



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER MATHESON**

**B2023/1111 B2023/1112**

**s.236 - Application for a majority support determination**

**Health Services Union**

**and**

**Clinical Laboratories Pty Ltd T/A Australian Clinical Labs**

**(B2023/1111)**

**(B2023/1112)**

**Sydney**

**10.00 AM, MONDAY, 15 JANUARY 2024**

PN1

THE COMMISSIONER: Good morning, parties. It's Commissioner Matheson. I will start with the appearances for the applicant.

PN2

MS S MOHAMMAD: If the Commission pleases, Ms Mohammad, initial S, appearing for the Health Services Union. I also have with me today Mr McDonald, initial J, industrial officer for the Health Services Union.

PN3

THE COMMISSIONER: Thank you, Ms Mohammad. For the respondent?

PN4

MR A BERRY: May it please the Commission it's Mr Berry, initial A, Ms Lai, initial K, and Mr Brownlow, initial C, appearing for the respondent.

PN5

THE COMMISSIONER: All right. Thank you, parties. Mr Berry, I know you have dealt with the issue of representation previously in a conference before. For completeness, you are an employee of the organisation I can take it?

PN6

MR BERRY: That's correct. I'm the national employment relations manager.

PN7

THE COMMISSIONER: Thank you. All right. Now, parties, we do have some witnesses in these proceedings today. Have you conferred about the order of those witnesses ahead of today?

PN8

MS MOHAMMAD: Commissioner, if I may, we have had some brief discussions. However, it has been drawn to our attention that one of the respondent's witnesses is also the instructing officer. In that instance we would propose that the instructing officer/witness step out at the time that the applicant's witnesses are giving their evidence.

PN9

THE COMMISSIONER: Yes. Would you have any objection to that, Mr Berry?

PN10

MR BERRY: Yes, we do. The instructor is entitled to hear the evidence and provide instructions to me in relation to that evidence. It may be that the applicant has such a strong case after hearing the evidence put on by the applicant, that the instructing officer for the respondent may seek to settle the matter.

PN11

THE COMMISSIONER: Do you change your view on things, Ms Mohammad?

PN12

MS MOHAMMAD: Commissioner, we would be amenable to the respondent putting its evidence - - -

PN13

THE COMMISSIONER: The witness going first?

PN14

MS MOHAMMAD: Yes, making its submissions and the witness tendering its evidence first.

PN15

THE COMMISSIONER: What do you think about that, having your witness dealt with first, Mr Berry? It might be an appropriate course of action. Ordinarily in proceedings before the Commission we wouldn't have a witness hear the evidence of other witnesses. I understand you have got some practical difficulties, but you are here to represent the organisation today. There is just simply no impediment in you doing so without having your witness give his evidence first. In any case, what do you say?

PN16

MR BERRY: Unfortunately, I'm not in a position to agree. This is the applicant's case. The applicant is required to satisfy the Commission that it does have the majority of employees that do wish to bargain and also that they have fairly chosen those groups. Now, we say - and, unfortunately, I'm getting into my opening statement here - there is not a majority and the groups have not been fairly chosen, so we diametrically oppose.

PN17

The respondent is prejudiced one way or the other if the motion of the applicant is granted. First, in that it's prejudiced because it is providing the evidence first when it should be the applicant and it's the applicant's applications. Secondly, it's prejudiced as the instructor is not present and not able to hear the strength of the applicant's evidence.

PN18

THE COMMISSIONER: Okay. So, Mr Berry, I put this to you: when your witness is giving his evidence it would be open to you to put any propositions to him based on what you have heard from the union's witnesses. We're talking about evidence here rather than submissions, I make that point. What I propose to do is give the parties an opportunity to say anything they wish to say in brief to open their case, but I would be asking that your witness leave the room while the applicant's witnesses are giving their evidence, then we bring him in and deal with him accordingly.

PN19

If there are propositions that arise out of the union's witnesses, you're able to put those to your witness; if you want to test them to the extent they're relevant to the matters contained in his statement. I don't think it's appropriate that witnesses do hear the evidence of another witness in circumstances where, as I said, you are - it's not that the respondent is without representation in those circumstances. You are here to be able to represent the organisation in your role as national IR manager.

PN20

I am happy to give you an adjournment of 10 minutes if you would like to get some instructions from the person within your organisation that you say is instructing you. Would you like to have some time confer with him about that?

PN21

MR BERRY: Ma'am, if I may and with respect, that position is somewhat contradictory in that you have said that I need to take instructions from the person who is here, but you're excluding them from the room - - -

PN22

THE COMMISSIONER: I'm just giving you an option because that was your position, but it's not appropriate that he hears the evidence of another witness when he is a key witness in the proceedings.

PN23

MR BERRY: Is that the order of the Commission?

PN24

THE COMMISSIONER: Yes, it is.

PN25

MR BERRY: As the Commission pleases.

PN26

THE COMMISSIONER: All right. Thank you. So on that basis what I am proposing to do is hear the - I'll start with your application, so you can make any opening remarks that you wish to make about your application at that point. You may wish to wait until you've heard the evidence and the circumstances, Ms Mohammad. What do you say about that?

PN27

MS MOHAMMAD: Commissioner, I would like to make some short submissions.

PN28

THE COMMISSIONER: Okay.

PN29

MS MOHAMMAD: Opening submissions and also some closing submissions, as well.

PN30

THE COMMISSIONER: All right. Well, what we'll do then is I think we'll ask the witnesses to leave the room at this point. We will start with your opening remarks, we'll then turn to the respondent and you can say anything you wish to say at that point, Mr Berry, then we will deal with the usual order of witness evidence starting with the applicant's witnesses, then the respondent's, okay? Thank you. All right. So, Ms Mohammad, I will now invite you to make some comments that you wish to put make.

PN31

MS MOHAMMAD: Thank you, Commissioner. These proceedings are in relation to two applications made by the HSU on behalf of its members employed at the clinical laboratory trading as Australian Clinical Labs. The Commission made two majority support determinations. One application relates to matter number B2023/1111, courier staff, and the other being B2023/1112 relating to customer service call centre staff.

PN32

By way of background, on 20 July 2023, the applicant as a bargaining representative for its employees who will be covered by the proposed agreement made a request on behalf of its members to bargain for an enterprise agreement. On 26 July 2023, the respondent responded and declined to bargain. On 8 September 2023, the applicant made an application to the Fair Work Commission pursuant to section 236 of the Fair Work Act seeking that the Fair Work Commission make a majority support determination.

PN33

On the same day, the respondent indicated that it was seeking to hold a meeting with the applicant to understand the applicant's intention for the EBA process and to allow dialogue between the parties on this. On 11 September 2023, the applicant then proceeded to withdraw its majority support determination applications before the Commission in good faith and to allow for further dialogue to progress.

PN34

A meeting was arranged and took place on 13 September 2023, whereby the applicant met with the respondent and following the meeting it was agreed that the applicant would send formal communications to outline the proposed process of commencing bargaining for an enterprise agreement. On 15 September, an email was sent by the applicant to the respondent outlining the proposed bargaining process. However, no response was received.

PN35

A further email was sent on 17 October, where the applicant made another two applications to the Fair Work Commission pursuant to section 236 of the Fair Work Act seeking that the Fair Work Commission make a majority support determination for customer service call centre staff and courier employees employed by the respondent. Both groups of employees in the application before the Commission are currently covered by the Health Professionals and Support Services Award 2020.

PN36

For the Commission to grant the majority support determination, the following under section 237 of the Fair Work Act must be satisfied and that is that:

PN37

*A majority of the employees who are employed by the employer or employers at a time determined by the Fair Work Commission; and who will be covered by the agreement; and want to bargain; and the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and that the group of employees who will be*

*covered by the agreement was fairly chosen; and it is reasonable in all the circumstances to make the determination.*

PN38

The HSU submits that those applications currently before the Commission satisfy the provisions of 237 of the Fair Work Act. We submit that the majority of the employees employed in the courier groups within New South Wales want to bargain with their employer and have been fairly chosen. We say that this group is geographically distinct as they are all employed in New South Wales; operationally distinct due to the nature of the work in a distinct service delivered by the business; operationally distinct as the performance of work is different from duties performed by others in the workplace.

PN39

A majority of 55 out of a total of 96 courier employees have signed statements demonstrating that they wish to bargain with their employer. For this group, the statutory declaration by Mr Brendan Roberts and the witness statement of Mr Sanjeev Sharma will show that the groups were fairly chosen and the majority within the groups wished to bargain.

PN40

The Commission will also see that the customer service call centre staff are fairly chosen. The customer centre call centre employees are based at the Bella Vista site and are all employed within New South Wales, therefore are geographically distinct from all other ACL employees. The group are also organisationally distinct as they are all in the same team structure with the organisation and operationally distinct based on the type of work performed with the respondent.

PN41

The majority of 12 out of a total of 16 have signed statements demonstrating that they wish to bargain with their employer. For this group, the statutory declaration of Mr Brendan Roberts will show that the groups were fairly chosen and a majority wished to bargain with their employer, which will in turn support the application to the Commission to make the majority support determination for customer service employees.

PN42

Therefore, the Commission will see that section 237 of the Fair Work Act is satisfied and, therefore, both majority support determinations should be made. These are my submissions.

PN43

THE COMMISSIONER: I'm just going to ask a question. A complication arises in this matter, Ms Mohammad, in that there is a timeline of events leading up to the making of the application that goes back some way. There are a couple of things I need to be satisfied of. First of all, one of the things I need to be satisfied about is that the employer hasn't agreed to bargain or initiated bargaining. I take it you're saying now that, notwithstanding there might be some understanding to the contrary in the past, there is no agreement to bargain.

PN44

MS MOHAMMAD: Yes, that's correct.

PN45

THE COMMISSIONER: It seems to be a matter that is not in dispute at this point in that case. The second complication that arises is that in the context of the timeline, what time should be applied for the purposes of dealing with the question of whether a majority of employees who will be covered by the agreement want to bargain in your view?

PN46

MS MOHAMMAD: We say the time that the applications should be considered from is from when the second applications were made to the Fair Work Commission.

PN47

THE COMMISSIONER: So the timeline for determining whether there is a majority or not - or the time for determining whether there is a majority or not, what do you say that is?

PN48

MS MOHAMMAD: In considering the group?

PN49

THE COMMISSIONER: Yes.

PN50

MS MOHAMMAD: We say that would be from the first application that we made.

PN51

THE COMMISSIONER: All right. I might hear from Mr Berry on that point, as well. Thank you.

PN52

MS MOHAMMAD: Thank you.

PN53

MR BERRY: Sorry, I'm a little confused and I would ask the applicant just to clarify the position as to when the Honourable Commission should determine whether a majority exists, because my hearing - which isn't perfect - is that there were a couple of oppositions put forward and I do not believe that I heard a settled position. So just before I respond, I would ask my friend to clarify that - - -

PN54

THE COMMISSIONER: Okay. I think I know what your response is, Ms Mohammad, but did you want to clarify for Mr Berry's benefit?

PN55

MS MOHAMMAD: Yes. We would be saying that in determining when a majority existed - we would be saying that would be from the point that the first two applications were made. Does that answer your question?

PN56

MR BERRY: Thank you, Ms Mohammad, but if I may, Commissioner, those applications were withdrawn by the applicant; so they have, in effect, died.

PN57

THE COMMISSIONER: There might be an issue there, Ms Mohammad. I might give you some time to think that one through. Do you want to take a few moments to have a look at your materials and have a think about it before you respond to Mr Berry's proposition, because I foreshadow what might happen here. You might say, well, look, you're relying on a majority that existed before you discontinued your last application such that it can't be taken any further, but if there was a different point in time it might be a different question for the Commission. It's a matter for you. Go on, Mr Berry.

PN58

MR BERRY: Perhaps if I may phrase it a bit more clearly for my friend. If the applicant is relying on the applications that have previously been withdrawn, the respondent will be seeking as a matter of procedure that this matter be immediately struck out because those matters were discontinued.

PN59

THE COMMISSIONER: Do you want to have a moment?

PN60

MS MOHAMMAD: Yes, just a few minutes to debrief - - -

PN61

THE COMMISSIONER: All right. I might just adjourn briefly for you to consider your position. I will be back shortly.

PN62

MS MOHAMMAD: Thank you.

**SHORT ADJOURNMENT**

**[10.33 AM]**

**RESUMED**

**[10.40 AM]**

PN63

THE COMMISSIONER: Ms Mohammad, I put to you a question of the time that you would be asking me to consider whether there was a majority. You were going to reflect on that. What is your position having had that opportunity?

PN64

MS MOHAMMAD: Thank you, Commissioner. After having given it some consideration, we would say that a majority should exist from the time of the second application. Not that we dispute the majority didn't exist at the time of the first application, but for the relevance of these proceedings we say that there was a majority at the time of this - - -

PN65

THE COMMISSIONER: At the time of bringing the application. All right. Mr Berry.



PN66

MR BERRY: The respondent has a different view to the applicant. That is, that the application should be determined at the date of hearing.

PN67

THE COMMISSIONER: All right. There is a contest of views now for me to determine. I will consider any submissions in relation to that, Ms Mohammad, by your closing remarks. Can I turn to Mr Berry now to say anything about the respondent's position?

PN68

MS MOHAMMAD: Yes, that's correct.

PN69

THE COMMISSIONER: Thank you. Mr Berry.

PN70

MR BERRY: Commissioner, I will briefly state the respondent's position. It's relatively simple in relation to both applications. That is, the respondent has not agreed to bargain or initiated bargaining. We reject the characterisation of the meeting of 13 September by Ms Mohammad and that will be clearly shown in the evidence, and certainly the evidence that has been filed by both parties in relation to both matters.

PN71

The respondent opposes the applications made by the applicant on the grounds that a majority of employees who are employed by the respondent do not wish to bargain. On that particular point, I ask the Commission or invite the Commission to note Ms Mohammad's opening submission that she is representing members, not employees, and certainly that is clearly evidenced - and will be shown, I'm sure, by the applicant - that they are acting in the best interests of the members which are not all employees and certainly nowhere near the majority of employees necessary for there to be a majority for which this Honourable Commission could grant the majority support determinations.

PN72

The respondent also says that the group of employees who will be covered by each respective application are not fairly chosen. The only common thread that can be deduced from the applicant's evidence is that these people share the same occupation. The respondent's position is that the law is very clear in relation to this matter and that will be addressed by me in closing submissions.

PN73

We also say that it is not reasonable in all the circumstances for this Honourable Commission to make the determinations sought by the applicant and that will become more apparent through the evidence that is given in the context of these proceedings today. I will also address that in my closing submission. However, the respondent says that section 237 of the Act is not met and, therefore, this Honourable Commission should decline the applications made by the applicant in relation to both matters. Thank you.

PN74

THE COMMISSIONER: Thank you, Mr Berry. All right. We will start with your witnesses now, Ms Mohammad. Who will we be hearing from first?

PN75

MS MOHAMMAD: Commissioner, I will be calling Mr Brendan Roberts.

PN76

THE COMMISSIONER: All right. Let's bring him in then. Thank you. Good morning, Mr Roberts. You are here to give evidence to the Fair Work Commission. You will now be asked to take an oath or an affirmation; what would you prefer?

PN77

MR ROBERTS: Affirmation, please.

PN78

THE ASSOCIATE: Please state your full name and address. Your business address is fine.

PN79

MR ROBERTS: Brendan Christopher Roberts. Business address is level 2, 109 Pitt Street, Sydney.

**<BRENDAN CHRISTOPHER ROBERTS, AFFIRMED [10.45 AM]**

**EXAMINATION-IN-CHIEF BY MS MOHAMMAD [10.45 AM]**

PN80

THE COMMISSIONER: Ms Mohammad, you may commence your examination-in-chief.

PN81

MS MOHAMMAD: Thank you, Commissioner. I would just like to confirm if Mr Roberts has a copy of his statement with him.

PN82

THE WITNESS: Not with - in one of these folders or - - -

PN83

MS MOHAMMAD: Can I just confirm if that's a copy of the court book?---Yes, yes.

PN84

THE COMMISSIONER: Yes.

PN85

MS MOHAMMAD: Okay.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XN MS MOHAMMAD

PN86

THE COMMISSIONER: We might take you to the relevant page of that court book then, Mr Roberts?---Yes.

PN87

I believe it's page 264 of the court book?---264, was it, Commissioner?

PN88

Yes, 264?---Yes, I have it now. Thank you.

PN89

MS MOHAMMAD: Mr Roberts, can I please ask you to confirm your full name, address and your occupation for the record?---Brendan Christopher Roberts. The business address is level 2, 109 Pitt Street, Sydney, New South Wales.

PN90

Just your occupation?---Health Services Union organiser.

PN91

Mr Roberts, can I confirm that you have prepared two statutory declarations, one for matter number B2023/1111 and another for matter number B2023/1112; is this correct?---That's correct, yes.

PN92

And you have a copy of those two statements before you?---Yes, I do.

PN93

Can I confirm that your statement for matter number 2023/1111 is 19 paragraphs long, was signed by you on 4 November 2023?---The paragraph length is correct. The date of this one should have been 4 December 2023, not November.

PN94

Thank you. Would you like to make any other further changes to your statement?---Just some clarity around paragraph 1, if I may.

PN95

THE COMMISSIONER: The 1111 matter, yes?---Yes, so from the 11 - my employment date is correct, 4 August 2008, but I started as a member services officer in 2010 and then I became union organiser.

PN96

Okay?---So just some - - -

PN97

Point of clarification?---Yes. Thank you.

PN98

All right. Thank you.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XN MS MOHAMMAD

PN99

MS MOHAMMAD: Is this statement true and correct to the best of your knowledge and belief?---Yes, it is.

PN100

Commissioner, I tender this statement.

PN101

THE COMMISSIONER: Thank you. So you would like it marked as an exhibit?

PN102

MS MOHAMMAD: Yes.

PN103

THE COMMISSIONER: We will mark the statutory declaration of Brendan Christopher Roberts, dated - well, it's dated 4 November, it was intended to be dated 4 December 2023, in matter number B2023/1111, as exhibit A1.

**EXHIBIT #A1 STATUTORY DECLARATION OF BRENDAN ROBERTS DATED 04/11/2023 - AMENDED TO 04/12/2023 - IN MATTER B2023/1111**

PN104

MS MOHAMMAD: I have nothing further.

PN105

THE COMMISSIONER: Did you want to introduce the other statement while you have the witness?

PN106

MS MOHAMMAD: Mr Roberts, can I confirm that you have prepared another statutory declaration for matter number 2023/1112?---That is correct, yes.

PN107

This is 15 paragraphs long and was signed by you on 4 November 2023?---Fifteen paragraphs long. Again, it should have been dated 4 December 2024(sic).

PN108

Do you wish to make any other further changes to this statement?---Again, just paragraph 1, that I commenced on 4 August 2008 as a member services officer, then became a union organiser in 2010.

PN109

THE COMMISSIONER: All right. Thank you. You wish to introduce that as evidence, so I will mark that as exhibit A2; that being the statutory declaration of Brendan Christopher Roberts and dated 4 November, intended to be dated 4 December 2023, as exhibit A2. That is in matter number 1112.

**EXHIBIT #A2 STATUTORY DECLARATION OF BRENDAN ROBERTS DATED 04/11/2023 - AMENDED TO 04/12/2023 - IN MATTER B2023/1112**

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XN MS MOHAMMAD

PN110

Any other questions?

PN111

MS MOHAMMAD: Nothing further. Thank you.

PN112

THE COMMISSIONER: All right. Mr Berry.

PN113

MR BERRY: Thank you, Commissioner.

**CROSS-EXAMINATION BY MR BERRY**

**[10.50 AM]**

PN114

MR BERRY: Mr Roberts, what did you tell Mr Sharma is an enterprise agreement?---An enterprise agreement is a document that is bargained and negotiated on behalf of employees which sets out your wages and your conditions, and is negotiated and voted upon by workers of that enterprise.

PN115

What did you tell Mr Sharma is the difference between a modern award and an enterprise agreement?---A modern award is the minimum set of standards determined by the Fair Work and an enterprise agreement is a document that has to improve on those minimum set of standards and conditions which is outlined in the modern award.

PN116

The HSU has stated that the respondent pays its employees the rock bottom minimum, hasn't it?---Is there a question or a statement of fact?

PN117

It's a question, Mr Roberts?---Australian Clinical Labs employ people under the health employees and support services conditions modern award, which is the minimum standard set out for the workers covered by Australian Clinical Labs.

PN118

The HSU has stated that ACL - sorry, the respondent pays it employees the rock bottom minimum, hasn't it?---I don't recall making that statement.

PN119

On 18 October 2023, the applicant uploaded to its Facebook page a statement that said, 'ACL workers deserve more than the rock bottom minimum', didn't it?---If that's what you - if that's a Facebook page you're referring to, we do believe that ACL workers believe more than the minimum award which is currently - Australian Clinical Labs employ people under, so we do believe that they deserve more than that minimum required under the modern award.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN120

So do you accept, Mr Roberts, that the applicant posted to its Facebook page on 18 October a statement that said, and I quote, 'ACL workers deserve more than the rock bottom minimum', end quote?---As I stated, Mr Berry, we believe the Australian Clinical Labs workers deserve more than the minimum modern award, which is the minimum standards that any employer is required to pay their employees. So we do believe that workers deserve more than that, because they are minimum safety nets that employers are legally bound to employ people under and, as I said earlier, enterprise agreements are negotiated to improve on those minimum standards.

PN121

But you accept that that post was made by the applicant to its Facebook page?---If that's what you're referring to, the post is there, Mr Berry, but again the position of the union has always been that the minimum award is the lowest standard that the employers are paying employees and we believe they deserve more than that.

PN122

So do you accept that that statement was made on the respondent's Facebook page?---If the - - -

PN123

I put it to you that the statement was made on the applicant's Facebook page on 18 October 2023 which stated, and I quote, 'ACL workers deserve more than the rock bottom minimum'?---If that's what the statement says, then that's what the statement says, Mr Berry - - -

PN124

MS MOHAMMAD: Commissioner, I object. Mr Roberts has answered the question to the best of his knowledge. It's becoming badgering now.

PN125

THE COMMISSIONER: All right.

PN126

MR BERRY: If I may ask that the witness be excused from the witness box.

PN127

THE COMMISSIONER: Yes, okay. Thank you.

<THE WITNESS WITHDREW

[10.55 AM]

PN128

THE COMMISSIONER: I might assist the parties here. Did you want to take the witness to the relevant page of the court book? That might be of assistance, Mr Berry.

PN129

MR BERRY: That may be longer, Commissioner. That may be a longer route.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN130

THE COMMISSIONER: Yes.

PN131

MR BERRY: Simply, Mr Roberts did answer a question but not my question. A simple 'yes' or 'no' would have sufficed.

PN132

THE COMMISSIONER: All right. Fair point, fair point, Mr Berry. We will bring him back in, but maybe if the evidence is before us, I would suggest that it might be a quicker route to take him to it. I'm just trying to assist the parties in terms of the position.

PN133

MR BERRY: I understand that, Commissioner, and I'm indebted to you. The problem is that the respondent's evidence hasn't been entered into evidence and if (indistinct) in being able to take him to that evidence - - -

PN134

THE COMMISSIONER: I will allow you to take him to that page of the court book, Mr Berry.

PN135

MR BERRY: There may be future references, so are you amenable to - - -

PN136

THE COMMISSIONER: I take it you have no objection to that, Ms Mohammad, it's in there. No? All right. Okay. Thank you.

PN137

MR BERRY: I will also need to confer with my associate.

PN138

THE COMMISSIONER: Yes. That's okay. Let's bring him back. Thank you.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [10.56 AM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [10.56 AM]**

PN139

MR BERRY: The respondent pays employees in New South Wales in accordance with the modern award, doesn't it?---That is my understanding.

PN140

The modern award provides fair wages, doesn't it?---It is the minimum wages that an employer is required to pay their employees.

PN141

The Fair Work Commission sets the wage rates in the modern award, doesn't it?---That is correct, yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN142

The Fair Work Commission, in determining wage rates, acts fairly, doesn't it?---That's a matter for the Commission to make a judgment on, not me.

PN143

I put it to you that the wages paid by the respondent to its employees are in accordance with the law and fair. What do you say in relation to that?---There have been - we would say that there have been a number of matters previously where we've discussed underpayment of wages to the tune of tens of thousands of dollars so far and again that's a matter for the employer. If the employer chooses to pay people on the modern award, that's their choice currently. We believe that workers should have the ability to negotiate higher rate of pay and wages for the work they do.

PN144

I'm going to take you now to the meeting of May 2023. In or about May 2023 you met with HSU members who are employed by the respondent, didn't you?---Can you point me where you're referring that to, please, Mr Berry.

PN145

Page 268 of the common court bundle, at paragraph 6?---Yes, that is correct, yes. Thank you, Mr Berry.

PN146

How many members attended the meeting?---That's a matter for the union. We don't disclose members' names or details of that meeting, but that one was with - that particular one on page 226 was related to our call centre members. That was an off-site meeting in their own time at Wentworth Footy Club.

PN147

I'm going to ask the question again, Mr Roberts: how many members attended this meeting?---I'm going to say I've been asked and answered that question, Mr Berry.

PN148

If I may ask that the witness be excused, Commissioner.

PN149

THE COMMISSIONER: Yes, Mr Roberts, I will get you to leave the room. We will have a discussion about whether you should answer the question squarely?---Yes.

<THE WITNESS WITHDREW

[10.59 AM]

PN150

MR BERRY: Perhaps I may invite my friend here to enlighten us on the, perhaps, privilege that Mr Roberts is claiming in respect of answering that question.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN151



THE COMMISSIONER: You can. Ms Mohammad, as I understand the response, if I can assist you, it was, 'We don't disclose the identities of our members', but we are talking about numbers and majorities here. It may not necessarily preclude him from answering the question about how many physical bodies were in attendance at a particular grouping. Is there anything you wish to say about that?

PN152

MS MOHAMMAD: Perhaps Mr Berry would like to rephrase it just so he is a bit more specific.

PN153

THE COMMISSIONER: I think he did say, 'How many people were there?' Is that right?

PN154

MR BERRY: Yes, correct, Commissioner.

PN155

THE COMMISSIONER: All right. I am inclined to require him to answer the question when he returns, but we will qualify that by saying, 'You do not have to disclose the names or identities of the persons who were present.' Thank you. We will bring him back.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [11.00 AM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [11.00 AM]**

PN156

THE COMMISSIONER: Okay, Mr Roberts, a question was put to you and Mr Berry is going to ask it again, and we'll get you to answer it. In doing so you do not have to disclose the identities, but it's a question of numbers; how many people were at the meeting?---Yes, Commissioner.

PN157

MR BERRY: How many members attended this meeting?---That particular meeting I don't recall the exact number, but it was in the vicinity of 10 to 12.

PN158

The meeting was only attended by members, wasn't it?---Yes. At that time it was attended by customer services staff who subsequently have now - or became part of the union at that point.

PN159

I'm going to take you to the request to bargain that was made on 20 July - - - ?---Yes, yes.

PN160

- - - 2023. I'm going to refer to B2023 - that is matter 1111 - at page 264, paragraph 6?---Yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN161

Now, the email was actually part of the annexures that were filed in the application - - -?---Yes.

PN162

- - - filed by the applicant; page 50 of the common court bundle?---Which one, sorry?

PN163

Page 50, five zero, of the common court bundle?---Court bundle page 50, yes.

PN164

Yes, page 50. Have you - - -?---Yes, I've got it.

PN165

Yes. My question, Mr Roberts, is on or about 20 July 2023 you sent an email to the respondent requesting that the applicant enter into bargaining negotiations for a single enterprise agreement capturing pathology couriers, pathology collectors and customer service/administration staff, didn't you?---Yes, that's correct, yes. That's what the email says, yes.

PN166

Your request of 20 July 2023 was declined by the respondent, wasn't it?---Yes, that's correct, yes.

PN167

At the time that you made that request you did not have majority support from employees employed within the respondent's organisation, did you?---Well, that was - at the time we had members there and we were basing it on previous conversations we had months earlier with a meeting with Mr Brownlow, Mr Sam Dastyari, in our office which - that meeting, before we started, where we talked about the enterprise agreement, so that was based upon those conversations. So, no, the intent at that time was not to go and seek a majority support determination. The intent was to initiate good faith bargaining with the employer without the need to go through all this extra rigmarole.

PN168

Which meeting are you referring to, Mr Roberts? Which date of the meeting that you have just cited are you referring - what date did that meeting - - -?---I think - sorry, yes.

PN169

If I may withdraw and I'll rephrase?---Yes.

PN170

What date did the meeting that we have just described occur on?---I would have to go and check my calendar on that date. It was - on that date, but it was a meeting - it was approximately April/May 2023, I think. I can't recall the exact date.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN171

So what you're saying, Mr Roberts, is that the applicant made overtures to the respondent for an enterprise agreement prior to 20 July 2023; is that correct?---That is correct. The meeting was held in our office at level 2 attended by Mr Chris Brownlow, Mr Sam Dastyari representing Crescent Capital and myself, Josh Howarth and assistant secretary Lauren Hutchins. It was in relation to Australian Clinical Labs wanting to pitch an idea to the union to campaign for better funding in the pathology sector.

PN172

Are you sure that that meeting did not occur on 15 September 2023?---One hundred per cent positive. I did not attend that meeting on - the one you referred to then in September. However, I attended that meeting in our office. It was in and around April/May and it was - during that meeting there were discussions around ACL's intention to - wanted the union to help campaign for better funding for private sector, but also discussions where held about where we wanted an enterprise agreement, as well. Again, it was attended by Mr Chris Brownlow, Mr Sam Dastyari representing Crescent Capital - I believe he's the largest stakeholder - myself, Lauren Hutchins, assistant secretary, and Josh Howarth, divisional secretary.

PN173

Did you make a request for a single enterprise agreement at that meeting? Did the applicant make a request for a single enterprise agreement in that meeting, Mr Roberts?---It was a discussion about how we can achieve an enterprise agreement, as well, and again the union has not - it has not from - the view of the union has always been maintained at our end would be to have an enterprise - or negotiate on behalf of members an enterprise agreement. At that time we were working in good faith with the employer and discussions about that.

PN174

Was that a formal request at that point?---The formal request came, as you've rightly pointed out, Mr Berry, on 26 July 2023. At that point our intention was to negotiate with the employer in good faith. Unfortunately, the employer has chosen to deny that request, hence we started the discussions with our members about how we might be able to go about that process to get a fair enterprise agreement for workers.

PN175

That request was made on 20 July 2023, wasn't it?---No, the 20 - I'm just trying to go back. Yes, 20 July, yes, to Mr Brownlow. Yes, that's correct. Mr Brownlow responded on 26 July.

PN176

Thank you. That request was for pathology couriers, pathology collectors, customer service/administration staff, wasn't it?---That was the intent at that time, yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN177

Your request of 20 July 2023 was declined by the respondent, wasn't it?---That is correct. Mr Brownlow responded on 26 July.

PN178

You did not have majority support from employees employed by the respondent - occupations of couriers or - I withdraw and rephrase. You did not have majority support from employees employed with the organisational cohort of couriers, collectors, customer service representatives and administration staff when you wrote this email, did you?---Mr Berry, I have answered that question. At the time  
- - -

PN179

MS MOHAMMAD: Commissioner, I object. I don't believe the application - - -

PN180

MR BERRY: May I ask that the witness be excused, Commissioner.

PN181

THE COMMISSIONER: Mr Roberts, please. Thank you.

<THE WITNESS WITHDREW

[11.08 AM]

PN182

MS MOHAMMAD: Commissioner, I object on the basis of relevance. The two groups that the applications are subject to are the customer service call centre staff and the courier staff.

PN183

THE COMMISSIONER: I think I understand why Mr Berry may be asking the question. It's based on your submissions. Are you saying it does turn - well, I'll let you - I don't want to put words, but I have read your submission on that point.

PN184

MR BERRY: Thank you, Commissioner. I'm indebted to you for reading the submissions and you are correct. The applicant's application is predicated on two occupations of employees employed by the respondent. Now, the law and section 237 is quite clear in that it makes reference for organisational distinctiveness, geographical distinctiveness and operational distinctiveness.

PN185

The position of the respondent, as articulated in the closing submissions, is that organisationally there may be a cohort in which these occupations all sit within and that may be an organisationally distinct area of the organisation of which a - that there could be an enterprise agreement for. The respondent does need to elucidate the evidence from the witnesses of the applicant in respect of the back history, because certainly there was a position on 20 July 2023 and the submission of the respondent will be that that position was resiled from, no explanation being given.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN186

THE COMMISSIONER: All right. Look, I will allow the question, Ms Mohammad, in terms of the context leading up to the application that is currently before me. That may be of relevance in the context of how Mr Berry has put his submissions. So we'll bring Mr Roberts in, we'll ask the question again and go from there.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [11.10 AM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [11.10 AM]**

PN187

MR BERRY: Mr Roberts, you did not have majority support from employees employed within the organisational cohort of couriers, collectors, customer service representatives and administration staff when you wrote this email, did you?---Upon writing that email it was based upon previous undertakings from having that meeting I referred to earlier and our intention was to ask the employer to consider negotiating in good faith, and we had not been - we hadn't considered majority support until after the refusal from - to bargain.

PN188

At the time you wrote the email did you have majority support from the occupations that were listed?---I've asked and answered and question, Mr Berry.

PN189

I ask that the witness be excused, Commissioner.

PN190

THE COMMISSIONER: Can we answer it again. Mr Roberts, if you consider that you have answered it - - -?---Sorry, Commissioner?

PN191

Put the question again.

PN192

MR BERRY: You did not have majority support from employees employed within the organisational cohort of couriers, collectors, customer service representatives and administration staff when you wrote this email, did you?---At the time of writing the email it was based upon a commitment that we had at the meeting I mentioned earlier where ACL would go and work with us when we were ready, and to enter into negotiation without the need for majority support, so at that point we hadn't - we weren't working towards majority support at that point in time. We were asking the employer to begin negotiations for a single interest enterprise agreement.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN193

But you did not have a majority of support within the organisational cohort of couriers, collectors, customer service representatives and administration staff when you wrote that email, did you?---Mr Berry, again, the union was not considering a majority support determination at the point of that email. It was

only after Mr Brownlow refused to bargain upon our request that we decided we would - with our members, decided that that would be the avenue we'll take.

PN194

If I ask that the witness be excused.

PN195

THE COMMISSIONER: I know what your objection is going to be; you want it as a yes/no potentially.

PN196

Mr Roberts, can you answer the question perhaps a little bit more squarely?---Again, the majority support was not a consideration. At the time we were hoping that the employer would enter voluntarily upon our request to negotiate an enterprise agreement. They had refused. At that point was when we decided that we would need to go down the majority support line, at that point. So that's our account of that, Commissioner.

PN197

Perhaps help me. Did you know if you had majority support at that time or not?---In some of the classifications we had more support than others, yes. So not all - in some of the areas we may not have, but in other areas we believed we did if we were - yes.

PN198

If you have any information to answer the question, can we answer it as a yes or no for Mr Berry, please, just so we are addressing the question he has put, Mr Roberts. If you don't have the information, that's okay, but it's a 'yes' or 'no' or 'I don't know' effectively?---In some areas, yes, in some areas, no, is the answer. Not everyone on that list we wouldn't have, but in some of those areas we believe we would have if we went down that path at that time, yes.

PN199

MR BERRY: So you're stating for the record, Mr Roberts, that you did not have a majority support within that entire cohort; is that correct? Yes or no?---I'm not going to have words put in my mouth, Mr Berry, so I've answered that. In some of the areas we believe we would have, in other areas we may not have, but again that was not our primary focus at that time to seek majority support because we were hoping, as we put in our email, that the employer would enter into those negotiations with the union and our members in its workforce.

PN200

At the time of writing the email on 20 July 2023, Mr Roberts, did you have majority support within those employed as pathology couriers?---We believe in that area, yes, we would have.

PN201

So it's a belief?---At that stage without knowing the - again, it was based upon anecdotal information that we had, so our belief in what we had was yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN202

So it was based on hearsay?---No, it was based upon numbers provided to us earlier in the year for another negotiation with a work group, the health and safety reps - for that group of people where we were advised that the couriers was approximately 95. That came directly from the employer when we negotiated health and safety reps for that work group.

PN203

So, Mr Roberts, I refer to your previous answer and you stated that you had received anecdotal information - - -?---It was anecdotal - - -

PN204

- - - that you had majority support within that occupational group; is that correct?---It was based upon - again, it was not confirmed. We weren't - we never saw any evidence, it was just a number that was bandied around, so we were - it was not confirmed, we never saw a list. It was a number that was bandied around. Again that was from the employer, but that was never confirmed, the exact number, but that was the number we were working off.

PN205

So you did not know if you had majority support for the occupation of pathology couriers at the time that - - -?---At the time, based upon information we had, we believed at the time we would have, but again it was not - we had not - we were just using the number provided from another process. We had not seen infrastructure or a list, but that was a number we were - and based on information from our members, that was the number we were working off, but it was all not confirmed because we hadn't actually seen it from the employer.

PN206

Who anecdotally told you that a majority of employees employed as pathology couriers supported a single enterprise agreement?---Mr Berry, at the time of writing this email we had not had discussions with our members about this. That's the point I'm trying to make, Mr Berry. At the point of this email - the discussions were only held after that when Mr Brownlow refused to negotiate. So you're asking me a series of questions, but again at the time that was not a discussion because we were hoping that the Australian Clinical Labs, through Mr Brownlow, would begin and commence those good faith bargaining discussions. Unfortunately, Mr Brownlow decided to decline that request and it was only then that we turned our attention to other ways to negotiate or to begin the process for negotiating an agreement for our members who wanted one.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN207

So, Mr Roberts, you have just stated that you had no discussions with those employed as pathology couriers prior to writing this email of 20 July 2023; is that correct?---No, about a majority support, Mr Berry, so please be clear. We had discussions with our members about an enterprise agreement, but not about the need to seek a majority support determination at that time, so I'm - I think I can't be clearer. I've answered these questions now. At the time of writing this email it was around seeking the employer to commence good faith bargaining

discussions. It was only after the refusal from Mr Brownlow we had begun exploring options to, I guess, bring ACL to tailor and negotiate that agreement and obviously the option we've chosen is a majority support determination.

PN208

But at the time of writing the email a majority of employees employed in the occupation of pathology couriers had not indicated their support for an enterprise agreement to you?---That is - no - - -

PN209

MS MOHAMMAD: Commissioner, I object on the basis of relevance. We have just established that we would be looking - or factoring in a majority support at the time that the application was made- - -

PN210

THE COMMISSIONER: All right. I'll get you to leave the room perhaps, Mr Roberts. We need to move on. Thank you.

<THE WITNESS WITHDREW

[11.19 AM]

PN211

MR BERRY: If I may, Commissioner, there appears a real reluctance on behalf of this witness to answers questions simply as you indicate in the yes or no fashion. I would ask that the witness be treated as a hostile witness at this point.

PN212

THE COMMISSIONER: All right. Look, I understand the basis of your objection. What I'm hearing from his evidence effectively, parties, he's effectively saying that he wasn't after a majority support determination at that point. He's trying to explain away that, but to your point - go on.

PN213

MR BERRY: Sorry, Commissioner. The point that I'm trying to make is at that point in time the applicant had not canvassed these groups of employees in terms of whether they actually supported an enterprise agreement, a fact that is somewhat elucidated in Mr Roberts' evidence, but it is not made clear as my friend would - has submitted.

PN214

THE COMMISSIONER: Yes. Ms Mohammad, is it fair that the inference to be drawn there is it wasn't sort of a canvassing of the majority in that structural sense perhaps that you might if you're otherwise preparing for an application?

PN215

MS MOHAMMAD: That's correct, Commissioner, perhaps not at that point in time. However, as Mr Roberts has said, that was considered in the future. I guess there is evidence before the Commission today in determining that we did have a majority support, but that wasn't at the time that the email was sent. The process hadn't started then formally.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY



PN216

THE COMMISSIONER: All right.

PN217

MR BERRY: If I may - - -

PN218

THE COMMISSIONER: Yes.

PN219

MR BERRY: - - - and perhaps the Commissioner's suggestion to expediate matters, if the applicant is willing to concede that it did not have majority support at the time of writing the email, then perhaps I can move on.

PN220

MS MOHAMMAD: Commissioner, we wouldn't be conceding to it just because we don't have any factual numbers or any evidence at that point in time to say that we did or didn't. It was based on meetings and discussions that had taken place.

PN221

THE COMMISSIONER: Yes, and maybe that - - -

PN222

MS MOHAMMAD: The feedback that we had received from our membership.

PN223

MR BERRY: If I may, Ms Mohammad has effectively made the point that I've asked her to concede.

PN224

THE COMMISSIONER: Yes, that was going to be my suggestion. It seems to accord with the evidence given from the witness box, so there's some canvassing perhaps going on and maybe he has formed a belief, by the sounds, that perhaps there is a majority there, but are you saying there is an absolute majority and that's a conclusion that should be drawn, because otherwise I think I'm going to bring him back in and we will let Mr Berry ask the question.

PN225

MS MOHAMMAD: Formally I can't answer that, Commissioner. I wouldn't know. That's a question for Mr Roberts to - - -

PN226

THE COMMISSIONER: Because if you're going to press the point, we will need to ask him to address the questions being put.

PN227

MR BERRY: I will be pressing the point, Commissioner, and in the interests of expedience perhaps if you ask Mr Roberts the questions and ask him to answer yes or no. That might expediate matters. I'm sorry - - -

PN228

THE COMMISSIONER: Okay.

PN229

MR BERRY: - - - but I have endeavoured on a number of occasions to make the necessary incisions, but as you have alluded to with your observation the witness does not seem to be assisting this Honourable Commission with clarity in the answers.

PN230

THE COMMISSIONER: It may be that he genuinely doesn't know, right, in a structural sense, but I see your point, Mr Berry. It's a question that should be answered.

PN231

MR BERRY: And perhaps it's a question, Commissioner, that you may wish to put.

PN232

THE COMMISSIONER: All right. Let's bring him back in. Let's put the question to him one last time.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [11.23 AM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [11.23 AM]**

PN233

THE COMMISSIONER: Mr Roberts, there is a question regarding a cohort at a point in time. There is a question turning to whether or not there was a majority in support of an application in respect to that cohort. Mr Berry is going to put it to you and I would suggest that the answer would be 'yes' or 'no' or you don't know. It's open to you to providing a response as to why might not know - - - ?---Yes.

PN234

- - - but that's the question being put and if you can answer it?---Thank you.

PN235

MR BERRY: I put it to you, Mr Roberts, that you did not have majority support from employees appointed within the organisational cohort of couriers, collectors, customer service representatives and administration staff when you wrote this email, did you?---We believed we had support, but in terms of numbers we weren't clear at the time. We believed that members wanted an enterprise agreement, hence why we initiated the email to Mr Brownlow. The level that that is for, you know, may not be determined at the time because again we were hoping the employer would enter into those negotiations upon our request. Clearly they didn't.

PN236

THE COMMISSIONER: Mr Roberts has expressed a belief. Is there any question you wish to raise out of that?

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN237

MR BERRY: Your belief, Mr Roberts, was a mistaken belief, wasn't it?---I'm not going to dignify that - that's my belief, Mr Berry.

PN238

I put it to you that that was a mistaken belief. What do you say in relation to that?---That's your position, Mr Berry. I'm not going to move away from what I've stated.

PN239

THE COMMISSIONER: We can move on, Mr Berry.

PN240

MR BERRY: Mr Roberts, in relation to pathology collectors, at the time of writing the email on 20 July 2023 you did not have majority support from employees employed within this occupation who are employed by the respondent, did you?---Again, we had support within that classification. Again, we were - whether we had a majority at that time is to be determined, but we have had members in that classification come to us wanting to negotiate - being part of negotiating an enterprise agreement which covered them.

PN241

But you did not have a majority, did you?---As I said just then, at the time we may not have, but again we had members who had expressed to be part of - being part of the negotiation to an enterprise agreement which covered them.

PN242

Mr Roberts, you weren't clear as to whether you had a majority at the time, were you?---The challenge with again that, Mr Berry, is the geographical location within the collectors, so given that they are scattered from as far north as Coffs Harbour down to the border, through the south Southern Highlands, we were - we couldn't cover everybody so we weren't a hundred per cent on the regions, but we believed we had a good support - a number of people who supported wanting an agreement which covered collectors from our discussions with them.

PN243

So I withdraw my question. I ask, Mr Roberts, in respect of employees employed by the respondent as pathology collectors in New South Wales, did you have a majority of employees employed in this occupation by the respondent supporting a single enterprise agreement at the time that you wrote this email?---We were unclear due to the fact that we were unable to get a good organisational structure and the geographical location of these employees, many only working singularly out across 420 separate sites across the state. We could not be sure, but we have had quite a large number of people employed in that classification express to us they wanted to be part of the negotiation to negotiate an enterprise agreement covering their classification.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN244

Thank you, Mr Roberts. In respect of the employees employed in the occupation of customer service representatives, did a majority of employees employed by the

respondent at the time that you wrote the email support a single enterprise agreement?---Within customer service, yes.

PN245

At the time that you wrote the email, did employees employed by the respondent as administration staff - sorry, did the majority of employees employed by the respondent as administration staff support a single enterprise agreement?---Again, administrative staff - we are unclear as to how people were classified and again it was in relation to customer service that we were trying to cover. We weren't exactly sure how the organisation classified the customer service, whether customer service was admin so it was really capturing that group, so staff outside customer service, again we wouldn't - again we are unclear about numbers, so that could have - we were not sure about, but customer service, yes, and that was in the context that we weren't a hundred per cent sure how the employer classified that group of people, so we covered the base there.

PN246

So, Mr Roberts, you were aware that the respondent employed customer service representatives, weren't you?---At the time, yes. We weren't sure if their classification was admin office or customer service.

PN247

Okay, but you were also - - -?---Yes.

PN248

- - - aware that the respondent employed employees as administration staff?---There are other people in other classifications outside - yes, who may be classed - yes, that's correct.

PN249

Those employees share the same duties or tasks, don't they?---Administrative staff - can you rephrase your question, please, Mr Berry.

PN250

So customer service representatives and administrative staff share the same duties and tasks, don't they?---Not to our understanding, no.

PN251

Mr Roberts, I refer to your email of 20 July 2023?---Yes. Page 50 still?

PN252

Page 50. You have written 'customer service/administration staff', haven't you?---That's what is written there, Mr Berry, yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN253

So I put it to you that you have written 'customer service/administration staff' because the applicant's position at the time that you wrote the email was that these occupations have a commonality between them. What do you say in relation to that?---The reason that was written is we were unclear as to how the structure worked at that time of writing the email for that. That's why it's written that

way. It's customer service and we've subsequently become more acquainted with your structure. So, at the time that was what the intent was.

PN254

Okay?---To cover that group of people - customer service people, 16 or so - who are based at Bella Vista.

PN255

I put it to you, Mr Roberts, that customer service representatives and administrative staff perform the same tasks and duties. What do you say in relation to that?---I don't believe that to be the case. The customer service people referred to perform a specific role. The admin staff you refer to, I believe would probably be your receptionists and other people in the context - it is the customer service people who are the only ones to our understanding who perform the role in which they perform - the duties which they perform. There may be some overlap, but the core base duty of customer service is only performed by that group of people based at Bella Vista. That is our understanding.

PN256

So you accept that there is some overlap?---There may be some email stuff, but in terms of the core functions - which I'm happy for you to ask questions on that, but the core functions of customer service are only performed to our understanding by that small group of people based at Bella Vista.

PN257

I refer to your previous answer, Mr Roberts, where you stated that there was some overlap. Are you now resiling from that position?---If you're going to - if the position that you're trying to articulate, Mr Berry, is that people may answer the phone, then of course there is an overlap in those sort of functions or people might respond in email, but in terms of the core functions that the customer service representatives at ACL - they are the only ones that perform the key tasks of that call centre to our understanding.

PN258

What is the key task of the call centre?---The key task of the call centre is to answer phone calls from the national call centre. They are to take inquiries from doctors, patients, general public, that provide results through their systems. They are managed by Victoria. Their manager is based in Victoria. They receive a direction - - -

PN259

If I may stop you there?---That's all right. I'm happy - yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN260

So you state in your response that customer service representatives answer phones and field inquiries from customers of the respondent; isn't that correct?---From a dedicated phone system which is only managed by that group of people, because that's where the lines go. It's a national call centre to my understanding. It's a dedicated number where doctors have - patients or doctors are given to get

information from, get test results. It's the number which is provided to all your customers and all your - I think it's a 1300 numbers if I'm not mistaken and that is where that volume of calls is answered from if people go through that process.

PN261

That's the number which you provide the doctors, you provide the specialists, you provide patients, you provide any other group of people who may need to contact. That is the number and that is answered by and managed by that group of employees, which is their core function. They also potentially do some bookings, they - not to say that other people may not, but their core function of that is that's where that work goes through and that's this group of people, and the customer service representatives is what they're called. That's where it's managed from.

PN262

MR BERRY: So, Mr Roberts, you accept that there are other employees that answer phones and deal with inquiries from customer services. That service - - - ?---No - - -

PN263

Sorry, if I may rephrase. I withdraw and rephrase. Mr Roberts, you accept that there are other employees employed by the respondent who answer phones and field inquiries from customers, don't you?---Not through that dedicated process and that dedicated line, no, because there is a dedicated phone system and number which they are responsible for. There may be other phone calls and other - but not from this group of people that are employed to take inquiries from that dedicated 1300 number which ACL provides, as I said, to your specialists, your doctors, any of your other people that need to contact - that is where - they are the only ones to my knowledge that deal with that work and that's why they are unique, and that's why they are chosen, is because they are the ones that get their work through that system which is a national system, so that's - - -

PN264

If I may stop you there, Mr Roberts. I put it to you that a dedicated phone line is not sufficient to create operational, organisational or geographical distinctiveness. What do you say in relation to that?---In relation to that I would say that where it becomes - or where - my understanding in relation to this work is that those workers perform the exact same work as their colleagues in Victoria. Their manager, Mr Dean Hartman, is from Victoria. Mr Dean Hartman reports through Victorian line management and the crux of where this all started from, Mr Berry, is because our workers in New South Wales performing the exact same tasks as their colleagues who are managed by the same management structure in Victoria and were paid under an enterprise agreement to which I believe you've - which is what their main concern was, because they were wanting to know why they were paid differently for performing the same work their colleagues in Victoria were doing, in the same team, in the same management structure.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN265

That's where our customer services people came to the union, to understand why. Obviously we had needed to explain to them the difference between the modern awards and an agreement, but that was what our members were saying they were experiencing leading up to these discussions, is that their colleagues managed by the same management structure in Victoria, performing the same work, were getting paid for having different structures, different career progress opportunities, different conditions of employment and rates of pay.

PN266

MR BERRY: So, Mr Roberts, are you aware that the Victorian enterprise agreement which you have referenced categorises customer service representatives and administration staff together?---I'm aware what the agreement says and again the conversation was - again going back to your previous questions about the first email, we were aware of that agreement and certainly our members initially - well, they wanted an agreement that we pay the same as their colleagues in Victoria utilising that agreement as, I guess, a bit of a base of our claims.

PN267

Their main focus is what - they were asking us the question, 'Why am I employed by the same employer, why am I getting paid doing the same job and the same function as my colleagues in Victoria, I'm part of the same team. Why are we getting paid less than my colleagues in Victoria? Why do we not have a career structure and definition about our role.' That was what our members came to the union - trying to rectify that anomaly.

PN268

MR BERRY: So you accept that in the enterprise agreement in Victoria, administration staff and customer service representatives are referenced together? Yes or no?---I'm aware of what that agreement says, Mr Berry, yes.

PN269

Thank you. In that agreement those occupations are grouped together?---That's the - well, how that agreement - how that came - that's a matter for the negotiation processes down there, but again the conversation with our members about an enterprise agreement to be for customer service came about when they became aware their colleagues in Victoria are doing the exact same work as them with the same manager as them. They were wanting to know they're getting paid less, have different rates of pay, have different conditions. That's where the conversation came about an enterprise agreement.

PN270

So it's simply those employed in the occupation of customer service representatives that want a single enterprise agreement - - -?---In the context that - yes, it's customer service, yes.

PN271

However, customer service representatives work alongside administration staff, don't they?---Can you - if you're talking about the group of people in Bella Vista, they are all customer service representatives in that group of people. Again, without being provided - that's my understanding based upon information I have.

PN272

I put it to you that they do work with administration staff, Mr Roberts. What do you say in relation to that?---Again, you will need to provide me an example of that, because again if you're talking about the work and the function, not to say they may not interact with other - they may interact with them in terms of the team, in terms of their management, in terms of the role they perform. They are separate, but they may interact with other people. They might - you know, receptionists or things like that, they would interact with them as part of their job, but in terms of their team, their structure and all of that, they are not - they're not - that's my understanding based upon what I've been told.

PN273

So they would work with administration staff employed in marketing or administrative roles, wouldn't they?---They may interact with them in terms of the work that they do. They are not managed by them, they are not part of them. They may interact with them, but they're not managed by them and perform that work, no. Not to say they don't talk to them, but that doesn't mean they can't be part of - you know, teams interact.

PN274

Just for ease of reference, Mr Roberts, you accept that in the Victorian agreement they are classified together with - administration staff are classified together with customer - - -?---I accept - but again without the history of how that came about - - -

PN275

Thank you, Mr Roberts?---You asked a question, I'm answering it. Without, as I said, the history of how that came about, that's what it states, yes.

PN276

Do employees employed as customer service representatives interact with couriers?---Very limited is my understanding.

PN277

But they do?---Very limited is my understanding.

PN278

Thank you?---I mean, we don't really know them, but, in terms of that, very limited.

PN279

Customer services representatives also interact with pathology collectors, don't they?---Again, very limited. They may, they may.

PN280

Thank you, Mr Roberts?---Very limited.

PN281



I put it to you that pathology couriers, pathology collectors and customer service/administration staff perform what the organisation - or the respondent terms as a pre-analytical/post-analytical function. What do you say in relation to that?---I'm not here to talk about how the employee(sic) tries to structure their organisation. We believe they perform very specialised roles. How you determine to classify them is a matter for you, Mr Berry, not for the union.

PN282

Thank you, Mr Roberts. You have stated that the applicant recognises the right of the respondent to structure its operations - it's business operations - as it sees fit?---I'm saying how you classify them is that we are - we say they are clearly distinct. Obviously the applications are very distinct, so what term you choose is a matter for you. I mean, we see - - -

PN283

Thank you, Mr Roberts?--- - - - them to be separate groups of people. Not to say they may not interact occasionally, but they perform very specialised roles and they're very skilled and they deserve to be recognised, that's why it's an EBA.

PN284

I'll come to that point later, but in respect of pathology couriers in application B2023/1111, the only thing that people in that application have in common is their occupation, isn't it?---They perform courier work - pathology courier work, that is correct.

PN285

But it's the occupation, employed as courier drivers?---They are also managed through Mr (Indistinct).

PN286

It's a simple yes or no, Mr Roberts?---So reframe the question, please, Mr Berry.

PN287

The employees that are proposed to be covered under application B2023/1111 are all employed as couriers by the respondent, aren't they? Yes or no?---That is my understanding, yes.

PN288

Their occupation is the only thing that they have in common, isn't it? Yes or no?---To who? Obviously, yes, they're all couriers, so - - -

PN289

Thank you, Mr Roberts?---Is there a - - -

PN290

In relation to application B2023/1112, the only thing that the employees covered by that application have in common is that they are employed in the occupation of customer service representatives, isn't it? Yes or no?---In common with who?

PN291

With each other?---Within that - if they perform the work associated with a courier, that would be that group, yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN292

I'm sorry, Mr Roberts, I'm referring to application B2023/1112?---Yes.

PN293

Which is the application in relation to customer service representatives?---Sorry, sorry - - -

PN294

And if I may rephrase my question for ease of reference?---Go for it.

PN295

The only thing that the employees have in common in relation to that application that has been made is their occupation, isn't it? Yes or no?---And the type of work that they do within the organisation.

PN296

You accept, Mr Roberts, that the respondent can structure its organisation as it sees fit, don't you? Yes or no?---In terms of the work they do - I will come back to my previous answer, the work that they do is what makes them distinct and they are the only people that perform that work in that manner, and managed in that way. As I said, it is managed from Victoria which makes it operationally distinct from - the management structure is not in this state, which also makes them distinct from the rest of the employees based upon in New South Wales because their management structure is based in Victoria, not here in New South Wales like other groups of employees.

PN297

Thank you, Mr Roberts?---They do - - -

PN298

If I may ask that the witness be excused.

PN299

THE COMMISSIONER: Anything in the way of re-examination?

PN300

MR BERRY: No, no, no, from the witness box.

PN301

THE COMMISSIONER: From the witness box?

PN302

MR BERRY: Yes.

PN303

THE COMMISSIONER: To deal with that, okay. I understand. I thought you were - - -

PN304

MR BERRY: No, no, no, we have some way to go first.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN305

THE WITNESS: I will leave, Commissioner.

PN306

MR BERRY: We have some way to progress.

PN307

THE COMMISSIONER: Yes, he is going to raise a point, so - - -?---Yes, all right.

PN308

Thank you.

<THE WITNESS WITHDREW

[11.47 AM]

PN309

THE COMMISSIONER: All right, Mr Berry.

PN310

MR BERRY: I think this turns, Commissioner - it's really on belief as opposed to fact.

PN311

THE COMMISSIONER: You may be entitled to make that submission.

PN312

MR BERRY: Thank you.

PN313

THE COMMISSIONER: It's a matter for you.

PN314

MR BERRY: Yes.

PN315

THE COMMISSIONER: I understand the inference you're drawing.

PN316

MR BERRY: Thank you.

PN317

THE COMMISSIONER: He's answering the question though.

PN318

MR BERRY: He is, under his belief, Commissioner.

PN319

THE COMMISSIONER: Anything you wish to say about that, Ms Mohammad?

PN320

MR BERRY: If I may, Commissioner, Mr Roberts' belief is irrelevant. It's merely a matter of fact and I will make that submission in my closing remarks.

PN321

THE COMMISSIONER: Okay. You may make that submission. We will deal with that at that time, but he is answering the question though in his way. I'll bring him back in and we'll - unless you wish to say anything, Ms Mohammad.

PN322

MS MOHAMMAD: Nothing further at this stage.

PN323

THE COMMISSIONER: Okay. Thank you.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [11.48 AM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [11.48 AM]**

PN324

MR BERRY: Mr Roberts, in your previous answers you referred to an undertaking that was provided to you by the respondent. Who provided you with that undertaking?---Can you put some context first in your question, please, Mr Berry.

PN325

It's in relation to your previous answer. I'm asking - - -?---There are many answers. Can you please - - -

PN326

Commissioner, may we have a copy of the transcript?

PN327

THE COMMISSIONER: Yes, I'll be ordering it, anyway.

PN328

MR BERRY: Mr Roberts has referred in his previous answer to an undertaking that was provided by the respondent which would lead to the email of 20 July and I'm looking to understand - - -

PN329

THE COMMISSIONER: Are you happy to answer?---I know what he's referring - - -

PN330

All right. He will answer the question. Thank you.

PN331

MR BERRY: What was the undertaking that was provided?---There was a discussion. As I said, it was in our office. It was prior to 20 July, probably somewhere around May or June. There was a meeting held in our office. Attending in that meeting was Mr Chris Brownlow, Mr Sam Dastyari, I believe representing Crescent Capital, myself, assistant secretary Lauren Hutchins and Josh Howarth, regional secretary. In that meeting it was - we made it clear that ACL wanted the union's help to campaign for greater funding within the pathology sector and there was a presentation and discussion about their plans.

PN332

As part of those discussions, Mr Dastyari I believe is the one that understood that we were wanting an agreement at some point and based upon that he was - left it in our hands, I suppose, to determine the timing at that stage bearing in mind that this is before the 20 June - and we spoke to members more and had some discussions, and that's when we chose to attempt that - getting the employer to negotiate in good faith, so it was in - - -

PN333

MR BERRY: Mr Roberts, my question was what was the undertaking provided to you by the respondent that you previously referenced in your previous answer?---That once the union was ready to negotiate an agreement, that they would commence negotiations with - Mr Sam Dastyari was the main spokesperson in that meeting.

PN334

But Mr Dastyari is not an employee of the respondent?---Mr Dastyari was there representing Crescent Capital, who is a major shareholder of Australian Clinical Labs, and also wanting the union to be, I guess, the front of a campaign to increase funding from the federal government and increasing Medicare levies and rebates, and things along those lines to get more funding for the pathology sector. I believe it was in relation to a thing called (indistinct) issue that they were discussing about the challenges in funding of the pathology sector, so this was - and this was at the - - -

PN335

If I may stop you there?---This meeting - sorry, I'm just refreshing my mind. This meeting was instigated at the request of Mr Sam Dastyari.

PN336

And Mr Dastyari is not an employee of the respondent, is he, Mr Roberts? Yes or no?---Mr Dastyari is a consultant for Crescent Capital, a major shareholder of Australian Clinical Labs. He was representing the chairman of the board.

PN337

So he was not representing the respondent in that meeting, was he?---He was at that meeting - he was with the respondent and again it was about the chairman of the board - the chairman was mentioned, so it's Australian Clinical Labs with the chief executive officer, Mr Brownlow - were there at that meeting wanting the union to support and run a campaign to increase funding to the pathology sector -  
- -

PN338

If I may, Mr Roberts, I put it to you that Mr Dastyari was representing the respondent's - or a major shareholder of the respondent, but was not representing the respondent and did not have authority to make any undertakings on behalf of the respondent?---That may well be true. Mr Brownlow was in the room - - -

PN339

Thank you, Mr Roberts?---Mr Berry, I might finish my answer, please. Mr Brownlow was in the room and was also part of those discussions. He had input in those discussions, so there was a representative from Australian Clinical Labs with the authority at those - there was no firm commitment, but it was when the union was in a position to want to start negotiating we would take the approaches we took and we did this all in good faith, and that's why we chose the timing when we were in a better position ourselves to be able to commence those - that process of negotiating and, unfortunately, Mr Brownlow decided to decline that request.

PN340

Thank you. On or about 26 July 2023 you wrote an email to, amongst others, Anika Marie Condon, Jamie Taylor, Louise Ross, Messrs James Mitcher, Sanjeev Sharma, Peter Shortland and the wife of Ian McGilvray, Jill McGilvray, stating, and I quote:

PN341

*We now need to fight and campaign for better wages and conditions -*

PN342

didn't you?---Can you refer me to those emails, please, Mr Berry.

PN343

I refer you to page 49 of the common bundle, which is, I believe, prior to the page that we were just looking at, page 50. So it's on page 49 - - -?---Yes, I'm looking at that. That would be correct, based upon the response from Mr Brownlow.

PN344

Thank you. On or about 26 July 2023, Mr James Mitcher, Sanjeev Sharma, Peter Shortland and Ian McGilvray were employed by the respondents as couriers, weren't they?---That's my understanding, yes.

PN345

On or about 26 July 2023, Ms Louise Ross was employed by the respondent as a customer service representative, wasn't she?---That's my understanding, yes.

PN346

The reason that you sent the email to Jill McGilvray is because Mr Ian McGilvray directed you to send correspondence addressed to him and to her, didn't he?---That's the email he communicates with Ian through, yes.

PN347

I'm going to take you now to the meeting of 13 August 2023?---Yes.

PN348

Which is on page, I believe, 265?---Yes, yes, I'm aware of it. 265, Mr Berry?

PN349

It's 265, paragraph 8?---Just bear with me, Mr Berry.

PN350

Not a problem, Mr Roberts. So for your reference - - -?---Paragraph 8, was it, on 265?

PN351

Thank you?---I just need to put these back in, Mr Berry.

PN352

On 13 August 2023, a meeting was held by the applicant with employees of the respondent, wasn't it?---That's correct.

PN353

At the time the respondent employed about 96 couriers, didn't it?---That is our understanding.

PN354

The meeting was attended by customer service representatives, lab staff and pathology collectors, wasn't it?---The meeting was an open meeting. Yes, that's correct.

PN355

Thank you. How many people attended that meeting, Mr Roberts?---Approximately 50 to 60.

PN356

I'm going to take you to paragraph 10 of your statutory declaration?---Yes.

PN357

You stated approximately 30 to 40 couriers attended that meeting?---Couriers, that's correct, yes.

PN358

Therefore, you would agree that at most 40 couriers attended that meeting, wouldn't you?---Yes, it was probably about - correct, yes. Most people had other commitments and weren't able to make it. That's correct, because it was in their own time.

PN359

Yes, Mr Roberts, but you have said at paragraph 10:

PN360

*Approximately 30 to 40 pathology courier drivers attended that meeting -*

PN361

didn't you?---Of those attending that's probably about the approximation, yes, of all the - - -

PN362

So you would agree, Mr Roberts, that at most 40 courier drivers attended that meeting, wouldn't you?---Attended face-to-face at the meeting, that is correct, yes.

PN363

Forty couriers would not constitute a majority of the 96 couriers employed by the respondent at that time, would it?---Well, at the meeting - probably at the meeting that would be correct.

PN364

Yes?---That would be correct at the meeting. That doesn't mean though that we didn't have other means and methods of talking to our members.

PN365

Thank you, Mr Roberts. I'm going to take you now to the meeting of 15 September - sorry, I'm going to take you to 15 September 2023?---What paragraph is that, Mr Berry?

PN366

Which is on page 38 of the common bundle. There is an annexure as part of the application filed by the applicant and this is a mirror of the document that was also filed in relation to the other application?---I think I've just got this out of order, sorry, Commissioner. I think I've got it out of order - - -

PN367

THE COMMISSIONER: That's okay. Take your time?---What number was it, Mr Berry?

PN368

MR BERRY: It's page 38, and please take your time, Mr Roberts. If I may, Commissioner, there is a level of duplication in relation to the materials filed by both the applicant and respondent.

PN369

THE COMMISSIONER: Yes.

PN370

MR BERRY: So in the interests of times I will only take Mr Roberts to the relevant parts of one application, but I ask - and I would hope that my friend here would not object - that the evidence tendered by Mr Roberts in relation to common materials is accepted in relation to both applications.

PN371

THE COMMISSIONER: You have no objection to that, Ms Mohammad?

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN372



MS MOHAMMAD: No, we wouldn't have any objection as long as obviously the attachments or the annexures are the same, yes.

PN373

MR BERRY: Yes, and I invite my friend to pull me up if they're not.

PN374

So page 38, Mr Roberts?---Yes, I'm looking at it.

PN375

Thank you. On 15 September 2023, the HSU wrote to the respondent and proposed an enterprise agreement that would cover all employees in New South Wales, didn't it?---Is this the only email, Mr Berry? I'm just trying to - - -

PN376

Mr Roberts, it's the email of 15 September, page 38 of the common bundle. I'm not aware of the applicant filing any other emails on 15 September - - -?---No, I'm just making sure that I'm looking at the whole email because I did not write this email.

PN377

I appreciate that, Mr Roberts, but you're here on behalf of the applicant?---I understand that. I'm just saying I didn't write this email.

PN378

I appreciate that, but the applicant - the HSU - wrote to the respondent and proposed an enterprise agreement that would cover all employees in New South Wales, didn't it? Yes or no?---There is some context to that position which I think would be relevant for the Commissioner having got to this email - - -

PN379

I'm simply asking for a yes or no answer, Mr Roberts?---As I said, I didn't write this email. There was a meeting held on the - - -

PN380

MS MOHAMMAD: Commissioner, I object to this question. Mr Roberts is - - -

PN381

MR BERRY: I ask that the witness be excused, Commissioner.

PN382

THE COMMISSIONER: Mr Roberts, thank you.

**<THE WITNESS WITHDREW**

**[12.02 PM]**

PN383

MS MOHAMMAD: Commissioner, Mr Roberts isn't copied into this email. This email is prior to the question that we are here to answer in the application that is made before the Commission today. We see no relevance.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN384

THE COMMISSIONER: Okay. Mr Berry.

PN385

MR BERRY: If I may, Commissioner, Mr Roberts has already given evidence that he was aware of the meeting of 15 September 2023. This is the natural corollary of the outcome of that meeting and the respondent does need to test the evidence of the applicant which appears to be at this stage flip-flopping between a single enterprise agreement for customer service representatives, pathology collectors, administration staff, couriers and all employees.

PN386

THE COMMISSIONER: He does make the point he didn't write the email, so if he provides some context that he doesn't understand - if he answers the question, he answers the question.

PN387

MR BERRY: If I may, Commissioner, the question is simply, 'On 15 September 2023, the HSU wrote to the respondent and proposed an enterprise agreement that would cover all employees in New South Wales, didn't it?' Now, the applicant has filed this email as part of their application. For Mr Roberts to say that he has no knowledge of it, that baffles belief.

PN388

THE COMMISSIONER: We can ask him the question and the answer will be his answer though. To his point he's saying he didn't write the email, he is going to say he doesn't - may not - - -

PN389

MR BERRY: I appreciate that Mr Roberts did not write the email and that's accepted by the respondent. The position of the respondent is that this email has been tendered into evidence by way of the applicant's application - - -

PN390

THE COMMISSIONER: Yes.

PN391

MR BERRY: - - - and, if necessary, I will ask that the Commission produce this email as an exhibit to be shown to Mr Roberts so that he may answer the question.

PN392

THE COMMISSIONER: I'm happy for you to take him to the email.

PN393

MR BERRY: If I may, Commissioner, that is what I have done.

PN394

THE COMMISSIONER: Yes, all right. Look, again it's context in the lead-up to the current - presently we're determining the application and its context in the lead-up to the application, and you might turn to matters, as I suspect you're saying, as you are in your written submissions whether or not the cohort is fairly

chosen or not. So I'll let you put the question to him, but if he saying it's not his email, he doesn't know, we'll have to leave it there. You can't keep putting the question to him until you get the answer that you want, Mr Berry.

PN395

MR BERRY: I'm sorry, Commissioner, but it's simply a matter of fact.

PN396

THE COMMISSIONER: All right.

PN397

MR BERRY: Does the email state that the enterprise agreement would cover all employees, that's - and if I may take the Honourable Commission to that - - -

PN398

THE COMMISSIONER: Maybe you will put that question to him, 'Can you see the email and does it state what you're saying it says?' Now, it may be that - anyway, I'll leave it there.

PN399

MR BERRY: Thank you, Commissioner.

PN400

THE COMMISSIONER: I'll allow that question.

PN401

MR BERRY: Would you like me to seek that this email be entered as a separate exhibit given my friend's reluctance to taking Mr Roberts to it?

PN402

THE COMMISSIONER: It's a matter for you, but do you have any objections to that this point? I don't have any issues with him taking him to the email. I mean, the Commission is not bound by the Rules of Evidence in any case, but if you want it formally tendered we can do it on that basis. Are you happy for him to be taken to the email?

PN403

MS MOHAMMAD: We're happy for him to be taken to the email. We see no reason - there's no relevance to this email. We see it as irrelevant, to be honest. These are all discussions that occurred in good faith.

PN404

THE COMMISSIONER: Yes.

PN405

MR BERRY: At the heart of this matter, Commissioner, is the fact of the matter that the applicant has tendered no direct evidence as to how it chose the employees.

PN406

THE COMMISSIONER: I understand why you're seeking to ask the question about it and on that basis I'm going to allow it. It appears to be of apparent

relevance. Yes, if you can ask the question in a precise manner, Mr Berry, to get the response that might be - - -

PN407

MR BERRY: Again, Commissioner, I'm indebted to you - - -

PN408

THE COMMISSIONER: All right.

PN409

MR BERRY: If necessary, I would defer to you from the Bench to ask the questions - - -

PN410

THE COMMISSIONER: All right. Okay.

PN411

MR BERRY: - - - if you would like.

PN412

THE COMMISSIONER: Bring him back in and we'll take him to the email. Thank you.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [12.06 PM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [12.06 PM]**

PN413

THE COMMISSIONER: Mr Roberts, you will be asked a question and if you can answer it, please?---Yes, Commissioner.

PN414

Thank you.

PN415

MR BERRY: Mr Roberts, the applicant sent an email to the respondent on 15 September 2023 at 3.54 pm, didn't it, and that email appears at page 38 of the common book of materials, doesn't it?---Yes, that's correct. It looks like it's the email you're referring to, yes.

PN416

In that email that states, and I quote:

PN417

*Scope would include all employees. However, open to discussion for New South Wales/ACT -*

PN418

doesn't it?---Point 5 seems to suggest that, but again there is a context to this email which I think is relevant, but that's okay.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN419

Thank you, Mr Roberts. I put it to you that at this point in time, 15 September 2023, the applicant was seeking an enterprise agreement that would cover all employees employed by the respondent in New South Wales and ACT, wasn't it?---That position became the position of the union following the union initially putting in a majority support application which in good faith we withdrew based upon commitments made by Australian Clinical Labs to have discussions and that's where this meeting was around. So again in good faith we entered into those conversations, but clearly we couldn't reach an agreement on commencing a - negotiating an agreement, so that's in the context of - - -

PN420

Thank you, Mr Roberts?--- - - - in good faith having a conversation with the employer. However, the employer - - -

PN421

Thank you, Mr Roberts?--- - - - has not - - -

PN422

I may stop you here. Are you aware of the applications that were previously filed by the applicant in relation to - - -?---Yes, I - yes, I'm aware of them, yes.

PN423

Thank you. So two applications were filed, weren't they, Mr Roberts?---The same - yes, that is correct, yes.

PN424

And the applications are substantively the same, aren't they?---In regards to - - -

PN425

To the coverage of - - -?---We were seeking an agreement to cover one for customer service and one for couriers on the basis that that's where we believe we were - (1) they were organisationally or geographically distinct, but also that we had the majority in those corridors. Again, the conversations - I was part of some of the conversations in between the withdrawing of the application and the secondary one, and there were more discussions about that.

PN426

Thank you, Mr Roberts. So why did the applicant file two applications which covered discrete occupation groups, couriers and customer service representatives, on or about 15 September 2023 and at or about that time, 15 September 2023, ask the respondent for an enterprise agreement that would cover all employees employed by it in New South Wales and ACT?---I believe that at that time there were discussions around an enterprise agreement and, as I said, this email does - about everyone else and there was no - there hadn't been an issuing of a NER by the employer. That was (indistinct) some points and our members were getting frustrated with no movement on this and our members have said that in those two classifications they want to pursue, I guess, the process of a - because ACL were not coming to the party with issuing a NER to commence negotiations.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN427

We made a strategic decision to go and - that's a matter for the union, that's a decision we made, but the employer was delaying the process, saying the right things but never got to the point of issuing the NER in those discussions which is why we made the decision to go down this path, because again we had been promised a lot of things and we weren't any closer to commencing negotiations for any of our members in Australian Clinical Labs.

PN428

MR BERRY: Thank you, Mr Roberts. Did the applicant have majority support from all employees - - -?---Again - - -

PN429

- - - within the respondent employed in New South Wales and ACT at the time that it wrote the email?---Well, I did not write the email. We believe we do within the groups that we're here today about and the other groups, again, some of it was difficult to ascertain due to the geographical location for some of these people, but we believe we got support for an agreement across the board, but again there are some challenges within the pathology sector to be able to get everyone in one place - - -

PN430

Thank you, Mr Roberts. At the time of writing the email of 15 September 2023 at 3.54 pm, did the applicant believe that it had majority support amongst all employees employed by the respondent in New South Wales and Australian Capital Territory for an enterprise agreement? Yes or no?---Again, I did not write the email and this is in the context of the employer agreeing to negotiate without the need for majority support, so again my similar answer is this was done in a good faith way with Australian Clinical Labs because ultimately, you know, we would like an agreement for everybody, but we don't - no, we don't necessarily have a majority in all the areas, but again we were in good faith enter in conversations with the employer - - -

PN431

Thank you, Mr Roberts. We have traversed the good faith negotiations?---Yes, well - - -

PN432

But I refer you back to the email of Mr Brownlow of 26 July 2023?---Yes.

PN433

And he declined a request, didn't he, for a specified group of employees which is much smaller - - -?---That is - - -

PN434

- - - than all employees employed in New South Wales and ACT, isn't it?---That is - in relation to that email that is correct; Mr Brownlow declines to negotiate.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN435

I'm going to take you to 4 October 2023?---Mm-hm.

PN436

Which is an email to which you were copied in?---Mm-hm.

PN437

Appearing on page 39 of the common court bundle?---Page 39, yes.

PN438

Again it is duplicated in the applicant's application in relation to 2023/1112?---Mm-hm.

PN439

You didn't write that email, did you, Mr Roberts?---That is correct.

PN440

But Mr Josh Howarth, divisional secretary of the applicant, wrote that email, didn't he?---That is correct.

PN441

And he wrote to the respondent on 4 October 2023 at 3.02 pm, didn't he?---That looks to be the time on the email, yes, Mr Berry.

PN442

On 4 October 2023, Mr Howarth on behalf of the applicant represented to the respondent that - and I quote:

PN443

*The majority of its staff and our HSU members are requesting this to occur in reference to bargaining for an enterprise agreement -*

PN444

didn't he? If I may refer you to paragraph 3 of that email, the last sentence of same?---Again this is - as I was saying earlier, this was in reference to the Health Services Union, as paragraph 2 - but as the email outlines in the last sentence of the first paragraph, Mr Berry:

PN445

*Please keep in mind that the union has withdrawn the majority support in good faith given ACL entered conversations to commence discussions on an EA. I feel that is now - - -*

PN446

Sorry, Mr Roberts - - -?---I'm just saying, too, it was very clear in that email that the union did withdraw our original application to have discussions and as it has pointed out at the end of - the beginning of that paragraph, 'Given the amount of time that has now passed - - -'

PN447

I'm simply asking whether the representation was made in that email?---Yes, Mr Howarth wrote to Australian Clinical Labs, to yourself, Mr McGrath and Mr Brownlow - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN448

So the applicant did not have majority support from employees when it sent this email, did it?---In the areas of customer service and couriers we believe yes, and again the reason - - -

PN449

So, Mr Roberts, if you believe that you had a majority support in relation to two separate and distinct occupations, why did the applicant not press its applications at those times?---That was a decision made by the union in their original application based upon undertakings or commitments given to the union. It wasn't to myself, but to the union - I believe Josh Howarth, as he is the divisional secretary - that ACL would enter into negotiations if we withdraw them. We entered into those conversations. Those conversations - again my understanding is it primarily took place with Mr Howarth and Mr Dastyari. Whilst I understand (indistinct) Mr Dastyari was making representation regarding Australian Clinical Labs.

PN450

I put it to you that the applicant did not have a majority of support in either of those occupations - or from employees employed in those occupations at the time that that email was written. What do you say in relating to that?---In relation to customer service and couriers we believe that we did.

PN451

So it's a belief that you have, Mr Roberts?---Well, that's why we - yes, that's currently our views that - - -

PN452

Is that your belief?---At the time we believed we had a majority of people in customer service and couriers who wanted to negotiate an enterprise agreement.

PN453

So that's your belief and not a fact, isn't it?---Well, it's our understanding based on the information we had, Mr Berry. Again, you know, a bit like - - -

PN454

So it's a belief, Mr Roberts?---So you claim in your evidence, Mr Berry, that we haven't provided evidence to suggest our claim will be - we would say the same in relation to you, Mr Berry. We have not been provided with evidence to demonstrate the numbers, so based upon what our members are telling us and previous information, we do believe that, but again without seeing a list of names we are only able to go off what we are told by members at the time, and again roughly 95 is the courier role and about 16 in customer services is the employee base.

PN455

For separate occupations, isn't that right?---For customer service and couriers.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN456



Thank you. But on 15 September, Mr Howarth - and I take you back to page 38 - sought an enterprise agreement that would cover all employees, didn't he, Mr Roberts?---But based upon conversations - which I believe you and I were part of the same meeting, Mr Berry. I was living in Brisbane at the time. Based upon conversations that we had had over Zoom with myself, yourself, Mr Berry, Joshua Howarth and Mr Sam Dastyari. There were conversations about how we would structure an EA. Obviously the employer was a bit hesitant to go for one, but we did talk about different groups and timings. That was a meeting - I remember sitting in a hotel room in Brisbane on that and - - -

PN457

Thank you, Mr Roberts?--- - - - that is where this email came from, based upon that conversation which I believe you were part of, Mr Berry.

PN458

Yes, but you accept, don't you, that the words used by Mr Howarth in his email of 4 October 2023 - which you were copied into - states, and I quote, 'The majority of your staff', end quote?---I'm just trying to see what the context of that comment is, Mr Berry.

PN459

That is in the third paragraph - - -?---Which email, Mr Berry?

PN460

It is on page 39, the email of 4 October 2023 at 3.02 pm?---Again, the - - -

PN461

I'm simply asking, Mr Roberts, that you accept that that is what is written in the document?---In relation to - so in relation to the majority of employees across ACL, no, but in relation to the two groups who we are here today about, customer service and couriers, we believe we do have a majority for that group.

PN462

I put it to you that the email doesn't say, 'The majority of staff' comma 'employed as couriers and customer service'?---As I said, I did not write this email, but that's my understanding at the time - - -

PN463

I'm simply putting it to you, Mr Roberts - - -

PN464

MS MOHAMMAD: Commissioner, I object. Mr Roberts isn't the author of this email. The email says what the email says.

PN465

THE COMMISSIONER: I think we can move on, Mr Berry. Thank you.

PN466

MR BERRY: Thank you.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN467

The respondent employs 1165 employees, doesn't it, Mr Roberts?---I'm not to know that. I'm taking that on face value that that's what you employ. I'm not - I don't - - -

PN468

So a majority of 1165 would be 583, wouldn't it?---Again, when I last went to school that was correct.

PN469

Thank you, Mr Roberts. I'm going to move now to a different topic. Mr Sharma provided you with at most eight written statements in support of bargaining, didn't he?---I don't recall how many Mr Sharma provided me, so - I'm not sure how you would know that, but I can't recall exactly how many Mr Sharma provided.

PN470

If that's your answer, Mr Roberts, that's your answer. How many written statements in support of bargaining did you personally obtain?---All the ones at the meeting, plus the customer service. I had conversations with all the customer service people and the ones who were at our meeting on 13 August, I was either asked questions for or they came and spoke to me.

PN471

So how many written statements in support of bargaining did you personally obtain, Mr Roberts?---As I said, again with the customer service I can provide them all and then with the couriers it was those at the meeting plus - so let me see, those at the meeting and then the rest with Mr Sharma and Mr Mitcher for customer service.

PN472

If I may ask that the witness be excused.

PN473

THE COMMISSIONER: I think I know what you're going to say. He is after the number. I understand, Mr Berry.

PN474

MR BERRY: Thank you, Commissioner.

PN475

THE COMMISSIONER: Number of statements.

PN476

MR BERRY: How many written statements did you personally obtain, Mr Roberts?---I do not - I don't - I just know how many we collected total. Again, I don't have the breakdown of how many I personally - I just know it was at the meeting and I know that most people spoke to me and asked questions after our meeting, and I had personal conversations with the customer service group of people.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN477

So just to recap, you're unaware of the number of statements that Mr Sharma obtained?---As I said - - -

PN478

Yes or no?---I'm not - I don't know the exact number, I just know the total number  
- - -

PN479

You don't know? Yes or no?---I know the total number - if you let me finish, Mr Berry. I know the total number of statements that were collected. I couldn't give you the exact number. As I said, at the meeting on the 13th with a majority of the (indistinct) that is, most people spoke to me afterwards and I was present at that conversation, and the customer service, I spoke to them all. So to put a number on it, I'm not prepared - I just know the total number of statements - - -

PN480

Mr Roberts, the question is you don't know the number of statements that you personally obtained, do you?---As I said, I know the total number of statements and I don't - I wasn't expected to be asked the exact number. I know the process that was taken and I know exactly how many we had. Without the data, which I don't have access to, it would be probably, as I said, 30 to 40 at the meeting on 13 August and then the rest would have been through a - then the rest would have been Mr Sharma and Mr Mitcher.

PN481

So Mr Mitcher obtained statements?---So Mr Sharma - they had conversations, too. That's in my evidence, too.

PN482

If you would like to take us there, Mr Roberts?---Yes, yes.

PN483

I'm happy to be taken there?---So those conversations with Mr Mitcher - - -

PN484

If you may reference the page of the court bundle - - -?---Yes.

PN485

- - - as well as the paragraph of your statutory declaration - - -?---Yes, I just went out of order.

PN486

- - - I would be indebted to you?---Sorry, Commissioner, I've got it out of order, the list of - - -

PN487

THE COMMISSIONER: That's okay. Take your time?---Have you got a spare copy, Shareeza?

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN488

MS MOHAMMAD: I haven't, sorry.

PN489

THE WITNESS: Mr Mitcher and - - -

PN490

MR BERRY: Mr Roberts, if you would like to take your time to find your place, we're more than happy to grant you that grace?---I've just got it out of order and it slipped out of there. It was two sixty - - -

PN491

Commissioner, I note that we're approached lunchtime. Was this Honourable Commission's thoughts in relation to the same?

PN492

THE COMMISSIONER: How long do you think your cross might take?

PN493

MR BERRY: I'm about a third of the way through there.

PN494

THE COMMISSIONER: Okay. All right. We'll probably adjourn around about 1.00.

PN495

MR BERRY: Okay.

PN496

THE COMMISSIONER: We'll break in a half hour if the parties are content to do so. If anyone wishes to have a bathroom break in a moment, I would get to that shortly.

PN497

MR BERRY: Just while Mr Roberts finds his place. I don't want him to have any undue pressure.

PN498

THE WITNESS: No, that's all right. I've just got it. I put it out of order earlier on. That's the call centre ones. That was the - - -

PN499

MS MOHAMMAD: Page 264 of the court book.

PN500

MR BERRY: 264, Mr Roberts, of the court book?---That's the customer service, couriers - - -

PN501

MS MOHAMMAD: 264.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN502

MR BERRY: I believe it's - - -?---Yes, I've got it.

PN503

- - - paragraphs 15 to 17?---Yes, so that's the process - - -

PN504

Sorry, it's 267?---Yes, 260 - so after the meeting on 13 August - - -

PN505

I will repeat my question for your benefit, Mr Roberts?---Mm-hm.

PN506

How many written statements in support of bargaining did you personally obtain?---They were all at the meeting, so those people all spoke - I addressed the meeting on that day, so whatever statements were on that day. I addressed the meeting and then the remainder, as I said earlier - I was beginning to answer - - -

PN507

Mr Roberts, do you not know the number of statements that you personally obtained?---I have said, Mr Berry, without - at the meeting we collected - without the exact number - I do have a spreadsheet I kept of this, but the meeting was attended by 30 or 40 couriers and then - which were all addressed by myself. The remainder were with Mr Sharma, Mr Mitcher and Mr West, as I've written in my statement.

PN508

We accepted into evidence that at most there were 40 - - -?---Yes.

PN509

- - - couriers. My question to you is how many written statements for the bargain did you personally obtain? Is your answer, 'I do not know'?---No, no, my answer is those at the meeting who completed the form were addressed by myself and I personally collected those forms, and took them with me. Those forms never left my presence after that meeting.

PN510

Commissioner?

PN511

THE COMMISSIONER: Mr Roberts, you don't have the precise number. How many do you think you - - -?---There would be 40 people at the meeting - of couriers were at the meeting. They all signed at that meeting, so they gave them to myself and I've kept them with me, but I don't - the exact number would be - 40 would be the number at the meeting. As I said, the rest were as I earlier - - -

PN512

Okay. All right.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN513

MR BERRY: So, Mr Roberts, your evidence is that you obtained somewhere between 30 to 40 written statements, but you cannot be sure of the exact number?---As I said, that meeting - at the meeting - it was all those people at the meeting - - -

PN514

Yes or no, Mr Roberts?

PN515

THE COMMISSIONER: Mr Roberts?---Thirty to 40 is my answer, Mr Berry.

PN516

MR BERRY: Do you accept that you are not sure of the number of statements that you personally - - -?---On the particular day - - -

PN517

MS MOHAMMAD: Commissioner, I object. I think the question has been answered - - -

PN518

THE COMMISSIONER: He has answered the question.

PN519

THE WITNESS: I've answered it, Mr Berry, you know.

PN520

THE COMMISSIONER: So 30 to 40 is what he said.

PN521

MR BERRY: If I may ask that the witness be excused, Commissioner.

PN522

THE COMMISSIONER: All right. Go on, Mr Roberts. Thank you.

**<THE WITNESS WITHDREW**

**[12.28 PM]**

PN523

MR BERRY: Commissioner, it's two very simple questions.

PN524

THE COMMISSIONER: I understand. The understand the frustration. I understand that it is unhelpful context. You did get there in the end, but I think we can move on. All right?

PN525

MR BERRY: It goes to a relevant point that the respondent wishes to make.

PN526

THE COMMISSIONER: Yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN527

MR BERRY: Now, I have asked Mr Roberts, 'How many statements did you obtain?' I accept that his evidence is somewhere between 30 and 40. I have asked Mr Roberts can he not be sure of the number of statements that he obtained - - -

PN528

THE COMMISSIONER: Yes.

PN529

MR BERRY: - - - and he cannot give a straight answer.

PN530

THE COMMISSIONER: Yes.

PN531

MR BERRY: I ask that that be recorded or a note made by the Commissioner. I'm happy to hear the objection.

PN532

THE COMMISSIONER: Ms Mohammad.

PN533

MS MOHAMMAD: Commissioner, Mr Roberts says that he doesn't know the exact number. He has given an approximate - - -

PN534

THE COMMISSIONER: Yes.

PN535

MS MOHAMMAD: - - - based on information that he had and - - -

PN536

THE COMMISSIONER: It did take a while for him to get there though, Ms Mohammad, but, yes.

PN537

MS MOHAMMAD: Yes.

PN538

THE COMMISSIONER: I note the concern that has been raised by Mr Berry. We will bring him back in. I will allow you to resume your questioning. I might have to be a little bit more interventionist, Ms Mohammad, if we don't get to the answers more quickly than what is otherwise desirable.

PN539

MR BERRY: I would be indebted to you, Commissioner.

PN540

THE COMMISSIONER: All right. Thank you.

PN541

MR BERRY: Would you like me to recap, Commissioner, on where we left off? Is there consensus between the parties as to the answer of the witness?

PN542

THE COMMISSIONER: Yes, I think we can move on.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [12.30 PM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [12.30 PM]**

PN543

MR BERRY: So, Mr Roberts, the applicant has obtained 55 written statements in support of bargaining, hasn't it, from employees employed by the respondent as couriers?---That's correct, yes.

PN544

Your evidence was that you obtained somewhere between 30 to 40. You personally obtained somewhere between 30 to 40 - - -?---Personally, yes, about 30  
- - -

PN545

- - - of those written statements and you are unaware of the number of statements that Mr Sharma collected - - -?---The remainder - - -

PN546

If I may finish my question, Mr Roberts. Who collected the remainder or the balance of the statements, somewhere between 25 and 50?---As my statement, Mr Mitcher, Mr Sharma, Mr West and I have regular conversations and, as I said, on the 14th we had further conversations.

PN547

I noted in your statutory declaration that you were very particular as to preserving the chain of evidence and I refer you to the statement that you make in your statutory declaration on page 266 - - -?---Yes.

PN548

- - - at paragraph 14(b), and I quote:

PN549

*They must keep the signed written statement with them at all times and contact me, and I would arrange to collect them in person.*

PN550

?---That's correct.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN551

The applicant has tendered no evidence as to how it obtained somewhere between 15 and 25 written statements, has it, Mr Roberts?---The union operates through the delegates and it's one of our - a role of a delegate is to speak to their colleagues. As I said, I had a briefing with those - Mr Mitcher, Mr Sharma,



Mr West - and I had daily conversations, and I'm happy - you know, if you don't - well, that's fine, but we had daily conversations and follow-up, and anything turns - and if I needed to ring people and explain it to them, I would. So the majority of people that were there, Mr Mitcher - he's very experienced in this process himself from a previous life and he was mentoring in that, as well.

PN552

I'm sorry, Commissioner, but I'm not sure as to whether the witness can give evidence as to - - -?---I would say he's very experienced in a previous life, Mr Berry. I mean, it's a basic Google search.

PN553

Mr Mitcher did not provide evidence in these proceedings, did he, Mr Roberts?---He hasn't done a statement, no. I mean, that subject - - -

PN554

Mr Mitcher did not provide evidence in these proceedings, did he? Yes or no?---No, I am saying in my statement that they are three key delegates who I personally had a conversation with about this process. Mr Sharma has done a statement, as you're aware, but Mr Mitcher has not, but again my evidence is that I have personal conversations on a daily basis - - -

PN555

Mr Roberts, Mr Sharma has provided evidence in these proceedings that you were unaware of the number of statements that he provided to you. That is your evidence, isn't it?---As I said, Mr Berry, between - - -

PN556

Yes or no, Mr Roberts? The record clearly - - -

PN557

THE COMMISSIONER: Let him answer the question.

PN558

Thank you, Mr Roberts?---So, as I said, we relied on three main delegates who were always with me on a daily basis, so to put a number on each delegate, I don't have that kind of information, but it is - so between the three, the remainder that I had conversations with - and on a daily basis I would speak to them and check in, and all that. The union doesn't have one delegate, it has multiple delegates and so - - -

PN559

MR BERRY: Thank you. Mr Sharma was one of those employees that signed a statement in support of bargaining, wasn't he?---Yes, he has, yes.

PN560

Mr Sharma is no longer employed by the respondent, is he?---I'm not sure that's relevant to this discussion. It was all about what had gone on at the time, but that would be true, yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN561

Thank you?---I'll leave it at that.

PN562

So Mr Sharma is no longer employed by the respondent. Mr Mitcher is still employed by the respondent, isn't he?---Currently, yes.

PN563

And Mr West is still employed by the respondent, isn't he?---Mm-hm.

PN564

And yet did not file evidence in relation to this proceeding from Mr Mitcher, did it?---No, not in relation to this matter, no.

PN565

Thank you, Mr Roberts. The applicant did not file evidence from Mr West in relation to these proceedings, did it?---No, not Mr West, no.

PN566

Thank you. So by way of summary, you personally obtained somewhere between 30 to 40 written statements, didn't you? Yes or no?---That's correct, yes.

PN567

And you're unaware of the number of statements that Mr Sharma obtained. Yes or no?---As an individual, no. As an individual - - -

PN568

Thank you, Mr Roberts?---But that was - - -

PN569

So there is somewhere between 25 and 15 statements that are unaccounted for at a chain of evidence presented to this Commission - - -?---No, because they were with our delegates who were in constant contact with myself, as I have put in my statement. So there was not - - -

PN570

You allege, Mr Roberts?---Pardon?

PN571

You allege?---That's the evidence I am providing and again I have daily - multiple conversations on a daily basis - - -

PN572

I put it to you that there are somewhere between 15 and 25 statements which have no provenance attached to them. What do you say in relation to that?---I disagree, because, as I said, I had a daily conversation with Mr Mitcher, Mr Sharma and Mr West as our delegates who were also part of this process.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN573

Thank you, Mr Roberts. So the applicant has obtained 54 written statements in support of bargaining, hasn't it, from employees employed by the respondent as couriers?---The number has changed. Earlier you said 55.

PN574

I'm going to refer you to paragraph - - -?---It's 54, sorry. Yes, 54, sorry - - -

PN575

- - - 17 at page 266 of the court bundle in which you state, and I quote - - -  
?---Fifty-five.

PN576

So you accept that in your statutory declaration, which you swore as true and correct at the beginning of these proceedings, that the number there is 55?---That is correct, yes. That's the number that - - -

PN577

And that was sworn on 4 December 2023, wasn't it?---Yes, Mr Berry. That's correct.

PN578

When was Mr Sharma's employment terminated, Mr Roberts?---I don't recall. Again, those signatures were collected well before Mr Sharma was terminated. I'm not sure what you're trying to get at here, Mr Berry.

PN579

I put it to you that Mr Sharma was terminated on 17 November 2023. What do you say in relation to that?---I believe that to be true. I'm not a hundred per cent sure of the date, but ACL decided to terminate Mr Sharma.

PN580

Do you accept that the respondent terminated Mr Sharma on 17 November 2023?---I'm not comfortable answering this question based upon - - -

PN581

MS MOHAMMAD: Commissioner, I object. These questions are - - -

PN582

MR BERRY: I ask that the witness be excused, Commissioner.

PN583

THE WITNESS: I'm not prepared to answer that.

PN584

THE COMMISSIONER: All right. Leave the room for a moment. I'll talk to the parties.

<THE WITNESS WITHDREW

[12.38 PM]

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN585

THE COMMISSIONER: You're taking him to paragraph 70 of the statement. It talks about the number of statements in any event being collected.

PN586

MR BERRY: Yes, and he has sworn, Commissioner, with a statutory declaration true and correct to the best of his knowledge, confirmed by my friend here at the beginning of the hearing - - -

PN587

THE COMMISSIONER: Yes.

PN588

MR BERRY: - - - that 55 statements were filed and correct. Now, Mr Sharma was terminated on 17 November 2023, almost several weeks prior to his swearing of that affidavit, let alone his confirmation today. The point that I wish to make, Commissioner, is that this witness is misleading this Commission in terms of the number of statements.

PN589

THE COMMISSIONER: Okay. So when do you say the statements were collected, Ms Mohammad? Is the inference that you're drawing, Mr Berry - you're asking me to draw, I should say, is at the time that he collected the statements there is one that he didn't collect the statement - - -

PN590

MR BERRY: No, Commissioner. I think the evidence that I have elucidated from the witness shows that there are some 15 to 25 statements which have no provenance as Mr Roberts is unaware of the number of statements that he previously collected, let alone - and he has no knowledge of the number of statements that Mr Sharma collected, but it's a more serious inference that I'm drawing; that he is misleading.

PN591

He has had two opportunities to correct his statement. He has chosen not to do so. The evidence as it stands is that there are 55. I will put it to this witness that he is misleading this Commission.

PN592

THE COMMISSIONER: All right. So it's not a question - you're not - - -

PN593

MR BERRY: It also is a question of fact material to these proceedings and that the applicant says that in respect of the numbers that it has in support of its application are in evidence at the moment 55.

PN594

THE COMMISSIONER: All right.

PN595

MR BERRY: Now, every individual is important.

PN596

THE COMMISSIONER: Well, yes, I understand that, but his statement does say he had collected 55 written statements, right, so that's what he is asserting.

PN597

MR BERRY: He says, 'We were able to collect 55 written statements.' The natural inference is that there are - -

PN598

THE COMMISSIONER: Yes, that's what he is asserting.

PN599

MR BERRY: The natural inference, Commissioner, is that there are 55 written statements in support of bargaining.

PN600

THE COMMISSIONER: If you're saying there is a lower number though - - -

PN601

MR BERRY: There is.

PN602

THE COMMISSIONER: - - - that's a matter - you can draw conclusions about that in your submissions.

PN603

MR BERRY: There is, because it comes back materially to when is the date of which there is a majority support determination.

PN604

THE COMMISSIONER: That I would agree with, the time to that point, but that's - I'm happy to take submissions. I think it's a - to say he's misleading or intentionally misleading at this point, however.

PN605

MR BERRY: I am entitled to put that to him.

PN606

THE COMMISSIONER: You can put it, yes, but - - -

PN607

MR BERRY: And I will put that to him.

PN608

THE COMMISSIONER: You can put it, yes, but - we'll bring him back in.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [12.41 PM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [12.42 PM]**

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN609

MR BERRY: I put it to you, Mr Roberts, that the applicant has 54 written statements in support of bargaining from employees employed in the occupation of couriers. What do you say in relation to that?---Well, 55 - I might have miscounted, we had 54 or 55. I counted 55, but, yes, that's - - -

PN610

MS MOHAMMAD: Commissioner, I object. This is an unqualified conclusion.

PN611

MR BERRY: If I may ask that the witness be excused. I note that Ms Mohammad did not address this Commission when this point was being addressed by - - -

PN612

THE COMMISSIONER: Put the question - and, Mr Roberts, can you answer it, please?---I will - - -

PN613

MR BERRY: I put it to you, Mr Roberts, that the applicant has obtained only 54 written statements in support of bargaining from couriers who are employed by the respondent - - -?---My statement says 55 - - -

PN614

- - - as couriers?---But my statement says 55. It might have been miscounted before, so 54, 55. I might have - - -

PN615

THE COMMISSIONER: That's your answer.

PN616

MR BERRY: I put it to you that you're misleading the Commission in stating 55 in your statutory declaration and noting that you had two occasions to correct your evidence, what do you say in relation to that?---I disagree with that statement. I am - - -

PN617

Thank you, Mr Roberts. The applicant has obtained 12 written statements in support of bargaining from employees employed by the respondent in the occupation of customer service representatives, hasn't it?---That's correct, yes.

PN618

In total the applicant has obtained 66 written statements in support of bargaining from employees currently employed by the respondent, hasn't it?---As a total, that is correct. That is - as a total.

PN619

And you accept that there is no providence for between 15 and 25 of those statements?---I have a clear discussion and process to ensure our delegates collect from everyone.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN620

Okay?---So I - - -

PN621

Thank you, Mr Roberts. I put it to you that there is no clear provenance for between 15 and 25 - - -?---I disagree with - - -

PN622

- - - of those statements. What do you say in relation to that?---I disagree with that statement.

PN623

Thank you. I put it to you that the respondent employs more than 96 couriers. What do you say in relation to that?---That would be news to the union. Based upon previous - - -

PN624

Thank you, Mr Roberts?--- - - - conversations it was 96, I believe.

PN625

I put it to you that the only thing that the employees that would be covered by an enterprise agreement if application B2023/1111 were granted would have in common is the occupation, isn't it?---And the work that they do, yes. That would be their work which they do and the way in which they manage them, and they're the only type of people who do that work in the organisation.

PN626

The only thing that employees that would be covered by an enterprise agreement if application B2023/1112 were granted would have in common is their occupation, isn't it?---And the work which they do, and the fact that they are managed out of Victoria, not New South Wales.

PN627

Thank you, Mr Roberts. The occupational group of employees was the basis for choosing them to be covered by the enterprise agreement that is sought by application B2023/1111, isn't it?---Which one is that? I'm getting confused with the - - -

PN628

That's couriers. Couriers is - - -?---The type of work which they do and the fact that they're the only group of people in that - who do that kind of work.

PN629

It's a yes or no, Mr Roberts. The occupational group of employees was the basis for choosing them to be covered by the enterprise agreement that is sought by application B2023/1111, isn't it?---That is the instruction - - -

PN630

Yes or no, Mr Roberts?---If you would write the answer for me, great, but - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN631

THE COMMISSIONER: Answer the question, Mr Roberts?---So I'm answering the question. Our members - that was the instruction our members had come up with, that they wanted to seek an enterprise agreement for that group type and work - that group and the work of couriers.

PN632

MR BERRY: And those members, employees, have in common that they are employed as couriers?---They're employed as pathology couriers, yes.

PN633

Which is an occupation, isn't it?---It's what you - - -

PN634

Thank you?---It's a title on its own, yes.

PN635

Yes?---Type of work.

PN636

In respect of application B2023/1112, the occupation was the basis for choosing that group to be covered by the enterprise agreement that is sought by the applicant, isn't it?---One of the reasons, the other reason being that there was an enterprise agreement in Victoria which covered their colleagues who are the same team, managed by the same people in Victoria, who in New South Wales were - the appropriate modern award and they were doing the same - - -

PN637

Thank you, Mr Roberts?---Let me finish my answer, please - and they were the - so there was two bases to that for that group.

PN638

So there are two bases, but you - - -?---The type of work they do and the fact that their colleagues doing the exact same work, in the exact same team, in the exact same management structure based in Victoria were on different rates of pay and conditions in New South Wales.

PN639

So you accept that in relation to that enterprise agreement in Victoria they are a group of administration staff, don't you?---How they are structured is again - that's another question, but in terms of our process to select that group was based upon their being paid - the customer service people being paid under - I believe there is a classification structure particular to customer service, as well.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN640

Thank you, Mr Roberts. I put to you that the employees employed as customer service representatives work in an integrated way with other employees that perform pre-analytical/post-analytical functions. What do you say in relation to that?---You have asked that question before, Mr Berry, and again our view is that the work they do is that they are the only people who perform that work in that



way managed by a team, managed by a structure which is in Victoria. Therefore, their operation in the organisation - therefore, the operation is organisationally - -  
-

PN641

But they perform the same function?---But in terms of - they're not under the New South Wales management structure, they're under Victoria, so therefore in New South Wales - they are not in the organisation in New South Wales, they report directly to the call centre manager - - -

PN642

I'm not asking about the reporting though, Mr Roberts?---But that's - - -

PN643

I'm simply asking about the function that they perform?---The function they perform is the same work as their colleagues in Victoria.

PN644

Which is pre-analytical and post-analytical functions?---Is that's the way you choose to describe it. We only describe it as call centre.

PN645

Okay. Thank you, Mr Roberts. You accept again that in Victoria those employees are grouped with other administration staff, don't you?---Yes, without the structure of Victoria, but again - - -

PN646

Thank you, Mr Roberts?---In the agreement - - -

PN647

If I may move on, Commissioner?--- - - - the classification structure - - -

PN648

I put it to you that employees employed as customer service representatives do the same or similar work, albeit different clerical/administrative work, and many of the employees employed by the respondent in those roles can work between areas such as data entry, collections, customer service and being a laboratory assistant. What do you say in relation to that?---I say that is untrue. That is not the practice of what happens. People do not - - -

PN649

Thank you, Mr Roberts.

PN650

THE COMMISSIONER: Let him finish the question.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN651

Go on, Mr Roberts?---People do not move between customer service and, as you put it, other reception roles or - people work in that function. People are not covered - interchanged within the static group of people who have areas, different

areas, different specialties for different tests. They do not integrate - well, they may speak to them on the phone, but people do not interchange as you suggest. That people come from the road and then work in the customer service call centre does not occur and these people are dedicated in that department.

PN652

MR BERRY: I put it to you, Mr Roberts, that employees employed as couriers come under the pre-analytical function structure and there are stores and administrative functions within that structure as well as collections and data entry staff. What do you say in relation to that?---Again they do not perform - they may take stuff - part of their role might be delivering to some store, but it is done by another group of people and it's - there are other departments for that. They may take stores - or stock to the collection centres and all that, but they don't work in the store and they don't work as - it's all done for them.

PN653

Mr Roberts, your evidence is that there are other employees in the respondent that perform the same or similar tasks?---No, that is not correct. As I said, they may - once it's put out for them to - allocated to the areas, the role might be for the courier driver to collect that from the table and take it to a collection centre. No one else - no other employee would take some stock from Bella Vista to the call centre or to the customer service - sorry, to the collection centres. No other employee unless it's an external contractor who might do it. It is placed upon shelves and - - -

PN654

If I may, I put it to you that that is a gross lie. I put it to you that there are other employees within the employ of the respondent who take other items to other areas or geographical locations for the respondent from time to time. What do you say in relation not that?---Not as - my response is not as direct employees. You may use taxis, you may use other courier services that are not employees of ACL. The people - the stores and the stock that's required to go to the collection centres is the ACL employees who undertake that, to collect - are the couriers and no other - unless there is an emergency, but on an ad hoc basis, yes, you might use taxis, yes, you might use third party courier services and it might be a supervisor on emergencies, but as a whole it is the couriers who take that stuff.

PN655

I put it to you, Mr Roberts, that the respondent has other staff that operate motor vehicles and follow a specific run to collect samples directly from patients via its home visit service, and that these employees fall under the same reporting lines as couriers and collections. They operate a motor vehicle and sometimes perform the same job, picking up samples from client premises. What do you say in relation to that?---I say those people are employed as pathology collectors, not couriers. Yes, they may - their role is to go there and - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN656

You previous evidence is that the respondent does not have employees that do the same tasks as employees that are employed as couriers. You have just contradicted yourself. What do you say in relation to that?---I don't believe I have, Mr Berry. Let me finish. There are home visit collectors who go and collect blood from a premises. They are not classed as couriers. They may drive a motor vehicle, but they are classed as collectors. The courier drivers we're talking about do not collect samples, do not have the qualifications to collect samples. These people, they may drive - the only connection is they may drive a vehicle to the people's premises, but they do not perform the same work. They are pathology collectors. We're not here to talk about pathology collectors. We're here to talk about couriers.

PN657

A specific group of occupation?---Employed as pathology - the people you mention are employed as pathology collectors for home visits.

PN658

Thank you, Mr Roberts, but they perform the same or similar tasks - - -?---No, they do not.

PN659

- - - as couriers?---No, they do not.

PN660

I put it to you that they do?---I'm going to disagree with that, because - - -

PN661

Thank you, Mr Roberts?--- - - - a courier does not provide - undertake invasive procedures such as taking blood, reading results. They do not do any of that work like a home pathology collector would do. They attend medical practices, hospitals, and they've got pre-bagged samples that are already taken. They do nothing in relation to the collection of that. Their role is to - already collected samples, transport them appropriately using the appropriate techniques and processes that are outlined. I would say that you're trying to put words in my mouth and trying to make an argument that simply is not true.

PN662

THE COMMISSIONER: Thank you, Mr Berry.

PN663

MR BERRY: Do I need to labour that point further, Commissioner?

PN664

THE COMMISSIONER: It's a matter for you. He has given you an answer, but it's a matter for you.

PN665

MR BERRY: I think that I put the respondent's case.

PN666

THE COMMISSIONER: Okay.

PN667

MR BERRY: I put it to you, Mr Roberts, that couriers also use the same integrated systems as other employees and come under a single operational reporting line. What do you say in relation to that?---Can you be more specific, please.

PN668

Sorry, Mr Roberts. We have previously been taking in regards to couriers, an occupation group. You have referred to another occupation, collectors. They share the same reporting line, don't they?---I'm unaware if they do or not - - -

PN669

I put it to you that they did. If your answer is - you either accept it or you don't?---No, I'm not inviting you to suggest - I'm not - the collectors, we're not discussing their reporting lines. We have been only discussing the couriers.

PN670

I accept that, but you have referenced the collectors. You have opened the door and now I'm putting it to you that they share the same reporting line. The previous occupational group that you referred to, they share the same reporting line, don't they?---I'm not aware of your structure for the collectors.

PN671

THE COMMISSIONER: He's saying he doesn't know.

PN672

MR BERRY: Thank you.

PN673

I put it to you that courier employees perform their work in a manner that is highly integrated so that the respondent can link its operational premise of providing pathology services including the collection, transport and testing of specimens and reporting of results to doctors, hospitals, patients and corporate clients. What do you say in relation to that?---They're playing an important role in that function, but it doesn't mean they're not operationally or geographically distinct or organisationally distinct. I'm not disagreeing they play an important part in that, but that doesn't mean - - -

PN674

I put it to you, Mr Roberts, that the HSU has resiled from its position of 20 July 2023 in which it sought to bargain for a single enterprise agreement capturing pathology couriers, pathology collectors which you've just referenced, customer service and administration staff. What do you say in relation to that?---That was our position. The July position is we want where we are now.

PN675

I put it to you that it would unfair to grant an enterprise agreement for employees employed as couriers because employees that are working alongside them in an

integrated way that perform the pre-analytical/post-analytical functions for the respondent would be covered. What do you say in relation to that?---It's a matter for those employees to come and talk to the union about applying for an enterprise agreement for that group.

PN676

Thank you, Mr Roberts. So you are saying that the applicant is predicating its applications based on occupation, aren't you?---We're basing it on our members' instructions and how they would like to do it based upon the employer's unwillingness to negotiate an enterprise agreement covering everybody.

PN677

I put it to you that you're not interested in all employees, but you're only interested in what your members want?---As a union we are instructed and advised by our members, Mr Berry, so - - -

PN678

Thank you?--- - - - that's a matter for the union, but to suggest in relation to all employees is a gross exaggeration. We want (indistinct) our members, but we are obviously reacting to the tactics and the responses from Australian Clinical Labs that affect our members.

PN679

Thank you, Mr Roberts. I put it to you that the applicant does not have a majority of members employed by the respondent. What do you say in relation to that?---It's a matter for you. We've got members across all sections. Again we're not here to talk about the rest of the group. We're here to talk about the applications we've made.

PN680

Based purely on occupation; isn't that correct, Mr Roberts?---Based on our decision. So we're here to talk about couriers and customer service, so - - -

PN681

Thank you. I put it to you that it would be unfair to grant an enterprise agreement for employees employed as customer service representatives because employees that work alongside them in an integrated way perform the pre-analytical and post-analytical function for the respondent and would not be covered. What do you say in relation to that?---I think I've answered this question ad nauseum, Mr Berry.

PN682

MS MOHAMMAD: Commissioner, I object to this - - -

PN683

MR BERRY: I must ask that the witness be excused.

PN684

THE WITNESS: I think I've answered this question multiple times, Mr Berry.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN685

MR BERRY: If I may, Commissioner, I asked the question first in relation to couriers. I'm now asking the question in relation to customer service representatives. I remind the applicant that it has filed two applications; one for an occupational group of couriers, one for an occupational group of customer service representatives. The respondent is entitled to put its case in relation to both applications.

PN686

THE COMMISSIONER: You have answered the question - - -?---If he asks the question, yes, I'm happy to - - -

PN687

On the basis that you've answered it before?---Pardon?

PN688

On the basis that you have answered it before, I understand?---Yes, yes, I've answered the question before.

PN689

MR BERRY: So, Mr Roberts, what you're saying is that your previous answers as they related to couriers are the same for customer service representatives?---I'll tell you again - - -

PN690

Is that correct?--- - - - our members have come to us and given us advice that they would like to seek an enterprise agreement to, again, bolster their wages and conditions above the legal minimum.

PN691

Thank you. Again, Commissioner, this is the subtlety of having the applications heard at the same time, but if that point is accepted by my friend and yourself, I will move on.

PN692

THE COMMISSIONER: Let's move on.

PN693

MR BERRY: Thank you.

PN694

I put it to you, Mr Roberts, that negotiating enterprise agreements purely on the basis of occupation is inefficient and a waste of resources. What do you say in relation to that?---Not from the union's perspective. We negotiate agreements for small cohorts of people across different organisations, so from the union's perspective ultimately we would like an employer to recognise the pay of all their employees, but if Australian Clinical Labs are not - we will exercise our rights to best represent our members in areas we feel we can achieve agreement in.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN695

I put it to you that a multitude of agreements would create unnecessary complexity and also administration costs for the respondent. What do you say in relation to that?---I'm not a business accountant, so I can't answer that.

PN696

Do you accept, Mr Roberts, that having multiple agreements for the respondent would create complexity and further administration costs? Yes or no?---No, no, because you've got an automated electronic paying system and that kind of stuff, so, no.

PN697

So how can you reconcile that answer with your previous answer which was that you're not a business accountant?---(Indistinct reply)

PN698

THE COMMISSIONER: It's 3 minutes past 1, Mr Berry.

PN699

MR BERRY: We are about halfway through the cross-examination.

PN700

THE COMMISSIONER: You might give me an indication in the next couple of minutes - I'm sure we all want a bathroom break and something to eat.

PN701

THE WITNESS: Yes, I do.

PN702

THE COMMISSIONER: When it's a good time for an adjournment.

PN703

MR BERRY: I think we should adjourn now.

PN704

THE COMMISSIONER: Yes. I was going to say it might be sensible in any case. I think Mr Roberts is seeking a relief break.

PN705

THE WITNESS: Yes.

PN706

THE COMMISSIONER: So let's adjourn and we'll resume at - - -

PN707

MR BERRY: Commissioner, if I may invite the Commission to remind Mr Roberts of his obligations as a witness prior to - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN708

THE COMMISSIONER: Mr Roberts, I understand sometimes it takes a while to answer the questions, but if you could just perhaps be a little bit more direct in

your response sometimes, that would be of assistance, but, yes, I'll help you out if I need to interject at that juncture. All right? Thank you.

PN709

MR BERRY: Sorry, Commissioner, if I may - - -

PN710

THE COMMISSIONER: I'm not going to give him a formal warning though. Thank you, Mr Berry.

PN711

MR BERRY: No, no, just that he's not able to discuss the case.

PN712

THE COMMISSIONER: Yes.

PN713

THE WITNESS: Yes.

PN714

THE COMMISSIONER: All right. Thank you, parties. I'll adjourn and don't discuss the case with any other witnesses, Mr Roberts, and we'll be back at about 5 past 2.

**<THE WITNESS WITHDREW [1.04 PM]**

**LUNCHEON ADJOURNMENT [1.04 PM]**

**RESUMED [2.10 PM]**

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [2.10 PM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [2.10 PM]**

PN715

THE COMMISSIONER: Mr Roberts, you have taken an affirmation in these proceedings so you remain under affirmation at this point?---Yes.

PN716

Mr Berry.

PN717

MR BERRY: Ma'am, if I may address the Commission just in the interests of the efficiency of this matter. Was the Commission disposed to hearing the matter tomorrow and, if so - - -

PN718

THE COMMISSIONER: Yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN719



MR BERRY: Just so that we can make arrangements for the balance of the witnesses.

PN720

THE COMMISSIONER: Yes, it is apparent to me that it's taking longer than I had first anticipated. I think it might go over the course of the day unless the parties tell me otherwise at this point. I am seeing some nodding. All right. I have a listing in the morning, but tomorrow afternoon I do have some capacity if it's the preference of the parties to have it carried over. What do you say about that?

PN721

MS MOHAMMAD: We have one similar issue.

PN722

THE COMMISSIONER: Yes.

PN723

MS MOHAMMAD: Our witness, Mr Sharma, is unavailable.

PN724

THE COMMISSIONER: He's not available tomorrow?

PN725

MS MOHAMMAD: No.

PN726

THE COMMISSIONER: Maybe we can get through Mr Sharma today and then we can deal with Mr Brownlow tomorrow afternoon. Are you free tomorrow afternoon?

PN727

MS MOHAMMAD: Yes, I'm available tomorrow afternoon. It's just the witness's availability.

PN728

THE COMMISSIONER: Yes.

PN729

MS MOHAMMAD: He is also not available this afternoon.

PN730

THE COMMISSIONER: He's not available this afternoon, okay. Well, that's a bigger problem that was first foreshadowed.

PN731

MS MOHAMMAD: I think we all anticipated that it would be a one-day hearing.

PN732

THE COMMISSIONER: Yes, okay. Right.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN733

MR BERRY: Commissioner, if I may, Mr Brownlow does have also some leave arrangements for the balance of the back end of this week.

PN734

THE COMMISSIONER: Yes.

PN735

MR BERRY: He is available tomorrow and did indicate that.

PN736

THE COMMISSIONER: Yes.

PN737

MR BERRY: And he also indicated some flexibility for Wednesday, as well.

PN738

THE COMMISSIONER: For Wednesday, as well. I'll just see what I've got listed - the types of matters I have listed - on that date. How are we looking on Friday?

PN739

MR BERRY: I would need to take instructions, but my associate Ms Lai could do that.

PN740

THE COMMISSIONER: Yes. It may need some refining or otherwise we're into the following week, looking at potentially Tuesday afternoon next week. They are really the options if we can't do tomorrow afternoon.

PN741

MS MOHAMMAD: I will have to check to see if Mr Sharma is available.

PN742

THE COMMISSIONER: Yes. Your witness Mr Brownlow is not available next week; is that right - this week.

PN743

MR BERRY: Yes.

PN744

THE COMMISSIONER: All right. So it's look like Friday is the day that we're going to have to work towards in that case.

PN745

MR BERRY: The parties may, by consent, be able to have Mr Brownlow give evidence tomorrow.

PN746

THE COMMISSIONER: Tomorrow, yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN747

MR BERRY: The evidence of Mr Sharma is somewhat slender and appears to be somewhat relevant to the collation of written statements.

PN748

THE COMMISSIONER: Depending on where the cross-examination might take you. Is he available to participate via video - - -

PN749

MS MOHAMMAD: I would have to get some instructions. I'm not sure if he would be - - -

PN750

THE COMMISSIONER: All right. Let's do this, let's get through Mr Roberts and see where we're at, then we might have an adjournment and I'll put some options to you. It may be that we can - if it's slender, the points being tested are slender, I'll put in those terms - it maybe that the video would take an hour or so, Ms Lai - - -

PN751

MR BERRY: We wouldn't necessarily be opposed to audio-video evidence given the nature of - - -

PN752

THE COMMISSIONER: Okay. All right. Let's park that and we will see if we can through your evidence now, Mr Roberts, we'll go from there. Thank you, Mr Berry.

PN753

MR BERRY: Mr Roberts, I put it to you that the HSU has made it clear to the respondent that it will seek to obtain further majority support determinations for other occupations employed at ACL that are under coverage of the Health Professionals and Support Services Award 2020. What do you say in relation to that?---All their options are open at the moment depending upon how these progressions may take. We obviously prefer to do a (indistinct) but we'll make decisions based upon the position of ACL at the time.

PN754

I put it to you that ACL is a medical practice which has the operational purpose of providing pathology services, including the collection, transport and testing of specimens and reporting of results for doctors, hospitals, patients and corporate clients. What do you say in relation to that?

PN755

MS MOHAMMAD: Commissioner, I object. This question is subject to separate proceedings which are before the Commission and they have no relevance to the applications.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN756

THE COMMISSIONER: I might just get you to step out for a moment while I hear submissions on the objection.

<THE WITNESS WITHDREW

[2.16 PM]

PN757

THE COMMISSIONER: Specifically categories you're talking - - -

PN758

MR BERRY: At the heart of this matter - and I'm somewhat befuddled as to why my friend is objecting here, but operational distinctiveness is key to a consideration that the Commission must make under section 237.

PN759

THE COMMISSIONER: I accept that, yes.

PN760

MR BERRY: And the operational purpose, as will be adduced into evidence by Mr Brownlow, is that ACL is a medical practice which has the operational purpose of providing pathology services including the collection, transport and testing of specimens and reporting of results for doctors, hospitals, patients and corporate clients. I have an obligation to put that to the witness.

PN761

THE COMMISSIONER: Okay. It raises a point. We will bring him back in and I'll let you put the question. Actually before we do that, they are separate proceedings, they are not before myself.

PN762

MR BERRY: No.

PN763

MS MOHAMMAD: No, they are before McKenna C.

PN764

THE COMMISSIONER: Okay. All right. So what is the concern and if they are relevant - if the question is of apparent relevance to these proceedings, what is the concern in terms of capacity to infect those other proceedings?

PN765

MR BERRY: There is none, Commissioner.

PN766

THE COMMISSIONER: Ms Mohammad will have a different view. What do you say about that?

PN767

MS MOHAMMAD: Commissioner, one of the main contentions of the other proceedings that are before the Commission are whether or not Australian Clinical Labs is in fact a medical practice or a pathology practice.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN768

MR BERRY: I'm not necessarily sure I would characterise it as that. It's an interpretive issue in relation to the modern award and whether the respondent comes within the ambit of a particular clause. I believe it's clause 27.

PN769

THE COMMISSIONER: Yes. I'll park that for the moment. I need to understand - I need information about the operations obviously if I am to determine whether it's operationally distinct or not. Now, I'm not familiar with the relevant clause of the award and I'm not dealing with a dispute. The question is asked in the context of these proceedings rather than the other proceedings. I don't know if you're bringing that individual, Mr Roberts, as a witness in those proceedings, as well, but - - -

PN770

MR BERRY: No evidence has been filed, ma'am.

PN771

THE COMMISSIONER: All right. I'm minded to allow the question to be asked, so I'm going to bring him back in. Thank you.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [2.19 PM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [2.19 PM]**

PN772

MR BERRY: I put it to you, Mr Roberts, that ACL is a medical practice which has the operational purpose of providing pathology services, including the collection, transport and testing of specimens and reporting of results for doctors, hospitals, patients and corporate clients. What do you say in relation to that?---I disagree they're a medical practice.

PN773

I put it to you that the respondent has other administrative staff that perform not dissimilar tasks, including receiving and making calls to doctors, patients or performing general administration. What do you say in relation to that?---Outside of the customer service maybe people interact, but this is about customer service and we're saying that they do a unique role.

PN774

I put it to you that customer service representatives perform their work in a manner that is highly integrated so that ACL can meet its operational purpose in providing pathology services, including the collection, transport and testing, and reporting of results for doctors, hospitals, patients and corporate clients. What do you say in relation to that?---Customer service perform a role with the 1300 call centre number. The allocation of work, or other work, is not governed by customer service. It's dealt with from a different system.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN775

The 1300 number that the respondent has goes through to other employees, not just customer service representatives, doesn't it, Mr Roberts?---My understanding is other states - it goes through other call - similar other call centres in other states. In WA - principally WA, Victoria, New South Wales, I believe potentially Queensland and South Australia, as well.

PN776

But there are other calls that goes through New South Wales, aren't there?---From that number. I believe that all of those - my understanding is all the call centre numbers go through that centralised system and they're all dealt with through that customer service group in that call centre.

PN777

So the calls emanate through that 1300 number, don't that?---I believe that - yes, I believe that's the number that's advertised by Australian Clinical Labs.

PN778

And those calls can be triaged to anyone that works in New South Wales, can't they?---I'm not sure how it works in the system. I've tried to call it and I end up in New South Wales, but I'm not sure how it works out where it's from. I'm not sure of the - I'm not an IT person. I'm not sure how they separate the calls.

PN779

I put it to you that customer service call centre employees work in a highly integrated matrix structure and work closely with their colleagues in New South Wales. What do you say in relation to that?---They may interact with their colleagues un New South Wales, but again if people want specific collection centres there is normally a number and they can call that collection centre. It doesn't normally go through that customer service function. It's mainly doctors and patients who are wanting results, is my understanding.

PN780

Right, Mr Roberts, and you have said 'mainly', so it could be that other calls are put through their 1300 number and triaged accordingly, isn't it?---Again, if they all go through that centre and they're all discharged - all triaged or dealt with through that call centre number where they might refer them to another department, but that's, like, the call centre where they may - - -

PN781

So an individual can call up that 1300 number and be triaged through to a different department, can't they?---I believe that, yes, people might - you know, I believe you had can get through to Mr Brownlow, I believe, through that number, but - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN782

Thank you, Mr Roberts. Are employees employed as customer service representatives in New South Wales paid more or less than their Victorian counterparts?---They were paid on a different structure and that was what led to the initial - the members came in to us because they are on lesser rates of pay and

even within the department people are on different grades within the modern award, as well, doing the same work.

PN783

Today are customer service representatives in New South Wales paid more than the Victorian counterparts? Yes or no?---I would have to - they are paid at level 5 of the modern award. I believe that - I'm not sure.

PN784

Are you aware that customer service representatives employed in Victoria are categorised as grade 4?---I'm not sure about the mapping of the modern award. I just know about the rates of pay and that agreement was negotiated two or three years ago, so I'm not up to speed for the - yes.

PN785

I put it to you, Mr Roberts, that employees employed as customer service representatives in New South Wales are paid more than their Victorian counterparts. What do you say in relation to that?---I would have - as I said, I believe the current rate of pay is level 5 and that was recently rectified as some were on level 4.

PN786

Okay?---You know, I haven't - I don't have the rates of pay for Victoria. I just know it's up for negotiation currently.

PN787

I put it to you that Bella Vista is a campus-style complex and staff regularly work across those premises. What do you say in relation to that?---Based on my information within the customer service it is that people don't mix or rotate through the customer service. People can't - you know, they don't go from a data entry role to customer service. It's the same group of people that are generally across or over - - -

PN788

Are you aware, Mr Roberts, that the respondent operates from separate addresses; 14, 18 and 20 Lexington Drive?---They have various different elements of their organisation across those addresses, yes. I can - yes.

PN789

And those are all formulated in one big campus style, aren't they?---They are connecting office - - -

PN790

So they're all interconnected?---Well, they're connected - joining office blocks or industrial complexes, yes.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN791

And staff work across those three sites which are interconnected, don't they?---No, Mr Berry, not in customer service. They operate in the corner of 18 - I think it's 18 Lexington Drive. The customer service is probably a room not

much bigger than this where that particular cohort of people work and don't interact.

PN792

So, Mr Roberts, what you're saying is customer service representatives work in one area of a building that is interconnected with other buildings, aren't you?---So what I'm saying is that the roles in other parts of 18 - the campus do not integrate with customer service, so a person working in the lab in 14 as an admin officer, for example, does not go and become a customer representative from that function of that group of people in that environment.

PN793

But administrative staff would work across - - -?---But they don't - what I'm saying, Mr Berry, is they don't - an administrative staff member does not interchange with a customer service representative and perform the function they perform.

PN794

I appreciate, Mr Roberts, that they may have different tasks, but I put it to you that they work across that one geographical site at Lexington Drive which is comprised of three addresses?---People employed as customer services officers - sorry, customer support representatives, do not go and perform duties in areas outside of the office space that they have. That's my understanding.

PN795

Why did the HSU obtain written statements in support of bargaining if it's position was that attendance at meetings was sufficient to demonstrate members' interest in wanting to bargain?---To be able to have some written statements in evidence to support our verbal claims. Obviously people verbally - but it's about making sure that we are able to demonstrate to the Commission if needed that we do have the majority. That's standard practice.

PN796

So an attendance register wouldn't be sufficient to demonstrate members' interest in wanting to bargain?---We don't believe that. We believe that individual statements, the way we have collected them, was the best way to do that, so we could have one-on-one conversations and ask people if they have questions and - -  
-

PN797

I put it to you, Mr Roberts, that mere attendance at meetings is not sufficient to demonstrate attendees' interest in wanting to bargain. What do you say in relation to that?---It's an element of - again that's why the written statements were there, as well.

PN798

I put it to you that mere attendance at meetings is only sufficient to demonstrate an interest in what was being discussed. What do you say in relation to that?---That's one element of working - how the union will proceed with a matter.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY



PN799

All right. On or about 14 September, the applicant took photographs of employees of the respondent's that were employed as collectors wearing a sticker issued to them by the HSU, didn't it?---That's correct, yes.

PN800

Some of those photographs were taken in the workplace of the respondent, weren't they?---I believe some of them may have been. Yes, that's correct.

PN801

The applicant did not obtain permission of the respondent before it took the photographs in this workplace, did it?---It's a matter for the union. I mean, those people in those photos gave those photos voluntarily to the union and knew the purpose of what - we believe knew the purpose of what it was for.

PN802

Did the applicant take the photographs?---I took a couple, yes.

PN803

Thank you. The HSU created a video using those photographs and uploaded it to social media on Facebook, didn't it?---As part of the campaign, given that ACL were not wanting to bargain with our members. It's part of a union campaign to represent and to articulate our members' wants or wishes in this case.

PN804

What did the sticker that the participants were wearing in the video say?---From memory it was long the lines of, 'I'll be okay with an EBA.'

PN805

The HSU has not filed an application seeking a majority support determination for employees employed as collectors, has it?---Not at this stage.

PN806

The HSU has not filed an application seeking a majority support determination for employees employed as lab staff, has it?---Not at this stage.

PN807

So the sticker that the collectors and lab staff wore in the video would have been more accurate if it had read, 'I would be okay if they got an EBA', shouldn't it?---That's a matter for - I mean, the union's communication and how we represent their views is a matter for the union. We're a collective organisation and we - and people are free to support their colleagues. Whether they're going to get an EBA or not is irrelevant. We are a collective organisation with our members and so it's about supporting those groups of people who are fighting or are campaigning for an EBA at this stage.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN808

How does the HSU in failing to file a majority support application for collectors, quote 'value these workers' end quote?---As I said, we made some choices because of the legislation to - and also some other discussions that were held in good faith

to do it this way. Like I said, there have been conversations when we drew the first lot about the collectors and I believe yourself and Mr Dastyari were part of those conversations. So there is an intention, as I said, that - well, our preference would be for the employer to sit down and work out a plan to bargain for everybody, but we're making decisions based upon the actions and positions of ACL at the time, and our ability, yes.

PN809

So, Mr Roberts, in relation to your previous answer you have just said 'we are making decisions'?---With the union - - -

PN810

Who is 'we'?---The union, our delegates and our members. Our members - all decisions are made with the union officials, myself and others, and our members. Our members are always involved in those discussions.

PN811

The union has decided to choose employees based on occupation group, hasn't it?---Based upon our members' discussions and processes, and the pros and cons of different strategies, that is a decision that members came up with it. Not to say that the collectors and other groups of people may not want - but at the moment, you know, we've got legislation that we've got to work within and we've got to work within the parameters of ACL's responses, but also some other good faith commentary which we believe hasn't been followed through and hence why we're here.

PN812

But the application - or the decision of the applicant to choose who would be covered by the applications is based on occupation, isn't it? Yes or no?---It's based upon our members coming to us and deciding that that's what they would like, and that's how the union works. Our members in those (indistinct) came to us and - - -

PN813

So, Mr Roberts, in relation to your previous answer why did you say 'we' - - - ?---Again it's 'we' being the union, our members and our officials making decisions; so 'we' is the rule, but our members are always involved in the discussions. We're always up-front and transparent about the pros and cons of different processes. There are challenges within the current legislation and the unions with the collectors, but again the discussions we held after withdrawing the first application led us to believe that over a period of time there would be a discussion about the collectors. I think Mr Dastyari and yourself were in our meeting when I was in Brisbane via Zoom and we had a bit of a discussion around how we might incorporate the rest of the classifications at the time, you know, so that was again based upon what we received from ACL. Mr Dastyari seemed to be the spokesperson or at least the liaison between ACL and - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN814

How does the HSU, in failing to file a majority support application for lab staff, quote 'value these workers' end quote?---Again our members understand the strategy and understand that this is about - once we're able to start the process we will - again we'll - let me rephrase. We were led to believe from discussions with yourself and Mr Dastyari that over a period of time the other groups would either form an agreement or come into large agreement, but at the time our most vocal group of people are couriers and customer service with their concerns.

PN815

I put it to you, Mr Roberts, that there was no representations made and that is why it has not been tendered in evidence by yourself or the applicant?---I disagree with that. I mean, we are constantly talking to our various members - - -

PN816

Thank you, Mr Roberts?--- - - - and different groups.

PN817

The HSU is not, quote 'fighting for better wages' end quote for collectors, is it?---Ultimately we are, yes. This is part of a broader strategy. At the end of the day if - unionism is about - if we are able to get one group, we are able to get more interest and hopefully, you know, the employer would see that there's a benefit in working with the union to create a better workplace for all its employees, but we're asking decisions based upon responses from ACL at the moment.

PN818

I put it to you that the HSU is not fighting for better wages for lab staff?---Again, I refute - although the union will fight for its - we're a member based organisation, so we fight where members ask us to get involved.

PN819

I put it to you that the HSU is not fighting for better wages for collectors?---I would - - -

PN820

What do you say in relation to that?---I disagree with all of that, as well. Again, we are constantly working with our members to find ways to ensure that people are paid and represented in their workplace. Again, we're making decisions based upon - I guess, unfortunately, in good faith, but it turns out that Australian Clinical Labs aren't willing to - some of those discussions we've had, but that's another story.

PN821

I put it to you that the applicant hasn't filed majority support determinations for collectors or lab staff. What do you say in relation to that?---At this stage, no, but we are continually reassessing our options based upon the information - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN822

Thank you, Mr Roberts. Has the respondent issued a notice of representational rights to employees?---Unfortunately, no, that's why we're here.

PN823

No bargaining has taken place, has it, between the applicant and the respondent?---Well, that's why we're here, so, no.

PN824

How can the applicant and the respondent be negotiating a fair enterprise agreement when the notice of representational rights has not been issued and no bargaining has taken place?---That's the whole point of this exercise, is to seek a majority support for that bargaining to commence.

PN825

The applicant made only three requests for negotiating an enterprise agreement, didn't it?---Sorry?

PN826

The applicant made only three requests for negotiating an enterprise agreement, didn't it?---Can you outline which three they were? I mean, the - - -

PN827

It would be 20 July 2023, 4 October 2023 and 15 September 2023?---At every process we've made it pretty clear from the beginning - from certainly early on last year now, so - we have made it very clear that in all the matters we've been dealing with our end goal is to have an enterprise agreement formally in writing, that is correct, but I think there has been other meetings and other processes where we've made it clear we believe an enterprise agreement would fix some of these other industrial actions we've dealt with over the last nine to 10 months.

PN828

So the respondent did not respond to the request of 4 October 2023, did it?---I didn't write that email, I'm not aware.

PN829

The respondent did not respond to the request of 4 October 2023, did it?---Can you just refer me to that - is it at page 38, Mr Berry? Was it that email you're referring to, just so I can - if it was.

PN830

So I refer you to page 39 of the common bundle?---Yes.

PN831

It's an email of 4 October and the question is the respondent did not respond to the request of 4 October 2023, did it?---I'm not aware of - I think we gave a deadline of 5 pm on Thursday, the 5th. I'm not aware of a response.

PN832

Thank you, Mr Roberts. I refer you to page 38 of the bundle. The respondent did not respond to the request of 15 September 2023, did it?---I wouldn't be aware because I'm not part of that email trail.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN833

Okay. Not a problem. Thank you. Mr Brownlow responded to your request of 20 July 2023 by declining it on or about 26 July 2023, didn't he?---That's correct, yes.

PN834

There was no threat in Mr Brownlow's response, was there?---It was fairly matter of fact. Can I refer to the page number first, Mr Berry, sorry.

PN835

I apologise?---The response. It's 30 something or 40 something.

PN836

It is page - - -?---I know there was - - -

PN837

- - - 49 of the common bundle - at 49 and 50. It's also replicated on page 146?---Yes, I'm just - it was fairly matter of fact.

PN838

So there was no threat in Mr Brownlow's response, was there?---Disappointing, but, no, I wouldn't say it was a threat, no.

PN839

There was no intimidation in Mr Brownlow's response, was there?---It was pretty matter of fact.

PN840

Thank you, Mr Roberts. Just yes or no; there was no intimidation in Mr Brownlow's response, was there?---Pretty matter of fact, no.

PN841

Thank you. The statement made by the applicant that - and I quote:

PN842

*Union members at ACL have been trying to negotiate a fair enterprise agreement with management and instead management met their request with threats and intimidation -*

PN843

in its Instagram post on or about 15 December 2023 is untrue, isn't it?---No, it's not.

PN844

Mr Roberts, you have just given evidence that there was no threats or intimidation in Mr Brownlow's response, the only response that the applicant received from the respondent, haven't you?---No, that is in relation to that email, Mr Berry, of that particular day at that moment in time. I'm answering that. There are a lot of other things that occurred around that which led to that post. To suggest there haven't been threats and words you used at that time is correct, but certainly actions taken by the employer after that led to that post.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN845

I put it to you that the statement made by the applicant that, quote:

PN846

*Union members at ACL have been trying to negotiate a fair enterprise agreement with management and instead management met their request with threats and intimidation -*

PN847

in its Instagram post on or about 15 December 2023 is untrue. What do you say in relation to that?---I remember reading that and it's not untrue.

PN848

Okay. The statement made by the applicant in its Instagram post on or about 15 December 2023 that, quote:

PN849

*Union members at ACL have been trying to negotiate a fair enterprise agreement with management and instead management met their request with threats and intimidation -*

PN850

is intended to lower or harm the reputation of Mr Brownlow, isn't it?---Not an individual, no. No, it's not to harm an individual, no. It's at an organisation.

PN851

Sorry?---It's about the organisation, it's not around the individual.

PN852

So it's about all of ACL management, isn't it?---It's about - well, ACL is their employer. As the employer as a whole; it's not about any individual at all.

PN853

But it's about management?---It's about the employer.

PN854

That's not what - - -?---Well, I - - -

PN855

I put it to you, Mr Roberts, that the statement says 'management', not the respondent or Australian Clinical Labs Pty Ltd. What do you say in relation to that?---Again, it's the employer of Australian Clinical Labs. It's not intended at anybody. Clearly the union have been agitating and campaigning since our initial (indistinct) but this initial email for enterprise agreements and we've been - are still trying to get that off the ground, so ACL, - regardless of who that might be, have not agreed to (indistinct) those negotiations and it's a part of the campaign against an employer to come to the table and negotiate an enterprise agreement for their employees.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN856

The statement made by the HSU in its Instagram post on or about 15 December 2023 that:

PN857

*Union members at ACL have been trying to negotiate a fair enterprise agreement with management and instead management met their request with threats and intimidation -*

PN858

is intended to ridicule Mr Brownlow, isn't it?---No, it's not intended to ridicule any particular individual.

PN859

I put it to you, Mr Roberts, that it is. What do you say in relation to that?---I refute that statement again.

PN860

Thank you. You hold a current Fair Work Commission entry permit, don't you?---That is correct, yes.

PN861

You hold a current HSU entry permit, don't you?---That is correct, yes.

PN862

The Fair Work Commission entry permit and the WH entry permit provide you with a lawful basis for entering the premises of the respondent, don't they?---That's correct, yes.

PN863

Those permits are in your possession today, are they?---The one - yes, they're in my phone, yes - the WHS one. My other one is in my bag in the office.

PN864

Okay. I ask you to produce those permits for the benefit of the Fair Work Commission?---I don't think my entry permit is necessary, Commissioner.

PN865

THE COMMISSIONER: What is the purpose of this?

PN866

MR BERRY: I ask that the witness be excused.

PN867

THE COMMISSIONER: Yes, go?---I have the work health safety one in my phone.

PN868

Thank you.

<THE WITNESS WITHDREW

[2.44 PM]

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN869

MR BERRY: Commissioner, we would ask that the permits be tendered into evidence.

PN870

THE COMMISSIONER: What is the relevance of the permits?

PN871

MR BERRY: We believe Mr Roberts does not hold a work health and safety permit issued by the Fair Work Commission.

PN872

THE COMMISSIONER: Okay. If he didn't, where are we going with it, I guess is - - -

PN873

MR BERRY: Mr Roberts has represented to the Commission that he holds a work health and safety permit. It goes to the credibility of the witness.

PN874

THE COMMISSIONER: Look, I think the discrete questions that I need to answer as a part of these - well, what do you say, Ms Mohammad, before I say anything.

PN875

MS MOHAMMAD: Commissioner, I object to that. We see no relevance in Mr Roberts having to tender his permits as a part of these proceedings. All union officials are required to hold permits. Mr Roberts has tendered in evidence today that he is an organiser. All organisers are required to hold entry permits if for the majority of their work they are required to be on sites speaking to members.

PN876

THE COMMISSIONER: Yes.

PN877

MS MOHAMMAD: We see no relevance in having to tender - - -

PN878

THE COMMISSIONER: Thank you. Aside from your general concerns around his credibility, I mean, why is it related to specific considerations turning to this application?

PN879

MR BERRY: Because it goes to a further point that the respondent will make in relation to the applicant not having sufficient numbers to support a majority support determination. The position of the respondent is that the actions of the applicant post filing of evidence show a dramatic increase in the number of entries executed by the applicant on the respondent and that is a dramatic number. We go from somewhere between - where are we - - -

PN880



THE COMMISSIONER: Let's just say that's accepted, right, they have got an increase in entries for health and safety or whatever - - -

PN881

MR BERRY: Yes.

PN882

THE COMMISSIONER: What follows from that in terms of relevance to this application?

PN883

MR BERRY: Again it goes to credibility. Mr Roberts says that he has the necessary permits. He does not, and this Commission and its register quite clearly record that Mr Roberts does not have the permit but he claims that he does. It goes to his credibility. I'm quite happy to hand it to my friend here and the Commission - a copy of the register that was searched this morning by myself indicates that Mr Roberts does not have a WHS permit.

PN884

THE COMMISSIONER: All right.

PN885

MR BERRY: We have also liaised with the Commission to confirm that and that has been confirmed.

PN886

THE COMMISSIONER: If I consider that to be a relevant point throughout these proceedings, I could always make my own inquiries to satisfy myself about that or not. I'm not sure we need to go through the process of formally tendering his permits that may or may not exist at this point in time.

PN887

So dealing with these proceedings efficiently, unless you can say it's directly related to one of the statutory considerations, aside from the issue - I take the point of credibility that you're raising, but unless it's directly related to one of the statutory considerations I need to have regard to, I don't know that it's taking us anywhere, this line of questioning.

PN888

MR BERRY: Yes, but, Commissioner, it does go to credibility and how do I put on record then that the credibility of the witness is impugned by the false evidence that he has given?

PN889

THE COMMISSIONER: You can put the proposition to him that it's false.

PN890

MR BERRY: Yes.

PN891

THE COMMISSIONER: As I said, if I consider it relevant - if I consider it relevant - - -

PN892

MR BERRY: Yes, yes.

PN893

THE COMMISSIONER: - - - I can always make inquiries myself around that.

PN894

MR BERRY: Okay.

PN895

THE COMMISSIONER: All right?

PN896

MR BERRY: Yes.

PN897

THE COMMISSIONER: Let's bring him back in.

PN898

MR BERRY: If I may, just before you do, the vein of questioning, Commissioner, is in relation to the number of entries that were executed by the applicant between the dates of the application and that's the intent of - the vein of the - - -

PN899

THE COMMISSIONER: But if he has entered, he has entered with or without a permit.

PN900

MR BERRY: It's not necessarily the entering without a permit. That's a separate matter which may be subject to other considerations. At the heart of the matter is he has claimed he has got a permit, the register reflects he doesn't have a permit, so his credibility is impugned. I take your point, we do not need him to produce that, but the respondent will be (indistinct) for the number of entries because it goes to the respondent's argument that the applicant doesn't have a majority support. It was aware that it didn't have any majority support and that was the basis for the further significant increase in entries made by the applicant - - -

PN901

THE COMMISSIONER: Well, if you're going to rely on that, you can put a proposition to him. I don't know whether his permits or (indistinct) is a part of that. All right. Let's go get him.

PN902

MR BERRY: Do you want me to tender this into evidence, the copy of the Fair Work register? In fact I would ask that it be handed up so that there is a record of it.

PN903

THE COMMISSIONER: Do you have any objection? If I consider it relevant - -

-

PN904

MS MOHAMMAD: Fundamentally we do object to it, Commissioner, given that there is no relevance to it.

PN905

THE COMMISSIONER: I don't think I need it in any case, Mr Berry. As I said, if I consider it a relevant point I will make my own inquiries.

PN906

MS MOHAMMAD: Thank you.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [2.50 PM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [2.50 PM]**

PN907

MR BERRY: How many times did you enter the premises of the respondent using your WHS entry permit between 26 July 2023 and 18 December 2023?---I don't have the exact number in front of me, but quite a few.

PN908

MS MOHAMMAD: Commissioner, I object. As to when Mr Roberts has entered, for what reason, why and how - once again, I say he is a union official and this is part of his role. I don't see any relevance of Mr Roberts's entries or the number of times he has entered into the workplace.

PN909

THE COMMISSIONER: I'm sure he's going to ask the question - I will allow the question, because I understand the point you are trying to make of it based on our earlier discussion, which I won't disclose to Mr Roberts. I will attach any weight to the response as I see necessary. It seems to be a - anyway, go on, Mr Berry.

PN910

MR BERRY: Did you enter the premises of the respondent using your WH permit on 18 July 2023?---I don't have the exact date, but I don't - I wasn't prepared to answer questions on this, Commissioner. I don't think that date is - - -

PN911

THE COMMISSIONER: Okay. That's fine?---I've answered a number of times - - -

PN912

Just answer to the best of your knowledge?---I mean, potentially, yes. Around that time, yes.

PN913

MR BERRY: Did you enter the premises of the respondent using your WHS permit on 15 August 2023?---Most likely, yes. I don't have the exact date, but - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN914

Thank you, Mr Roberts. Did you enter the premises of the respondent using your WHS permit on 20 October 2023?---Potentially, yes.

PN915

How many times did you enter the premises of the respondent using your Fair Work entry permit between 26 July 2023 to 18 December 2023?---A number of times. Again, this is - - -

PN916

MS MOHAMMAD: Commissioner, I object.

PN917

THE COMMISSIONER: Can I just get you to leave for a moment, Mr Roberts?---Thank you.

<THE WITNESS WITHDREW

[2.52 PM]

PN918

THE COMMISSIONER: So a concern I have in the framing of the question, do you indicate it was relevant to the numbers of times entered, right, because the concern I have, Mr Berry, is this becoming a case of, you know, pursuing Mr Roberts for his lack of entry permits that you say is - which I have said is not relevant necessarily to these proceedings, aside from the issue of credibility that you're raising.

PN919

The line of questioning you're putting to him, 'Have you used your permit on these days', is not necessarily relevant to the number of entries, but it seems to be a line of questioning associated with whether he has validly exercised his right of entry under the Fair Work Act, which his responses - it's drifting into territory that we may not want to go down that pathway for the purposes of these proceedings. I don't know what you have to say about that, Ms Mohammad, but I'm minded to warn - well what do you say?

PN920

MS MOHAMMAD: Commissioner, we agree. I mean, there is no relevance to go down this pathway, for Mr Roberts to provide this information.

PN921

THE COMMISSIONER: My understanding is - don't let me put words into your mouth, Mr Berry, but the reason for the number of entries you're saying is relevant because you're seeking to establish that there was no majority support and so somehow the union has upped the ante, so to speak. That's the point you're trying to raise.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN922

If you want to put a question along those lines to him, you could, based on the number of entries, but without turning to the validity or otherwise of his permits to do that. If there is a question there, that's more relevantly dealt with through separate proceedings, not the one that's currently before me.

PN923

MR BERRY: Okay.

PN924

THE COMMISSIONER: Are you content to move on on that basis?

PN925

MR BERRY: I'm just thinking, Commissioner, in terms of how I do that.

PN926

THE COMMISSIONER: Yes.

PN927

MR BERRY: It is possible. I just need to change tack slightly. 'Between 26 July 2023 and 28 November 2023 you entered the premises of the respondent 55 times using a Fair Work Commission entry permit.'

PN928

THE COMMISSIONER: Entered the premises 55 times, what is the validity - what is the reason for permit?

PN929

MR BERRY: Well, the permit gives the ability to enter and that's the right that he has exercised.

PN930

MS MOHAMMAD: How do that relate to these two applications though?

PN931

MR BERRY: Again, it gets back to the crux of the point that I'm intending to make, for which the Commissioner has deeply and astutely anticipated, that there has been a dramatic upswing in the number of entries and I would like to put it to Mr Roberts that the dramatic upswing in entries is purely in relation to trying to seek or garner further support for a majority support.

PN932

THE COMMISSIONER: Are you suggesting - anyway, I'm happy for you to put a question, okay, on the number of times he has entered, but I think in terms of the validity of his permits or otherwise, I think it's dangerous territory to drift into. You know, if he has committed some type of offence, as an example - - -

PN933

MR BERRY: I'm not wanting to cast aspersions.

PN934

THE COMMISSIONER: All right.

PN935

MR BERRY: And that's certainly not a matter for me - - -

PN936

THE COMMISSIONER: Because I would need to warn him or give him at least - if he's incriminating himself in any way throughout the course of these proceedings, I think he needs to be given a warning about that if we are to go down that territory, but again I'm not sure that that line of questioning is relevant to the number of times the union has been on site in the respondent's premises.

PN937

MR BERRY: It is relevant because again, Commissioner, it does go to show an upswing in the number of entries, particularly post 5 December 2023. The reason that we say that that is important because post 5 December 2023 they filed and sealed the information capsules in relation to couriers and customer service representatives, but the reality is that Mr Roberts, on or about 20 July, sought a single enterprise agreement for pathology collectors, as well.

PN938

The position of the respondent is that pathology couriers, pathology collectors, customer service would all fit within a rubric of a part of the organisation that would be organisationally distinct relevant to the section 237 determination which you're required to make a determination on.

PN939

THE COMMISSIONER: All right. Look, to be honest, I'm not persuaded that the validity of this permit or otherwise is relevant to the questions I need to determine. I am worried that putting the question to him in that form will risk him drifting down territory of incriminating himself for evidence that may make its way into the decision here, so - - -

PN940

MR BERRY: It is relevant to - I mean, there are two discrete aspects here. One is the number of entries.

PN941

THE COMMISSIONER: Yes.

PN942

MR BERRY: The second discrete aspect is - - -

PN943

THE COMMISSIONER: However - - -

PN944

MR BERRY: - - - the validity of the permit.

PN945

THE COMMISSIONER: Why?

PN946

MR BERRY: We say that that relates to his credibility as a witness. This is not the first time we say that Mr Roberts has misled, particularly in relation to the number of employees who have filed written statements in support.

PN947

THE COMMISSIONER: I'm not persuaded that the validity of the permit is a relevant question at this point in time. I will give you the opportunity to ask him how many times he has entered, all right, so that's my ruling on that point. Let's bring him back in.

PN948

MR BERRY: So I cannot put it to him that he does not have a permit - - -

PN949

THE COMMISSIONER: I don't understand that you - not for the purposes of these - or even - - -

PN950

MR BERRY: It goes to the credibility of the witness.

PN951

THE COMMISSIONER: If you're going to put it, Mr Berry, I'm going to tell him that he doesn't have to answer the question - - -

PN952

MR BERRY: Okay.

PN953

THE COMMISSIONER: - - - on the basis if he's going to incriminate himself as a result of his answer.

PN954

MR BERRY: Okay. I will ask the questions in relation to the number of entries and then finally I will put it to him, and you may - - -

PN955

THE COMMISSIONER: All right.

PN956

MR BERRY: - - - in your discretion may warn the witness.

PN957

THE COMMISSIONER: All right.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [2.59 PM]**

**CROSS-EXAMINATION BY MR BERRY, CONTINUING [2.59 PM]**

PN958

THE COMMISSIONER: Mr Roberts, Mr Berry is going to put a question to you. One of those relates to your attendance on premises and the other one he's going to put to you relates to your permit or its validity, or the basis upon which you've entered the premises?---Mm-hm.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN959

I will tell you that if you feel that you may be somewhat incriminated by providing a response, you do not have to answer it?---Yes.

PN960

Okay?---Yes. Thank you, Commissioner.

PN961

MR BERRY: Commissioner, there will be a series of questions in relation to the entries.

PN962

THE COMMISSIONER: Yes, all right. That's okay.

PN963

MR BERRY: Between 26 July 2023 and 28 November 2023, you entered the premises of the respondent 55 times, didn't you?---I can't remember if that is the number.

PN964

I put it to you that the number of times you entered the premises of the respondent was 55. What do you say in relation to that?---Is that just that I visited the premises or your collection centres, as well?

PN965

It's all the premises of the respondent based in New South Wales that you entered?---Probably sounds about right. I don't have those numbers in front of me. I mean, there was a lot of activity going on at the time with various issues, so  
- - -

PN966

Yes?---Potentially it could, yes.

PN967

The number of days between 26 July 2023 and 28 November 2023 is 125, isn't it?---I can count on my calendar or I can take your word for it. I don't know.

PN968

So you would have been entering the premises of the respondent approximately once every three days, wouldn't you?---If I recall correctly, a lot of my entry notices were for multiple sites on one day. For collection centres it might have been five or six on one day, so that would be not entirely correct what you're representing of the actual numbers.

PN969

Between 5 December 2023 and 21 December 2023 you issued notices pursuant to the Fair Work Act 2009 to enter the respondent's premises 18 times, didn't you?---Which premises, Mr Berry, because again, I mean, there was multiple - there was a lot of issues going on at that time with Australian Clinical Labs and many conversations, so - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY



PN970

I ask that the witness be excused.

PN971

THE COMMISSIONER: Sorry, on what basis?

PN972

MR BERRY: On the basis I was hoping to seek the Commission's permission to show Mr Roberts pages 313 to 314 of the common court bundle.

PN973

THE COMMISSIONER: Hang on, let me just - - -

PN974

MR BERRY: Which are the evidence of - - -

PN975

THE WITNESS: I've seen those already, Commissioner, with their evidence.

PN976

MR BERRY: Yes, okay?---What page number, Mr Berry?

PN977

I ask you to turn to pages 313 - - -?---313.

PN978

- - - and 314 of the common bundle?---Thank you for fixing up the file - - -

PN979

THE COMMISSIONER: You can thank my associate for that, Mr Roberts.

PN980

MR BERRY: It also goes to 315. Do you accept that - - -?---Hang on, Mr Berry, let's a lot of documents here. I can't travel through the file easily.

PN981

Sorry?---Three - - -

PN982

MS MOHAMMAD: 311 to 315, yes.

PN983

MR BERRY: 311 to 315?---311 - - -

PN984

THE COMMISSIONER: It's a table?---I think I've seen that. It was part of their evidence, Commissioner, but I was just trying to - - -

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN985

MR BERRY: So do you accept - - -?---Just hang on a minute, Mr Berry. I just don't want to rip any more out. Three - - -

PN986

311 to 315?---I'm almost there, Mr Berry. Bear with me. Is that a table?

PN987

Yes, it's annexure I?---Yes, I see that, Mr Berry, yes.

PN988

Tabulated in that table, Mr Roberts, is the entries that you and your colleague made in respect of the respondent's - made of the respondent's premises between 26 July 2023 to 21 December 2023; do you accept that?---That looks to be what it's demonstrating, Mr Berry.

PN989

Thank you. Between 5 December 2023 and 21 December - - -?---Just give me a moment, yes.

PN990

- - - you entered the premises 18 times, didn't you?---Which - the date, Mr Berry?

PN991

Pardon me?---What date?

PN992

5 December - - -?---5 December.

PN993

- - - and 21 December?---And 18 December?

PN994

21 December?---21 - - -

PN995

A total of 18 times?---My last one is on the 18th according to your - that's correct, Mr Berry.

PN996

So between 5 December 2023 and 21 December 2023 - - -?---Yes.

PN997

- - - your colleagues entered the respondent's business premises on behalf of the applicant an additional 54 times, didn't they?---Without doing the maths, it looks about - that looks about right, Mr Berry.

PN998

The number of days between 5 December and 21 December is 16 days, isn't it?---I guess so.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

XXN MR BERRY

PN999

So a representative of the applicant was entering the business premises of the respondent on average at least four and a half times each day during the period 5 December 2023 to 21 December 2023, wasn't it?---I'm not a mathematician, but that's - yes, if that's what you want to go with.

PN1000

The purpose of the entry was to obtain further support from employees who are employed as collectors for bargaining for a collective agreement, wasn't it?---That is incorrect. That is incorrect, Mr Berry.

PN1001

I put it to you that the purpose of that entry was to obtain further support from employees who are employed as collectors for bargaining for a collective agreement. What do you say in relation to that?---I say that that was in relation to a dispute subject to McKenna C around ACL forcing collectors and closing centres down on annual leave subject to another dispute, so that had nothing to do - these entries had nothing to do with the majority support determination because they're collection centres and that's related to a further arbitration which is scheduled in relation to Australian Clinical Labs forcing and closing centres around, which I'm - that is the purpose for that - for all those visits, to ascertain what those centre opening hours were over Christmas, what the rostering arrangements were, who was working, who had leave. It had nothing - there was no conversations at all in relation to a majority support determination. It was subject to another matter which is scheduled before McKenna C I think in March sometime. I think it's for a two-day arbitration.

PN1002

I put it to you, Mr Roberts, that you do not have a valid WH permit. What do you say in relation to that?---I would disagree with that.

PN1003

Thank you. I have no further questions for the witness, Commissioner.

**RE-EXAMINATION BY MS MOHAMMAD**

**[3.06 PM]**

PN1004

MS MOHAMMAD: Mr Roberts, in relation to the discussions which commenced with the respondent regarding collective bargaining - - -

PN1005

MR BERRY: Objection, Commissioner. That is a leading question.

PN1006

THE COMMISSIONER: Sorry, what was - - -

PN1007

MR BERRY: My friend is beginning to lead the witness.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

RXN MS MOHAMMAD

PN1008

THE COMMISSIONER: Okay. Ms Mohammad, can you frame the question - perhaps put it differently.

PN1009

MS MOHAMMAD: You said that you attended discussions which commenced with the respondent regarding bargaining; is that correct?---I'm just not sure of that question, sorry, Ms Mohammad.

PN1010

So you were part of discussions - - -?---Yes.

PN1011

- - - involving the respondent around commencing bargaining?---I was - there had been discussions probably six to eight weeks before the email, yes. There were some discussions with Mr Dastyari, Mr Brownlow, and Mr Howarth and Ms Hutchins. We had generalised discussions about wanting to get an enterprise agreement off the ground.

PN1012

Was that the sole purpose of the discussions on that day?---No, the purpose of those discussions with Australian Clinical Labs, I believe through Mr Dastyari - wanted the union to run or support a campaign to bring more federal funding into the pathology sector.

PN1013

Did Mr Dastyari contribute to any of the conversations around commencing bargaining?---Mr Dastyari, from my recollection, was the one leading the conversations and talking about getting towards an enterprise agreement. Mr Brownlow didn't seem to have an understanding of how unions work and what enterprise agreements were during those discussions. He asked a lot of questions about how unions work and what we were trying to do, but Mr Dastyari was sort of leading or contributing the most in those conversations.

PN1014

So did Mr Brownlow oppose the discussions around commencing bargaining for an enterprise agreement?---I wouldn't say he opposed or - - -

PN1015

MR BERRY: Objection, Commissioner. If I may ask the witness be excused.

PN1016

THE COMMISSIONER: All right, Mr Roberts, just duck out for a moment. Thank you.

<THE WITNESS WITHDREW

[3.08 PM]

PN1017

THE COMMISSIONER: All right, Mr Berry.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

RXN MS MOHAMMAD

PN1018

MR BERRY: Mr Roberts has testified that he was not present at that meeting of 15 September 2023. How can he have knowledge of what was discussed first-hand?

PN1019

THE COMMISSIONER: Ms Mohammad.

PN1020

MS MOHAMMAD: I believe we're referring to a meeting that took place in May that Mr Roberts was present.

PN1021

MR BERRY: Well, I apologise. I withdraw that, but that was not certainly apparent from the question - - -

PN1022

THE COMMISSIONER: Maybe if you clarify the meeting - the date of the meeting - on the record so we know what meeting he's giving evidence in relation to. I mean, that's a sensible course of action. I did draw the same inference that it was the earlier meeting. All right. Let's bring him back in.

**<BRENDAN CHRISTOPHER ROBERTS, RECALLED [3.09 PM]**

**RE-EXAMINATION BY MS MOHAMMAD, CONTINUING [3.09 PM]**

PN1023

MS MOHAMMAD: So, Mr Roberts, you mentioned that you attended a meeting in May?---Thereabouts. It was between six to eight weeks before we wrote the initial email. It was a meeting initiated in our office.

PN1024

The meeting that took place on 15 September, you weren't in attendance?---I was not in attendance. No, I was not.

PN1025

I'm going to take you to the email that was dated 4 October?---Can you give me the page number?

PN1026

So that's on page - - -?---A hundred and something or two hundred and something, wasn't it?

PN1027

THE COMMISSIONER: Thirty-nine, I think it was?---39. Thank you, Commissioner.

PN1028

Is that the one you're after, Ms Mohammad?

\*\*\* BRENDAN CHRISTOPHER ROBERTS

RXN MS MOHAMMAD

PN1029

MS MOHAMMAD: So 39, I believe, yes?---Thirty-nine, yes. Thank you.

PN1030

Okay. So when Mr Howarth refers to - it's the third paragraph, the final sentence?---Yes.

PN1031

When Mr Howarth refers to 'the majority of your staff' - so he says:

PN1032

*I would remind the organisation that a majority of your staff and our HSU members are requesting this to occur.*

PN1033

?---That's right.

PN1034

Is he referring to a particular cohort?---I wasn't part of that meeting, so I don't know what he was - yes, I can't answer for Mr Howarth. Sorry, Shareeza - Ms Mohammad, sorry. Certainly we would - the majority - we have members in all the groups that would like this majority support determination, but there are certainly members - a lot of members and staff in - - -

PN1035

MR BERRY: I must object, Commissioner, again, and the reasons for my objection are the same as the previous objection in relation to this particular matter - - -

PN1036

THE WITNESS: Would you like me to leave?

PN1037

MR BERRY: - - - which Ms Mohammad is trying to traverse.

PN1038

THE COMMISSIONER: Yes.

PN1039

MS MOHAMMAD: Can I rephrase the question, Commissioner?

PN1040

THE COMMISSIONER: Yes, you can rephrase the question.

PN1041

MS MOHAMMAD: So, Mr Roberts, I take you to the first paragraph and the first sentence of that email - - -

PN1042

MR BERRY: Again I must object, she's leading the witness.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

RXN MS MOHAMMAD

PN1043

THE COMMISSIONER: No, she's not leading the witness.

PN1044

MS MOHAMMAD: She is asking him - - -

PN1045

THE COMMISSIONER: She is taking him to the first paragraph of an email. Ms Mohammad.

PN1046

MS MOHAMMAD: So the email says:

PN1047

*Following discussions in previous weeks, the Health Services Union is seeking a response to the proposed enterprise bargaining in relation to couriers and customer service within ACL or indeed a collective.*

PN1048

?---Yes.

PN1049

So where Mr Howarth says:

PN1050

*I would remind the organisation that a majority of your staff and our HSU members are requesting this to occur - - -*

PN1051

THE COMMISSIONER: Yes, okay. I might leave that one there, Ms Mohammad.

PN1052

THE WITNESS: I can - - -

PN1053

THE COMMISSIONER: No, don't answer that one, Mr Roberts?---I'll take your advice, Commissioner.

PN1054

Mr Roberts, I also note you're not the author of the email?---Thank you.

PN1055

Which you pointed out earlier, so we might continue, Ms Mohammad, but I understand the inference that you're seeking to draw from the email, okay?

PN1056

MS MOHAMMAD: Okay.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

RXN MS MOHAMMAD

PN1057

Going back to the meeting that occurred in May - - -?---Yes.

PN1058

- - - you said Mr Brownlow was in attendance?---That's correct, yes.

PN1059

So in this meeting did Mr Brownlow oppose to the discussions taking place about commencing bargaining for an enterprise agreement?---He - - -

PN1060

MR BERRY: Object. Asked and answered.

PN1061

THE WITNESS: I haven't actually answered that question. You objected last time, Mr Berry.

PN1062

MR BERRY: In cross-examination that question was traversed.

PN1063

THE COMMISSIONER: Okay.

PN1064

THE WITNESS: Again, the answer, Mr Dastyari led the conversation. Mr Brownlow didn't seem to understand the industrial landscape or what it was. He left the discussions to Mr Dastyari. He didn't make an inference one way or the other. Mr Dastyari sort of led the conversation what appeared to be on behalf of ACL even though he's representing Crescent Capital, I believe.

PN1065

MS MOHAMMAD: So, Mr Roberts, you have been asked if having multiple agreements would increase costs or waste resources for the respondent?---Mm-hm.

PN1066

Was there ever an opportunity for ACL to bargain a single enterprise agreement for their whole cohort of staff?---Certainly in the discussions we had - I don't know the exact date - with Mr Berry and Mr Dastyari on Zoom, while we had discussions about other cohorts of agreements we did - we had had some - saying our preference would be to bargain for everyone else, but ACL didn't want to entertain that for various reasons as outlined from Mr Brownlow's email in July. Our preference would be one, but as a union our members were the ones that wanted to start - at least get the process started and the hope was that Australian Clinical Labs would come and just make it simple for everyone, but they chose not to so we went down the path our members asked us to.

PN1067

I have no further questions for this witness, Commissioner.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

RXN MS MOHAMMAD

PN1068



THE COMMISSIONER: Thank you for giving your evidence, Mr Roberts. You are now free to leave?---Thank you.

<THE WITNESS WITHDREW

[3.15 PM]

PN1069

THE COMMISSIONER: We might get Mr Sharma.

PN1070

MS MOHAMMAD: Commission, Mr Sharma - - -

PN1071

THE COMMISSIONER: That's right. Okay. Let's deal with that issue.

PN1072

MS MOHAMMAD: - - - is unavailable. He was here in the morning and he had to leave - - -

PN1073

THE COMMISSIONER: Yes, yes, okay. So the way forward here - it's 3.15 in any case. Let's look at the calendar. Now, did you want to call Mr Sharma and we could get him there for a window tomorrow? I'll be transparent, I have a matter in the morning between 10.00 and 12.00, okay, so I could do it very shortly thereafter. We can bring him on at any time after 12 pm. I'll just check with my associate actually. How long do you think the cross might take, Mr Berry? Say an hour?

PN1074

MR BERRY: If that. There are somewhat 30 questions, relatively straightforward.

PN1075

THE COMMISSIONER: Okay.

PN1076

MR BERRY: We note that the evidence of Mr Sharma is slender and isn't - I'm sure my friend will disagree with me - fundamental to the case that the applicant has made.

PN1077

THE COMMISSIONER: Yes, okay. All right. If we say an hour - obviously I could it via video if that made it easier for him depending what his competing arrangements are. My morning matter - - -

PN1078

MR BERRY: Commissioner, if I may.

PN1079

THE COMMISSIONER: Yes, go on.

\*\*\* BRENDAN CHRISTOPHER ROBERTS

RXN MS MOHAMMAD

PN1080

MR BERRY: We are somewhat happy with the fluid calling of witnesses. If it would assist the Commission, Mr Brownlow - - -

PN1081

THE COMMISSIONER: To having Mr Brownlow at this point.

PN1082

MR BERRY: - - - being called given that Mr Sharma will be attending by videoconference. If we had an undertaking from the applicant that there was no discussion with Mr Sharma prior to his evidence - - -

PN1083

THE COMMISSIONER: Do you want to think about it?

PN1084

MS MOHAMMAD: Let's have a think about it, because I will obviously have to contact Mr Sharma to see if he does have some availability.

PN1085

THE COMMISSIONER: Yes. Otherwise, as I said, the only other day next week that is looking to be okay for me is the Friday. There is a chance I could engage with my morning party tomorrow and see if they're willing to move to the afternoon, as well. I could try and do that call shortly, so you might just see what his availability is for the whole day and we'll go from there.

PN1086

MR BERRY: If we could get an indication as to the length of cross-examination for Mr Brownlow.

PN1087

THE COMMISSIONER: Yes.

PN1088

MR BERRY: Because Mr Brownlow has already indicated that he has some leave arrangements post Wednesday.

PN1089

THE COMMISSIONER: Yes.

PN1090

MR BERRY: Which would require travel.

PN1091

THE COMMISSIONER: How long do you think you might take with Mr Brownlow?

PN1092

MS MOHAMMAD: I don't think it would be more than a couple of hours. I don't think it would be more than two to three hours.

PN1093

THE COMMISSIONER: Yes.

PN1094

MS MOHAMMAD: We prepared for a one-day hearing, so - - -

PN1095

THE COMMISSIONER: Yes, yes, so we could potentially fit you all in tomorrow afternoon is what I'm hearing if we could make it work, or during the day sometime if I can secure that other party's agreement to change their schedule a little bit around your own. The other option is I can bring them in potentially earlier tomorrow morning and we can start just a little bit later, like 10.30 or something along those lines. Look, you make your calls. Let's take five minutes and you make your calls, and depending where that lands I'll see if I can do it by - all right.

**SHORT ADJOURNMENT**

**[3.19 PM]**

**RESUMED**

**[3.32 PM]**

PN1096

THE COMMISSIONER: Who wants to go first? How did you go perhaps, Ms Mohammad, it's your witness.

PN1097

MS MOHAMMAD: Yes, I have spoken to my witness and he is available tomorrow up until 11.00.

PN1098

THE COMMISSIONER: 11.00.

PN1099

MS MOHAMMAD: Via AVL; audio-video.

PN1100

THE COMMISSIONER: Yes. All right. So the action might be at my end.

PN1101

MS MOHAMMAD: And he does have some availability on Friday morning up until 12.00.

PN1102

THE COMMISSIONER: That was a problem for you, Mr Berry.

PN1103

MR BERRY: On that, the respondent's witness will be on leave from Wednesday, but they are flexible with the Wednesday. They will be away for the balance of the month.

PN1104

THE COMMISSIONER: Yes.

PN1105

MR BERRY: So we would like this matter to be heard as soon as possible, certainly the evidence tendered into - - -

PN1106

THE COMMISSIONER: All right. Let me then go and make some inquiries at my end (indistinct) if you can bear with me. I might just make my morning matters a bit more flexible and perhaps we can move to the afternoon. There is a reason I have to deal with that matter tomorrow, but I'll see what I can do. All right. Bear with me. Thank you. You are welcome to have discussions in my absence, as well, and try and resolve the dispute. Thank you, parties.

**SHORT ADJOURNMENT** [3.33 PM]

**RESUMED** [3.42 PM]

PN1107

THE COMMISSIONER: All right, parties, so the morning will work tomorrow. I think it's preferential that we plough on. Now, Ms Mohammad, 11 am - what I'm suggesting, are you happy to come in a bit earlier if I list it at 9 o'clock? Kick off at 9 am?

PN1108

MS MOHAMMAD: Yes.

PN1109

THE COMMISSIONER: Yes. All right. So if we do that and I'm looking for Mr Sharma, and then Mr Brownlow, and then that will enable an adjournment so you can do your closing in the afternoon or wherever we get to depending on how long it takes to get through that evidence. All right. So on that note, anything that either of you wish to raise ahead of 9 am tomorrow morning?

PN1110

MS MOHAMMAD: Nothing further from us at this stage, Commissioner.

PN1111

THE COMMISSIONER: Thank you. Anything from you, Mr Berry?

PN1112

MR BERRY: No, Commissioner.

PN1113

THE COMMISSIONER: I will adjourn and see you then, and we should hopefully be able to get through the balance of the proceedings. That's my anticipation, anyway. All right. Thank you, parties.

**ADJOURNED UNTIL TUESDAY, 16 JANUARY 2024** [3.43 PM]

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