DECISION

Fair Work Act 2009
s.739—Dispute resolution

Dr Ngoc Le
v
Western Health
(C2019/4604)

COMMISSIONER HARPER-GREENWELL MELBOURNE, 7 DECEMBER 2020

Enterprise Agreement - dispute about matters arising under the AMA Victoria - Victorian Public Health Sector - Medical Specialists Enterprise Agreement 2018-2021 – correct construction and application of disputes clause – s.739 Fair Work Act 2009.

[1] Dr Le filed an application in the Fair Work Commission (the Commission) against Western Health alleging that she had been bullied at work (the Bullying Application). She subsequently filed an F10 application (the Dispute Application) asking the Commission to hear and determine an alleged dispute pursuant to s. 739 of the *Fair Work Act 2009* (the Act).

[2] The respondent to the application is Western Health, a publicly funded organisation that is responsible for the management of three public hospitals in Victoria. Western Health objects to the application being heard and determined by the Commission.

[3] The Bullying and Dispute Applications were heard concurrently. On 4 October 2020 I issued a decision[1] concerning the Bullying Application. This decision relates to an alleged contravention of clause 12 (Discipline) of the *AMA Victoria - Victorian Public Health Sector-Medical Specialists Enterprise Agreement 2018-2021*[2] (the Agreement). The Agreement is a single enterprise agreement that covers and applies to Dr Le and Western Health.

[4] Dr Le submits that as at 31 October 2018 Western Health and Dr White not only held concerns about her performance and conduct, they had reached conclusions about the nature and quality of the performance issues and conduct. Dr Le submits it is in those circumstances that Western Health has failed to comply with clause 12 of the Agreement.[3]

[5] Western Health submits Dr Le has not complied with the terms in clause 11 (Dispute Resolution) of the Agreement therefore the Commission has no jurisdiction to hear and determine the dispute application.

Relevant Law and Agreement terms

[6] Section 595 of the Act empowers the Commission to deal with disputes if it is expressly authorised to do so under or in accordance with the Act. The Commission can deal with disputes in a number of ways, including by mediation or conciliation, making a

recommendation or expressing an opinion. The Commission can only arbitrate a dispute with the express agreement of the parties to the dispute.[4]

[7] Section 739 of the Act empowers the Commission to deal with certain disputes under an enterprise agreement procedure for dealing with disputes.

[8] The Agreement contains a procedure for dealing with disputes at clause 11:

"**Dispute Resolution**

11.1 Resolution of disputes and grievances

(a) For the purpose of this clause 11, a dispute includes a grievance.

(b) This dispute resolution procedure will apply to any dispute arising in relation to:

(i) this Agreement;
(ii) the NES;
(iii) a request for flexible working arrangements;
(iv) a request for an additional 12 months parental leave; or
(v) matters purported to be saved due to the operation of the Savings provision.

(c) A party to the dispute may choose to be represented at any stage by a representative including the Association or employer organisation. A representative, including the Association or employer organisation on behalf of a Health Service, may initiate a dispute.

11.2 Obligations

(a) The parties to the dispute and their representatives must genuinely attempt to resolve the dispute through the processes set out in this clause and must cooperate to ensure that these processes are carried out expeditiously.

(b) While the dispute resolution procedure is being conducted work will continue normally according to the usual practice that existed before the dispute, until the dispute is resolved.

(c) This requirement does not apply where a Doctor:

(i) has a reasonable concern about an imminent risk to his or her health or safety;
(ii) has advised the Health Service of the concern; and
(iii) has not unreasonably failed to comply with a direction by the Health Service to perform other available work that is safe and appropriate for the Doctor to perform.

(d) No party to a dispute or person covered by the Agreement will be prejudiced with respect to the resolution of the dispute by continuing work under subclause 11.2(b).

11.3 Dispute settlement facilitation

(a) Where the chosen representative is another Doctor employed by the Health Service, that Doctor will be released by the Health Service from normal duties as is reasonably necessary to enable them to represent the Doctor/s including:

(i) investigating the circumstances of the dispute; and
(ii) participating in the processes to resolve the dispute, including conciliation and arbitration.

(b) A Doctor who is part of the dispute will be released by the Health Service from normal duties as is reasonably necessary to enable them to participate in this dispute settling procedure so long as it does not unduly affect the operations of the Health Service.

11.4 Discussion of dispute at workplace

(a) The parties will attempt to resolve the dispute at the workplace as follows:

(i) in the first instance by discussions between the Doctor/s and the relevant supervisor; and
(ii) if the dispute is still unresolved, by discussions between the Doctor/s and more senior levels of local management.

(b) The discussions at subclause 11.4(a) will take place within fourteen days or such longer period as mutually agreed, save that agreement will not be unreasonably withheld.

(c) If a dispute cannot be resolved at the workplace it may be referred by a party to the dispute or representative to the FWC for conciliation and, if the matter in dispute remains unresolved, arbitration.

11.5 Disputes of a collective character

Disputes of a collective character may be dealt with more expeditiously by an early reference to the FWC. However, no dispute of a collective character may be referred to the FWC directly without a genuine attempt to resolve the dispute at the workplace level.

11.6 Conciliation

(a) Where a dispute is referred for conciliation, the FWC member will do everything the member deems right and proper to assist the parties to settle the dispute.

(b) Conciliation before the FWC is complete when:

(i) the parties to the dispute agree that it is settled; or
(ii) the FWC member conducting the conciliation, either on their own motion or after an application by a party, is satisfied there is no likelihood that further conciliation will result in settlement within a reasonable period; or
(iii) the parties to the dispute inform the FWC member there is no likelihood the dispute will be settled and the member does not have substantial reason to refuse to regard conciliation as complete.

11.7 Arbitration

(a) If, when conciliation is complete, the dispute is not settled, either party may request the FWC proceed to determine the dispute by arbitration.

(b) The FWC member that conciliated the dispute will not arbitrate the dispute if a party objects to the member doing so.

(c) If the dispute resolution procedure results in a finding by the FWC that a breach of the Savings provision of this Agreement has occurred, the parties agree that the order of the FWC under this subclause 11.7 will be to restore all rights and entitlements affected by the breach to the state which would have prevailed if the breach had not occurred.

(d) Subject to subclause 11.7(e) below, a decision of the FWC is binding upon the persons covered by this Agreement.

(e) An appeal lies to a Full Bench of the FWC, with the leave of the Full Bench, against a determination of a single member of the FWC made pursuant to this clause.

11.8 Conduct of matters before the FWC

Subject to any agreement between the parties to the dispute in relation to a particular dispute or grievance and the provisions of this clause, in dealing with a dispute or grievance through conciliation or arbitration, the FWC will conduct the matter in accordance with sections 577, 578 and Subdivision B of Division 3 of Part 5-1 of the Act."

[9] Dr Le asserts that Western Health failed to comply with Clause 12 Discipline which provides:

"**12.1 Application**

(a) Where a Health Service has concerns about:

(i) the conduct of a Doctor; or
(ii) a performance issue that may constitute misconduct,
the following procedure will apply.

(b) There are two steps in a disciplinary process under this clause as follows:

(i) investigative procedure; and
(ii) disciplinary procedure.

(c) A Doctor will be provided a reasonable opportunity to be represented at any time (including by the Association) with respect to all matters set out in this clause.

12.2 Definitions

(a) **Performance** means the manner in which the Doctor fulfils his or her job requirements. The level of performance is determined by a Doctor's knowledge, skills, qualifications, abilities and the requirements of the role.

(b) **Conduct** means the manner in which the Doctor's behaviour impacts on their work.

(c) **Misconduct** means a Doctor's intentional or negligent failure to abide by or adhere to the standards of conduct expected by the Health Service. A performance issue can be considered misconduct where, despite all reasonably practicable interventions by the Health Service, the Doctor is unable to fulfil all or part of their job requirements to a satisfactory level.

(d) **Serious misconduct** is as defined under the Act and is both wilful and deliberate. Currently the Act defines serious misconduct, in part, as:

(i) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
(ii) conduct that causes serious and imminent risk to:
(A) the health or safety of a person; or
(B) the reputation, viability or profitability of the employer's business.

Conduct that is serious misconduct includes each of the following:

(iii) the Doctor, in the course of the Doctor's employment, engaging in:
(A) theft; or
(B) fraud; or
(C) assault;
(iv) the Doctor being intoxicated at work;
(v) the Doctor refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

Subclauses 12.2(d)(iii)-12.2(d)(v) do not apply if the Doctor is able to show that, in the circumstances, the conduct engaged in by the Doctor was not conduct that made employment in the period of notice unreasonable.

12.3 Investigative procedure

(a) The purpose of an investigative procedure is to conclude whether, on balance, concerns regarding conduct or performance are well-founded and supported by evidence. An investigation procedure must be fair including proper regard to procedural fairness.

(b) The Health Service will:

(i) advise the Doctor of the concerns and allegations in writing;
(ii) provide the Doctor with any material which forms the basis of the concerns;
(iii) ensure the Doctor is provided a reasonable opportunity to answer any concerns including a reasonable time to respond;
(iv) advise the Doctor of their right to have a representative, including a representative of the Association;
(v) ensure that the reason for any interview is explained; and
(vi) take reasonable steps to investigate the Doctor's response.

12.4 Disciplinary procedure

(a) The disciplinary procedure applies if, following the investigation, the Health
Service reasonably considers that the Doctor's conduct or performance may warrant disciplinary steps being taken.

(b) The Health Service will:

(i) notify the Doctor in writing of the outcome of the investigation process, including the basis of any conclusion; and
(ii) meet with the Doctor.

(c) In considering whether to take disciplinary action, the Health Service will consider:

(i) whether there is a valid reason related to the conduct or performance of the Doctor arising from the investigation justifying disciplinary action;
(ii) whether the Doctor knew or ought to have known that the conduct or performance was below acceptable standards; and
(iii) any explanation by the employee relating to conduct including any matters raised in mitigation.

12.5 Possible outcomes

(a) Where it is determined that after following the procedures in this clause that disciplinary action is warranted, the Health Service may take any of the following steps depending on the seriousness of the conduct or performance:

(i) counsel the Doctor, with the counselling recorded on the Doctor's personnel file;

(ii) give the Doctor a first warning, which will be verbal and a record of the warning recorded on the Doctor's personnel file;
(iii) give the Doctor a second written warning in the event that the Doctor has previously been given a first warning within the previous 12 months for that course of conduct;
(iv) give the Doctor a final written warning in the event that the Doctor has previously been given a second written warning within the preceding 18 month period for that course of conduct;
(v) terminate the Doctor's employment on notice in the case of an employee who repeats a course of conduct for which a final warning was given in the preceding 18 months;
(vi) terminate the Doctor's employment without notice where the conduct is serious misconduct within the meaning of the Act that is wilful and deliberate; or
(vii) as an alternative to subclause 12.5(a)(vi) above and in those circumstances, the Health Service may issue the Doctor with a final warning without following the steps in subclauses 12.5(a)(i) to 12.5(a)(iii) above.

(b) The Health Service's decision and a summary of its reasons will be notified to the Doctor in writing.

(c) If after any warning, a period of 12 or 18 months elapses (as relevant) without any further warning being required, all adverse reports relating to the warning must be removed from the Doctor's personnel file.

(d) A dispute over this clause is to be dealt with in accordance with the Dispute Resolution Procedure of this Agreement."

[10] In *The Australian Meat Industry Employees Union v Golden Cockerel Pty Limited*[5] a Full Bench of this Commission set out the relevant principles to be applied in the construction of agreements. These principles were revised in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited.*[6]

[11] I respectfully adopt and apply these principles in reaching this decision.

The dispute

[12] Dr Le alleges that Dr White, Ms Hill and Dr Eleftheriou have, in raising concerns about her conduct and performance, failed to comply with clause 12 of the Agreement as at or before 31 October 2018, or at the very least as at 15 February 2019.

[13] Western Health does not take issue with the dispute being a dispute arising in relation to the Agreement. However, it objects to Dr Le's application, submitting that the Commission does not have jurisdiction to hear and determine the dispute as there is no evidence that Dr Le has satisfied the relevant preconditions set out in clause 11 of the Agreement.

Respondents Jurisdiction Objection Submissions

[14] Western Health submits that Dr Le must comply with the terms of the applicable dispute resolution clause, before the Commission's powers of arbitration can be enlivened and that the burden of establishing the Commission's jurisdiction lies with Dr Le, being the party purporting to invoke it.[7]

[15] Western Health submits there is an obligation in clause 11.2 for the parties and their representatives to genuinely attempt to resolve any dispute. There are four stages to the dispute resolution process set out in clause 11. The first step requires that the parties must attempt to resolve the dispute in discussions between the employee and their supervisor in the first instance. If the dispute remains unresolved it is to be escalated to be addressed between the employee and "more senior levels of local management". Should the dispute not resolve at stage two then it may be referred to the Commission for conciliation in accordance with the terms set out in clauses 11.6 and 11.8 of the Agreement. Each of the preceding steps must be complied with before the Commission can arbitrate the dispute.[8]

[16] Western Health further submits that Dr Le has not properly invoked the jurisdiction of the Commission because she has failed to comply with the preconditions contemplated in clause 11. Western Health's contention is that Dr Le did not raise the dispute with her "relevant supervisor" in accordance with clause 11.4(a)(i). In this instance Dr Le's "relevant supervisor" is and was Dr White.[9]

[17] Dr Le has been absent from the workplace since 25 February 2019 and Western Health submits that she has not at any stage discussed her grievance that is the subject of this dispute with Dr White or attempted to have her representative discuss these matters with Dr White. Western Health argues that not having satisfied the first step in the dispute resolution process in clause 11, Dr Le is unable to escalate the dispute to "more senior levels of local management".[10]

[18] Western Health further submits due to the operation of clause 11.4(b) of the Agreement Dr Le is now time-barred from raising the dispute in relation to conduct that occurred in October 2018 or February 2019.[11]

[19] Dr Le raised her concerns about Western Health's compliance with clause 12 of the Agreement for the first time on 27 July 2019 when her solicitors wrote to the Chief Executive Officer of Western Health. Western Health submits that this was beyond the timeframes contemplated by the terms of clause 11.4(b).

[20] Western Health submits should the Commission make a finding that it has jurisdiction to determine the Dispute Application it should otherwise be dismissed.[12]

Applicant Jurisdiction Submissions

[21] Clause 11.7 of the Agreement provides that if a dispute is not settled through conciliation, on the request of either party, the Commission may determine the dispute by arbitration. Following completion of the conciliation before the Commission without resolution, Dr Le requested the Commission proceed to determine the dispute by arbitration. Dr Le submits Western Health did not raise an objection to the Commission arbitrating at the time of Dr Le's request. Dr Le submits that it follows there is no jurisdictional obstacle and

the Commission is capable of exercising its powers as contemplated and authorised by clause 11.7 of the Agreement.[13]

[22] It is Dr Le's submission that Clause 11 of the Agreement has been complied with and at no point prior to the issuing of the directions in this matter did Western Health advance the proposition that conciliation should not have proceeded because the Commission did not have jurisdiction to deal with the Application. Further, she submits that Western Health did not advance any reservation during the conciliation or prior to the issuing of directions. Dr Le proceeded on the assumption that the matter was validly before the Commission and seeks relief pursuant to the arbitration power referred to in clause 11.7 of the Agreement. [14]

[23] Dr Le submits that a survey of the evidence in the witness statements shows that there was a whole course of exchanges well before and after she went on sick leave in February 2019 in which Ms Hill and other senior officers of the hospital participated and in that course of correspondence the question of whether Dr Le was being treated in the way that she should be treated was the subject of consideration and exchanges at the highest level.

[24] It is Dr Le's submission that the question of whether there was compliance with the steps that are prescribed by a dispute settlement provision is a question, not of technicality but of substance.[15] Dr Le submits it simply does not lie in the mouth of the respondent to propose that there is not a dispute in respect of which the Commission has cognisance. The proposition put by Western Health is on the basis that there wasn't a discussion about the dispute with Dr White in circumstances where the whole matter of the treatment by Dr White had been escalated right up to the highest levels of management of the hospital. Dr Le submits the consequence of the proposition advanced by Western Health would result in an absurd outcome being that Dr Le would have to hold a discussion with Dr White about the complaints she had previously raised with Dr White and others about her treatment of Dr Le.

The Evidence

[25] The background and evidence in this matter is set out in the Bullying Decision and I do not intent to repeat all of the evidence here. It is however necessary to set out in some detail the email correspondence that took place between Dr Le and Dr White on 31 October 2018 and subsequently between Dr Le and Dr Eleftheriou that is relevant to this matter.

[26] The evidence led by Dr Le was that on 31 October 2018 she received an email from Dr White outlining a number of concerns and that Dr White had reached conclusions about her performance and conduct. It is this email *inter alia* that Dr Le relies upon in her assertions that clause 12 of the Agreement has not been complied with. It is also part of the evidence relied on by Dr Le in support of her claim that she had complied with clause 11 of the Agreement.

[27] Dr White's email[16] set out below states the following:

> "We have spoken on two occasions where we discussed some issues related to our expectations of you in your role as a Consultant Rehabilitation specialist at Western Health (WH)
>
> I was concerned about your response as I felt that you were struggling to reflect on the changes expected of you and had some difficulty taking in the feedback provided.

My concerns are around;

> *that a disagreement with a manager about a transfer of a patient referred to rehab was inappropriately documented in the patients notes. When provided with the feedback that this was not appropriate you stated that you did not agree. I had no assurance from you that you would not do so again.
> *that there has been feedback from ward staff about multiple negative comments and the failure to manage poor morale regarding the ability of staff to manage complex patients on the ward. These issues have not been escalated appropriately or potential solutions raised by yourself. We have explained that more is expected of you as a clinical leader in the ward environment.
> *that you expressed to me that it was not a concern to you if there were large numbers of patients in the ED awaiting beds, despite available beds in rehab, if you felt that particular patients should not come into your ward. This was separate from any question of the patients being medically stable. This statement is not acceptable and is not consistent with the values of WH and leaves patients at risk of harm.

My expectations going forward are;

> *that for each patient referred to the rehab service the question is asked "does this patient need to be in an acute bed?" and if the answer is no, the onus is on yourself to help the acute unit find an alternative pathway-either to home or the next best subacute bed,
> *that these decisions are made in a timely fashion so that each patient receives the right care in the right place at the right time
> *that complex discharge planning is a valid and appropriate reason to be transferred to a rehab bed
> *that all efforts are made to fill empty beds as early in the day as possible
> *that all problems and issues of concern are approached with staff in a positive and professional manner, recognising the leadership position that comes with being a Rehabilitation Consultant.
> *that any disagreements about the right bed for a particular patient are not to be documented in the patient file but escalated appropriately to your line managers.
> *that a whole of organisation approach is to be used regarding decisions around the transfer of subacute patients, where there are significant pressures on the system to best safeguard the interests of all patients across WH

I am happy to discuss the above issues further. I am always available to help solve problems on the ground for individual patients if needed. As previously discussed, if you feel there is any way that WH or myself can support you more in your role, then please feel free to discuss this with me as we are willing to help. (emphasis added)

I really hope that we can see some changes in your approach to the above issues, however, if any are repeated formal disciplinary processes may need to be commenced. I do hope we can continue to work together in a collaborative and positive manner.

Clare"

[28] Dr Le responded to the email in writing on 1 November 2018[17]. Dr Le provided the following response to each of the concerns raised by Dr White.

- I have been asked to provide a rehabilitation medical opinion regarding the patient's rehabilitation goals and the appropriate aim of treatment as well as the expected outcome, without compromising the patient's medical care. It was a medical decision, NOT an administrative one. I think we should be clear when the decision is medical or administrative as it does have different legal ramification.
- I think it is more appropriate to give specific examples. I believe in my clinical management of rehabilitation patients and the extra supports that I have been provided to my team members in managing complex patients on the ward. If there are issues then this should be raised. There are many forums where these could be brought up including unit meetings, and audits.
- I do not recall having stated this. On the contrary, I can give you a recent example of the time I personally organise a direct admission for a patient to come to the ward from ED because I believed that was in the patient's best interest. Moreover, there were numerous occasions that the rehabilitation team have done above and beyond our duty to ensure that patients' discharge can be brought forward to create beds. And this is clearly reflected in the recent AROC benchmark which recognised our work over the past year. I also think that it is inappropriate to raise accusation about the ED situation as I am tasked with looking after rehabilitation patients, managing the issues pertaining to my specialty. The bed issues are administrative. Rehabilitation patients can only be discharged when it's appropriate. And likewise, patients should only be admitted to a rehabilitation ward when appropriate without compromising their care.

[29] In her correspondence Dr Le then turns to deal with each of Dr White's expectations, providing the following responses:

- My work is to deal with the rehabilitation issues. If patients do not have rehabilitation goal, and does not fit the acute bed, then there should be an official pathway that they can take. Currently, it is operating on an ad hoc basis.
- I have no issue with the patients needing rehabilitation care. What is currently unclear is the patients who do not have rehabilitation goal. And the other issue to consider is whether they have priority over patients who have clear rehabilitation goals.
- Many of the rehabilitation patients have complex discharge planning. This is seen across all fields. I think it is unreasonable for rehabilitation to take on the hospital load of complex discharge planning for all specialties, particularly when the specialities pertaining to the patients' medical needs do want to be involved with the discharge process.
- I believe that all efforts should and have been made. If there are specific patients or circumstances, then you should bring them to my attention.
- Again, I need specific examples of these accusations. I can confidently state I have provided the support that the team required for the management of complex patient whilst being respectful of their professional opinion. I think it is not appropriate for non rehabilitation staff to dictate what a Rehabilitation Consultant should do. For example, just as I have no right to dictate or interfere with a geriatrician or an

> orthopaedic surgeon work. We may have disagreement, but these should be discussed in a non-threatening manner in an appropriate forum. (emphasis added)

[30] Dr Le's evidence is that she regarded Dr Whites's behaviour in sending the email as an instance of bullying conduct and that the email expressed concluded views about her performance which were reached without any fair inquiry into or fair-minded consideration of the facts and circumstances relevant to the formation of views on the subjects concerned[18]

[31] Dr White responded to Dr Le on 10 November 2018 stating that she would consider the response and get back to her.[19]

[32] Dr Le did not wait for a response from Dr White, she sought assistance from the Australian Medical Association Victoria (AMA) and subsequently sent an email the next day to Western Health's Chief Medical Officer, Dr Paul Eleftheriou.[20]

[33] In her correspondence to Dr Eleftheriou on 11 November 2018[21], Dr Le states the following:

> " …
>
> I am writing to you seeking your help in providing an independent clarification on the issues which have resulted in significant conflict, particularly between Dr Claire White (subacute medical director) and myself. We have had email exchanges in which we have expressed our disagreement, and I think these are unlikely to be resolved in the near future without an external independent review.
>
> … "

[34] Dr Le then proceeds to outline some details about the history of the ward and the work environment before she states that "these expectations have become more unrealistic for us to accommodate which resulted in significant conflict between Dr White and myself, as well as low morale in the rehabilitation ward staff and the trainees rotating through the unit." Dr Le proceeds to address some of the general concerns raised by Dr White's 31 October 2018 email and providing some background and her explanation for each of the issues raised. Dr Le states amongst other things that:

> "Of great concern is the ongoing lack of respect for our rehabilitation specialty. It is quite condescending when we are not seen as "proper" physician. I think it is time for others to realise that their ignorance is causing great distress to us rehabilitation physicians as well as our trainees. Examples of these disrespectful and thus unacceptable behaviours include:
>
> -A patient on the rehabilitation ward with deterioration of the respiratory condition and it was evident that the nursing staff on the rehabilitation ward could not provide the intensive nursing care that the patient needed (due to the lower nursing staff-to-patient ratio and patient's medical instability). When I asked for help to transfer the patient to the acute ward which was endorsed by ICU liaison and after hour coordinator, not only that I did not get the support required, I was also told that I may have over-reacted as "you are not physician trained". The patient later died of the respiratory related problem.

> -Telling us how to do our job without understanding the patient situation, and not understanding the rehabilitation medical issues as they are of a different specialty.
>
> -Dictating what we can or cannot write in clinical documentation.
>
> -Ignoring our concerns and talking to us in a condescending manner "you rehab people"."

[35] Dr Le concludes by stating:

> "It is disappointing that there is a lack of recognition of our achievement, and the stressful work condition. Furthermore, when disagreement arises, I receive a threatening email for which I can't help but felt being bullied by my medical director.
>
> As a team we need help to improve our working condition so that our team don't get burn out or lose our highly skilled and devoted staff due to poor working conditions and low morale" [22] (sic)

[36] After consulting with Dr White, Dr Eleftheriou wrote back to Dr Le on 12 November 2018 suggesting that a meeting be held with Dr White in an attempt to resolve the disagreement before the matter is taken externally. Dr Eleftheriou's evidence was that Dr White was "definitely keen to resolve this professionally".[23]

[37] Dr Le responded on 13 November 2018 agreeing to attend a meeting stating "I think it is a good idea for us to meet and work through these issues". Dr Le informed Dr Eleftheriou that she would bring her representative to the meeting.[24] Dr Eleftheriou responded that same day informing Dr Le that he would consult with Human Resources and get back to her as to how they would proceed. Dr Eleftheriou subsequently arranged a meeting with Dr Le and Ms Hill.

[38] On 18 December 2018 Dr Le attended the office of Dr Eleftheriou along with Ms Hill and Mr Ryan from AMA. Dr Eleftheriou recommended that Dr Le and Dr White attend a mediation in an attempt to resolve the issues between them. Dr Le informed Dr Eleftheriou that she did not feel comfortable talking to Dr White and that she felt threatened by her. Dr Eleftheriou recommended a third party facilitate/mediate the grievance to resolve the issue. Mr Ryan proposed an independent third party review the communication issues and facilitate a way forward.[25]

[39] On 20 December 2018 Dr Eleftheriou wrote to Dr Le seeking a response to his proposal to "facilitated/mediated discussion."[26]

[40] On 21 December 2018 Mr Ryan wrote to Dr Eleftheriou on behalf of Dr Le with an alternative proposal. In his proposal Mr Ryan wrote that whilst Dr Le does not consider communication between herself and Dr White to be the issue he suggests that an independent internal reviewer/facilitator examine the communication issues between Dr White and Dr Le.[27] Mr Ryan's email requests that the internal reviewer looks at the communication between Dr Le and Dr White and separately talk to all of the staff in the Rehab Unit. Mr Ryan states:

> "We are not suggesting this is a problem specifically related to Clare! We are advising you that there is a complex and serious issue involving the utilisation of an operation within the Rehab Unit that needs to be understood and once understood it needs to be acknowledged and once acknowledged it can be addressed."[28]

[41] Due to the Christmas period Dr Eleftheriou didn't respond to Dr Le until 10 January 2019 when he informed her that he was still considering her proposal.[29]

[42] On 29 January 2019, Ms Hill wrote to Mr Ryan informing him that they had considered his proposal and whilst they understand that Dr Le had taken offence to Dr White's email, she was within her rights as a manager to set out her expectations of Dr Le and therefore Western Health had concluded that the proposal submitted on Dr Le's behalf was inappropriate in the circumstances. Ms Hill proceeded to inform Mr Ryan that it was Western Health's intention to move to a formal process.

[43] On Dr Le's first day back from leave she was provided with the letter directing her to attend a performance meeting on 28 February 2019. Dr Le proceeded to be absent from work on or around 25 February 2019 however she continued to correspond with Western Health through her lawyers.

[44] On 17 April 2019 Dr Le filed an application in the Commission against Western Health alleging that she had been bullied at work. On 26 July 2019 Dr Le filed her Dispute Application in the Commission.

Consideration

[45] The Commission's powers to deal with disputes under an enterprise agreement are drawn from sections 595 and 739 of the Act and the relevant dispute resolution clause in the Agreement. Section 595 provides that the Commission may deal with a dispute "*only*" if it is "*expressly authorised to do so under or in accordance with another provision of (the Act)*". Section 739 of the Act makes clear that the Commission's function in dealing with a dispute referred to it under an enterprise agreement is dependent on the terms of that agreement.

[46] Section 739(3) provides that, in dealing with a dispute under a term in an enterprise agreement, the Commission "*must not exercise any powers limited by the term*". Section 739(4) states that if, in accordance with a term in an enterprise agreement, the parties have agreed that the Commission may arbitrate a dispute, the Commission may do so. Section 739(5) states that the Commission "*must not make a decision that is inconsistent with" (relevantly) an enterprise agreement, or with the FW Act*".

[47] It is well accepted that parties to an agreement may structure or limit the role of the Commission and s.739 makes clear that the Commission's function in dealing with a dispute referred to it under an enterprise agreement depends on the terms of the agreement. The Commission has no general discretion under the Act to deal with disputes even if it is impossible for a party to comply with the dispute resolution clause.[30]

[48] The Full Bench in *The Australian Workers' Union v MC Labour Services Pty Ltd*[31] considered the issue where it is genuinely impossible for a party to comply with mandatory steps in a dispute resolution procedure. The Full Bench observed that the existence of such circumstances did not empower the Commission to recast or ignore certain steps in a dispute

clause.[32]The Full Bench concluded that once in operation the agreement is presumed to be valid and that the Commission does not have general discretion under the Act to deal with a dispute under an enterprise agreement.

[49] Western Health as with most employers can in the circumstance participate voluntarily in dispute resolution procedures before the Commission (such as attending a conference/conciliation). Attending a voluntary conciliation does not prevent the Commission proceeding to determine the matter by way of a jurisdictional objection such as that raised by Western Health.

[50] It is not uncommon for parties to agree to participate in a conciliation to attempt to resolve matters before a tribunal or court in a less formal manner before raising a jurisdiction objection. It is often the case that parties participate voluntarily to prevent having to go through lengthy or protracted proceedings and to avoid the expense of litigation. Voluntary participation does not automatically result in the Commission having jurisdiction to deal with the matter, nor does it enable the Commission to sidestep determining whether or not it has jurisdiction before it can proceed to determine the substantive issue. It would be an unfortunate consequence if the Commission was prevented from assisting parties resolve disputes through voluntary conciliation prior to determining whether or not it had jurisdiction in every matter.

[51] Clause 11 is clear in its terms. Clause 11.1 provides that the dispute resolution procedure will apply to any dispute arising in relation to the Agreement. Clause 11.2 sets out the obligations of the parties to the dispute and their representatives and states that they must genuinely attempt to resolve the dispute through the processes set out in the disputes clause and must cooperate to ensure that those processes are carried out expeditiously. Clause 11.3 provides general dispute resolution principles detailing how the resolution process will be facilitated.

[52] Clause 11.4 sets out prerequisite steps to be followed prior to the Commission dealing with a dispute, those steps must be followed. In circumstances where the dispute clause is not complied with the Commission cannot deal with the dispute.

[53] Clause 11.4(a)(i) requires the parties to attempt to resolve the dispute at the workplace by in the first instance holding discussions between the Doctor/s and the relevant supervisor. If the dispute remains unresolved, the next step is to hold discussions between the Doctor/s and more senior levels of local management.

[54] Although Dr Le had written to Dr White stating that the issues contained in her email should be resolved in a less threatening manner, she chose to take a more punitive approach herself and prematurely escalated her dispute to more senior levels of management. Even though Dr White had committed to coming back to Dr Le in response to her concerns, Dr Le did not give Dr White the courtesy of a response. Instead she engaged her representative and prematurely escalated her grievance to Dr Eleftheriou, denying Dr White the opportunity to resolve the grievance.

[55] As to the issue of whether or not Dr Le raised a dispute that clause 12 had not been complied with, this issue cannot be viewed narrowly. Dr Le was largely concerned that Dr White's conduct was bullying by its nature and she was determined to have Dr White's conduct reviewed by an independent person.

[56] Dr Le disagreed with the content of the 31 October 2018 letter and although she first suggested that such matters be resolved in a manner that was not threatening, she herself sought to take a punitive approach. Dr Le took particular issue with the threat of formal processes being engaged if Dr White was not satisfied that Dr Le had changed her behaviour relevant to the matters raised.

[57] The grievance that Dr Le raised with Dr Eleftheriou was that Dr Le felt bullied by Dr White's approach and that she felt she was undervalued, she also raised issues questioning Dr Whites authority. The email from Mr Ryan makes it clear that the dispute was not specifically pertaining to a breach of clause 12 of the Agreement. Mr Ryan wrote that Dr Le was not suggesting the problem specifically related to Dr White but was a more complex issue involving the utilisation of an operation within the Rehab Unit.

[58] The evidence suggests that the grievance Dr Le raised with Dr Eleftheriou were of a nature of a disagreement relating to the content of Dr White's email and that Dr Le felt the Rehab Department was undervalued and not receiving enough recognition. Dr Le also raised issues of bullying.

[59] In his response, Dr Eleftheriou suggested the parties try to resolve the disagreements locally before taking the matter externally. Dr Le's grievance was then the subject of a meeting between Dr Le with her representative, Dr Eleftheriou and Ms Hill at which point it was again recommended that the matter in the first instance be resolved through a mediation between Dr Le and Dr White with an third party present. Dr Le expressed that she had no intention of attempting to resolve her grievance with Dr White, she instead wanted an independent review of the circumstances that had arisen.

[60] The events preceding the filing of Dr Le's Dispute Application were somewhat clouded by the bullying allegations and although it may appear unreasonable in the circumstances, the steps set out in clause 11.4 are not optional. Due to the operation of clause 11.2(a) and 11.4(a)(i) it was incumbent on Dr Le to first raise her grievance with Dr White and then to genuinely try and resolve the grievance in a forum involving Dr White.

[61] It is unfortunate that Dr Le declined to participate in any process where she was required to meet with Dr White to try and resolve the grievance she held. Consequently, I find that the Commission has no present jurisdiction to deal with the Dispute Application. I therefore am not required to determine if Western Health failed to comply with clause 12 of the Agreement and dismiss Dr Le's Dispute Application.

COMMISSIONER

Appearances:

B. Mueller Special Counsel for Dr Le
M. Minucci of Counsel for Western Health and Dr White

Hearing details:

2020.
Melbourne:
February 19, 20.
May 18 (by telephone).

Final written submissions:

Applicant: 19 March 2020
Respondent: 8 April 2020
Applicant reply: 17 April 2020

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[1] [2020] FWC 4687
[2] AE429332
[3] Exhibit A4, [11]-[12]
[4] CC Pty Ltd T/A Cook Colliery v Construction, Forestry, Mining and Energy Union [2017] FWCFB 2749
[5] [2014] FWCFB 7447
[6] [2017] FWCFB 3005
[7] Exhibit R2, [77]
[8] Ibid, [78] and [80]
[9] Ibid, [81]
[10] Ibid
[11] Ibid, [83]
[12] Ibid, [86]
[13] Transcript PN72 and PN74
[14] Ibid PN72
[15] Ibid PN75
[16] Exhibit R3, Annexure CW12
[17] Exhibit A1, Annexure NL3
[18] Ibid, [128]-[132]
[19] Ibid, Annexure NL3
[20] Ibid, [133]
[21] Ibid, Annexure NL4
[22] Ibid
[23] Exhibit R4, [16]-[17]
[24] Ibid, Annexure PE5

[25] Exhibit A1, [168]-[169]

[26] Exhibit R4, Annexure PE9

[27] Exhibit R6, Annexure DH5

[28] Ibid

[29] Exhibit R4, [41]

[30] [2017] FWCFB 5032 at [24]-[25]

[31] [2017] FWCFB 5032

[32] Ibid at [37]