dispute was notified. The dispute was notified when the mandate was put in place, not after the dismissals had already taken effect or after people – you know, that people had reached a point.

PN282

I take your point about Mr Mitchell being dismissed on 18 March and this dispute being lodged on 15 March, but the application, the form F10 - which is not in the appeal materials, but I'm looking at it now - doesn't say anything about seeking

damages, general damages, anything of the kind. It seeks an arbitration on whether the direction was a lawful and reasonable direction, and then an interim order that until the Commission determines the dispute the university take no steps to dismiss, discipline or otherwise prejudice the employment of the applicant and then that was refused.

PN283

MR M MITCHELL: Which is why there is no application for damages for dismissal. Apart from any other reason, the main reason was there had been no dismissal at that time; at the time the attempt occurred. After Mr Mitchell was dismissed the order sought was to reinstate him, so we're asking the Commission to find that he should not have been dismissed on the very basis which was under dispute and that then orders be made to consult.

PN284

VICE PRESIDENT ASBURY: Where was that order sought? Where is that documentation?

PN285

MR M MITCHELL: That was sought in the hearing before Colman DP which resulted in the first appeal.

PN286

VICE PRESIDENT ASBURY: That was before Lee C.

PN287

MR M MITCHELL: I'm sorry, I'm sorry, Lee C, yes.

PN288

VICE PRESIDENT ASBURY: Yes.

PN289

MR M MITCHELL: Yes, if it please the court. I mean, I said to Lee C on that occasion, 'There are two interim matters before you. One is that my client is seeking an interim order that he be reinstated. The second is that the respondent is seeking an order that you don't have jurisdiction to hear this.' Lee C made a comment to the effect that the first one didn't arise if the second went against us and I had to concede that was true. In the event, Lee C made a decision that he had no jurisdiction and that's what we appealed from.

PN290

Now, the matter was then remitted. By the time it came to be heard, this time before Colman DP, the situation had changed. I don't think my client can be faulted for not seeking reinstatement at that stage where he had been – even though he had just recently been made permanent. He had been working in the same job for eight months and, yes, the situation had evolved. That's why compensation was sought at this stage, because it was the only way of appropriately resolving the dispute. There was another matter arising from your questions. I can't offhand recall what it is now.

PN291

VICE PRESIDENT ASBURY: When the application for damages was made.

PN292

MR M MITCHELL: That was made for the arbitral hearing before Colman DP, which occurred in early March, I believe, and it was made in our submissions which probably went in in February.

PN293

VICE PRESIDENT ASBURY: Okay, because by that point the appellant had obtained other employment.

PN294

MR M MITCHELL: Had obtained permanent employment, had been in it for eight months and so what we were saying to the Commission was, look, we were seeking for him to be reinstated and orders to be made for consultation but things have just gone too far now. It's not possible to put this genie back in the bottle. Without doing injustice to the appellant by making him give up permanent employment, et cetera, we would just say it wasn't reasonable.

PN295

VICE PRESIDENT ASBURY: Okay.

PN296

MR M MITCHELL: I thought there was something else, as well, but if I just finish my submissions and it may occur to me in the meantime, if that please the court. Now, there was the issue of remoteness in ground 18, but I think we've dealt with that. Ground 19, the Deputy President saying there was a conflict between the vaccination requirements of the university and the personal convictions of Mr Mitchell. As we're saying there, actually Mr Mitchell's reasoning also was based on objective factors, but it doesn't really matter because it was never responded to.

PN297

I refer there in the Mt Arthur appeal where the Full Bench was quite happy to say that on a prima facie basis the decision to implement the vaccination proposal appeared to be both lawful and reasonable. We wouldn't disagree with that in that case. There's no particular reason why a vaccination mandate cannot be made by an employer, but the issue now was the extent to which the respondent had or had not complied with its consultation obligations before making that decision and whether its failure to do so had the effect of rendering the decision to implement the proposal not reasonable.

PN298

We say that was the case and the university should have realised that. It should have said, 'Okay, we're going to rescind that determination, at least in Mr Mitchell's case, and we're going to hold the consultation.' This could have been dealt with even before - I mean if that had come up in the informal dispute resolution process it could have been resolved probably by February of 2022. In ground 20, saying:

PN299

Affording undue priority to Mr Mitchell's personal interests over the bona fide evidence of the university to protect the health and safety –

PN300

again we're saying here Mr Mitchell did not seek such compensation because the respondent had proposed or imposed a vaccination mandate. That is not the reason compensation is sought. It's because the respondent terminated his employment after he referred the dispute to the Commission without letting the Commission go through its role and then, as things developed, he was in a position where he could no longer be reinstated.

PN301

The mitigation point, that's ground 21. Look, we say this is a clear error of law. Mitigation is a matter where the defendant responded in this case. If it claims that there has been a failure to mitigate, it has got to prove it. It holds the onus there. Now, in fact incidentally there was some evidence relating to mitigation here because when Mr Mitchell put on his evidence of the effect that the termination and the way it was done – the effect that it had on him, which was relevant to a genuine damages application – he also pointed out that the effect of it was such that he was depressed and didn't start looking for work for a couple of months.

PN302

So, in fact that evidence was there and it doesn't help the respondent, but we would say that it really doesn't matter. The onus lies on the respondent on the issue of mitigation and they didn't attempt to discharge it.

PN303

DEPUTY PRESIDENT HAMPTON: Mr Mitchell, are you leaving the area of mitigation?

PN304

MR M MITCHELL: I was going to leave it.

PN305

DEPUTY PRESIDENT HAMPTON: Yes. Look, just in my experience in the Commission the common law approach isn't adopted by the Commission. Now, there might be a variety of reasons for that, but one of those I suspect is because, you know, we're a quasi-judicial tribunal rather than a court. Obviously common law principles are generally used for guidance. They are applied much more strictly when it comes to contractual disputes, but given that we're an equity, good conscience jurisdiction and we can inform our minds as we see fit - subject only to natural justice of course - in my experience issues of onus are rarely relied on in matters of this kind. I just wanted to raise that with you.

PN306

MR M MITCHELL: Thank you, your Honour. You know, to that extent we would say that, look, there is evidence from Mr Mitchell as to why he didn't seek work for a couple of months after he was terminated and we will put that there. That evidence wasn't challenged. It stands and it's probably all I can say on that issue.

PN307

DEPUTY PRESIDENT HAMPTON: All right. Thank you very much.

PN308

MR M MITCHELL: I think my client wants to ask me something. Could I just have a minute or two and I'll put my microphone on mute? Thank you, your Honour. Your Honours, I will just raise one more point which my client has asked me to raise and I think it's a fair one. He's saying that issues raised about whether he could have come to a different conclusion due to consultation - but also pointing out that the university also, if it had engaged in proper consultation, could have come to a different conclusion.

PN309

There was evidence before Colman DP that did not appear to be any other university that had done this, imposed a vaccine mandate, particularly on people even working from home, and in fact there was specific evidence about I think the University of Adelaide which considered the issue and decided not to implement a 100 per cent vaccine mandate although it did take a number of other measures.

PN310

So, I think the way to put what my client is saying is that it's not possible to say that the university, if it had engaged in consultation with its employees and in particular Mr Mitchell, may not have come to a different decision either on having a mandate at all or on having it under different terms and circumstances.

PN311

I will conclude my submissions there. We ask that the appeal be allowed. We're not really up to that point yet, but we may ask that there should be – there may be enough here, if the appeal is allowed, for the Full Bench to make its own decision on the issues rather than remitting again just because of the length of time this matter has gone, but I'm jumping the gun there so I won't say anything further, may it please the court.

PN312

VICE PRESIDENT ASBURY: Thank you. Ms Masters?

PN313

MS MASTERS: Thank you, Vice President. I am just wondering before I do commence my submissions for the respondent if we could just have a very short comfort break. I anticipate I will take far less time than the appellant. Perhaps somewhere between half an hour and 45 minutes, I suspect we will wrap up our response submissions.

PN314

VICE PRESIDENT ASBURY: Okay, well, do you want to just have the break for, say, 10 minutes?

PN315

MS MASTERS: That would be great. Thank you.

PN316

VICE PRESIDENT ASBURY: Is that sufficient?

PN317

MS MASTERS: Yes, thank you.

PN318

VICE PRESIDENT ASBURY: All right. So we will resume at 20 past 12. Thank you.

SHORT ADJOURNMENT **[12.09 PM]**

RESUMED **[12.21 PM]**

PN319

VICE PRESIDENT ASBURY: Ms Masters?

PN320

MS MASTERS: Thank you, Vice President. There is somewhat of a long history to this matter and there are some 24 grounds of appeal; it's difficult to know where to start. However, I think most probably having regard to the decision of Colman DP and his efforts to achieve finality, probably the best place to start is where he landed ultimately with this matter.

PN321

It's clear from Colman DP's decision that despite his finding that the direction was not invalidated and was a reasonable direction, and subsequently that even if that was not the case he did not consider that the Commission had power to make an order for compensation sought by the appellant, Colman DP ultimately did go to the trouble of exercising a discretion to decide whether or not even if he did have power to grant an order for compensation to the appellant, whether he would do that or not.

PN322

Now, given the appellant's effectively end game for this matter is to seek those orders for compensation and penalties that have been discussed already, there really is no utility to this appeal unless the appellant can show that the exercise of discretion by Colman DP should be overturned and in some way was in error. That would require a consideration of *House v the King*-type appeals. Sorry, Vice President, I am just having technical difficulties. That would require the appellant to show that there was a *House v the King*-type error in that exercise of the discretion and the appellant simply has not done it in this case.

PN323

We say the big picture for this appeal is that permission to appeal should not be granted because there is no utility in the appeal, because that exercise of discretion has not been appealed in a *House v the King*-type manner and is not capable of being filled in a *House v the King*-type manner, and the decision of Colman DP should be upheld. In any case, I will deal briefly with the factors which the appellant says justify the grant of permission to appeal having regard to the public interest.

PN324

What I would like to say in relation to those particular factors is that we're dealing here with the decision of Colman DP and he was dealing with four specific questions at first instance. As you identified, Vice President, there is a lot of water under the bridge in this matter and we have moved on somewhat from the original notice of dispute, but we are now dealing only with those four questions which Colman DP determined at first instance.

PN325

Firstly, the question was was the university required to consult and just, I guess, to close a loop on that issue, it was conceded before Colman DP that the university was required to consult, the reason for that being from the respondent's perspective, rightly or wrongly, that the list of things that characterises major changes in 12.2(g)(ii) of the enterprise agreement is an inclusive list.

PN326

Following the determination in Mt Arthur and in particular paragraph 134 of that decision, the respondent formed the view that the introduction of the mandate which could potentially result in termination did amount to a significant change and that was the particular reason around why that point was conceded before Colman DP, and there was no real analysis around that in his decision. So that was the first question, was consultation required? The answer was conceded as being yes.

PN327

The second question was did the university comply with its consultation obligations under clause 12.2. Once again, that point was actually conceded by the university, that (indistinct) complied with its consultation obligations. There is no detailed analysis in respect of those points, them having been conceded before Colman DP.

PN328

The next question considered by the Deputy President was effectively what was the legal consequences for that failure to consult. Ultimately the Deputy President determined that it did not invalidate the direction and that the direction was reasonable. Despite that finding, Colman DP then moved on to consider even if that was not the case, what remedies were available and ultimately would make an order for the compensation which he determined he could not. The appeal is of course limited to the Deputy President's findings in respect of those particular questions.

PN329

The appellant has in their submissions, and particularly in trying to establish some basis for public interest, advanced reasons which we say do not clinically reflect the nature of this particular appeal and the issues that the Full Bench could consider arising from Colman DP's decision. In particular we say that the decision does not deal with a genuine question of whether there must be an express provision to prohibit a significant change where it doesn't comply with consultation.

PN330

What Colman DP did at first instance was to interpret the provisions of clause 12 of the enterprise agreement. In this particular case there was no general proposition determined where Colman DP decided that in every case there must be an express provision to prohibit a significant change being implemented if there was no compliance with a consultation requirement. So there is no general proposition here, it's just an interpretation of the particular clause that we're dealing with in this case.

PN331

Secondly, the decision of Colman DP does not deal with the powers of the Commission under section 595(3) to an extent that it's not dealt with in other cases at all. The law is very settled around the Commission's powers to make orders from a section 739 dispute and there is no question as to the powers of the Commission being limited by the words of the particular dispute provision that's dealing with an enterprise agreement. There is no novel argument that has been raised by the appellant in this case which justifies the Full Bench around an appeal to consider that particular matter.

PN332

Thirdly, we accept that arguably there is a conflict between how Colman DP dealt with the decision in Mt Arthur, around whether or not there needed to be a possibility or a reason likelihood of a different outcome through the consultation. However, to the extent that that creates some public interest, we say it does not, particularly in this case where the finding of fact by Colman DP was that there was no possibility of a different outcome even if all the consultation obligations had been met. There's no particular issue which attracts the public interest on that basis.

PN333

The decision of Colman DP does not deal with a particularly novel or interesting scenario which – I believe my friend referred to their decision that they had dared to run this type of dispute as opposed to other options they had available to them, which have been pointed out by the Bench, including unfair dismissal or potentially general protections.

PN334

It doesn't create a particularly novel scenario. This really just comes down to an interpretation and application of the enterprise agreement to the particular facts and circumstances in this case. That really is just interpreting and applying the dispute resolution procedure as it affects the consultation requirements in the EA. There is nothing novel about this particular appeal.

PN335

Finally, there is nothing in the decision which deals with a general proposition about how to resolve – sorry, the power in section 739 to determine whether or not a Commission has power to make orders maintaining the status quo. This particular fact which the appellant says attracts public interest is misguided. We have moved well on from the maintaining of any status quo in this particular matter and it just doesn't arise as a question for determination by Colman DP in his decision.

PN336

We say there really is nothing that the appellant has advanced as being a factor which would attract the public interest which the Commission could reasonably accept as establishing a public interest case. In the most part those factors in fact seemingly do not arise in the decision of Colman DP and we say that permission to appeal should be refused in this case.

PN337

To turn now to the specific grounds of appeal, I will say that the respondent relies upon its written outline of submissions where we do address - and in a consolidated manner as best we could - each of the specific grounds of appeal in a fairly succinct manner, so I don't intend to laboriously go over each individual ground because I don't think that's going to be helpful to the Bench.

PN338

Generally, what I would like to address the Bench on is the specific determinations of Colman DP and why we say there has been no error been identified in those determinations. So firstly dealing with the finding that Colman DP determined that as a matter of construction, the failure to comply with the consultation obligations did not invalidate the direction that was given to the university staff to comply with the vaccination mandate. There is no dispute at all that clause 12, where it requires consultation, uses a mandatory language, but as Colman DP has rightly stated, we say, at paragraph 20 of the decision:

PN339

There is a distinction between a clause that creates a consultation obligation and one that also prohibits change before consultation is concluded.

PN340

Now, the reasoning why as a matter of construction clause 12 does not prohibit the change in this case where consultation has not occurred is set out in the decision and particularly included at paragraph 28 of the decision, and that involved an interpretation of a particular term of this enterprise agreement.

PN341

In the decision Colman DP points to matters of construction particularly where other clauses of enterprise agreements contained a status quo-type arrangement or requirement as opposed to this particular clause if it regarded consultation, ultimately concluding – we say rightly – that the failure to comply with the consultation obligations in the enterprise agreement did not invalidate the direction.

PN342

Having determined that as a matter of construction in the enterprise agreement the direction was not invalidated, Colman DP then turned to consider more generally whether the direction to the appellant to comply with the mandate was reasonable. In doing this, Colman DP rightly stated that the approach is to basically weigh and balance different factors in a particular case.

PN343

My friend refers to, in a number of ways, comparisons with Mt Arthur and how this case is, he says, worse in terms of the failure to consult, but of course we're dealing with a completely different circumstance where Colman DP has carefully, and we say correctly, weighed a number of factors in determining that the direction was not unreasonable.

PN344

We say there are effectively two key considerations that Colman DP went through in the decision. Firstly, we say that the conclusion or the factual conclusion Colman DP made that further consultation would have achieved nothing was a particular key determination in finding that ultimately the direction was reasonable. Now, that particular finding, which he makes at paragraph 40 of the decision, is we say absolutely open on the facts that were before Colman DP.

PN345

He sets out the facts that he has taken into account in reaching that conclusion at paragraph 31 of the decision and we have dealt with and pointed to where the evidence is in the materials, in our written outline of submission which we refer to at paragraph 17 and the particular documents are footnoted at footnote 21. I won't take the Bench through each of those particular documents, but rather I just draw your attention to that is where you can find that evidence in the material and we would say that is the material which Colman DP had before him, and which left it open for him to make the conclusion that further consultation would have in this case achieved nothing.

PN346

The other key finding we say that Colman DP balanced in forming the conclusion that the direction was reasonable is the fact that he considered that substantive consultation, albeit it not formal/procedural/technical consultation under the EA, had in fact occurred. He goes through how he reached that conclusion in the decision, particularly at paragraphs 34 and 41, and again we say that that particular conclusion was open to Colman DP.

PN347

Once again I don't intend to take the Bench through those particular documents, but we have referred to the evidence in our written outline of submissions. In particular paragraph 23 and footnote 31 is where you will find those references for the Bench to be satisfied that that evidence was available to the Deputy President at first instance. We say that in reaching the conclusion that the direction was reasonable, despite the failure to engage in procedural consultation as required by the enterprise agreement, they were the two key factors which on balance Colman DP found the direction was reasonable despite the failure to meet the consultation obligations.

PN348

Whilst it's not necessary given the finding of Colman DP that the direction was firstly invalidated as a matter of construction with the enterprise agreement and, secondly, was reasonable despite the failure to consult, it wasn't necessary for him to do so but Colman DP then turned his mind to what remedial orders could be made had he have found differently; so if he was wrong on that first point, he

would then have considered, 'Well, I'm wrong about that, what orders are available to the Commission to remedy the failure to consult in this case?'

PN349

The Bench has engaged with my friend in respect to the orders that are sought here. I intend to only deal with this briefly because the law is very well settled on this point, I would say, but Colman DP rightly concluded – and this appears at paragraph 53 of the decision – that there is nothing in the EA to suggest that it was contemplated by the framers that the Commission would have power to order the compensation which is sought by the appellant in this matter.

PN350

Colman DP rightly accepted that it was possible for an enterprise agreement to include a clause which would enable an order for compensation of the type that the appellant seeks. However, he described it as being – his particular term is telling, I would say, and consistent with comments from the Bench, but 'such a clause would be an exotic beast' which he had not himself encountered. I think that particular comment perhaps is quite telling with respect to other comments from yourself, Vice President, around the options that the appellant did have at the time the employment was terminated.

PN351

Again, my friend described their circumstances as being they dared to run this type of application rather than taking an option of doing an unfair dismissal, but I think where Colman DP sort of identifies the difficulty for the appellant in achieving the outcome he is now seeking – that being an order for compensation and for penalties – is the way that he has described the fact that, yes, that could be something which the Commission has power to do under the enterprise agreement, but it would be highly unusual and, in his words, an exotic beast for such a power to exist from the terms of an enterprise agreement.

PN352

We say that Colman DP has correctly identified the powers of the Commission where he has dealt with that in the decision and correctly determined that in this case the enterprise agreement does not give the Commission power to make an order for compensation or penalties such as sought by the appellant arising from this particular dispute.

PN353

Finally – and again it's clear that Colman DP has sought to achieve some finality in this long-running matter - Colman DP helpfully turned his mind to, 'Well, even if I'm wrong and the direction was invalidated or unreasonable, and the Commission did in fact have power to make an order for compensation', he has then considered and set out in his decision where he would in fact do that and exercised his discretion to make an order for compensation.

PN354

Now, as I've set out already, the exercise of the discretion is only appealable on that *House v the King* appeal point and the appellant hasn't specifically attempted to establish that that exercise of discretion is itself appellable. The appellant does attack or, I guess, appeal against some of the findings of fact which Colman DP

did consider would be relevant to the exercise of that discretion, but we say those particular grounds of appeal don't establish a basis for finding that those facts were irrelevant or find the fact that maybe the error is such that they would establish a basis to appeal against that exercise of discretion.

PN355

I don't intend to specifically address those, I think they have been dealt with sufficiently by the Bench with the appellant, running through the appellant's submissions. I don't wish to particularly address any facts that were taken into account in the exercise of discretion, other than to say that each of the facts that were taken into account were relevant to an exercise of discretion if it did in fact exist. There is no basis for finding that there was an error in the way that Colman DP did exercise that discretion at the conclusion of his decision.

PN356

That does conclude the submissions that I wish to make in respect of the respondent's position in this matter. I am of course willing to address any other matters I haven't particularly dealt with that the Bench would like me to address, but otherwise that concludes our submissions.

PN357

VICE PRESIDENT ASBURY: Thank you. No questions from me. Do either of my colleagues have any?

PN358

DEPUTY PRESIDENT HAMPTON: Yes. Perhaps I might just raise a question that arises from the second proposition you advanced and in particular about whether or not the direction was reasonable or unreasonable. I think your proposition was, well – you know, I think you acknowledged that the findings were made and this was like a worse failure to consult perhaps than Mt Arthur. If that wasn't a concession, at least noted that that was an observation that was made. I just wanted to explore a little further about the proposition that the finding that was open to the Deputy President wouldn't have made any difference.

PN359

Now, you've heard Mr Michael Mitchell on behalf of the applicant put the proposition that there wasn't a binary choice. That is, that the consultation - or more particularly I think for the purposes of our appeal the implementation of the policy - was not a binary choice in that there were factors such as that the appellant here was operating in a New South Wales campus rather than a Tasmanian. Secondly, the work-from-home option which I think was only addressed as part of the process ultimately leading to the dismissal.

PN360

I just want to explore this. Firstly, do you accept it's not a binary choice; that is vaccinated or not vaccinated? Secondly, why do you say given the particular circumstances of the appellant here that there was, in effect, no value or no consequence of the failure to consult about at least how the policy was implemented?

PN361

MS MASTERS: Thank you, Deputy President. So as Colman DP found and correctly determined, the question as to whether or not the direction is reasonable is not to be considered in a vacuum. Now, in this particular case with the appellant we have of course moved on from the point that there was consultation in respect of the policy itself and really what we were dealing with was a direction for the appellant himself to comply with that policy.

PN362

In determining whether or not that direction was reasonable the Deputy President, we say rightly, concluded that with respect to the appellant as a matter of fact he had been given - prior to his dismissal and at the time that he was being directed to comply with the policy, he was given an opportunity to put any information before the university or the respondent that he sought to have taken into account. In fact he provided them with a 33-page document setting out his views which the university considered, but ultimately did not change their view on the implementation or the direction to the appellant to comply with that policy.

PN363

We say it was certainly open to the Deputy President as a matter of fact to conclude that even if they had have – you know, back in December if they hadn't complied with the strict consultation obligations in the enterprise agreement as it relates to the appellant, it would not have produced a different outcome because they effectively did get the opportunity to engage with him directly and take into account all of his views about the direction and the vaccination mandate.

PN364

At that point – and I think it was yourself, Deputy President, or perhaps the Vice President, but I think it was put to the appellant that, 'Well, if there was some other way for you to – you know, if there was some other outcome for you or some other outcome for the university, the point at which your employment is going to be terminated, would that not have been the point in time in which you would have raised it?'

PN365

We say that the conclusion that consultation was not have resulted in a different outcome was open to the Deputy President because he had the benefit of, you know, I guess, what happened in this particular matter as it applies to the appellant; seeing, well, the appellant did get that opportunity to put forward his detailed views on the policy at a point in time which he was facing termination of his employment. That would have been the time at which, you know, if something was going to change it would have and the fact that it didn't leading to the conclusion that there was never going to be anything – well, sorry, that consultation would not have produced a different outcome in this particular case.

PN366

DEPUTY PRESIDENT HAMPTON: All right. I understand it's that process you fundamentally rely on. The only observation I would make, of course, is the policy is already implemented at that point, but certainly I'll give some further consideration to what you say. Just to complete the picture, can I ascertain whether or not there is any dispute about the observations that are made at

paragraphs 7.1 and 7.2 of the appellant's submissions on the appeal? Let me know when you have got them.

PN367

MS MASTERS: I have that in front of me, yes, thank you.

PN368

DEPUTY PRESIDENT HAMPTON: In particular is it agreed that the respondent didn't reply or provide a response to the appellant's survey or email?

PN369

MS MASTERS: It is agreed that that was the case at the time of consultation, yes.

PN370

DEPUTY PRESIDENT HAMPTON: All right. In relation to what occurred with the show cause process, I take it you rely on your earlier submissions rather than dispute the facts there?

PN371

MS MASTERS: Yes, thank you, Deputy President. The show cause process, we don't say that that was part of, or forms part of, the consultation at all. However, so far as it's relevant to the Deputy President's ultimate finding that the direction to the appellant was reasonable, we say that that was a factor he took into account in finding it was reasonable.

PN372

DEPUTY PRESIDENT HAMPTON: All right.

PN373

MS MASTERS: That's in the decision and I can take you to that part of the decision, because I believe the appellant has perhaps, with respect, misconstrued this part of the decision. If you would bear with me for just a moment, I'll take you to the particular part of the decision. It's paragraph 37 of the decision, I believe.

PN374

DEPUTY PRESIDENT HAMPTON: Yes.

PN375

MS MASTERS: At paragraph 37 – it's towards the end of that paragraph and I'll just briefly read that part if that's acceptable, Deputy President.

PN376

DEPUTY PRESIDENT HAMPTON: Sure.

PN377

MS MASTERS: But Colman DP says:

PN378

I agree with Mr Mitchell that his 33-page document was not part of the consultation process per se. But it is relevant to the reasonableness of the university's decision to enforce its direction because it was one of the means by

which Mr Mitchell was able to put forward his views and arguments. The university took these into account before deciding to dismiss Mr Mitchell. It did not consider the matters raised by Mr Mitchell to warrant a different course.

PN379

I think that particular extract of the decision demonstrates that the Deputy President did not consider that show cause process could be a substitute for consultation or was part of the consultation at all. Rather, it was a relevant factor for him in determining whether or not the direction to the appellant was reasonable.

PN380

DEPUTY PRESIDENT HAMPTON: And you rely on that?

PN381

MS MASTERS: Yes.

PN382

DEPUTY PRESIDENT HAMPTON: All right. Thank you very much. No other questions from me.

PN383

MS MASTERS: Thank you, Deputy President.

PN384

VICE PRESIDENT ASBURY: Commissioner Platt, did you have any questions? Thank you. Mr Mitchell, anything in reply?

PN385

MR M MITCHELL: First I wanted to clarify one thing. When Deputy President Hampton at the end there referred to a clause of our submissions - I didn't want to interrupt my friend while she was in flight, like as in, you know, interrupt her flow – what was the clause of our submissions that the question was about as to whether the facts were - - -

PN386

DEPUTY PRESIDENT HAMPTON: Well, the particular facts in 7.1 and 7.2.

PN387

MR M MITCHELL: Thank you. Then the only thing I would ask, Madam Deputy President, is do you require me to address you on the *House v the King* point, in response on that?

PN388

VICE PRESIDENT ASBURY: That is a matter for you, Mr Mitchell, but it seems the submission is that essentially the Deputy President said on a discretionary basis he wouldn't have come to a different view even if he believed he had the power to do so.

PN389

MR M MITCHELL: Yes.

PN390

VICE PRESIDENT ASBURY: And that in order to overturn that you require a *House v the King* error.

PN391

MR M MITCHELL: Yes, all right. I will briefly address you in reply, if that is permissible.

PN392

VICE PRESIDENT ASBURY: Sure.

PN393

MR M MITCHELL: The first point is that the Full Bench must first consider the issues that arise before that point is reached. The issue that arises from the Full Bench in Mt Arthur's application of Stead to consultation – the High Court case of Stead and of QR Limited as to whether the reasonable likelihood of a different result in consultation occurs needs to be shown as opposed to a mere possibility, we say that that is an example of an error of law. It does affect the reasoning of more than just question 3 which Colman DP looked at.

PN394

Errors in relation to which subsections of clause 12.2 had been complied, we say there are several that were not complied with. Those are errors of fact, they're not matters to which *House v the King* applies. Again, the extent of that failure to comply with clause 12.2 was taken into account by Colman DP not only in regard to whether the decision to implement the mandate was reasonable, but also in relation to exercise of his discretion.

PN395

The issue of taking into account consultation that occurred after 9 December 2021, an error of construction. The finding that there was no power to make the orders sought is clearly not a matter of discretion. It doesn't come under *House v the King*. Otherwise, the only thing I would say is that's very difficult to separate discretionary decisions in this from a number of the non-discretionary points of appeal, may it please the court.

PN396

VICE PRESIDENT ASBURY: Thank you, parties, for your submissions. We will indicate that we will reserve our decision and issue it in due course. On that basis we will adjourn.

ADJOURNED INDEFINITELY **[1.01 PM]**