



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT CROSS**

**C2024/130**

**s.739 - Application to deal with a dispute**

**Mr Cameron Webb**

**and**

**Aurizon Operations Limited, Aurizon Operations Limited  
(C2024/130)**

**Aurizon NSW Coal Operations Enterprise Agreement 2021**

**Sydney**

**2.00 PM, TUESDAY, 27 FEBRUARY 2024**

**Continued from 14/02/2024**

PN326

THE DEPUTY PRESIDENT: Yes, good afternoon. Just noting the appearances; Mr Hart you continue to appear for the applicant?

PN327

MR HART: Yes, may it please, thank you, Deputy President.

PN328

THE DEPUTY PRESIDENT: Mr Williams, you continue for the respondent?

PN329

MR WILLIAMS: Yes. Thank you, Deputy President.

PN330

THE DEPUTY PRESIDENT: Okay. The start time today is slightly amended, in an attempt to be more convenient, rather than less convenient, due to the matter of resolving, I hope, that was the experience of both of you. Mr Hart?

PN331

MR HART: Yes. Thank you, Deputy President.

PN332

The proper construction of clause 12 of the agreement requires that the principles of natural justice and due process must apply to any internal investigation, in relation to a matter or incident by the company that may lead to disciplinary action. The scope of clause 12.1 is expansive and it is not limited to solely clause 12.1. It plainly sets forth that the provision applies to any investigation and steps that may lead to disciplinary action and the course of the disciplinary outcome itself. Where the disciplinary outcome contemplates the termination of an employee's employment it is captured by the scope of clause 12.1 of the agreement.

PN333

In the present matter this is, of course, what has occurred. An investigation occurred between 8 and 9 January, insofar as Mr Webb's availability to attend those meetings, and it was conducted by a former HR manager and employee of Aurizon, who now provides consultancy services, by their own company.

PN334

The respondent's submission that the investigation was conducted by an independent investigator should, when properly considered, examine whether Mr Plasto, as a former employee who now benefits from an ongoing relationship with the respondent, is truly independent.

PN335

On 17 January Mr Webb was asked to attend an outcome meeting to be held on 23 January, and on 23 January he did so. Mr Morgan read from a pre-prepared letter, which was the show cause letter, that the Commission is aware of.

PN336

It's common ground, at this meeting, that the union requested a copy, in redacted format, of the investigation report. It is between 23 January to 14 February that the applicant has sought access to this report and is the subject of these proceedings.

PN337

The respondent submits that clause 12 provides no basis for the release by the applicant. The submissions are misconstrued and fail to properly consider the extent to which the parties have agreed to ensure the principles of natural justice and due process are afforded throughout the entirety of the matter or incident that forms part of an investigation or disciplinary action.

PN338

The respondent advances that the nexus between the procedural fairness obligations is severed, at clause 12.1, in circumstances where an investigation proceeds to other steps, as contemplated in the residual elements of clause 12.

PN339

The respondent, however, accepts that clause 12.4 re-enlivens the express procedural fairness obligations but contends that the concept of procedural fairness, as expressed in clause 12.1 and, separately, clause 12.4, are somehow artificially divorced from each other.

PN340

It is our submission that the principles of natural justice and due process weave their way throughout the entirety of clause 12. Taking the principles in the decision of Berri, it's necessary to take a purposive approach when attempting to distil the meaning of the provision. It's evident that the concept of procedural fairness is woven throughout the clause and we submit has been done so intentionally to ensure the parties are afforded the rights and protections that such principles inform.

PN341

The respondent submits that clause 12.2 provides some immunity from disclosing the report in the ordinary course of investigations and consistent with the letter of allegation issued to Mr Webb on 8 January. The intention here is to ensure that employers to not discuss or disclose the existence of an investigation, it doesn't preclude, in the way that the respondent submits, the disclosure of the investigation report.

PN342

The provision cannot provide, as the respondent submits, a right to withhold a report that has been fundamentally determining whether the applicant conducted themselves in the manner alleged and on which any appeal or submission, in respect of providing a response to the show cause letter requires.

PN343

The respondent submits that clause 12.4 does not provide for any re-opening of the investigator's findings. The provision, however, at clause 12.4.2(i) requires that the employer is required to assess and place appropriate weight to relevant matters only.

PN344

The impossibility, of course, Deputy President, is that the applicant is being - the impossibility of the applicant being able to direct the mind of the respondent as to what may or may not be relevant, or what weight to accord certain facts and issues central to the relief being sought. In respect of our submissions that during the course of the investigation several errors and inconsistencies were uncovered by the applicant. In the absence of being able to read the report, albeit in redacted format, places the applicant in an invidious position of being denied the opportunity to direct the employer's mind, as clause 12.4.2 contemplates.

PN345

The respondent objects to our submissions that employees were coerced into providing statements. At PN 266 of the transcript, Mr Morgan accepts that, in all instances, a request was made but was also followed up by giving a direction to concerned employees. Taking the ordinary meaning of the verb 'to direct' means, 'To control or to govern and is synonymous with giving an order'.

PN346

It was on this basis that Mr Morgan asserted he was making a lawful direction to those employees or individuals to comply with his direction. We say the verb 'to coerce' used in our submissions, is similarly defined as, 'Persuading someone to do something that they may not be willing to do'.

PN347

The respondent further submits that assurances were given to employees to preserve the confidentiality of their evidence. Such assurances are manifestly impotent in light of the powers the Commission may exercise, in respect of the relief sought. Further, were the matter to progress to an unfair dismissal, those assurances, if any such were given, cannot be held to fetter the Commission's powers.

PN348

It is our respectful submission, Deputy President, the relief sought in this matter is uncontroversial. It is the right of the applicant to defend against a decision to potentially terminate his employment and invite the Commission to determine the matter in the favour of the applicant, such that he's given reasonable opportunity to press the issues relevant to his interests.

PN349

Thank you. They are our submissions.

PN350

THE DEPUTY PRESIDENT: Thank you. Mr Williams?

PN351

MR WILLIAMS: Thank you, Deputy President. Thank you, Mr Hart.

PN352

Deputy President, I'm conscious that you've got two sets of written submissions and I'm not going to risk - or I hope not to risk irritating you by repetition, but I will take a look (indistinct) I do promise to be as efficient as I think I can be.

PN353

THE DEPUTY PRESIDENT: That's fine.

PN354

MR WILLIAMS: Deputy President, placing all the cards back on the table, we (indistinct).

PN355

THE DEPUTY PRESIDENT: Can I just - I'm getting some feedback, so it might be in your room the cause of the feedback is. Is there a possibility of just adjusting the microphone?

PN356

MR WILLIAMS: I'll see what can be done, Deputy President. Is that any better?

PN357

THE DEPUTY PRESIDENT: No, that's not better. I'd probably be happy if I mute myself and see what happens.

PN358

MR WILLIAMS: You might have to use the sign language now, Deputy President. Is that better?

PN359

THE DEPUTY PRESIDENT: Slightly. Why don't we see if we can proceed with this.

PN360

MR WILLIAMS: All right. Thank you.

PN361

Deputy President, I was suggesting that I didn't want to irritate you by repetition, I hope not to irritate you by feedback as well, but I'll do my best and if it persists please pause me again and I'll see if I can get some technical assistance.

PN362

Deputy President, I want to put the cards on the table, we're aware, from the Commission's point of view, or Aurizon is aware that from the Commission's point of view there is a certain attractiveness about the position which Mr Hart puts. It may seem like a simpler way through this and it may seem like a fairer way through it, from Mr Webb's point of view. So we accept that you may be disposed towards a resolution which provides at least some parts of the report or at least some form of the report to Mr Webb or to his representatives.

PN363

From Aurizon's point of view, we don't - we wouldn't accept that it would be fairer, I'll come to that in a moment. We'd accept that that would be simpler, because we could get on with the process to whatever result. We also accept that Mr Webb and his advisors would feel that that was a fairer way to deal with this.

PN364

But for reasons we've explained, Aurizon would be gravely concerned by an outcome here, in this matter, which achieved a result which, in Aurizon's view, certainly would be inconsistent with the process in its enterprise agreement. So, therefore, Deputy President, my - I do seek to persuade you that the outcome sought by Mr Webb is not available, in this jurisdiction at least, and if it was available, it wouldn't be a result which you would entertain.

PN365

We're, as I've said, conscious you have two sets of written submissions, I'm not going to repeat anything but I think I must emphasise the core, or the basic core, of Aurizon's case and also, perhaps, to explain its strong reluctance to agree to any variation of the process, as it sees it, is mandated by clause 12.

PN366

Deputy President, the process that we're all looking at, and the only source of authority of the dispute, rather, then, of course, the authority to resolve the dispute is clause 12, so we all know that.

PN367

Clause 12 is not a perfect clause but when considered carefully it does describe and, as we would say, confine the investigation and then subsequent disciplinary process with sufficient clarity and sufficient precision. The problem that it's directed to resolving, that is, clause 12 is directed to resolving, in both of its parts, is a pretty obvious one and it's one which is faced by many employers, certainly of any size and complexity. That is the problem of what to do, how to proceed when allegations emerge which - and as it turns out, this is a good example, of conduct by one employee against another, which is one-on-one, where there were no direct witnesses, no record, no photographic or videographic record and the employer, nevertheless, has to deal with the allegation. In this case, of course, it's (indistinct) allegation.

PN368

That's a tough challenge for employers to deal with but, nevertheless, they have to. It's challenging for the reasons that Mr Morgan explained in his evidence. There may be many complex forces at work, some of which the employer, or those responsible for decisions may be aware of and, I suppose, some which they may never be aware of. That includes, Mr Morgan says, the complainant who makes the allegation may be reluctant to come forward, may be reluctant to put the allegation in the first place, and there might be different reasons for that.

PN369

Witnesses might be reluctant to come forward and that reluctance on all sides might come from fear, in some cases. I'm not suggesting that there's any evidence before you that's a factor here but what we do now, of course, that it is an allegation of a form of assault by one employee against another, so it's a circumstance where that absolutely could be the case and Aurizon would have to anticipate that. Or the reluctance might come, simply, from a reluctance, generally, to get involved in a workplace matter between two colleagues. Some employees just don't like to get involved, they don't want to be seen to take sides. There might be complex interpersonal issues at stake. There might be

supervisory, hierarchical issues, which are a factor. Employees don't wish to be seen to be giving evidence or taking a position against somebody of more seniority in the organisation.

PN370

These are issues which play out day by day and, Deputy President, with your vast experience on this Commission and in previous roles, no doubt you're aware of that.

PN371

These don't only make the task of investigating allegations, particularly this kind of allegation, in a rigorous way, quite challenging. And, as I said, it of course remains the duty of the employer to do so, basically to ensure a safe place at work, to uphold and maintain behavioural standards and also, of course, to ensure that those who are accused of wrongdoing are also treated fairly. It's not an easy balance at the best of times.

PN372

(Indistinct). There is no law which says that in any particular circumstance there has to be an investigation. In a different workplace if an allegation of this kind rolled in the employer might - the process might simply require them to put the allegations to the respondent, get a response. If they're denied then flip the proverbial coin. If it comes up tails, substantiated; if it comes up heads it's not substantiated. So that could be an approach, that is, an employer not being required to or not choosing to take any rigorous approach to the fact finding process but simply to receive the allegations and get a response and then make the best decision they can. But that's not our situation.

PN373

Quite sensibly, Aurizon, which is a sophisticated employer dealing with a sophisticated workforce, has provided, at clause 12, for a quite sophisticated process. If one reflects on it, it's a very nicely balanced process which has, as Mr Hart says, some quite distinct parts to it.

PN374

It's deliberately designed, when one considers it, to ensure maximum protection for the investigation as well as procedural and - by the investigation I mean for those who participate in it, but also for those who are accused of wrongdoing, including the guarantee of procedural fairness.

PN375

I don't want to be boring in relation to returning to a pretty well travelled path, as far as the clause is concerned, we have dealt with this in previous submissions, but we don't accept Mr Hart's contention that there is - that there could be said to be some principle of procedural fairness which, in some implied way or referred way, winds its way through clause 12 and it's hard to finish. It's a clause, it has to be read in accordance with its terms and you can't import or infer concepts which are simply not in the text. Of course, that's a concept pretty clearly established in Berri and many other cases. We would say it's actually pretty straightforward.

PN376

Clause 12.1 plainly provides for investigation, that's what it's about, and it guarantees procedural fairness. In clause 12.1.1 Mr Webb, in this case, must be fully aware, in writing, of the allegations and of the subject of the investigation. He's got to be required, by 12.1.2, he must be provided with sufficient information to enable the provision of an informed response. He has a guarantee of support, including union support. Clause 12.1.4, he is guaranteed reasonable time to prepare a response to the allegations that are subject to the investigation. Then there's clause 12.1.5, which I'm not sure what it means or what it says. It seems to be something which was dropped in from somewhere else, but we probably (indistinct) clause 12.1.5.

PN377

This is the process, in clause 12.1, in which Mr Webb is guaranteed to receive absolute procedural fairness. It's not fair and not correct for Mr Hart to contend that Mr Webb, in some way, has been denied procedural fairness. Clause 12.1 of the investigation guarantees it.

PN378

The steps in the procedural fairness obligation, in clause 12.1, which I've referred to, would satisfy, as we would say, any externally provided concept of procedural fairness. Among the cases put before you by both sides is the Coutts(?) decision. There's a pretty close match between what clause 12.1 guarantees and what Coutts says are the reasonable requirements of natural justice.

PN379

So what this process guarantees is that it's not the decision maker, the Aurizon decision maker, who's responsible for making the findings of fact, and for objectively and carefully assessing the evidence for and against and making a decision, that role is exclusively referred to the investigator. It's the investigator, not the decision maker and not Mr Webb, as the respondent, who has the obligation to do the things which Mr Hart says Mr Webb wants to do now. That is, interrogating the evidence, testing it and really reopening what the investigator has done.

PN380

There are other models under which that might be an available scenario but, under this model, which is, as I said a pretty rational and quite carefully crafted design, it's for the investigator to do that.

PN381

Now, the investigator might succeed or fail, hopefully succeed in more cases than not, but whatever, it's the investigator who has that role. There is no provision, once you get past 12.1, there's no provision in the clause for the decision maker to reject the findings of the investigator. That is, for the decision maker to substitute his or her own conclusion to that, whether or not the allegations are made out, or some of them are made out. There might be circumstances where a decision maker could do that, if there was a suggestion that the investigation had completely (indistinct) or been biased or corrupted in some way and, in that circumstance the obligation would probably be to find to defer it to another investigator.



PN382

THE DEPUTY PRESIDENT: Could I - - -

PN383

MR WILLIAMS: (Indistinct) a situation like that - I'm sorry, Deputy President.

PN384

THE DEPUTY PRESIDENT: I was trying to pick a good time to interrupt you. Where it talks of allegations, that would include, would it not, an outline of the evidence said to go against Mr Webb?

PN385

MR WILLIAMS: Well, evidence? That's a nice question. I think an allegation is just an assertion which may or may not be supported by evidence.

PN386

THE DEPUTY PRESIDENT: I just want to take you, if you've still got it, to my prior decision in this matter, paragraph 46.

PN387

MR WILLIAMS: I have that.

PN388

THE DEPUTY PRESIDENT: (Indistinct) you were kind enough to provide me with a copy of the report some time ago, but I'm being intent on preserving confidentiality of that document. But when one looks at the extract of Mr Morgan's correspondence it talks of, only on the second line, 'The evidence of witnesses who observed the complainant immediately following the incidents'.

PN389

MR WILLIAMS: Yes.

PN390

THE DEPUTY PRESIDENT: Now, I think it's, on the available materials, clear that that's not been put to Mr Webb.

PN391

MR WILLIAMS: Mr Webb has not been provided with a copy of, or an extract, of the evidence, which was given by witnesses, that is true. But to respond simply to the question, the allegation is made by the complainant - - -

PN392

THE DEPUTY PRESIDENT: I haven't asked you a question yet.

PN393

MR WILLIAMS: Okay.

PN394

THE DEPUTY PRESIDENT: My question is, in the scheme of the natural justice and due process, how is it that what is referred to in Mr Morgan's correspondence, which seems to be something Mr Webb would be able to comment upon, how is it that that evidence is not within the purview of clause 12.1?

PN395

MR WILLIAMS: Thank you. It's not within the purview of clause 12.1. If I can put it this way. The allegations are made by the complainant. There's no suggestion that a witness has made an allegation, the witness just gives the investigator information which might or might not germane to the allegations the complainant made. So the process that - the allegations themselves don't expand because a witness have given evidence, one way or the other, they remain the allegations. It's the allegations which Mr Webb, in the investigation, is called to respond to. So we wouldn't accept - - -

PN396

THE DEPUTY PRESIDENT: It's the findings, based on the evidence.

PN397

MR WILLIAMS: No, the findings - Deputy President, I think the way that Aurizon sees it is this. There are a number of different concepts and it's perhaps unusual to break them down quite as precisely as I'm breaking them down now, but I think it's very relevant to the scheme which clause 12 sets up.

PN398

Step 1 is the allegations. Allegations have to come forward. Once allegations come forward then they are investigated and an investigator is appointed. The investigator's role is to make findings as to whether the allegations are substantiated. In performing that task the investigator has to take into account relevant evidence. But we wouldn't accept the proposition that that evidence is in the nature of an allegation. That's just information which the investigator has to take into account in performing his or her role, which is to decide whether the allegations are substantiated.

PN399

So we think it would be in error to give the information provided to the investigator status as an allegation. Because what the allegation - sorry, the investigation process, under clause 12.1, results in is a finding, one way or other, whether some, all or none of the original allegations have been substantiated. So we would see the evidence provided by the witnesses as a step along the way in the investigators process, but that it always remains the investigator's role to balance all of that: interrogate it, test it, do all the things that Mr Hart would like Mr Webb to be able to do, and then to advise the decision maker what allegations have been established.

PN400

So you could well come to a situation where there's allegations are made, evidence received and considered, but no allegations are substantiated at all. In that case, the process stops. The (indistinct).

PN401

THE DEPUTY PRESIDENT: Mr Webb is hindered in his show cause because he doesn't know what the evidence of witnesses who observed the complainant immediately following the incident was.

PN402

MR WILLIAMS: No, that's right. That's right. And that's because, imperfect as it might be seen, I would defend this process. This is - to me, this is a good process because it balances the rights and expectations of both complainants, respondents and witnesses, in a very sensible way, so I defend it.

PN403

But what - - -

PN404

THE DEPUTY PRESIDENT: You've balanced the interest of three groupings, but did Mr Webb not come in as a fourth consideration, in the balance.

PN405

MR WILLIAMS: I think I said the respondent, I mentioned Mr Webb as the respondent. Absolutely. But the process doesn't only serve the interest of the respondent. The process, which Aurizon has set up, which is, I think, unequivocally, a two-stage process, is a process by which the rights and interests and expectations of all stakeholders, which may be quite different, but all of them which need to be protected, are balanced in a methodical way by the investigation process, which does guarantee Mr Webb procedural fairness, as that term is understood.

PN406

Mr Webb is required, as I said, to be provided, in writing, of the allegations and sufficient information to allow the provision of an informed response, which is exactly what Coutts tells us are the elements of natural justice.

PN407

There is no process and no authority has been provided which suggests that natural justice, whether externally derived or found within this clause, requires the process of the kind that Mr Webb would like to take, namely to interrogate or to challenge the evidence which is, of course, a right which is not available to the applicant, although the investigation serves the applicant's interests as well.

PN408

So we're aware that Mr Webb would like to do that. We're aware that he could see that as a fairer process but his interests, although they have been protected in an appropriate way, are not the only interests that clause 12 protects. As I said, when you step back, you can see that clause 12 is designed to protect all interests, in a balanced way and also in a way which is, as I said, is fully compliant with an external - any externally derived concept of what procedural fairness is.

PN409

Procedural fairness, in the employment scene, does not permit an adversarial or does not require an adversarial approach, be that the person who is accused has the right to test every element of the evidence being considered by the decision maker or, in this case the investigator. That's not required. This is a workplace process, not a tribunal process. We may be there at one point, Deputy President, but we're not there yet. We're still at the workplace decision making stage of this process.

PN410

So we would not accept that anywhere in clause 12, 12.1 or, certainly, 12.4, can there be found the basis for a right for Mr Webb be granted the right he sees, which is to challenge and test and, essentially, Mr Hart said, to reopen, to seek to reopen the findings of the investigator. That role is reserved for the investigator and, hopefully, it's been dealt with in an appropriate way.

PN411

Because the investigator certainly has the role of testing the allegations, working out who should be bullied, who should not be, but that all takes place within the protection of clause 12.1. I'm sure, Deputy President, you expect me to refer to clause 12.2, because it is absolutely crucial to the construction that we place on the clause but also the extent to which we say you've got the right, the ability, the jurisdiction, to resolve this in a way Mr Webb requests.

PN412

Because 12.2 says, in specific terms, that, 'Investigations - disciplinary inquiries and investigations shall be confidential'. That's a pretty absolute concept. It cannot be right, as Mr Hart suggests, that that just means that you're not allowed to talk about the investigation in the workplace or refer to it. It can't just mean that. It must also mean, necessarily, that the investigation records, the witness transcripts or photographs or whatever are supplied during the investigation, and certainly evidence from witnesses, and also the report itself must be confidential. It just cannot work that clause 12.2 has the concept of confidentiality in relation to the investigation but that could allow or permit, for example, Aurizon, to put the investigation report in the crib room. It just cannot be right because that would mean that, contrary to clause 12.2, the entire investigation would not be confidential.

PN413

There's no qualification to clause 12.2. It doesn't suggest that it's confidential within limits, or that it's confidential up to a point, or that confidentiality, as required, would permit Aurizon to publish a summary of the investigation or, of course, perhaps relevant to your own determination, that it would allow a redacted (indistinct) copy to be provided to anyone. It's confidential.

PN414

That point is an important one because this is a dispute notification, of course, and therefore we're all bound by section 739(5), and that means the dispute can't be resolved, at least by arbitration. Everything is possible by agreement, I suppose, but it can't be resolved by arbitration in a way which is inconsistent with the industrial instrument.

PN415

So the way we see it, Aurizon would be - clearly it would be prohibited, by clause 12.2 of providing a copy of the investigation report by anyone. To Mr Webb, to the complainant, to a witness. To anyone outside of those people within Aurizon properly tasked with the responsibility for making a decision and it's confidential.

PN416

THE DEPUTY PRESIDENT: That's a convenient carve out, if it's confidential in the fashion you say. It would have more limited exposure, wouldn't it?

PN417

MR WILLIAMS: (Indistinct), Deputy President.

PN418

THE DEPUTY PRESIDENT: It gives me one-way confidentiality, that's all.

PN419

MR WILLIAMS: Yes, I understand. Well, I'm just trying to revisit the circumstance where Aurizon investigated a - allegations were made, or some issue occurred. Aurizon investigated it, under clause 12 and then Aurizon itself wanted to share the report. It wanted to share it with a departmentary inquiry, or another employer or something, or for the purpose of some kind of reporting, which it thought was to its advantage, it just wouldn't be able to because it's committed to confidentiality, in clause 12.2. Anyone could enforce that. There might be circumstances where Mr Hart might find himself tasked with stopping Aurizon from doing that or, alternatively, one of the employees, because they're all bound but it, all the rights under it.

PN420

So if that's right, and I appreciate you'll have to give that some consideration, but that seems, to me, to be the inevitable result of clause 12.2.

PN421

THE DEPUTY PRESIDENT: But the (indistinct) parties in this matter is that if it unfortunately turns into an unfair dismissal case, then the report will be produced, as a matter of course.

PN422

MR WILLIAMS: I am aware of that, Deputy President, and there's nothing that -  
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PN423

THE DEPUTY PRESIDENT: (Indistinct), I think.

PN424

MR WILLIAMS: No. If that happens there'll be such confidentiality as me or somebody else, and that might include Mr Webb at that point, can persuade the member to (indistinct), I accept that. That's always been an issue. That's always been a bit of an elephant hanging over this case, that we can all see circumstances where Mr Webb will gain probably unfettered access to the report. So (indistinct) orders can be made. That's a simple fact. But we're not at that stage yet and we may never be.

PN425

THE DEPUTY PRESIDENT: Has it been a continual concession that if this matter turns into an unfair dismissal that the report would be produced without objection?

PN426

MR WILLIAMS: Well, I don't have an instruction that it would be provided without exception. I can't comment as to whether that's been suggested to you, but it wouldn't be at all unusual for the report to be disclosed on terms, including as to confidentiality, and perhaps as to redaction. But it is - I'm not quibbling with your point, which is that if this goes to an external proceeding, there'll be a whole different legal regime required.

PN427

But although that may contributed to a feeling that the practical way through this and the simplest way through this, and may for the fairest way through this, would be for Mr Webb to receive the report now. But Aurizon does not believe it is at liberty - it would be at liberty to agree with that because of the binding nature of clause 12.2, which probably, primarily, binds Aurizon, in considering that it would be the recipient of the report. It also would be gravely concerned with the prospect that absent the kind of proceedings we've talked about, which nobody can do much about, they exist, those rights exist, that it could ever be required, in the course of a disciplinary process, to turn over the report. It doesn't think it would be permitted to and it would be of grave concern if it was required to. Of course, that's why we're here.

PN428

But the simple point which I suggest lies right at the core of this matter, which is, as I said, disputes matter, constrained by section 739(5) is that, rightly or wrongly, better or for worse (indistinct) better, if Aurizon is not permitted to, let alone required to, provide a copy of the investigation report, because of clause 12.2, then it is unavailable for the Commission, as the arbitrator, to determine that it be (indistinct) to disclose it or is allowed to disclose it, because that would be, we say, a resolution specifically inconsistent with the industrial instrument. That seems to be, to us, the result, irrespective of the practicality or other attraction that might be seen by the delivery of the report. As I said, we accept that, from Mr Webb's point of view, it would seem simpler and it would see fairer, but we just say it's unavailable.

PN429

But we also, I don't want to - I don't want to suggest that we would see that as actually regressing fairness, but Mr Webb's opportunity to understand the allegation and respond to them has been fully (indistinct) to him and he fully took advantage of it. He was provided with details of the allegations the investigator was considering and given a full opportunity to respond to them, and he did respond to them and he denies them. He certainly denies that any of it took place.

PN430

So, in those circumstances, firstly, clause 12 provides no right or even opportunity for Mr Webb to be provided with the investigation report, for the purpose of having another go at that. That process has finished. Secondly, in circumstances where, with full opportunity, the allegation was simply denied, a full denial, there is no utility.

PN431

That's where I really want to go to next. Sorry, before I do, I want to say something about clause 12.4 because Mr Hart's submission is that the concepts from clause 12.1 soak their way through in 12.4. That you can find in clause 12.4 a basis for being provided with the investigation report, in pursuance of procedural fairness. But that can't - you can't go beyond the terms themselves because, of course, that's what we're interpreting, we're interpreting the clause. If you look at 12.4, by reference to its purpose, its object or its text, there's just no basis or support for Mr Hart's submission.

PN432

We see this in the submissions, I might be boring my repetition, but clause 12.4, the disciplinary process, only commences following the procedure in clause 12.1. So there can only be and will only be a disciplinary procedure once the investigation has been completed and then only if the investigation substantiates allegations.

PN433

There could easily be a case where a whole welter of allegations are made and investigated and out of 10 allegations only one is substantiated. At that point the investigation report becomes an historical artefact. It doesn't bear - except for the fact that it only substantiated allegations will be considered by the decision maker it doesn't bear any relevance to the disciplinary process in clause 12.4, it's done its work.

PN434

At that point the decision maker receives the report and, as I said, there seems to be very limited capacity for the decision maker to disagree with it or arrive at any other conclusion about allegations. Then at that point the decision maker appears to be bound, or is bound, to proceed in accordance with the allegations, as they've been substantiated, whether or not the decision maker agrees with those findings. The decision maker might say, 'Well, I would think more of these allegations should have been established' but they're not, then that's binding on the decision maker. So (indistinct) the disciplinary process proceed and only on the allegations which are established.

PN435

If you look at clause 12.4.2 Mr Hart says that all concepts of procedural fairness flow their way into clause 12.1 into clause 12.4, but that's actually not correct. It's very obvious, or we think it's obvious, we say so in our written submissions, that once you get to 12.4 you're really only getting the (indistinct). Clause 12.4.2 requires, as a separate aspect, we accept, procedural fairness. But the employee must be given a reasonable opportunity to provide reasons to the company as to what the appropriate (indistinct) to be, taking into account their performance history, years of services, performance and their plans for improving their performance or conduct.

PN436

So that doesn't seem to provide any scope for either the employer or the employee to reopen or challenge or test or do anything with the allegations which are made. At that point everybody's got to deal with it, on the basis of the allegations, as established.

PN437

Now, it would be available, I suppose, it might be available here, for Mr Webb to respond to the letter which he got, if he wanted to. He could deny that the allegations should have been established but it doesn't seem like the decision maker can do very much with that. The allegations have been established.

PN438

A (indistinct) might say, 'Okay, I accept that something happened' put it in context and, speaking hypothetically, apologise and move to a different course of action in the future. That would be relevant, we would say, to a response that would have to be taken into account, 12.4.2 says so in its concept of plans for improving performance or conduct. But what clause 12.4, in any of its subclauses, does not provide is for an opportunity to reopen the substantiated allegations.

PN439

When you go to clause 12.1 and understand what's happening in clause 12.1, and what's required under that clause, and then circumstances under which you get to a clause 12.4 disciplinary process, it all makes perfect sense. What this employer has done to deal with a - well, not just the employer, the employees voted for it. What these parties have done is provide for a quite sophisticated and quite balanced two-stage process, which is actually fully protective of Mr Webb's rights.

PN440

His rights are protected in the investigation, so far as the allegations themselves are concerned. They are not separately protected, that is, his right to contend that the allegations are false, they are not separately protected once you get to a clause 12.4 process. Therefore, the investigation report, in a very real sense, is irrelevant to the 12.4 disciplinary process. It is, at that point, an historical artefact.

PN441

So as much as Mr Webb might want to see the report, as much - if he saw it he might do all of the things he's suggested he wants to do. He might criticise, he might interrogate, he might test, but none of that can go anywhere because the company is bound by the - and Mr Webb is bound, at that point, by the allegations, as they've been established.

PN442

Now, it's a different scenario if there's a termination decision, we're not there of course, but if there was, and Mr Webb wants to challenge that unfair dismissal application. We accept that. We accept the one line of authority which says that a Commissioner's task, in an unfair dismissal application, is to decide, afresh, whether or not there's a valid reason for termination and, of course, whether the employee has been treated in a procedurally fair way. It would be available for the Commissioner, at that point, to determine, based on all of the evidence, that the allegations should not have been and - were not and should not have been established. That the conduct did not occur or occurred in a different way, and to substitute a decision. That's the way unfair dismissal applications work, but that's not this process. This process must proceed strictly in accordance with clause 12. And, as I said, and I might repeat it again, we are all, of course, bound by the restrictions in section 739.



PN443

Now, Deputy President, all of my submissions so far have been directed, I think, to Aurizon's contention that irrespective of what seemed simple, fair or appropriate, there is just simply no basis for the Commission to order something which Aurizon itself could not do, and that is the production of the report to Mr Webb, or to anyone else.

PN444

We have made submissions as to how you should dispose of the matter, if you disagree with me. If you disagree with my submission and you find that a basis under which an order of that kind could be ordered. In those circumstances we still contend that an order providing a copy of the report to Mr Webb, or to his representative, in any form, redacted or not, is not an appropriate resolution of the dispute before you.

PN445

We make those submissions by reference to utility. That is, that it can't make any difference to the process, under clause 12.4, which is limited by the terms of clause 12.4 and is directed only at penalty. So we make that submission that there is just simply no utility. But I also want to make the submission, by reference to Aurizon's concern that to establish the principle, despite clause 12.2, that investigation reports are available to respondent's, or to anyone else, in disciplinary processes or in any other process, would be corrosive of what Aurizon is attempting to achieve in its workplace, including specifically by reference to the protection in clause 12.

PN446

Deputy President, Mr Mitchell - yes, sorry, Mr Morgan, Mr Mitchell Morgan, gave evidence, from paragraph 18 of his statement, which expressed his concerns. He gave evidence that he's not aware of any other circumstance where Aurizon has, in fact, provided an investigation report and to do so would be a seismic shift in the process of a debate amongst large employers. Unfortunately it will find itself, in these process, from time to time, so no doubt there'll be many and we'll deal with any in the future.

PN447

He give some evidence about the investigation process, which, for anyone experienced in the area, it would be common sense. He gives evidence about how employees are asked to (indistinct) and I've referred to the challenges which occur, inevitably, in these processes. Mr Mitchell Morgan also explains those in his own evidence. He explains that his concern that in future instances, if the principle is established that investigation reports are shared to anyone, some witnesses may not be comfortable in providing information adverse to their co-workers. We can all understand why that might be so. We've probably all had some experience with the situation.

PN448

He refers to the obligation of confidentiality and how they emphasise that within investigation processes, at paragraph (e). He expresses his concern that participants may decline to participate. Mr Hart made something of that in his own submissions. We've made the same in our submissions, (indistinct) that

participants participate of their own free will, or perhaps with some encouragement with the employer than we get into some awkward situation of having to impose disciplinary consequences.

PN449

He's concerned that people may participate, but actually not participate candidly. They might be concerned about adverse consequences, I would say also just concerned about getting involved in disputes between other employees. He says that in extreme cases there may be risks of harm.

PN450

I'm not suggesting that any particular combination of those concerns arises in relation to Mr Webb's matter, I'm not making any such assertion. But we are dealing with a matter which is of considerable precedent value, or implication, as far as Aurizon is concerned, and therefore, on the basis of those concerns, Aurizon would be very reluctant to, or be very concerned, rather, by any situation where - within the disciplinary process, of course we still are within the disciplinary process, there was any dilution, as it would see it, of the obligation of confidentiality.

PN451

So for all of those reasons, Deputy President, and I should also refer, I know we've had the evidence, to Mr Morgan's evidence, in his cross-examination, or, in fact, it was re-examination, from paragraph 295, where he gives some specific examples of why he holds those concerns. I know you'll remember that and have some reference to it. He refers to the demographic focus on bullying and harassment in the workplace. We need to build a culture where people do feel safe to speak up and the need to protect, in that context, of victim's weaknesses.

PN452

He's expressed deep and logical concerns that - of the implications which might arise if investigation reports are provided to anyone and, specifically, to the respondent. He's concerned that Aurizon's effective and (indistinct) obligations might be eroded as a consequence.

PN453

So, for those reasons, Deputy President, we say that, to put it bluntly, you can't arbitrate an outcome which provides that the report be provided and also that (indistinct) it's just not the appropriate resolution of this dispute because there is insufficient utility to do so, in the face of the moderately expressed concerns of Mr Morgan, on behalf of his employer. As I said, for what purpose, given the limited basis upon which Mr Webb can now respond, under clause 12.4.2.

PN454

So they're our submissions, Deputy President. We did ask, in our written submission, and I would just emphasise it, if you are against me on any of these matters, we ask that in any order that you do make you give us seven days so that my client can consider, at the highest level, what it's response should be. Of course, it goes without saying, that we wouldn't progress - Aurizon wouldn't progress Mr Webb's disciplinary process while that was occurring.

PN455

THE DEPUTY PRESIDENT: No problems.

PN456

MR WILLIAMS: Thank you.

PN457

THE DEPUTY PRESIDENT: Mr Hart. You're on mute, Mr Hart.

PN458

MR HART: I'm sure many people in my life would wish that was the case.

PN459

Thank you, Deputy President. I just wanted to respond to a handful of matters that Mr Williams has raised in response.

PN460

The first being that in accordance with clause 12.1.2 there is a requirement that the respondent provides to Mr Webb, or to employees, in general, sufficient information to enable the provision of an informed response. Mr Webb cannot make an informed response without access to the investigation report. I reject, Deputy President, the submissions made by Mr Williams, respectfully, concerning the well-crafted or carefully crafted clause.

PN461

As consistent with Berri and with many enterprise agreements, these are matters that are crafted or drafted by lay people who don't have the experience or may well, in fact, not contemplate the entirety of what is contemplated by the operation of the provision. We say that the Commission should favour the view that there was no such carve out, with respect to clause 12.2 of the agreement, to operate in the same way and we acknowledge, in your previous decision, at paragraph 54, that you rejected the submissions made by the respondent with respect to the confidentiality provisions.

PN462

We further say, Deputy President, that you are entirely empowered, pursuant to clause - sorry, section 739 subsection (5) of the Act, Fair Work Act, to make a determination with respect to the matters that are in dispute. We rely on our submissions that were filed earlier, concerning the powers that are enlivened with respect to section 590 of the Act and other points that we raise, that the Commission is entirely empowered to deal with this matter if it determines if you're on our side, with respect to the way that the provisions of clause 12, in its entirety should operate.

PN463

We say that in respect of the other matters that Mr Williams has raised, in terms of utility, well, there is a great utility in this matter for Mr Webb to be able to review, or is representatives in this case, review the investigation report, for the purposes of defending himself against potential termination, as already been flagged by Mr Morgan, in his evidence. To say that Mr Morgan had already arrived at a pre-

concluded view, that he wanted to dismiss Mr Webb, subject to any response from a show cause letter.

PN464

We submit, Deputy President, that what more could Mr Webb provide, in terms of a response, that he hasn't already provided, where he fundamentally denies the allegations against him. There's no new information that Mr Webb could potentially or possibly add to a response to a show cause letter that he hasn't already done so, save for the opportunity to be able to avail himself of materials that the respondent has had at their disposal, to be able to counter and put forward any new information or an alternative or a competing version of events.

PN465

As we've made out in our submissions, Deputy President, through the course of the investigation process Mr Webb has uncovered several inconsistencies or errors. It's certainly open for us to potentially, given the opportunity to review the investigation report, to uncover even more inconsistencies or outright errors. In the absence of being able to simply look at the report and review it, and interrogate it for that purpose, it puts Mr Webb at a considerable disadvantage and denies him the opportunity to have procedural fairness and due process accorded to him, as is contemplated in the terms of the agreement.

PN466

For those reasons, Deputy President, we submit the Commission should determine the matter in favour of Mr Webb, on the basis of the application that's put forward. They're our submissions, if it pleases.

PN467

THE DEPUTY PRESIDENT: Thank you very much. I thank the parties for their submissions. I intend to reserve my decision. I understand the urgency of the matter. It will be placed on the top of the list of decisions to draft.

PN468

MR WILLIAMS: Appreciate it.

PN469

THE DEPUTY PRESIDENT: Otherwise I adjourn the matter indefinitely. Thank you very much.

PN470

MR HART: Thank you.

**ADJOURNED INDEFINITELY**

**[2.52 PM]**