



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

Sydney

9.30 AM, FRIDAY, 24 FEBRUARY 2023

Continued from 03/02/2023

PN1

PRESIDENT HATCHER: Ms Morgan-Cocks, you appear for the applicant, Mr Gusset; is that right?

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MS G MORGAN-COCKS: That's right, President Hatcher.

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PRESIDENT HATCHER: Mr Shariff, you seek permission to appear for the Apple, the employer?

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MR Y SHARIFF: I do, thank you.

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PRESIDENT HATCHER: Mr Murtagh, you appear on your own behalf?

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MR K MURTAGH: I do, yes.

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PRESIDENT HATCHER: Mr Bliss, you appear for the SDA?

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MR D BLISS: Yes, your Honour.

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PRESIDENT HATCHER: Is there any opposition – at least for today – for permission for legal representation being granted to Apple?

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MS MORGAN-COCKS: Nothing from us, your Honour.

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MR BLISS: No, your Honour.

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PRESIDENT HATCHER: Permission is granted. So how does the applicant wish to proceed?

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MS MORGAN-COCKS: Your Honour, we have put some suggested dates to the employer yesterday evening. I appreciate they may not have had some time to get instructions on that, but our proposed dates are as follows – if you're ready to hear them.

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PRESIDENT HATCHER: Yes.

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MS MORGAN-COCKS: Firstly, the applicant will file any submissions and evidence in the matter by 17 March. To follow that, any covered employee and employer – just noting that there are no covered registered organisations subject to the agreement - will advise the Commission of their view on the application by 31 March.

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PRESIDENT HATCHER: Their view, okay, yes.

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MS MORGAN-COCKS: I do want to go to that point, but I will get through these because I did want to raise - - -

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PRESIDENT HATCHER: Yes.

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MS MORGAN-COCKS: - - - a question about that process. To follow that, any bargaining representative that wishes to provide submissions and evidence on the matter of whether the termination of the agreement would adversely affect the bargaining position of the employees that will be covered by the proposed agreement also do so by 31 March. To follow that, any reply from the applicant by 14 August. Following that, the hearing is not later than 10th of - - -

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PRESIDENT HATCHER: Sorry, what was that reply date?

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MS MORGAN-COCKS: 14 April, your Honour.

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PRESIDENT HATCHER: Yes.

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MS MORGAN-COCKS: And a hearing listed not on a date later than 10 May. I'm on leave at that time, your Honour, so that's the reason for that date midweek.

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PRESIDENT HATCHER: All right. Thank you. Mr Shariff, shall I turn to you next?

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MR SHARIFF: Yes, your Honour. I suppose there is an application before the Full Bench for an expedited hearing, but perhaps that doesn't need to be dealt with if we're simply going to deal with programming orders. My client's position is that they are midstream in bargaining. In fact very advanced in bargaining.

PN26

My client's position is that the Commission's resources and facilities would be better utilised to assist the parties – that is the bargaining representatives – in

seeking to obtain an outcome by agreement that can be put to a vote of employees. We think that's a better utilisation of the Commission's resources.

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PRESIDENT HATCHER: Well, has anyone made a section 240 application to do that?

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MR SHARIFF: No, your Honour, but I think what we're effectively saying is that to date the Commission hasn't assisted the parties in any assisted bargaining as opposed to a dispute resolution. My understanding is that that is a position that is shared by some of the bargaining representatives, but not all, but I understand what your Honour puts to me that the Commission needs to have something before it to activate that. I don't think what the bargaining representatives – including my client – had in mind is a section 240 application, but rather the Commission's assistance in facilitated bargaining, conciliations and the like.

PN29

Be that as it may, if one deals with perhaps just programming the matter, what our alternative position is to putting the matter over – which is what we seek. We seek the matter to be put over and we have provided the Commission with some submissions on that effect, but if we're going to deal with programming then if I can take up my friend's proposal, I think order 1 of her proposals was the applicant file any submissions and evidence in the matter by 17 March. We don't oppose that as our fallback.

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The second order that my friend sought was any covered employee and the employer advise the Commission of their view on the application by 31 March 2023. We don't oppose that. The third order was that any bargaining representative that wishes to provide submissions and evidence on the matter of whether the termination would adversely affect the bargaining position, to do so by 31 March 2023, as well.

PN31

Where we differ is that we seek an additional order after that – a new order 4 – that would have any employee who opposes the termination application and wishes to put on evidence and submissions do so by 14 April 2023. Just pausing there, as we understand it there has been an employee – we don't know the identity of the employee – who has indicated to the Commission through processes facilitated by Gostencnik DP that he or she opposes the termination application but we don't know, we haven't seen any evidence or submissions from that person or others.

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PRESIDENT HATCHER: Just to be clear, what is your client's position?

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MR SHARIFF: My client's position is it hasn't yet formed a position and I think that's why perhaps Ms Morgan-Cocks has indicated that some time be given to my client, the employer, and any other bargaining representative, to indicate what

their position is by 31 March. Part of the reason why I suppose we can't really take the matter further is that to date, as we set out in the submissions, the only materials that have been put forward to the Commission was by Mr Gusset and then there has been a responsive statement to that - or declaration to that by Mr Murtagh. I've probably mispronounced that name and I apologise to him in advance. He points out a number of discrepancies in Mr Gusset's position.

PN34

At the moment we don't know what the position is that RAFFWU advances by reference to appropriate evidence. In any event, could I just perhaps go back to the orders that we would seek in the alternative. Our order 5 would then have Apple to put on its evidence and any submissions, if it is opposing the application or as to its position, by 12 May. Order 6 would be the applicant file any submissions and evidence in reply by 9 June and thereafter the matter be brought back and listed for hearing.

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We think at the moment it's highly premature to list the matter for hearing because we don't know what's in issue and we don't know the extent of the evidence. That is our position.

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PRESIDENT HATCHER: Mr Shariff, just going back to the issue about assistance in bargaining, the threshold to have a bargaining dispute under section 240 is pretty low, so if Apple or any other bargaining representative files an application, I promise you you will get assistance from the Commission in whatever form the parties would like to help with bargaining.

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MR SHARIFF: Yes.

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PRESIDENT HATCHER: If that's what is sought.

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MR SHARIFF: Thank you, your Honour. Look, there is more to it than that. Bargaining has been on foot; (a) a proposed enterprise agreement was put to a vote. You will have seen that and it wasn't approved by a valid majority. Since then there have been extensive, we would say, engagements between bargaining representatives.

PN40

The reality is that the resources of my client had been directed and its efforts have been directed to try and resolve those issues, and to take away what might be colour around the bargaining. I just put that in as best neutral way as I can. My understanding is that at least the two registered the organisations – the SDA and ASU – are supportive of that process for a negotiated outcome.

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PRESIDENT HATCHER: Yes.

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MR SHARIFF: This application is, frankly, in our client's view at the moment a distraction and they just haven't formed a view as yet because it's distracting attention from that where attention should be directed, in our respectful submission.

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PRESIDENT HATCHER: All right. Thank you. Mr Murtagh, is that the way to pronounce your name?

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MR MURTAGH: That's correct, yes.

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PRESIDENT HATCHER: So what do you say? Just to be clear, notwithstanding the matters you have raised in your declaration you support termination; is that right?

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MR MURTAGH: Yes. Ordinarily I would support termination, but I think to echo Mr Shariff's point that that would likely be better achieved through coming to an agreement on a new enterprise bargaining agreement as opposed to proceed with termination its current form.

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PRESIDENT HATCHER: So what do you say should be done with the application procedurally? You have heard what the applicant says.

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MR MURTAGH: Certainly. I would agree with Mr Shariff if orders were made for parties to file any submissions, whether that be bargaining representatives, the employee or the respondent and applicant. I would say, however, I would agree that a hearing shouldn't be scheduled at this point. I think based on the timelines that have been presented by Ms Morgan-Cocks, at that point I believe two to three additional bargaining meetings would have been held between all parties.

PN49

Based on the current timeline proposed by Apple and to my understanding agreed upon by the two registered organisations and RAFFWU, the indicative timelines that (indistinct words) bargaining would be around June to July and hopefully at that point an agreement will be formed. Based on the timeline presented, if we did get to the point of a hearing on the matter, likely that would coincide not too far from actually submitting a voted upon agreement to the Commission for approval assuming that bargaining goes ahead productively.

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PRESIDENT HATCHER: All right. Thank you. Mr Bliss?

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MR BLISS: Thank you, your Honour. I would indicate the SDA's position is that we believe this application is premature. We would broadly align with Apple's

position in that we think the matter should be stood over to allow the parties to bargain in good faith. I wouldn't quite agree with the characterisation that it has been continuous. There has been a significant hiatus over the Christmas break in bargaining. Bargaining is scheduled to resume next Monday and Tuesday, and then there are monthly meetings scheduled for two days at a time for the next – tentatively for six months, but the union has indicated to Apple would we wish this matter to be concluded much sooner.

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In relation to this matter, our broad position would be the matter should be stood over to allow our time and our resources to be spent on bargaining. Having said that, if the matter is to be programmed, in absence we would indicate the time frame sought by Apple would be broadly agreed by us.

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PRESIDENT HATCHER: All right. Thank you. Anything in response to that, Ms Morgan-Cocks?

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MS MORGAN-COCKS: Yes, thank you, your Honour. I think the point that the application is premature is a strange one. From August to October when Apple announced the access period for the enterprise agreement, we had had 17 bargaining meetings. A number of times matters have been referred to good faith bargaining issues. We have not had a bargaining meeting to discuss substantive claims since October. We have had a number of meetings to discuss general terms, but the matter has been drawn out for some time now.

PN55

We have been agitating to meet since the vote went down in October, including by asking everyone to continue to negotiate through the Christmas period, which was not agreed to; so to say that it's premature, I think is a strange one. Either it's too rushed or it's not, but, in any event, we say that these considerations regarding bargaining are really largely irrelevant.

PN56

I provided the Commission with a set of submissions to this point on 17 January, but in summary the Full Bench authority is clear that making decisions regarding programming applications under section 225 of the Act, the focus needs to be on performing the functions quickly and informally rather than having any deference to any kind of good faith bargaining obligations. Bargaining and termination applications are not mutually incompatible. The two things can happen at the same time.

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Apple is a very well-resourced company. Very often termination applications and bargaining occurs at the same time. There is no reason we can't, you know, do two things at once. We would say that there has been plenty of time to reach an agreement over the past six months or more and that it hasn't happened. To say that the company needs more time, well, we say that there has been a lot of time.

PN58

The union has put in a lot of effort in order to reach an agreement, including by taking industrial action over a number of months and we think that we can walk and chew gum at the same time, so I think it's appropriate that the matter be programmed in the way that we have suggested. It's not a shortened time frame. We think that it is a standard programming for this kind of matter. To delay functionally until the middle of the year would be largely unnecessary given that the matter was filed in December.

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Any considerations regarding giving more time for bargaining we would say would be an error and are irrelevant, and we think that the matter should be dealt with in the way that we have suggested.

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PRESIDENT HATCHER: All right. I thank the parties for those submissions. The course I propose to take is, firstly, I will issue a direction for the applicant to put on his evidence and submissions in support of the application by the date indicated; that is, by 17 March. I will not make any further directions at this stage, but I'll call the matter on for a further directions hearing at a date to be advised after 17 March and I will hear a report from the parties about the bargaining position at that stage.

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I want to indicate to your client, Mr Shariff, that unless there is advice by that further directions hearing that there is real progress or an enterprise agreement is imminent, then I think the applicant is entitled to have his application programmed for hearing.

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MR SHARIFF: I understand and of course there is the interests of other employees who – at this stage there is at least one from what we know oppose it and at the moment we don't know what that employee's position is, but we'll have to take some steps in the meantime to understand that position so we can inform your Honour what our position is at that date to be advised, but I hear what your Honour says.

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PRESIDENT HATCHER: Yes, well, by the next directions hearing the parties and anyone else who is interested will have a full understanding of the applicant's case. I will also take into account whether any party has sought the assistance of the Commission with bargaining on or before that date. All right. I thank the parties for their attendance and we will now adjourn.

ADJOURNED INDEFINITELY

[9.49 AM]