



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AG2022/5615

s.225 - Application for termination of an enterprise agreement after its nominal expiry date

**Application by Gusset
(AG2022/5615)**

Apple Retail Enterprise Agreement 2014

9.30 AM, MONDAY, 26 JUNE 2023

Continued from 30/03/2023

PN159

JUSTICE HATCHER: I will take the appearances. Ms Morgan-Cocks, you appear for Mr Gusset?

PN160

MS G MORGAN-COCKS: Yes, that's right.

PN161

JUSTICE HATCHER: Ms Bulut, you appear for Apple?

PN162

MS V BULUT: Yes, your Honour.

PN163

JUSTICE HATCHER: And, Mr Bruno, you appear for the SDA?

PN164

MR D BRUNO: I do, your Honour.

PN165

JUSTICE HATCHER: Well, it seems to me unless I am contradicted that all the material for the hearing has now been filed. Is that correct?

PN166

MS MORGAN-COCKS: That's my understanding, your Honour.

PN167

JUSTICE HATCHER: All right. Do the parties have an estimate of time to conduct the hearing based on the material filed?

PN168

MS MORGAN-COCKS: Your Honour, the parties have had some preliminary discussions about this briefly. We understand there may be an estimate between about three days or maybe five days at the very most at this stage.

PN169

JUSTICE HATCHER: That's a big difference. Which is it, three days, four days or five days?

PN170

MS MORGAN-COCKS: I would have a good guess that it would be three or four days.

PN171

JUSTICE HATCHER: Does anyone want to contradict that?

PN172

MS BULUT: Your Honour, my best estimate is four days based on the fact that 13 witnesses are required for cross-examination. Whilst none are particularly lengthy in terms of an estimate or length of cross-examination, but the sheer

number usually means that some time is spent in terms of transitioning from one witness to the next, and so a four day estimate would be my best guess.

PN173

JUSTICE HATCHER: All right. As to the timing of the hearing obviously there will be issues of availability of a Full Bench to sit for four days any time soon in any event, but I understand that Apple is moving to a position where it's going to put up a proposed enterprise agreement for a vote. Is that correct?

PN174

MS BULUT: Yes, your Honour, contended that the agreement go to a vote in late July.

PN175

JUSTICE HATCHER: All right. Unless someone wants to contradict me my inclination would be not set the matter down for hearing pending the conduct of that vote. It seems to me that the making of an enterprise agreement and subsequent approval of that occurred would, as it were, render the application futile. Ms Morgan-Cocks, do you have any different view about that?

PN176

MS MORGAN-COCKS: That seems an appropriate course, your Honour.

PN177

JUSTICE HATCHER: All right. So allowing some time for slippage is it appropriate then that the application not be listed for hearing before mid August?

PN178

MS BULUT: Yes, your Honour, that would be appropriate. And can I indicate, your Honour, if I can assist in that regard, we have taken some preliminary assessment as to absences, leave and the like, and there is a window of about 10 or 11 days where it seems to be clear, 28 August until 7 September, where witnesses will be available, various counsel available. And so I think that if that could be accommodated, if that appears to be suitable to the witnesses at the very least.

PN179

JUSTICE HATCHER: All right. I can't promise that there will be a Full Bench available during those dates, but I will see what can be done. In the event that I can't put in those dates I will ask the parties to give me any other available dates subsequent to that, and we will do the best we can. Are there any other issues I need to deal with this morning?

PN180

MS MORGAN-COCKS: Yes, your Honour, we have two matters. At this stage we have a clearer picture of the material (indistinct) the final hearing. However, we understand that as part of the termination question we will need to have regard to views of the employees. There hasn't been any discussion in depth about that matter at this stage, so we would suggest that perhaps a two week period be set aside for the gathering of those views, the employees be able to provide their views to the Commission and then shared with the parties. We are conscious that

the Commission may have other views about how that should proceed, so we'd be subject to those views as well.

PN181

JUSTICE HATCHER: Sorry, I thought before the matter was referred to me there was already a process to determine employees' attitudes towards the application. Are you proposing to do that again, are you?

PN182

MS MORGAN-COCKS: There was a process, and from what I understand, your Honour, that was to determine whether any parties opposed the application, and consequently whether it was referred to a Full Bench. That was not for the gathering of employees, it was about the merits of the application per se.

PN183

JUSTICE HATCHER: So how do you propose that be done, Ms Morgan-Cocks?

PN184

MS MORGAN-COCKS: What we would suggest is that from tomorrow, 27 June, to 11 July be put aside and the employees are able to maybe email a designated address to provide the Commission their views, and then those views at the end of that period be shared with the parties so they can comment on submission about that at a final hearing.

PN185

JUSTICE HATCHER: Could this be done anonymously or by people identifying their names, or - - -

PN186

MS MORGAN-COCKS: We would understand that the Commission would need to verify that the employees are indeed employees, so we wouldn't expect that it would be anonymously done, but obviously the parties involved would seek to take advantage of any of that information.

PN187

JUSTICE HATCHER: All right. Given that the hearing will only go ahead if agreement is not made and/or not approved wouldn't it be more advisable to obtain the views of employees in light of that circumstance rather than before knowing what the outcome of the proposed agreement process is?

PN188

MS MORGAN-COCKS: If there is a period of time between the end date of a vote and a hearing that certainly could be done in that time, your Honour.

PN189

JUSTICE HATCHER: Ms Bulut and Mr Bruno, do you want to say anything about this?

PN190

MS BULUT: Your Honour, we would embrace your Honour's suggestion that the views of the employees only be sought after and if the enterprise agreement is not

voted up. It appears that based on your Honour's indication of dates there would be a period of time in terms of the vote closing, let's say some time in late July early August and the hearing being conducted. It appears there would be some time. And so we would certainly embrace that approach in the first instance.

PN191

And secondly directions were made in terms of how this would be conducted, how the views would be gathered, by Deputy President Gostencnik, as your Honour rightly pointed out, on 25 January. There was a particular direction made that Apple, my client, serve a copy of the direction, et cetera, and some more information to relevant employees covered by the enterprise agreement to ensure that the relevant employees were invited to express their views. And given that that had been a tried and tested method we would embrace the same sort of approach be taken in terms of gathering the views of the employees.

PN192

JUSTICE HATCHER: All right. Mr Bruno, do you want to say anything about this?

PN193

MR BRUNO: Your Honour's suggestion about the time period there seemed imminently sensible.

PN194

JUSTICE HATCHER: All right. Well, that's the step I propose to take. So I will issue a direction to permit that, but I will formulate that once we have established what the hearing dates are. Ms Morgan-Cocks, what's your other issue?

PN195

MS MORGAN-COCKS: In our covering email to your chambers on Friday we flagged the seeking of confidentiality orders over some of the material in the reply evidence, subject to being able to discuss with Apple with that. We haven't heard from Apple yet about the merits of that. Noting that the material is due to be published on the Commission's web page shortly we wanted to flag making an application regarding confidentiality over those materials, and we can address you on that now or we can provide information to your chambers separately by a note if that would be preferable.

PN196

JUSTICE HATCHER: So what's the nature of the material you say should be kept confidential?

PN197

MS MORGAN-COCKS: The material is very similar in nature to that which was - orders were granted on 3 April. It's largely confined to personal calendar entry dates.

PN198

JUSTICE HATCHER: Sorry, I missed that, personal what?

PN199

MS MORGAN-COCKS: Personal calendar entry dates, you know, going out for dinner, things that are not relevant to the matter. Witnesses have provided evidence of their calendars, and some matter in there is related to the case, some of it is related to their own personal lives and - - -

PN200

JUSTICE HATCHER: Can you take me to an example of that in the reply material?

PN201

MS MORGAN-COCKS: Yes, I can take you to it now, your Honour. For example we look to the reply statement of Wilbur Fong(?) we can see - - -

PN202

JUSTICE HATCHER: Sorry, I will get that. Yes.

PN203

MS MORGAN-COCKS: We have annexure RFW1, which is a series of calendar dates. For example we've got on 27 April a hair cut entry. We've got 7 May dinner with (indistinct). These matters are personal.

PN204

JUSTICE HATCHER: What's confidential about them.

PN205

MS MORGAN-COCKS: It's not that they are confidential per se, but they're not relevant to the case and we wouldn't necessarily see that it be important that that matter be accessible to the public at this stage. Confidentiality orders were made in a similar vein over similar material on 3 April and we would ask those dates be filed as well. We have also got - - -

PN206

JUSTICE HATCHER: Is that your best example, Ms Morgan-Cocks?

PN207

MS MORGAN-COCKS: No, I have other examples, your Honour, my apologies. For example we also have - - -

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JUSTICE HATCHER: Give me your best example.

PN209

MS MORGAN-COCKS: Okay, your Honour. Yes, thank you. For example we have the annexure, it's RJG2, it's the annexure to Justin Gusset's reply statement.

PN210

JUSTICE HATCHER: Give me a second. Yes.

PN211

MS MORGAN-COCKS: For example we have on 7 April 'ANS paid' - seemingly bills paid. We have multiple entries in relation to bills being paid. We have 23 June 'Power bill due.' These are personal financial matters. It's not totally

controversial, but it's not in the public interest that these matters be publicly available we would say.

PN212

JUSTICE HATCHER: I don't think, with respect, that's the test. All right. I am not satisfied that these matters need to be the subject of confidentiality orders. So I won't ask the other parties to address it. Is there anything else we need to deal with today?

PN213

MS MORGAN-COCKS: No, your Honour.

PN214

JUSTICE HATCHER: All right. I thank the parties for their attendance. I will notify the parties either of dates within the time window that has been identified, or if we can't meet that I will ask the parties to identify their unavailable dates in the period following that window. We will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[9.57 AM]