



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

B2023/771

s.234 - Application for a serious breach declaration

**United Firefighters' Union of Australia
and
Fire Rescue Victoria T/A FRV
(B2023/771)**

Melbourne

2.00 PM, FRIDAY, 20 OCTOBER 2023

PN1

JUSTICE HATCHER: I'll take the appearances. Mr Borenstein and Mr Friend, you appear for the United Firefighters' Union.

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MR BORENSTEIN: We do.

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JUSTICE HATCHER: Ms Sweet and Mr Garozzo, you appear for Fire Rescue Victoria.

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MS SWEET: We do, your Honour.

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JUSTICE HATCHER: And Mr O'Grady and Ms Leoncio, you appear for the Minister.

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MR O'GRADY: Yes.

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JUSTICE HATCHER: I've seen the competing versions in terms of the directions. It seems to me that which version is to be favoured depends upon how far the parties are about the issue of agreed and disputed terms. Mr Borenstein, do you want to report about that?

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MR BORENSTEIN: I'm sorry, your Honour's asking how far apart we are on - - -

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JUSTICE HATCHER: Yes. Two weeks ago, or a bit over two weeks ago, you were very far apart. I'm just wondering if any progress has been made.

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MR BORENSTEIN: No, your Honour. We're still in the same position. We've still got that situation where FRV are saying that if not everything is agreed, then nothing is agreed, and so their position appears to be, in the correspondence to us, that everything is not agreed.

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JUSTICE HATCHER: In that case, Mr Borenstein, I don't see how I can make directions for a full hearing in circumstances where the parties are so far apart as to what the actual issues are to be arbitrated. That is, it seems to me - - -

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MR BORENSTEIN: Your Honour, we agree with that.

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JUSTICE HATCHER: All right.

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MR BORENSTEIN: In the directions which we've sent to you - - -

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JUSTICE HATCHER: Yes.

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MR BORENSTEIN: - - - you'll see that we propose that there be a preliminary question decided on what are or are not the agreed terms which will then fix the parameters of what the arbitration needs to be.

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JUSTICE HATCHER: What about the Minister's application for intervention? What's your client's attitude about that?

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MR BORENSTEIN: We're opposed to that, your Honour. I can tell you briefly why, if you wish to hear.

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JUSTICE HATCHER: Well, if there's a dispute about that, maybe that should be an additional preliminary question.

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MR BORENSTEIN: Certainly.

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JUSTICE HATCHER: That is, I think the Full Bench to hear the matter should determine that issue and then that can be sorted.

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MR BORENSTEIN: Certainly, your Honour.

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JUSTICE HATCHER: So just looking at the timetable - - -

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MR BORENSTEIN: Your Honour will see the timetables are the same in the two – well, one of the timetables is proffered by the Minister, but we deal with that because FRV say they agree with that.

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JUSTICE HATCHER: Yes.

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MR BORENSTEIN: The only difference between them is that in item number 4 we have sought a period of three weeks to file our reply material and the Minister, in her infinite wisdom, has suggested we only need two, with a view to having a hearing on Christmas Eve, on an estimate of half a day. This is not a half-day case, your Honour.

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JUSTICE HATCHER: No, it's not, but I think, given the statutory imperative to hear the matter as soon as possible, it would be desirable if this preliminary question can be determined before the end of the year.

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MR BORENSTEIN: Yes, your Honour, if that can be done, but if people are going to be put under pressure, then I think all of the steps should be abbreviated, not just the last one.

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JUSTICE HATCHER: It might turn out to be a case of finding a date the Full Bench will be available then working backwards on it, and a fair and reasonable approach - - -

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MR BORENSTEIN: That might be the most efficient way, your Honour.

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JUSTICE HATCHER: Ms Sweet?

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MR BORENSTEIN: I'm sorry, can I just say - - -

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JUSTICE HATCHER: Yes?

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MR BORENSTEIN: I mentioned a half-day case. Our estimate is it will take two days.

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JUSTICE HATCHER: Two days.

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MR BORENSTEIN: Yes, because there will be a deal of evidence which will be tested, and then submissions.

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JUSTICE HATCHER: Ms Sweet?

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MS SWEET: Yes, your Honour.

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JUSTICE HATCHER: What course do you propose we take? First of all, are you amenable to a hearing on the preliminary question as to the agreed and disputed issues prior to the end of the year?

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MS SWEET: Yes, we are.

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JUSTICE HATCHER: And the estimate of two days, is there any issue about that?

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MS SWEET: There is. We accept the same position as the Minister, that it would be half a day.

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JUSTICE HATCHER: Having heard what I've heard during the earlier hearing, it seems to me that it's likely that there will be evidence as to what has occurred during the course of negotiations to support a view about what are the agreed and non-agreed terms. That seems to me to raise the possibility of a more elongated hearing, and I'm not sure how that could be dealt with in half a day.

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MS SWEET: We're in your Honour's hands. That was our estimate.

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JUSTICE HATCHER: Is there anything else you want to add, Ms Sweet?

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MS SWEET: No. Otherwise I agree our learned friend Mr Borenstein has set out the position accurately.

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JUSTICE HATCHER: Mr O'Grady?

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MR O'GRADY: Yes, thank you, your Honour. We are content with the contraction of the timetable as proposed by my learned friend. If there are going to be evidentiary issues, I accept that a half a day hearing will not be sufficient. As you would appreciate, the question of agreed and/or matters in issue is, to an extent, a technical issue, and that was why we put forward the earlier estimate, but if my learned friend wants to go into evidence, well, that changes things.

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You will have seen that there is a slight difference in the proposed separate question between our version and the UFU's version. The UFU's version simply deals with what are the agreed terms, whereas we have dealt with that, we've also sought a determination as to what are the matters at issue. It may be that nothing really turns on that, but we thought it was appropriate that given we are going to have a debate about the scope of the arbitration, it was perhaps better to capture the various limbs that are set out in the Act.

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JUSTICE HATCHER: Just trying to think that through, does it require parties to file draft determinations in order to identify not only the agreed terms but what's actually in dispute?

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MR O'GRADY: I think there is ultimately going to have to be a determination of the separate question so that advance can be made in respect of ultimately what is at issue, in that whilst it may be, given the time, that there are no agreed terms, that doesn't necessarily give rise to a situation that everything is at issue, in our view, but it's unlikely that we're going to progress that until we have the preliminary question heard.

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JUSTICE HATCHER: Are you content for the issue of your application for intervention be dealt with at the same hearing?

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MR O'GRADY: Yes.

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JUSTICE HATCHER: Yes, all right. Mr Borenstein, are you happy with a modification of the question which would include definition of the issues to be arbitrated, in addition to the agreed matters?

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MR BORENSTEIN: I think we're content with that, your Honour, yes.

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JUSTICE HATCHER: Is there anything further I need to deal with at this stage?

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MR BORENSTEIN: Not from our side, your Honour.

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JUSTICE HATCHER: I can indicate that notwithstanding the statutory regime dividing the matter into agreed terms and issues in dispute, again if any party thinks any assistance by the Commission would be of assistance, they can avail themselves of that at any time. We'll try to develop a timetable and issue that this afternoon, based upon when I can locate hearing dates.

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MR BORENSTEIN: Can I just ask your Honour, your Honour indicated you will need to look at when the Full Bench will be available. Your Honour will see from the Bar table there's a lot of people who have been invested in this case for a long period of time, so if I might ask that the parties might be given some prior notice of the available dates.

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JUSTICE HATCHER: Well, can we do this. Perhaps we'll do this as a first step. Can the parties send to my chambers a list of any definitely unavailable dates in December?

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MR BORENSTEIN: Certainly, your Honour.

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JUSTICE HATCHER: And then we'll construct it from there.

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MR BORENSTEIN: Yes, that works. Thank you.

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JUSTICE HATCHER: Yes, all right.

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MR O'GRADY: Before you adjourn, President, can I just make one other observation as to the differences between the two proposed directions. Our proposed directions has facility for the Minister to file material going to the separate question, and we would be seeking to do that, as well as our submissions going to intervention.

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JUSTICE HATCHER: Yes. Mr Borenstein, you have no objection to the Commission making directions that provisionally assume the Minister will be involved, subject to the determination.

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MR BORENSTEIN: As long as it's understood it's subject to the determination of the intervention.

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JUSTICE HATCHER: Yes. All right. If there's nothing further, we'll now adjourn.

ADJOURNED INDEFINITELY

[2.08 PM]