[2020] FWC 5994 [Note: Paragraphs 113, 115 and 117 of this decision are set aside - refer to Full Bench decision dated 31 August 2021 [2021] FWCFB 5392]

DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

National Tertiary Education Industry Union
v
The University of Newcastle
(C2020/2269)

DEPUTY PRESIDENT BOOTH SYDNEY, 24 NOVEMBER 2020

Alleged dispute about any matters arising under the University of Newcastle Professional Staff Enterprise Agreement 2018 and the University of Newcastle Academic Staff and Teachers Enterprise Agreement 2018

[1] On 9 April 2020, the National Tertiary Education Industry Union (NTEU) made an application for the Fair Work Commission (Commission) to deal with a dispute pursuant to s.739 of the *Fair Work Act 2009* (the Act) and clauses 75 and 48 Dispute Resolution Procedure of the *University of Newcastle Professional Staff Enterprise Agreement 2018* (Professional Staff Agreement) and the *University of Newcastle Academic Staff and Teachers Enterprise Agreement 2018* (Academic and Teachers Agreement) respectively. (Together referred to as the enterprise agreements.)

[2] The dispute concerned a direction given on 31 March 2020 by the University of Newcastle (University) for all staff to take 5 days annual leave from 20 - 24 April 2020 (the direction) in addition to 3 days ex gratia "concession days" on 15 - 17 April 2020. The NTEU's complaint was that the University acted contrary to the provisions of the enterprise agreements, and in doing so hardship was experienced by staff, in particular that the direction resulted in some staff incurring a negative leave balance.

[3] Efforts to resolve the dispute prior to the commencement of the taking of the annual leave the subject of the direction were undertaken by direct discussions between the University and the NTEU (together referred to as the parties) and by conciliation between the parties in the Commission constituted by my colleague Commissioner Johns. These efforts proved unsuccessful. The matter was referred to me for arbitration after the annual leave had been taken. The parties made further efforts to resolve the dispute by conciliation before me. These efforts over several conferences also proved unsuccessful. The NTEU requested the dispute to be resolved by arbitration. The matter was listed for hearing and after one adjournment, as a result of the unavailability of an advocate, the matter was heard by me on 17 and 18 November 2020.

[4] The NTEU was represented by Mr J Gava, Senior Industrial Officer. By permission of the Commission the University was represented by Mr R Warren of counsel.

[5] Witness Statements were tendered on behalf of the NTEU from Dr Suzanne Ryan, Dr Tim Connor, Alison Hillier, Emma Joel and Daniel Conway. Dr Ryan and Dr Conner were required for cross examination and gave oral evidence. Witness Statements were tendered on behalf the University from Professor Alexander Zelinsky, Dr Elizabeth Burd, Mark Wylie and Martin Sainsbury. Each of these witnesses were required for cross examination and gave oral evidence.

[6] At successive junctures during the course of the hearing the parties held direct discussions and the scope of the dispute was narrowed.

[7] The parties agreed that the direction to academic staff was not available to the University under the Academic and Teachers Agreement or the Act or common law.

[8] The University gave an undertaking that it will recredit 5 days annual leave to current academic staff and pay 5 day's pay to any former academic staff who were affected but whose employment has since ended.

[9] The parties agreed that the direction to professional staff and teachers was not available to it under the Professional Staff Agreement and the Academic and Teachers Agreement to the extent that employees were caused to incur a negative leave balance.

[10] The University gave an undertaking that it will recredit or repay employees or former employees to the extent of the negative leave balance incurred as a result of the direction.

[11] The University indicated, and the NTEU accepted, that accompanying the communication about these undertakings would be an option for a staff members to opt out of the opportunity for their leave to be recredited.

[12] This means that the scope of the dispute was lessened to professional staff and teachers who were eligible to take annual leave to the extent of their available accrued annual leave.

[13] The NTEU contend that it was not available to the University to issue the direction to professional staff and teachers and the University contends that it was.

[14] Parties agree, and I concur, that the Commission has the power to resolve the dispute by arbitration.

[15] The questions posed by the NTEU that remain following the narrowing of the dispute are:

1. Did clause 57.9 of the *University of Newcastle Professional Staff Enterprise Agreement 2018* and clause 77.9 of the *University of Newcastle Academic Staff and Teachers Enterprise Agreement 2018* permit the University to direct professional and teaching staff to take the five days' annual leave between 20-24 April 2020?
2. If the answer to question 1 is 'yes', was it reasonable within the meaning of section 93(3) of the *Fair Work Act 2009* (Cth)?

[16] The University agrees that these are the relevant questions for me to answer to resolve the dispute.

Background

[17] The University employed 3,356 ongoing and fixed-term staff at the time of the direction.

[18] The NTEU and the Community and Public Sector Union (CPSU) are covered by the Professional Staff Agreement and the NTEU is covered by the Academic and Teachers Agreement. The NTEU and the CPSU represent a number of the staff affected by the dispute.

[19] On Friday 27 March 2020, a meeting regarding the impact on the University of the COVID-19 Pandemic was held between the Vice Chancellor, Professor Alex Zelinsky, Chief People and Culture Officer, Martin Sainsbury, Associate Director (Employee Relations), Mark Wylie, NTEU Newcastle Branch President, Daniel Conway, and NTEU National President, Alison Barnes. There was no reference to the direction at this meeting.

[20] On Monday 30 March 2020 the Executive Committee of the University met. Dr Burd made a recommendation that the University extend its mid-semester break by a week and shut down for a total of three weeks coinciding with the Easter period. She gave evidence that the shutdown was proposed as a means to provide staff a rest, students a chance to catch up and as financial saving to reduce annual leave accruals into 2021. [i] The Executive Committee decided to accept this recommendation.

[21] At 8.30am on 31 March 2020, Professor Zelinsky and Mr Sainsbury met with Mr Conway, CPSU Staff Representative, Sue Freeman and CPSU Industrial Officer, Lisa Nelson to inform them of this decision. The University did not foreshadow the purpose of the meeting with the NTEU or CPSU representatives.

[22] In the course of the 31 March 2020 meeting, Professor Zelinsky advised that immediately following the conclusion of the meeting he would be issuing a direction for all staff to take leave inclusive of 3 additional concessional days (15-17 April 2020) and 5 days annual leave (20-24 April 2020).

[23] Mr Conway advised Professor Zelinsky during the meeting that he had concerns regarding the proposed direction and suggested that it should be put forward as a voluntary measure with the three concession days used as an incentive. He also requested a delay in the announcement until after lunch to allow him to discuss the University's decision with the local Branch and state NTEU officials. Professor Zelinsky declined this request and indicated that he intended to go ahead with the direction, replying "Bad news is not like a fine wine Dan. It doesn't get better with age".

[24] The Vice Chancellor Professor Zelinsky circulated a statement containing the direction at 9:34 am that day which stated:[ii]

> "The Executive Committee has agreed that the University will extend its Easter break by eight days. After the staff concession day already scheduled for Tuesday 14 April, the University will provide all staff with Wednesday, Thursday and Friday (15-17

> April) as 3 extra paid University Special Leave days. After this period all staff will be required to take the following week (20-24 April) 5 days as annual leave. The key exception to this requirement to take 5 days annual leave will be those staff who need to use this period to prepare materials for continuation of online teaching after the April break."

[25] The exception described by the Vice Chancellor was to be accessed by way of application for exemption. 600 such exemptions were granted. There was no evidence of the number of exemptions that were sought.

[26] The University did not have regard to the relevant provisions of the enterprise agreements before making the decision in the Executive Committee on 30 March 2020 or announcing the decision to the staff on 31 March 2020.

[27] Among a set of "Frequently Asked Questions" on the University's intranet, the coverage of the direction was further explained as follows:

> **"Does the extended compulsory April break apply to all staff?**
>
> The intention is that eight days extended leave will apply to all staff, other than a few exceptions. These exceptions are:
>
> - Staff deemed to be 'crucial' by PVCs or Directors
> - Teaching staff preparing online materials for use beyond the Easter break.
> - Campus security staff
> - Staff currently seconded to NSW Health to help with COVID-19"
>
> **Can I apply for an exemption from taking the extended April leave?**
>
> Generally speaking, no. Some staff deemed critical for the University's operation will be granted an exemption. The Vice-Chancellor must approve all exemptions in writing."

[28] At 11.45am on the same day Mr Conway emailed Professor Zelinsky flagging that the NTEU may have a problem with the decision. The Vice Chancellor acknowledged Mr Conway's email.[iii]

Relevant provisions of the enterprise agreements

[29] The provisions of the Academic and Teachers Agreement that are most relevant to the dispute in relation to teachers are clauses 77.9 and 77.10:

> "77.9 The University may direct a staff member to take, at such time as is convenient to the working of the University, annual leave for which the staff member is eligible, but as far as practicable the wishes of the staff member concerned will be taken into consideration when fixing the time for the taking of annual leave.

> 77.10 If a staff member reaches an annual leave accrual of 40 days and a leave plan cannot be agreed upon, the University will direct the staff member to take 10 days annual leave within 1 month of notification by the University".

[30] The provisions of the Professional Staff Agreement that are most relevant to the dispute in relation to professional staff are clauses 57.9 and 57.10:

> "57.9 The University may direct a staff member to take, at such time as is convenient to the working of the University, annual leave for which the staff member is eligible, but as far as practicable the wishes of the staff member concerned will be taken into consideration when fixing the time for the taking of annual leave.
>
> 57.10 If a staff member reaches an annual leave accrual of 40 days and a leave plan cannot be agreed upon, the University will direct the staff member to take 10 days annual leave within 1 month of notification by the University"

[31] It will be observed that the provisions in relation to professional staff and teachers are identical. (Together referred to as the clauses)

Principles of construction of enterprise agreements

[32] The principles for interpreting an enterprise agreement were recently and succinctly restated by the Full Court of the Federal Court in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (Skene) as follows:

> "The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context. The interpretation "…turns on the language of the particular agreement, understood in the light of its industrial context and purpose …". The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament. To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced."[iv]
>
> [references omitted]

[33] A summary of the principles relevant to the approach that the Commission should take to the construction of enterprise agreements was set out in *Australian Manufacturing Workers Union (AMWU) v Berri Pty Ltd* [2017] FWCFB 3005 (Berri decision):

> 1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:

(i) the text of the agreement viewed as a whole;

(ii) the disputed provision's place and arrangement in the agreement;

(iii) the legislative context under which the agreement was made and in which it operates.

2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.

3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.

4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.

5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.

6. Enterprise agreements are not instruments to which the *Acts Interpretation Act 1901 (Cth)* applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such *objective* facts is to be distinguished from evidence of the *subjective* intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

    (i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;

    (ii) notorious facts of which knowledge is to be presumed; and

    (iii) evidence of matters in common contemplation and constituting a common assumption.

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.

14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.

15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding.

[34] The above principles outlined in Berri have been derived from earlier decisions of the Federal Court and the Commission, some of which are also authorities drawn upon in Skene.[v] The two formulations are consistent and I will deal with the questions posed by the NTEU by applying the principles set out in Skene and Berri.

NTEU's case

Evidence

Witness Statement of Allison Hillier

[35] Ms Hillier is a Senior Learning advisor at the University and at the time of the direction, was eligible for leave. Ms Hillier said that despite her annual leave balance it was not convenient for her or team to take leave. [vi]

[36] During the Easter period, Ms Hillier was conducting recruitment and as the team leader she was responsible for applicant enquiries. Additionally, she also had reports and updates to complete during this period.

[37] Ms Hillier said that she was never consulted prior or after the direction being issued. Ms Hillier raised her and the team's concerns to management with a proposed solution which involved splitting the staff to take leave during the leave period. This proposal was rejected. [vii]

[38] Ms Hillier had sought an exemption based on the need to respond to applicant enquiries for recruitment. The exemption was approved but was not reflected in the annual leave accruals, which was later rectified. [viii]

Witness statement of Suzanne Ryan[ix]

[39] Dr Ryan is employed as an Associate Professor at the School of Business at the University. Ms Ryan gave evidence that she was never consulted about her general leave plans or the direction.

[40] Ms Ryan said that the forced annual leave was not convenient to her or her workplace. Ms Ryan needed to revise all workshops and lectures to an online format which she believed to be an acceptable reason for exemption.

[41] Her exemption request was refused, and Ms Ryan said that her colleagues received exemptions with the same reason. Despite the refusal, Ms Ryan continued to work during the leave period for 8-9 hours per day including weekends.

[42] Ms Ryan had plans to use her leave prior to the direction but cancelled due to COVID-19. She will no longer be able to use her leave this year as the delayed start of Semester Two meant it began one week after Semester One results were released.

Witness Statement of Emma Joel[x]

[43] Ms Joel is employed as a learning advisor at the University. Ms Joel had been using her annual leave, long service leave and personal leave entitlements throughout the year to manage her chronic health conditions, caring for her father and maintaining University responsibilities.

[44] Ms Joel had purchased leave as part of her leave plans in 2020 to stay with her father during palliative care, plan for the funeral and to be with the family. She said the direction meant her leave plans were disrupted. Ms Joel submits that she was anxious that she did not

have enough annual leave to cover the direction. Ms Joel said that the direction to take leave delayed her return to work as she planned leave from 10 March – 9 April and return to work on 15 April 2020.

[45] Ms Joel notes that after her return to work, many colleagues had reported interruptions to work patterns and increased busy periods. Ms Joel views the approval process, which required the approval of exemptions from the Vice Chancellor, as not the normal University practice. Leave approvals and work area businesses were usually managed at the work area level.

[46] Ms Joel noted that the direction resulted in her being unable to use leave for respite as per her leave plans discussed with her line manager at the beginning of the year.

Witness Statement of Daniel Conway [xi]

[47] Mr Conway is the technical advisor at the University and the NTEU Branch President of the University of Newcastle since 24 April 2020 and Acting Branch President since March 2020.

[48] Mr Conway said that prior to the announcement of the direction, the Vice Chancellor Professor Zelinsky said that the University was in a strong financial position.

[49] During 31 March 2020, Mr Conway had raised concerns about the proposed direction and said that Professor Zelinsky was aware of those concerns but proceeded to give the direction in any event. Further Mr Conway had raised concerns with Mr Mark Wylie, Associate Director of Employee Relations on a number of occasions. Mr Conway submitted text messages which showed Mr Wylie confirmed that Academics would not be the subject of the direction. [xii]

[50] Mr Conway raised his concerns by a letter to Mr Wylie, to which Mr Sainsbury, Chief People and Culture Officer replied in writing. The letter said that leave was for the staff's wellbeing and for the students to catch up during the COVID-19 pandemic.[xiii]

[51] Mr Conway notes that while he had excess annual leave, he had discussed with his line manager that he intended to use it for extended leave in 2021 to complete his Practical Legal Training.

[52] At the time of the direction, Mr Conway did not apply for an exemption as he was listed as an essential worker due to the type of work he was involved in at the time. Despite this, he was deemed to be on annual leave and continued to work during those 5 days. He also notes that he has been directed to take 9 days annual leave during the forthcoming Christmas/New Year closure.

Witness Statement of Dr Tim Connor

[53] In support of the NTEU's reply Dr Tim Connor, Senior Lecturer at the University submitted a witness statement on 30 October 2020.

[54] Dr Connor had originally planned leave during April 2020 but due to COVID-19 it was cancelled. Due to COVID-19 it resulted in an increased amount of work. Dr Connor

sought an exemption and was refused. Dr Connor advised the Head of School of his willingness to take leave after the forced leave directive to accommodate the University's financial needs, however this was refused. Dr Connor continued to work during the leave period. He said that he was not aware of the University's policy to recredit leave for staff who worked. [xiv]

Submission

[55] The NTEU would answer the questions no and no.

[56] The NTEU's case is that the direction to professional staff and teachers was not available to it under the Professional Staff Agreement and the Academic and Teachers Agreement or the Act.

[57] The NTEU contend that the clauses have a plain meaning and are not ambiguous or susceptible of more than one meaning and the Commission should apply the Berri decision and in particular principle 7 of the decision. The University does not disagree.

[58] They say the use of the words "a staff member" or "the staff member" in the clauses mean that the University may only direct an individual staff member to take annual leave.

[59] The NTEU says the words "but as far as practicable the wishes of the staff member concerned will be taken into consideration when fixing the time for the taking of annual leave." mean that the clauses require management to take staff wishes into consideration as far as practicable. This means that management is required to consult each staff member and provide them with an opportunity to put forth reasons why the proposed timing of the direction to take annual leave is not convenient. They say that the clauses provide a staff member concerned with an opportunity to affect the decision making and change the outcome. This means necessarily consultation must be prior to the decision fixing the time of the taking of the annual leave.

[60] They say that the University's evidence shows that there was no attempt on the part of the University to consult each staff member concerned on their wishes or to take those wishes into consideration when fixing the time for the taking of the annual leave. They say that providing a process for exemptions that was couched in terms of the operational needs of the University did not meet this requirement. They invite the Commission to make a *Jones v Dunkel* inference that the disclosure of the number of exemptions requested would not assist its case.

[61] The evidence, the NTEU says, shows that the direction was not given taking into consideration the needs of staff, either in their personal capacity or the needs of their role within the university. It was made, they said, to overrule any other leave arrangement previously agreed with the individual employee which was contrary to the customer practice of University.

[62] The NTEU says that a blanket direction in the manner of that of 31 March 2020 deeming all staff to be on annual leave cannot ever meet the requirements of the clauses.

[63] The NTEU took the Commission to s.88 of the Act that reads as follows:

> (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
>
> (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

[64] They submit that s.88 demonstrates that the entitlement to paid annual leave is intended to be accessible at a time of the employee's choosing. An employee may make a request to their employer about the timing of taking paid annual leave. The employer may only refuse that request when such refusal is not unreasonable.

[65] In support of this interpretation reference is made to *Workpac Pty Ltd v Rossato* [2020] FCAFC 84:

> 'The terms of s 88 of the FW Act demonstrate that the entitlement to paid annual leave is intended to be accessible at a time of the employee's choosing so long as the request for leave is not unreasonable.'

[66] They note that an employee or employer could request that any employee take paid annual leave at a particular time. But there is no similar requirement that the employee's refusal to such a request must be reasonable.

[67] The NTEU took the Commission to s.93(3) of the Act that reads as follows:

> (3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

[68] The NTEU says that s.93(3) is to be understood to mean that employees and their employer can agree to include a term in an enterprise agreement that allows for a direction requiring an employee to take annual leave but only if the requirement is reasonable.

[69] Reference was made to the Full Bench decision in *Four yearly review of modern awards*[xv]. In that decision, the Full Bench stated what is reasonable includes consideration of those matters set out in paragraph 382 in the Explanatory Memorandum to the Fair Work Bill 2008 and the individual needs of each employee.

Paragraph 382 of the Explanatory Memorandum reads as follows:

> "382. In assessing the reasonableness of a requirement or direction under this subclause it is envisaged that the following are all relevant considerations:
>
> - the needs of both the employee and the employer's business;
> - any agreed arrangement with the employee;
> - the custom and practice in the business;
> - the timing of the requirement or direction to take leave; and

- the reasonableness of the period of notice given to the employee to take leave."

[70] The NTEU submits that the evidence shows the University did not take into consideration the needs of the employees, the direction overruled any previous leave arrangement, was contrary to custom and practice and did not consider the convenience of the timing of the leave. The NTEU submits that the direction was manifestly unreasonable within s 93(3).

[71] The NTEU drew my attention to the Full Bench decision in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* (Pilots decision)[xvi] paragraph 26 that reads as follows:

> "It is apparent that the nature of these considerations, so far as they concern an employee, is personal to the employee the subject of the direction. It follows that generalised assessments about the impact of a requirement on employees will be insufficient. Moreover, the reasonableness of a requirement is to be assessed at the time that the requirement is to be fulfilled because self evidently the factual circumstances which underpin any consideration will change, as for example, the needs of both the employer and the employee are subject to change."

[72] The NTEU note that in that case the relevant clause of the enterprise agreement in question was found to be a term that was not permitted by either ss 55(4) or 93(3) of the Act and it followed that it had no effect. They invite me to come to the same conclusion about the relevant clauses of the enterprise agreements in this matter.

[73] In relation to a remedy the NTEU says that the Commission ought to give declaratory relief in the form of an order that the University recredit 5 days paid annual leave to all staff who were subject to the direction.

University's case

Evidence

Witness Statement of Alexander Zelinsky[xvii]

[74] Professor Zelinksy is the Vice Chancellor and President of the University.

[75] Professor Zelinsky gave evidence that on Monday 30 March, the University's Executive Committee met. The meeting received a COVID-19 update from Professor Liz Burd. He stated that a recommendation was put that met the group's views about the need to balance transition to remote learning, the worsening budget projections and the recognition that the staff needed a break to help adjust to the new reality of COVID-19. He said that an extended Easter close down was subsequently endorsed by the Executive Committee.

[76] Professor Zelinsky says that on 31 March 2020, he advised the NTEU representatives about the Easter close down and the CPSU did not object.

[77] He said that the NTEU raised concerns about timeframes and Mr Conway requested a delay in announcement of the direction. Mr Zelinsky refused on the basis that he believed that all staff should be advised as soon as possible to ensure maximum time for preparation for

closure. In cross examination he said that he wanted the University to make the announcement, not the NTEU, so he declined the request for more time to mitigate this risk.

[78] Professor Zelinsky says that he had spoken to staff and students from various locations regarding the closure and received encouragement regarding the closure.

[79] Professor Zelinsky said that he met with Mr Martin Sainsbury to review all applications for exemption from the close down and supported the decisions or recommendations from Pro-Vice Chancellors and Directors.

[80] Professor Zelinsky said that his office received no negative submissions concerning the close down and he concluded that this reflected the support he had received during in-person discussions with staff.

Witness Statement of Elizabeth Burd[xviii]

[81] Dr Burd is employed as the Pro-Vice Chancellor COVID-19 Response Lead. Dr Burd gave evidence that on 19 March, students were advised that the University would be moving to online/remote delivery for all lectures.

[82] Dr Burd said that during this period, many staff reported fatigue due to transitioning online with online teaching and anxiety about the possibility of infection. She said that other NSW institutions paused teaching to help staff catch up and many staff requested a similar opportunity.

[83] Dr Burd gave evidence that she recommended to the Executive Committee that they should consider delaying the re-commencement of the teaching period by extending the mid-semester break by a week and that they should instigate a similar shut down arrangement to that which applies at the University at Christmas. She said that the intention was to provide staff a rest, students a chance to catch up and as a financial saving to reduce annual leave accruals into 2021. Under cross examination she said that her decision making was confined to educational considerations. [xix]

Witness Statement of Mark Wylie[xx]

[84] Mr Wylie is employed at the University as the Associate Director – Employee Relations and Work, Health and Safety.

[85] Mr Wylie gave evidence about discussions and text messages with Mr Conway that reflected his belief at the time (the day of the announcement, 31 March 2020 and 1 April 2020) that the majority of academic staff were to be exempt from the direction.

[86] Mr Wylie stated that he reassured Mr Conway in regard to staff going into a negative balance or otherwise in 'tricky' situations, that we would work through individual cases and try and lessen the impact.

[87] Mr Wylie advises that subsequent to the Easter closure, a survey was conducted to obtain feedback from staff. The overall satisfaction score was 4.04/5 and the specific question regarding the Easter extended break received positive feedback. [xxi]

Witness Statement of Martin Glen Sainsbury[xxii]

[88] Mr Sainsbury is employed at the University as the Chief People and Culture Officer. Mr Sainsbury's role involved him overseeing the Human Resources function in the University. Mr Sainsbury joined the University on 17 March 2020.

[89] He gave evidence that he attended the Executive Committee meeting on 30 March 2020. Under cross examination Mr Sainsbury said that he did not refer to the enterprise agreements or the Act during the Executive Committee meeting and did not give advice concerning them.

[90] Mr Sainsbury said that he regarded it as too cumbersome to utilise the same process to arrange annual leave as the Christmas closedowns. This required staff to submit individual leave bookings. Mr Sainsbury said that he regarded the simplest way to ensure all staff were paid was to allocate leave for staff and then manage exemptions. Mr Sainsbury gave evidence that over 600 staff were granted an exemption.

Submission

[91] The University would answer the questions yes and yes.

[92] The University's response to the NTEU case is that the direction to professional staff and teachers was available to it under the Professional Staff Agreement and the Academic and Teachers Agreement.

[93] They say the clauses do apply to more than one employee. In effect the University says it is narrow and pedantic to interpret the singular 'a staff member' and 'the staff member' as meaning that the clauses cannot be used to direct more than one employee at a time to take annual leave. They say the enterprise agreement is replete with references to the singular and plural interchangeably and it would be a nonsense to suggest that you can only direct one staff member to go on leave, and not another staff member at the same time.

[94] The University and the NTEU are not apart on the qualifications "at such time as is convenient to the working of the University" and "annual leave for which the staff member is eligible".

[95] The University does however disagree with the NTEU that the words "as far as practicable the wishes of the staff member concerned will be taken into consideration when fixing the time for the taking of annual leave" mean that the University must consult with each staff member as submitted by the NTEU. The University agrees that this did not occur on this occasion but says to have done so would have been impractical in the circumstances that the University wished to shut down to provide students and staff with respite from a situation that was unprecedented and extraordinary. The University says that employees had the opportunity to apply for an exemption and that this allowed the wishes of the staff member concerned to be taken into account. It was impractical or impossible to consult individually with each and every staff member.

[96] In support of the contention that the direction complied with the clauses of the enterprise agreements the University submits that the direction was convenient to the working

of the University. They say the evidence of Dr Burd details the unprecedented situation that the University faced during March and April 2020, as a result of the outbreak of the COVID-19 pandemic. They say that the University determined that, given these circumstances, it was convenient, practical and prudent to close all campuses to students and all but essential staff. They say the timing of the closure meant that, with Easter public holidays (10 and 13 April); the University Easter concession day (14 April); an additional 3 concession days (15-17 April and 5 annual leave days (10-24 April), all non-essential staff could take an uninterrupted 17 day break and students struggling with online workloads and the impact of COVID-19 would have an opportunity to catch up on assessments.

[97] The University refutes the submission that as far as practicable, the wishes of staff members were not considered when directing annual leave be taken. They say:

> "Amongst other things:
>
> a. Prior to the leave direction being given the University was aware of staff and student complaints of high levels of stress and exhaustion.
>
> b. Staff members who considered that they had essential work to do during the leave period were invited to make application for exemption, and that request was considered.
>
> c. Staff who were deemed essential were exempt from the leave direction. Essential staff were not required to work but could choose instead to take the extended break.
>
> d. School meetings attended by the Vice-Chancellor after the leave direction was made confirmed the favourable staff response to the extended leave package.
>
> e. The University's email system is regularly utilised by staff to log complaints and grievances. Not one negative email was received in response to the leave direction.
>
> The Respondent rejects the Applicant's position that in the circumstances faced by the Respondent, and in relation to any University closedown, it was either practicable or indeed possible to consult individually with each and every member of the University's staff. What the Respondent did do, however, was to take account of the wishes of all staff to the extent that was practicable, in the circumstances"[xxiii]

[98] The University says that the direction was reasonable in the circumstances and met the requirements of s.93(3) of the Act. In support of this contention they say:

> "The Applicant notes that the Explanatory Memorandum envisages that a reasonable requirement may include where an employer decides to shut down the workplace over the Christmas/New Year period. The Respondent submits that the Respondent's decision to shut down the workplace in the circumstances confronting it during March/April 2020 was equally reasonable.
>
> 26. The Applicant further notes the Explanatory Memorandum's assessment of considerations that will be relevant in considering the reasonableness of an

employer's direction to take leave.

a. *The needs of the employer's business*: The Respondent's firm and considered view was that the circumstances it was dealing with required the closedown to allow an expedited transfer of courses online and make other required changes to work arrangements; to allow students to catch up with assessments; to allow exhausted staff members a respite and to help support the Respondent's financial position in an uncertain time.

b. *Any agreed arrangement with employees*: There is no evidence that the Respondent overruled any leave arrangements that had previously been agreed with employees.

c. *The custom and practice of the business*: It was not the custom and practice of the Respondent to direct employees to close down over the period in question or to provide 3 extra days concession leave. Nor was it custom and practice for the University to make other arrangements in the interests of the University and its employees such as paid COVID-19 leave for casual staff. The situation facing the Respondent and its staff were not customary circumstances.

d. *The timing of the requirement or direction to take leave:* the timing of the direction to take leave, adjacent to the public holidays together with University concession days leave meant that employees could take an extended break over a very difficult and stressful time.

e. *The reasonableness of the period of notice given to the employees:* Staff were provided with nearly 3 weeks' notice of the leave direction. The Respondent submits that in all the circumstances, this notice was reasonable."[xxiv]

[99] The University submits that if the Commission is against it in relation to either question the Commission should confine the remedy to an order that the University refrain from giving such leave direction in the future. To do otherwise would be an exercise of judicial power and beyond the power of the Commission.

Consideration

Did clauses 57.9 of the University of Newcastle Professional Staff Enterprise Agreement 2018 and clause 77.9 of the University of Newcastle Academic Staff and Teachers Enterprise Agreement 2018 permit the University to direct professional and teaching staff to take the five days' annual leave between 20-24 April 2020?

[100] I agree with the NTEU that clauses have a plain meaning and are not ambiguous**.** My task is to discern the meaning of the relevant words, having regard to their context and purpose, and apply them to facts disclosed in evidence.

[101] The words "The University may direct a staff member to take, at such time as is convenient to the working of the University" vests a discretion in the University. This is clear from the use of the word "may". The exercise of that discretion is at the choice of the

University as the discretion is based upon the convenience of the working of the University and that decision could only be made by the University.

[102] I agree with the University that the use of the singular "a staff member" or "the staff member" does not mean that only one employee at a time may be directed to take annual leave.

[103] The words "annual leave for which the staff member is eligible" means that the staff member must have sufficient accrued annual leave in accordance with clause 57.1 of the Professional Staff Agreement and clause 77.1 of the Academic and Teachers Agreement 2018 77.1 to meet the direction. This is now not controversial between the University and the NTEU.

[104] The words "but as far as practicable the wishes of the staff member concerned will be taken into consideration when fixing the time for the taking of annual leave" means that as long as it is practicable the University is required to have regard to the wishes of the staff member concerned as to the timing of the leave. Correspondingly where it is not practicable the University is not required to have regard to the wishes of the staff member concerned as to the timing of the leave. Notably, the wishes of the staff member relate only to the timing of the taking of the leave, not to the taking of the leave itself.

[105] The term "practicable" is defined by the Mirriam - Webster Online Dictionary as:

> **1 :** capable of being put into practice or of being done or accomplished **:** FEASIBLE a *practicable* plan
> **2 :** capable of being used **:** USABLE a *practicable* weapon

[106] If it is practicable to consider the wishes of the staff member concerned to give effect to this, this must allow each individual employee to whom a direction has been given the opportunity to express their wishes.

[107] The University contends that it was not practicable to consider the wishes of the staff members concerned in the circumstances pertaining in March 2020. I agree that having decided to shut down the university on 31 March 2020 with the mid-semester break commencing on 13 April (noting Easter commenced with Good Friday on 10 April) it would have been very difficult to consult each staff member personally over a 9 day period. However, it might have been feasible to conduct a survey or seek feedback by email or for line managers to engage with their staff members, but this was not done.

[108] The exemption process was not the only way to consider the wishes of the staff members concerned. It was one way, although I agree with the NTEU that employees were not invited to express their wishes in regard to their personal needs, and this was a failing of the process. This contributes to my conclusion in relation to question 2 below but does not alter my conclusion about the effect of the clauses. It does not render the direction non-complaint with the clauses, as the obligation to take the wishes of the staff member concerned into account stands alone as a severable obligation upon the University.

[109] The clauses give the University a very wide discretion to direct annual leave with no constraint on the reason or circumstance, and at any time that is convenient to the university.

Again, it is important to note that the wishes of the staff member relate only to the timing of the taking of the leave, not to the taking of the leave itself.

[110] On a plain reading of the clauses I consider that the enterprise agreements did permit the University to direct professional and teaching staff who had sufficient accrued leave to take the five days' annual leave between 20-24 April 2020.

[111] The answer to question 1 is **yes.**

If the answer to question 1 is 'yes', was it reasonable within the meaning of section 93(3) of the *Fair Work Act 2009* (Cth)?

[112] In the Pilots decision the Full Bench at paragraph 28 says:

> Section 93(3) permits an enterprise agreement to include terms requiring an employee (or allowing an employee to be required) to take annual leave in particular circumstances provided the requirement is reasonable. In considering whether a requirement is reasonable the term imposing the requirement must relate to particular circumstances in which annual leave will be required to be taken and must on its face be reasonable or enable the consideration of relevant considerations earlier identified before the requirement is imposed in relation to a particular employee. Our conclusion that clause 14.2.1(b) of the Agreement is not a term permitted by s.93(3) is based on the circumstances of this case and the text of clause 14.2.1(b). Issues such as the capacity for personal circumstances to be taken into account when imposing a requirement, the ability to take an annual leave entitlement as a block and the need to travel long distances to take a period of annual leave, amongst others, will be relevant in considering the reasonableness of a requirement to take annual leave in particular circumstances that may be contained in particular agreements.
>
> In *Construction, Forestry, Mining and Energy Union v CSRP Pty Ltd* (CSRP decision)[xxv] the Full Bench noted and adopted the Pilots decision. Their reasoning is pertinent to this matter. The Full Bench said:
>
> > **[31]** Section 55 of the FW Act contains the interaction rules between the NES and a
> > modern award or enterprise agreement, and relevantly provides that an enterprise agreement must not exclude the NES or any provision of the NES. That section also provides that an enterprise agreement may include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES and terms that supplement the NES, provided that the effect of any such term is not detrimental to an employee in any respect when compared to the NES. A provision of an enterprise agreement need not expressly exclude the NES in order to fall foul of s.55(1). A provision of an enterprise agreement which in its operation would
> > result in an employee not receiving the full benefit of the NES also contravenes the prohibition.
> >
> > …..

[55] Section 88(1) provides for agreement between an employer and an employee about when annual leave is to be taken by the employee and the duration of that leave. Pursuant to s.88(2), an employer must not unreasonably refuse to agree to a request by an employee to take paid annual leave. Self-evidently, clause 8.1 of the Agreement has the effect of denying an employee the opportunity of reaching agreement with CSRP about when annual leave may be taken and the duration of leave whenever CSRP gives the requisite direction to take annual leave for which provision is made. At the very least, the clause will, in the face of a direction, limit the days on which annual leave may be taken by agreement. There is no scope under clause 8.1 to reach agreement to take annual leave, except for leave taken in advance of its accrual.

……..

[58] The impugned paragraph of clause 8.1 of the Agreement must therefore depend for its efficacy on it being a term of the Agreement permitted by s.93(3) of the FW Act.

[59] The essence of s.93(3) is that it permits terms to be included in an enterprise
agreement which require an employee to take paid annual leave in particular circumstances if the requirement is reasonable, or which allow for an employee to be required to take annual leave in particular circumstances if the requirement is reasonable.

[60] The impugned paragraph is a term that on its face requires an employee to take annual leave during any part of the year and for any number of days that CSRP may direct. The effect of a direction given by CSRP to an employee to take annual leave pursuant to that paragraph, as we have already observed, is to limit the circumstances in which an employee may take annual leave by agreement with his or her employer in accordance with s.88 of the FW Act. The provision does not identify any "*particular circumstances*" in relation to which the requirement that an employee take annual leave would be invoked. We therefore doubt that the provision may properly be described as a term in an agreement which requires, or allows an employee to be required "*to take paid annual leave in particular circumstances*". It seems to us that for a term of an enterprise agreement to come within the permissible scope of s.93(3), the term itself must describe the "*particular circumstances*" in which the employee is required, or in which the clause permits the employee to be required, to take annual leave.

[61] The third paragraph of clause 8.1 is no more than a conferral upon CSRP of an
unfettered right to direct an employee to take annual leave. No particular circumstances in which the power to require an employee to take annual leave will be exercised is disclosed……

……

> **[73]** Section 56 of the FW Act relevantly provides that a term of an enterprise agreement has no effect to the extent that it contravenes s.55. It would be open to us to do nothing and allow s.56 to have operational effect on the provisions affected by the challenge mounted in ground two of the notice of appeal. However, we do not think it is desirable, when there is an opportunity to take rectification action, to allow an agreement to continue operating with provisions of doubtful legal efficacy. Moreover, employees covered by the Agreement and those who in the future will be covered by the Agreement deserve to understand their rights and obligations under the Agreement without recourse to a lawyer or the legal niceties of s.56. For that reason we propose to quash the Decision and to re-hear the application for the approval of the Agreement for ourselves.

[113] Clause 57.9 of the Professional Staff Agreement and clause 77.9 of the Academic and Teachers Enterprise Agreement appear to me to share the defects that were found by the Full Bench in the CSRP decision.

[114] The clauses confer a wide discretion on the University and do not disclose the particular circumstances in which the power to require an employee to take annual leave will be exercised. Furthermore the way the clauses were applied in relation to the exemption process failed to allow the wishes of the staff member concerned to be properly considered because the communication of the exemption process focussed on the operational needs of the University not the personal needs of the individual.

[115] I consider the clauses to be unreasonable in that they contain no obligation upon the University to engage with the individual employee so that their particular needs can be considered, there is no required notice (or reference to reasonable notice) for the timing of the taking of the leave and there is no requirement for a certain leave balance to remain once the directed leave is taken – something that was considered necessary by the Federal Parliament when they enacted the Jobkeeper legislation in response to the COVID-19 situation.

[116] Furthermore, the direction issued under the clauses fails the tests of reasonableness contained in the Explanatory Memorandum.[xxvi] The University exemption process was insufficient to allow it to take into consideration the individual needs of employees in relation to the taking of leave or the timing of taking the leave. It was weighted towards the needs of the University.

[117] Guided by the CSRP decision I consider that the clauses are contrary to s.93(3) of the Act and pursuant to s.56 of the Act have no effect. The enterprise agreements do not otherwise allow the direction and consequently the direction was not available to the University under the Act.

[118] The circumstance facing the parties was a perfect storm. The Vice Chancellor and the Pro-Vice Chancellor COVID-19 Response Lead were seized with a sense of urgency about the needs of students and staff, as they saw them. The Chief People and Culture Officer had only been in his role for 15 days. The Associate Director – Employee Relations and Work, Health and Safety, who had been in his role since April 2016 was not in attendance at the meeting where the decision to issue the direction was made. The NTEU Acting Branch President had been in the role for 24 days. Approximately 24 hours separated the making of the decision from the issuing of the direction. The University's siloed decision making was

exacerbated by a lack of considered dialogue with the representatives of those affected. As a consequence some of the matters that would usually be had regard to when making a decision like this were missed. Unfortunately, the old saying "act in haste, repent at leisure" appears apt.

[119] The answer to question 2 is **no.**

Conclusion

[120] As a consequence of my decision it is my opinion that the University should recredit 5 days annual leave to current professional staff and teachers, and pay 5 day's pay to any former professional staff or teacher who was affected, but whose employment has since ended.

DEPUTY PRESIDENT

Appearances:

Mr J Gava, for Applicant

Mr R Warren, counsel for Respondent

Hearing details:

Video via Microsoft Teams

17 November 2020

18 November 2020

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[i] Exhibit UON 2 Statement of Elizabeth Burd dated 16 October 2020 paragraph 15.

[ii] Statement of Agreed Facts filed 18 September 2020 paragraph 13, pages 39 – 45 Court Book.

[iii] Exhibit NTEU 5 Statement of Daniel Conway dated 2 October 2020 Annexure DC7.

[iv] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [197].

[v] See for example *Kucks v CSR Limited* (1996) 66 IR 182 at 184 and *City of Wanneroo v Australian, Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at 440; AMIEU v *Golden Cockerel* Pty Limited [2014] FWCFB 7447 at [19]–[22].

[vi] Exhibit NTEU 1 Statement of Allison Hiller dated 2 October 2020 paragraph 3-7.

[vii] Exhibit NTEU1 Statement of Allison Hillier dated 2 October 2020 Annexure AH9.

[viii] Exhibit NTEU1 Statement of Allison Hillier dated 2 October 2020 Annexure AH4 and AH6.

[ix] Exhibit NTEU 2 Statement of Dr Suzanne Ryan dated 2 October 2020.

[x] Exhibit NTEU 3 Statement of Emmal Joel dated 2 October 2020.

[xi] [xi] Exhibit NTEU 5 Statement of Daniel Conway dated 2 October 2020.

[xii] Exhibit NTEU 5 Statement of Daniel Conway dated 2 October 2020 Annexure DC8.

[xiii] Exhibit NTEU 5 Statement of Daniel Conway dated 2 October 2020 Annexure DC11.

[xiv] Exhibit NEU 6 Statement of Dr Tim Connor dated 30 October 2020.

[xv] [2015] FWCFB 5771

[xvi] [2015] FWCFB 3124.

[xvii] Exhibit UON 1 Statement of Professor Alexander Zelinsky dated 20 October 2020.

[xviii] Statement of Elizabeth Burd dated 16 October 2020.

[xix] Transcript of 17 November 2020 P500

[xx] Exhibit UON 3 Statement of Mark Wylie dated 19 October 2020.

[xxi] Exhibit UON 3 Statement of Mark Wylie dated 19 October 2020 Annexure MW4.

[xxii] Exhibit UON 4 Statement of Martin Sainsbury dated 20 October 2020.

[xxiii] Respondent's Outline of Submissions dated 20 October 2020 paragraph 25-26, pages 191-196 Court Book.

[xxiv] Respondent's Outline of Submissions dated 20 October 2020 paragraph 22-23, pages 191-196 Court Book

[xxv] [2017] FWCFB 2101.

[xxvi] Explanatory Memorandum of Fair Work Bill 2008, paragraph 382.