



DECISION

Fair Work Act 2009
s.739—Dispute resolution

Health Services Union

v

Menarock Aged Care Services (Claremont) Pty Ltd T/A Menarock (C2022/5641)

DEPUTY PRESIDENT MASSON

MELBOURNE, 26 MAY 2023

Application to deal with a dispute under an enterprise agreement.

[1] On 12 August 2022, the Health Services Union (the HSU) applied to the Fair Work Commission (the Commission) to deal with a dispute pursuant to s 739 of the *Fair Work Act 2009* (the Act) under the dispute resolution procedure at clause 46 of the *Menarock Aged Care Services (Claremont) Pty Ltd Non-Nursing Enterprise Agreement 2018-2021*¹ (the 2018 Agreement). The Respondent in the matter is Menarock Aged Care Services (Claremont) Pty Ltd (Menarock).

[2] The dispute may be shortly described as follows. Whether employees employed at Menarock’s aged care facility known as the the Gardens at Claremont Tasmania (the Gardens), were directed on 4 January 2022 to attend work 15 minutes prior to the commencement of their normal rostered shifts for the purpose of undertaking a Rapid Antigen Test (RAT) and if so instructed whether they were entitled to be paid overtime rates for such attendance.

Jurisdiction of the Commission

[3] Section 739 of the Act empowers the Commission to deal with certain disputes under enterprise agreement dispute settlement terms. The 2018 Agreement contains such a term, which is clause 46 ‘Dispute Resolution’ (the DRP). The DRP relevantly states as follows;

“46 Dispute Resolution

46.1 If a dispute relates to:

- (a) a matter arising under the agreement; or
- (b) the National Employment Standards; then

this term sets out procedures to settle the dispute.

46.2 An employee who is a party to the dispute may appoint a representative for

the purposes of the procedures in this term.

- 46.3** In the first instance, the parties to the dispute must use their best endeavours to try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.
- 46.4** If discussions at the workplace level do not resolve the dispute a party to the dispute can refer the matter to the Fair Work Commission.
- 46.5** The Fair Work Commission may deal with the dispute in 2 stages:
- (a) the Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
 - (b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:
 - (i) arbitrate the dispute; and
 - (ii) make a determination that is binding on the parties.

Note: If Fair Work Commission arbitrates the dispute, it may also use the powers that are available to it under the Act.

A decision that Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

.....”

[4] It was not contested that the questions to be determined by the Commission, which are set out below, are capable of constituting a dispute relating to “*a matter arising under*” the 2018 Agreement. Nor was it in dispute that the steps taken by the parties to resolve the dispute constituted compliance with the DRP of the 2018 Agreement. Having regard to the information in the revised Form F10 application and the views of the parties, I am satisfied that the Commission has jurisdiction to deal with the dispute, including by arbitration as provided by clause 46.5(b)(i) of the 2018 Agreement.

[5] The matter was subject to conciliation before the Commission during a number of conferences conducted with the parties pursuant to clause 46.5(a) of the 2018 Agreement but was not resolved and the HSU subsequently requested the matter be programmed for arbitration pursuant to clause 46.5(b)(i) of the 2018 Agreement.

The hearing

[6] The matter was listed for hearing before me on 26 & 27 April 2023 in advance of which the parties filed witness statements and material on which they intended to rely in accordance with directions issued.

[7] At the hearing, the HSU was represented by James Milligan of the HSU who called the following employees of Menarock to give evidence;

- Jodie Collins – Laundry Hand
- Natasha Woods – Personal Care Assistant (PCA)
- Tania Long - PCA

[8] The Respondent was represented at the hearing by Mr C Holland, a Director of Menarock, who called the following persons to give evidence;

- Anica Papadopoulos – General Manager People & Culture for Menarock
- JC Yap – Non-Executive Director of Menarock
- Josh Piper – former Chief Executive Officer (CEO) of Menarock
- Rhea Goldbluff – Administration Officer
- Natalia Wickham – Residential Manager, The Gardens Claremont

Issues for determination

[9] The following questions arise for determination by the Commission;

1. *Did a direction exist which required staff to attend the workplace early to undertake RAT Testing; if so*
2. *Did the Employer pay employees in accordance with the Menarock Aged Care Services (Claremont) Pty Ltd Non-Nursing Enterprise Agreement 2018-2021.*

Agreement provisions

[10] The dispute in the present matter relates to whether Menarock issued a direction to its staff to attend work 15 minutes prior to their rostered shift to undertake a RAT and if so whether in so attending they were entitled to be paid in accordance with clause 29 of the 2018 Agreement which states as follows;

29. OVERTIME

29.1 An employee who is directed to work hours in excess of their rostered hours in any day, or seventy-six (76) hours per fortnight will be paid as follows:

- (a) For a part-time employee, all time worked in excess of their rostered hours on any one day unless otherwise agreed.
- (b) For a day worker - work outside the span of hours 6am to 6pm except where

agreement is reached.

29.2 The overtime rate of pay is:

Day	First 2 Hours	Thereafter
Weekday	Time and a Half	Double Time
Weekend	Double Time	Double Time
Public Holiday	Double Time and a Half	Double Time and a Half
Weekend Public Holiday	Double Time and a Half	Double Time and a Half

Background and chronology of events

[11] On 3 January 2022, Residential Managers of Menarock’s aged care facilities received an email² (the 3 January Email) from Menarock’s General Manager Residential Services, Sheridan Devlin advising that all services were required to go into immediate lockdown and that all staff entering facilities were required to undergo a RAT for every shift. Ms Natalia Wickham who was the Residential Manager at the Gardens received the email which was marked “Urgent”.³ On the same day a letter⁴ (the 3 January Lockdown Letter) was prepared by Mr Yap on behalf of the CEO Josh Piper and sent to all Menarock Residential & Care Managers for distribution to residents, families, and friends. The 3 January Lockdown Letter advised that all Menarock homes would be placed in lockdown immediately for a period of up to seven days.

[12] On 4 January 2022, Ms Wickham prepared and distributed an authorised Memo⁵ from senior management to all staff at the Gardens under the title of “Covid 19 update” (4 January Covid 19 Update Memo). The memo was distributed to staff via shift handover, communication folder, staff notice board and the nursing station⁶. The 4 January Covid 19 Update Memo relevantly stated;

“.....

With the exponential rise in cases of COVID 19 over the last few days, Menarock Life have had a review of our existing protocols on how to keep our clients and facilities as safe as possible. Balancing the current risk and potential consequences of not putting further measures in place, a careful decision has been made to place all Menarock homes in lockdown effective immediately for a period of *7 days* (up to 9 January 2022).

During this period of enhanced measures:

- Visits will be restricted to end-of-life purposes or for other urgent matters as discussed with the Residential Manager
- Residents are allowed to leave the facility for social leave/medical appointments for personal reasons.
- Residents can see their visitors outside the facility
- Window visits encouraged
- Residents don't need RAT unless they have spent leave overnight or more or are symptomatic
- Visitors don't need RAT if they don't enter the site
- All staff entering for every shift will need to be rapid antigen tested.

.....” (emphasis added)

[13] On 4 January 2022 at 1.38pm, the Gardens’ Administration Officer Ms Godbluff distributed a message⁷ (4 January Emprevo Message) reviewed and authorised by Ms Wickham, to staff via the Emprevo App. The Emprevo App is an app used by Menarock for the purpose of posting vacant shifts which staff can respond to and pick up vacant shifts in addition to their rostered shifts. The 4 January Emprevo Message stated as follows;

“Good Afternoon Team

We are starting to test staff this afternoon. This will be undertaken every shift, every staff member.

The test results take 15 min, so please aim to be at work 15 min prior for the test to be conducted.

Cheers, Rhea”

[14] On 5 January 2022, Sharon Swards who is an Organiser with the HSU, sent an email to Mr Piper titled “RAT Testing”⁸ (5 January HSU Email) in the following terms.

“Dear Josh

RAT Testing

HACSU members have advised they have received a message that requests them to attend work 15 minutes prior to the start of their shift, so they can be tested before commencing work on the floor. HACSU agree that this can be done but members must be paid for the extra 15 minutes.

I request that you confirm that members will be paid and ask for a response by COB 12 January 2022. If you wish to discuss this matter further or have any other queries do not hesitate to contact me by email to admin@hacsu.org.au, Attn: Sharon Swards or via HACSUassist on 1300 880 032.

Yours sincerely

.....”

[15] On 21 January 2022, Menarock’s Crisis Management Team (CMT) sent a Memo⁹ to all staff under the subject heading of “RAT Testing and PPE” (21 January CMT Memo). Staff were advised in the memo that due to a shortage of available RAT tests, that the frequency of RAT testing would be changed for staff who were not ‘close contacts’ to every 72 hours while ‘close contacts’ would continue to be required to undertake a RAT each shift. No reference was made in the memo to whether the RATs were to be undertaken by staff prior to or at the start of the relevant shift.

[16] Mr Piper, who was on a period of leave between 25 December 2021 and 16 January 2022 and then dealing with a Covid outbreak at another facility between 20 January 2022 to 23 February 2022¹⁰, did not respond to the 5 January HSU Email until 3 February 2022 at which point Mr Piper sent an email¹¹ (3 February CEO Email) to Ms Swards in the following terms;

“Thank you Annie,

I have recently returned from leave and will be more than happy to respond.

I shall formally respond by letter however staff are more than welcome to adjust their rostered hours to reflect the additional time to account for the required RAT Testing.

Staff have the capability on their "Daily Allocation" Roster Log to adjust the time as required as they would in the event that they work beyond their rostered hours.

We are so lucky to have amazing staff that support our COVID response.

Regards”

[17] On 14 February 2022, a Memo¹² was sent from Menarock’s Corporate Support Centre (14 February Support Centre Memo) to all staff advising of the extension of “enhanced precautionary measures” due to the ongoing risk and vulnerability of aged care facilities to Covid outbreaks. While not specifying the frequency or timing of RAT testing of staff, the memo reinforced the continuation of RAT requirements.

[18] On 7 April 2022 a general staff meeting was conducted at the Gardens chaired by Ms Wickham. The minutes¹³ of the meeting record that RATs would be undertaken by staff every 72 hours as opposed to every shift they attend the facility.

[19] On 29 May 2022, Mr Yap who was the EGM Residential Services at the time, sent a letter¹⁴ (29 May Letter) to staff to advise that because two residents had tested positive to Covid 19 at the Gardens, the Gardens was classified as an ‘outbreak site’ and would remain so for at least seven days. The requirement for staff to undertake a RAT at the start of every shift was confirmed in the letter.

[20] On 6 July 2022, a general staff meeting was conducted at the Gardens chaired by Ms Wickham. The minutes¹⁵ of the meeting record that RATs would be undertaken by staff every 72 hours as opposed to every shift that employees attended the facility.

[21] On 14 July 2022, Menarock’s CEO Kyan Ho sent a letter¹⁶ (14 July Letter) to staff advising that because two residents and one staff member had tested positive to Covid 19 at the Gardens, the Gardens was classified as an ‘outbreak site’. Consequently, all staff on-site had been subject to a RAT, the Gardens would remain an outbreak site for the next seven days and staff would need to do a RAT at the start of every shift.

[22] On 13 September 2022, a general staff meeting was conducted at the Gardens chaired by Ms Wickham. The minutes¹⁷ of the meeting record that RATs would be undertaken by staff every 72 hours as opposed to every shift that employees attended the facility.

[23] On 27 September 2022, a Memo¹⁸ (27 September Memo) was sent by Menarock's Acting EGM Residential Services April Casio under the heading of "Changes to infection Control Protocols" to all residents, representatives and staff advising of a review of visitor restrictions across its facilities. While relaxation of some infection protocols was communicated, RATs for each entry remained a requirement.

[24] On 9 November 2022, Menarock produced to the Commission a summary¹⁹ (Timekeeping Summary) of the timekeeping and payment records for the period from 1 January – 31 October 2022 as they related to the 15 minutes pre-shift RATs. The summary relevantly stated as follows;

- The audit of timekeeping and payroll records for the period 1 January – 31 October 2022 was conducted in respect of all staff working at the Gardens in the period, which included care, lifestyle, hotel services and administration staff.
- The time and attendance records (actual sign-in time by employees) were cross-checked with payroll records to verify that staff who signed in 15 minutes prior to their shift were paid for that time.
- Of the 9000 shifts for which there were time and attendance records, there were 382 shifts (4.2% of the total number of 9000 shifts) on which attendance 15 minutes prior to the rostered shift start time was recorded.
- 84 staff at the Gardens signed in the time and attendance records during this period.
- Of the 84 staff, 42 staff signed in 15 minutes early at some time during the period and were subsequently paid for that early attendance.
- The first shift that an early start was recorded for which payment was made was on the 4 January 2023 and the last shift on which an early start was recorded for which payment was made was 23 October 2023.
- The records reveal that early attendance of staff was recorded consistently throughout the 1 January – 31 October 2022 period.

HSU Witnesses

Jodie Collins

[25] Ms Collins has been employed at the Gardens for over six years and is employed as a Laundry Hand²⁰. She states that to the best of her knowledge she was told to attend the workplace 15 minutes early in January 2022 to undertake a RAT before commencing work each shift and that a memo was sent out via Emprevo to that effect, which requirement she says was also communicated verbally by the Director of Nursing. She also believes a separate memo was sent by Mr Piper regarding the RAT requirement. Ms Collins further states that no staff could commence "work on the floor" until the RAT was completed which took about 15 minutes. She says that to the best of her memory she complied with the requirement to turn up 15 minutes

early to do the RAT and remained unpaid for any 15-minute periods until Menarock paid an amount in October 2022²¹.

[26] Ms Collins gave evidence that Emprevo which was the app through which the 4 January Emprevo Message was sent is not just used for posting available shifts but is also used for communicating to staff about required training, management meetings and general changes to workplace operations²².

[27] Ms Collins was cross-examined on the sign-in arrangements and variously stated that;

- normally she would enter the facility and sign on in the sign on book on arrival;
- if she was late, she would enter the late time of arrival in the sign-on book;
- she would amend the sign-on time if she finished early and would record if she was required to start early; and
- during lockdowns she was unable to sign-on in the sign-on book as normal because she was not able to come into the facility and went straight to the laundry but used photocopy sheets provided to sign-on.

[28] Ms Collins was questioned why she only signed in early on some occasions, that being 26 shifts out of 202 shifts that she was rostered to work in the period²³ despite her evidence that she turned up early regularly. She replied that lockdowns had impacted the sign-in arrangements but agreed that she was able to sign the timesheet photocopies provided to the laundry during lockdowns. Ms Collins also claimed that she stopped signing in early after a while because she hadn't been paid for recording the 15-minute pre-shift early starts for the RAT. She could not say however when she stopped signing in early and could not adequately explain how her evidence reconciled with records of her recording early starts in August and September 2022²⁴.

[29] Ms Collins agreed that important information relating to changes in policies and procedures was normally communicated via Memo or emails and conceded that she did not actually receive the 4 January Emprevo Message because the app on her phone was playing up at the time. She did however become aware of it (the message) and took it as a direction to attend 15 minutes early each shift for which she would be paid although acknowledging that no one spoke to her directly in relation to the 'direction'. Ms Collins was also questioned if she had raised a pay query during the January-October 2022 period for the 15 minutes pre-shift RATs she believed she was entitled to payment for, in response to which she replied that she could not recall raising a pay query in the period while acknowledging she knew the process for raising a pay query.

Natasha Woods

[30] Ms Woods is employed as a Carer at the Gardens and has been employed by Menarock for over six years²⁵. She also states that to the best of her memory she was told to attend the workplace 15 minutes prior to the normal shift start time in early January 2022 for the purpose of undertaking a pre-shift RAT. She refers to the 4 January Emprevo Message to all staff and claims Ms Wickham verbally instructed staff to attend early. Ms Woods agreed that staff did not normally take directions from the Admin Officer Ms Godbluff who sent the 4 January Emprevo Message but states that Ms Godbluff puts up messages for the Residential Manager.

[31] She further states that she and her colleagues understood they were required to attend 15 minutes early and that this expectation remained in place until October 2022. She also states that Ms Wickham also confirmed to staff that they would be paid for the additional time at the workplace²⁶. During cross-examination Ms Woods also claimed that Ms Wickham had issued a written Memo to staff advising them they were required to attend 15 minutes early to undertake a RAT and that they would be paid for such attendance. When pressed on the alleged Memo, Ms Woods claimed that the Memo had been removed from the file and was not able to be produced in evidence. Ms Woods also referred to the 3 February CEO Email from Mr Piper to the HSU as supporting her claim of a direction to attend early for which payment would be made.

[32] Ms Woods claimed that if staff did not attend early for the purpose of doing the required RAT it would mean they were late onto the floor by 15 minutes which would create a staffing issue at shift handover which would be detrimental to the workplace. She says however there were some occasions where she was unable to attend 15 minutes early, but other than on these occasions she claims to have always turned up 15 minutes early. She also states that she remained unpaid for the 15-minute periods until October 2022 when some payments were made by Menarock. A payslip²⁷ produced in evidence for Ms Woods for the pay period ending 6 November 2022 revealed that Ms Woods received payment for some RAT tests performed before normal shift commencement time at the ordinary time rate of pay. Ms Woods also claims that while she initially recorded her early attendance each shift, she stopped doing this at a certain point because she had not been paid for many months and believes other staff similarly stopped recording early attendance²⁸.

[33] Ms Woods also gave similar evidence to Ms Collins in relation to the use of Emprevo for communication²⁹. She elaborated on this evidence during cross-examination and stated that while Emprevo was used for notifying available shifts, it was also used to notify staff of required training, staff meetings and mandatory training such as manual handling. In respect of policy changes, she confirmed that this information was normally conveyed in staff handovers, by Memos or in the staff room Comms folder.

[34] Ms Woods was questioned on whether she had raised any payroll queries regarding the non-payment for the 15-minute pre-shift attendances in the January-October 2022 period. She stated that she recalled making some payroll queries on the unpaid 15-minute periods. It was put to her that Menarock's records indicated that she had made three payroll queries in the period, two in respect of annual leave and one in respect of overtime but none in respect of the unpaid 15-minute periods. She remained adamant however that she had made payroll queries over the unpaid 15-minute periods and was then directed by the Commission to furnish evidence of those queries. Ms Woods' representative subsequently confirmed she was unable to locate any records of such queries.

Tania Long

[35] Ms Long is Carer at the Gardens, has been employed for approximately five years and recalls there having been an Emprevo message in early 2022 sent to all staff at the Gardens requiring early attendance each shift for the purpose of undertaking a RAT.³⁰ She states the requirement to attend pre-shift for the purpose of undertaking a RAT continued until October 2022 and as best as Ms Long can recall she arrived early for every shift unless she was on a

period of leave³¹. She also states that Emprevo was more than just a shift availability app and was used for broader communication to staff³².

[36] Ms Long stated during cross-examination that she became aware of the 4 January Emprevo Message but could not say with certainty whether she received the message. She also stated that Ms Wickham sent a memo which she sighted, could not recall the content of it but claimed it stated that employees were required to come in 15 minutes early for which they would be paid. Ms Long also claimed that the memo from Ms Wickham had gone missing.

[37] In responding to questions during cross-examination on time keeping, she acknowledged her understanding of the requirement to record arrival and departure times in the sign-in book and stated she would record early or late arrivals in the book. When questioned why the records revealed that she had recorded early starts on the timesheets on only 2 occasions out of a possible 172 shifts³³ in the January – October 2022 period, she restated that she had always started early and didn't change her practice of early arrival for her shift. She also agreed that during the January – October 2022 period she had not raised any payroll queries regarding non-payment of the 15 minutes pre-shift RATs stating there would have been no point.

[38] In relation to the Emprevo app, Ms Long confirmed that the app was used for training and special event reminders as well as notifying staff of available shifts and agreed that the Emprevo app was used more for reminder text messages rather than notifying staff of policy changes.

Menarock Witnesses

Josh Piper

[39] Mr Piper was the CEO for Menarock in the period from 11 November 2019 to 13 May 2022. In the period from 25 December 2021 to 15 January 2022 he was on annual leave on return from which he was required to deal with a Covid outbreak at another Menarock facility from around 20 January 2022 to 23 February 2022. He states that his annual leave and Covid outbreak responsibilities delayed his response to the 5 January HSU Email until he replied with the 3 February CEO Email to the HSU³⁴.

[40] In responding to Ms Swards, Mr Piper states that Ms Swards letter to him on 5 January 2022 did not suggest to him that there was a formal direction to staff at the Gardens to attend 15 minutes early and claims that his response to Ms Swards cannot be taken as a direction to staff to attend work 15 minutes early to perform a RAT. He also claims that he did not become aware of the 4 January Emprevo Message until it was brought to his attention by Ms Papadopoulos in March 2023 as part of the present dispute escalation. He states that the 4 January Emprevo Message was not authorised by him, and he does not read the words in the message of "*please aim to be at work 15 minutes prior for the test to be conducted*" as a direction. Further, his response to Ms Swards simply communicated that if staff did attend work early to undertake the RAT, they could update the daily timesheet accordingly³⁵.

[41] During cross-examination Mr Piper stated that in his role of CEO he did not issue any emails to staff regarding RAT protocols as any directives would have been issued via the General Manager Residential Services. He also confirmed that on receipt of the 5 January HSU

Email to which he responded on 3 February 2022, he did not make any enquiries with management of the facility as to whether employees had been requested to attend 15 minutes before normal shift start times. Nor did he send or cause to be sent any clarifying communication to staff at the Gardens regarding attendance expectations or requirements for undertaking RATs. He explained this inaction on the basis that he did not accept that employees were required to attend early and that it was the Residential Manager's responsibility to deal with staff attendance. He did however accept that if staff did attend early to undertake a RAT, such attendance would be 'work' for the purpose of payment.

[42] Mr Piper also gave evidence that Emprevo is a "*shift bidding*" platform that is primarily used to advise staff of vacancies on the roster system to allow them to pick up additional shifts. He disagreed with evidence of the HSU witnesses that it is used to organise meetings, training or advise of changes to policies, procedures, and protocols. He also confirmed that staff are 'encouraged' but not directed to download the app. He states that Acredia is the company platform used to communicate authorised message to staff³⁶.

Anica Papadopoulos

[43] Anica Papadopoulos gave evidence that she commenced employment with Menarock on 28 March 2022. She confirmed that she undertook a review of all payroll queries raised in the period 3 January – 31 October 2022 for the Gardens and identified there were no payroll queries raised in relation to non-payment of pre-shift RAT attendance. She also confirmed that it is company policy that as General Manager People and Culture, she must be contacted by Residential Managers regarding any disciplinary action taken against employees. She further states that Ms Wickham had not contacted her regarding any disciplinary action taken against employees in the above-referred period for arriving 'on the floor' 15 minutes late after completing their RAT on arrival at the normal shift start time³⁷.

[44] Ms Papadopoulos referred to contracts of employment that all facility staff have in place which expressly provide that staff are responsible for accurately entering their hours of work and that a failure to do so may result in a loss of pay. Ms Woods contract³⁸ was provided as an example of the standard contract of employment and relevantly includes clauses 4.3, 4.4 and 4.5 which deal with timekeeping requirements. Ms Papadopoulos states that in her experience staff know that they must use the time and attendance system to get paid correctly and when an employee believes there has been an error in their pay are required to use a payroll query form³⁹.

JC Yap

[45] Mr Yap resigned from Menarock on 5 August 2022 and currently holds the position of non-executive Director of Menarock but in the period between 31 January 2022 and 5 August 2022 held the position of Executive General Manager Residential Services. He states that while Josh Piper was on leave in the period from 25 December 2021 to 16 January 2022 communication was sent to families and staff by Mr Yap on behalf of the CEO⁴⁰.

[46] Mr Yap states that Emprevo is an app used by facility management to manage rosters and communicate shift availabilities to staff and is not a platform used to communicate memos and directives. He further states that official signed memos or in some cases letters duly signed by authorised managers are the means through which directives to staff are issued. According

to Mr Yap, the 4 January Emprevo Message written and sent by Ms Godbluff was not in accordance with and consistent with the authorised and approved Infection and Prevention (IPC) Protocol which includes RATs. Further, Ms Godbluff is not an authorised person able to make changes to the IPC Protocol⁴¹.

[47] Mr Yap also confirmed in the relevant period he was the executive accountable for Menarock's Covid response and ensuring that it was in line with State Health Directives and was also responsible for communicating regularly with staff, residents, and families. He further states that Directors and the senior clinical management team of which he was a member, were the only staff authorised to change IPC Protocols, which includes RATs and PPE⁴².

[48] Mr Yap states that he was delegated to prepare a letter template for use by Residential Managers that was sent to staff which stated, "*All staff entering for every shift will need to be rapid antigen tested*"⁴³ and that he never provided verbally or in writing a direction to staff and/or to management that staff were required to attend work 15 minutes before their normal shift start time to undertake a RAT⁴⁴. He also confirmed that during his employment as Executive General Manager Residential Services no staff member had raised with him verbally or in writing any pay queries relating to undertaking RATs⁴⁵.

[49] Mr Yap also gave evidence on the clinical care model in place at the Gardens for the period January – October 2022. He states that the model involves a full-time Residential Manager, a full-time clinical Manager, and a shift system of registered nurses (RNs) providing 24 hour a day coverage as well as PCAs, laundry, and cleaning staff. He states that due to the clinical care model in place, care staff handover, staff to resident ratios, workload and staffing issues were not compromised if staff arrived 'on the floor' 15 minutes after their rostered commencement time⁴⁶. Mr Yap agreed during cross-examination that it would be unacceptable not to have any PCAs on the floor at a given time but claimed there would always be PCAs on the floor because of the overlapping shift arrangements in place at the Gardens.

Rhea Godbluff

[50] Ms Godbluff commenced employment with Menarock at the Gardens as the Administration Officer, a position she still holds, on 18 October 2021. She states that due to the rise in Covid cases in Tasmania in December 2021, as a precaution the Gardens was placed in lockdown along with other Menarock facilities on 3 January 2022⁴⁷. She states that on 4 January 2022 Ms Wickham was in a meeting receiving instructions on what to do with respect to the facility lockdown and asked Ms Godbluff to send a message out on Emprevo about staff RATs on every shift. Ms Godbluff says Ms Wickham verbally instructed her on what was to go out in the message. She says that the message to staff that they should 'aim' to get to work 15 minutes early was discussed and included in consideration of the 15-minute wait time for results of the RATs. She stated that it was not her intention to give a direction to staff as that was not within her role⁴⁸. She accepted during cross-examination that the 4 January Emprevo Message was not subsequently clarified.

[51] Ms Godbluff also stated during cross-examination that use of the Emprevo app by staff is voluntary and not all staff have the app. She further states that the main purpose of Emprevo is to post vacant shifts for staff to pick up, but it is also used to send general messages to staff in relation to meetings or training. In communicating company directions Ms Godbluff states

she uses Acredia which all staff are required to use and is another system used by Menarock for communicating its policies, procedures, forms, and training⁴⁹.

[52] Ms Godbluff also gave evidence that Ms Wickham conducted regular staff meetings in the period during which updates were provided on infection control protocols including PPE requirements and RATs. She says she regularly attended those meetings during which she took minutes, copies of which were then placed in the staff room communications folder. She further states that she does not recall any occasion where Ms Wickham told staff in Ms Godbluff's presence that they were required to attend work 15 minutes early to undergo a RAT and that she has not received any payroll queries for the period 3 January 2022 to 31 October 2022 in relation to non-payment pre-shift RATs⁵⁰.

Natalia Wickham

[53] Ms Wickham commenced employment with Menarock in the position of Residential Manager at the Gardens on 24 June 2021 and continued to hold that role until very recently. She states that on 3 January 2022, all Residential Managers including herself received the 3 January Email from Ms Devlin advising that all facilities would go into immediate lockdown and that all staff entering the facility would need to undertake a RAT. On 4 January 2022 Ms Wickham also received an authorised memo and subsequently distributed it (the 4 January Covid 19 Update Memo) to all staff at the Gardens by way of placement in the communication folder, on the staff notice board and at the nursing station⁵¹.

[54] Ms Wickham states that on 4 January 2022 she checked and authorised the 4 January Emprevo Message before it was sent by Ms Godbluff to staff. In approving the sending of the message to staff, Ms Wickham states that Emprevo which is not downloaded by all staff, is not used as a means of distributing authorised directives to staff but is used to post vacant shifts as well as notifying or providing reminders to staff of meetings or training. Ms Wickham while acknowledging that the content of the 4 January Emprevo Message varied in content to the 4 January Covid 19 Update Memo, was nonetheless adamant that at no stage had she directed staff verbally or in writing that they were required to attend work 15 minutes early or that they would be paid if they arrived early. Ms Wickham confirmed that she subsequently distributed the 21 January CMT Memo to staff which advised of changes to staff RAT frequency and PPE requirements⁵².

[55] When cross-examined on the 4 January Emprevo Message, Ms Wickham did not accept that the message either required or encouraged employees to attend 15 minutes prior to normal shift start time. She described the message as 'engagement' with staff. She accepted that no clarifying message was sent by her to staff regarding the 15-minute early arrival to undertake a RAT that was referred to in the 4 January Emprevo Message. She nonetheless rejected that staff were entitled to payment for the 15 minutes if they arrived early as no direction had been issued. Ms Wickham was pressed on her evidence that at no time had she directed staff orally or in writing to attend early. She confirmed the correctness of that evidence and further stated that had she been questioned by staff about early starts which she does not recall any staff raising, she would have unambiguously answered that staff were not required to attend early.

[56] Ms Wickham further states that all subsequent communication from senior management to staff regarding RAT frequency and PPE made clear that RATs were to be conducted at the

start of each shift, depending on the frequency of required testing. Ms Wickham also states that minutes of staff meetings conducted by her in the period also make clear that RAT and temperature testing was to be conducted at the “*beginning of each shift*”⁵³.

[57] According to Ms Wickham staff are aware that if they arrive early for work, they are expected to sign on to get paid correctly for the time worked. In the period from January – October 2022, she says no staff raised with her any queries regarding payment for early attendance to undertake RATs. She also says that in the period from January to October 2022 she observed staff arriving at various times. This involved some staff arriving early for work and performing RATs before normal shift commencement while other staff arrived at their normal shift start time and then performed the RAT which meant they were not on the floor until 15 minutes after their rostered shift commencement. That later arrival on the floor was she states accommodated without any compromise to resident care, staff ratios or handover. Furthermore, no employees were disciplined for being late onto the floor due to having undertaken RATs at the start of their shifts⁵⁴.

[58] Ms Wickham was questioned regarding staff numbers and shift handover arrangements at the Gardens in the context of the contended impact on handover of staff arriving on the floor 15 minutes after rostered shift commencement. She stated during cross examination that on a dayshift during the week there would normally be four PCAs, two RNs, two kitchen staff, one laundry attendant, a Clinical Manager, and the Residential Manager. She also stated that a handover is not required for laundry, cleaning, or kitchen staff. According to Ms Wickham, handovers as they involved PCAs during the January – October 2022 period were not impacted by PCA’s arriving on the floor 15 minutes after rostered shift commencement due to performing a RAT on arrival at the rostered shift start time. That is because shift rostering arrangements at the Gardens provide for a 15-minute shift overlap such that there were always PCAs on the floor and that any necessary handover communication could be provided by the RNs if PCAs arrived ‘on the floor’ 15 minutes after the rostered shift start time.

Case for HSU

[59] The HSU contend that the staff at the Gardens were during the period from 4 January – 31 October 2022 directed to attend work 15 minutes prior to their rostered shift commencement time for the purpose of undertaking the required RAT. Having been directed to attend work early and complied with such direction it follows that staff were entitled to be paid in accordance with clause 29 of the Agreement which provides for such attendance at penalty rates set out in the clause. In summary, the HSU seeks a determination of the matter that a direction was issued to staff at the Gardens to perform work outside ordinary hours of work which must be paid at the appropriate penalty rate.

[60] The HSU rely on the following matters in support of their submission that a direction was issued to staff;

- the 4 January Emprevo Message sent to staff was clear in its meaning, that being staff were required to attend early for the purpose of undertaking a RAT;

- contrary to Menarock's contention, Emprevo was also used for a range of communication purposes as confirmed by Ms Godbluff and was not confined in its use to that of a shift availability tool;
- contrary to the Respondent's contention, Emprevo was used interchangeably with Acredia for the purpose of communicating to staff, including for example for meetings and training;
- Mr Piper's 3 February CEO Email response to the 5 January HSU Email from Ms Swords confirmed the direction contained in the 4 January Emprevo Message;
- the 4 January Emprevo Message was taken as a formal direction by staff and no clarifying communication was subsequently issued by Menarock;
- staff enquired with Ms Wickham at or around the time of the 4 January Emprevo Message in response to which she confirmed the requirement for staff to attend 15 minutes early for the purpose of performing RATs for which early attendance they would be paid overtime rates;
- to the extent there was confusion regarding the requirement of staff to attend work early, Menarock took advantage of that confusion by not clarifying the requirement;
- the evidence of HSU witnesses confirms that staff overwhelmingly complied with the direction and attended early but did not receive payment for such early attendance until an audit was conducted in October of 2022 arising from which payments were made to employees at ordinary time rates of pay and not at overtime penalty rates;
- despite Ms Wickham being aware that employees were attending early and recording it on the timesheets which she reviewed daily, she took no action to either address early attendance or alternatively ensure employees were being paid correctly for such early attendance;
- if employees arrived at their normal shift start time, they would have been late onto the floor which would have impacted handover, but there is no evidence that handovers were adversely impacted which indicates employees were arriving early to undertake pre-shift RATs; and
- communication to staff via Memos sent after the 4 January Emprevo Message did not revoke the requirement to attend shift 15 minutes early.

[61] It follows the HSU contends, that on a straightforward construction of clause 29 of the Agreement, if the direction was issued to staff as they argue it was and the staff complied with the direction, then employees are entitled to be paid penalty rates in accordance with clause 29.2 of the Agreement.

Case for Menarock

[62] Menarock argue that there was no direction or instruction to staff, either express or implied, that they were required to arrive 15 minutes before their normal shift start time to undertake RATs. Further, the 4 January Emprevo Message did not contain any mandatory language and that formal directions to staff in relation to Covid infection control measures issued by corporate management stated that RATs needed to be undertaken at the start of each shift, not prior to. As employees were not “directed” to attend work 15 minutes before normal shift start time, the necessary pre-condition for overtime under clause 29.1 of the Agreement, that of being “directed to work hours in excess of their rostered hours in any day”, was not present and as such the entitlement to the payment at overtime penalty rates was not enlivened.

[63] In support of its submission on the absence of a direction, Menarock relied on the following matters;

- Emprevo was a voluntary app, was not downloaded and used by all employees and was primarily a tool used to advertise and fill vacant shifts;
- Acredia and/or authorised memorandums were the means through which formal directions were issued to staff during the Covid pandemic in relation to infection control measures;
- the words “please aim” used in the 4 January Emprevo Message could not be interpreted as mandatory language.
- contrary to the HSU’s contention, the language used by Mr Piper in the CEO Email response to the 5 January HSU Email from Ms Sward did not confirm the alleged direction to staff emanating from the 4 January Emprevo Message;
- the 5 January HSU Email from Ms Sward did not in fact allege there had been a direction but rather refers to “requests” for employees to attend work 15 minutes early;
- Ms Godbluff was in any case not authorised to issue directions to staff in relation to infection control or timekeeping arrangements at the Gardens facility;
- a direction to employees establishes a duty to comply if the direction is reasonable and lawful and in the present case there is neither evidence of widespread compliance nor consequences of non-compliance;
- employees at the Gardens were aware of their contractual obligations to accurately record their hours of work and there is no evidence of any payroll queries being raised regarding non-payment of the 15 minutes pre-shift attendance;
- the claims of the three HSU witnesses as to the belief of approximately 60 other employees at the Gardens as to the existence of a direction should not be relied on given, they cannot know the thinking or beliefs of their colleagues;

- Ms Wickham’s evidence should be accepted regarding her rejection of the claim that she communicated to staff both verbally and in writing that they were required to attend work early;
- the evidence of timesheet records of early attendance should be preferred over generalised claims from HSU witnesses that employees overwhelmingly attended early on a regular basis; and
- due to the clinical care model and the 15-minute shift overlap at the Gardens, handover and resident care were not compromised by employees arriving on the floor 15 minutes late due to completing their RATs at the start of their shifts.

Consideration

Did a direction exist which required staff to attend the workplace early to undertake RAT testing?

[64] The case of the HSU is largely advanced on the basis of the 4 January Emprevo Message constituting a ‘direction’ to staff to attend 15 minutes prior to their normal shift start time for the purpose of undertaking a RAT. That argument is said to be supported by evidence of Mr Piper’s confirmation of the direction, oral confirmation of the ‘direction’ by Ms Wickham, ‘overwhelming compliance’ of staff with the ‘direction’, the failure of Menarock to clarify confusion over attendance requirements and the impact that late arrival of staff onto the floor would have had on resident care in the Gardens. For the reasons that follow I am not persuaded that a ‘direction’ was issued to staff to attend 15 minutes prior to the start of their normal shift time to undertake a RAT.

[65] Firstly, while I accept that Emprevo was used by Menarock to communicate with staff for purposes other than just shift availability, it was not a tool used to routinely communicate Covid or infection control requirements during the pandemic. In fact, the evidence was compelling that appropriately authorised Memos or letters from senior management to staff, residents and their families was how Menarock communicated infection control measures. It is also significant that mobile phone installation and use of the Emprevo App was not a mandatory requirement for staff. It follows that Emprevo was not the means by which ‘directions’ were issued to staff in relation to infection control measures. Nor was Ms Godbluff authorised by Menarock to issue directions to staff regarding attendance or infection control measures.

[66] Secondly, the 4 January Emprevo Message did not use mandatory language that could be reasonably construed as a direction with which compliance was required. Use of the term *“please aim to be at work 15 min prior for the test to be conducted”* does not constitute an unequivocal statement requiring early attendance, failure to comply with which would expose an employee to disciplinary consequences. By contrast, Memos and letters sent to staff as well as notes of staff meetings made clear in the period that RATs were required to be undertaken at the start of each shift (depending on the required testing frequency).

[67] Thirdly, contrary to the HSU’s contention, Mr Piper’s 3 February 2022 response to Ms Sward’s 5 January HSU email did not confirm the ‘direction’ now said by the HSU to have been made in the 4 January Emprevo Message. Ms Sward did not claim a direction had been

issued but rather advised Mr Piper that staff had been requested to attend work early to perform pre-shift RATs. Whether deliberately or inadvertently, Mr Piper's response did not engage with the claim that a request of staff to start early had been made. Rather, Mr Piper pointed to the ability of a staff member to adjust their time sheets if they worked outside their normal hours of work. While Mr Piper may be rightly criticised for failing to formally respond despite foreshadowing in his 3 February 2022 email that he would do so, I am not persuaded that Mr Piper's 3 February 2022 email response to Ms Sward confirmed the alleged 'direction' to attend early.

[68] Fourthly, I found HSU witness evidence that Ms Wickham confirmed the 4 January Emprevo Message both orally and in writing to be unconvincing. The oral direction by Ms Wickham was said by HSU witnesses to have been made on or around the time of the 4 January Emprevo Message although it was not clear whether that oral confirmation was provided to some or all employees, in what forum it was provided and whether it was made in a staff meeting. For her part, Ms Wickham denied that she gave such a direction orally to staff. Ms Godbluff also stated that she could not recall any occasion where Ms Wickham gave such a direction in her presence, noting that she routinely attended staff meetings with Ms Wickham. I note that records of staff meetings produced for the period make no reference to a pre-shift attendance requirement but simply refer to undertaking RATs at the beginning of each shift.

[69] Turning to the claimed written direction from Ms Wickham confirming the pre-shift attendance requirement, Ms Woods and Ms Long, both claimed to have seen a Memo from Ms Wickham that has since gone 'missing' that is said to have confirmed the pre-shift RAT testing attendance requirement. The only memo to staff from Ms Wickham produced in evidence was that of the 4 January Covid 19 Update Memo which made no mention of pre-shift attendance requirements but stated that "*All staff entering for every shift will need to be rapid antigen tested*". Ms Wickham denied that she sent any written directions to staff regarding pre-shift attendance for RAT purposes. Given the passage of time, the absence of copies of the alleged 'missing' memo from Ms Wickham, and Ms Wickham's strenuous denial of having issued such a written direction, I approach with caution the evidence that such a direction was issued in writing by Ms Wickham and then went 'missing'. I am not satisfied on the evidence that Ms Wickham issued such a written direction.

[70] Fifthly, the conduct of Menarock's staff in the period from 4 January – 31 October 2022 was not consistent with a direction having been issued to staff at the Gardens facility. Nor is there evidence of overwhelming compliance with the alleged direction. Significantly, it was established on the evidence of both HSU and Menarock witnesses that timekeeping requirements were well understood by staff, including the process for raising a payroll query. Despite the well understood timekeeping requirements of signing in and recording attendance outside of ordinary hours of work, timekeeping records for the period revealed that staff recorded early attendance for less than 5% of all shifts worked in that period. The evidence of the three witnesses as to the beliefs and conduct of their colleagues is not helpful and does not establish that there was 'overwhelming compliance' by staff when weighed against the actual timekeeping records.

[71] In the case of the three HSU witnesses, the timekeeping records revealed that each of those witnesses variously recorded early attendance in the 4 January – 31 October 2022 period on the following number of shifts; Ms Collins recorded early starts on 26 occasions, Ms Long

recorded early starts on two occasions and Ms Woods recorded early starts on 16 occasions. The records of early starts reveal that these three employees only recorded early starts on a minority of shifts worked by them in the period. Those records are not easily reconciled with their evidence that they started early on most shifts. Nor can the evidence of Ms Collins that she stopped recording her early attendance after a while because of non-payment be reconciled with the records which showed that she recorded early starts throughout August, September, and October 2022.

[72] Tellingly, there was no evidence that any employees raised a payroll query regarding non-payment for pre-shift attendance to undertake RATs. That cannot be easily squared with the HSU contention that employees believed there had been a direction and that it (the direction) was overwhelmingly complied with. Given employees' knowledge of the payroll query process, the fact that no employees queried with either Ms Wickham or HR the non-payment for pre-shift required RAT attendance undermines the HSU claim that there was a widespread belief that a 'direction' to attend early had been issued.

[73] Sixthly, the conduct of Menarock was not consistent with having issued a direction to staff that they were required to attend 15 minutes prior to normal shift start times to undertake RATs. There was no evidence of a formal Memo issued by the appropriately authorised manager confirming a pre-shift attendance requirement. Nor was there any evidence of any counselling or disciplinary action taken against any employee for failing to comply with the claimed direction.

[74] Seventhly, the HSU contention that shift handover would have been adversely impacted if staff had not arrived early is undermined by the unchallenged evidence of Ms Wickham that the Gardens have a 15 minute shift overlap which ensured that even where employees were late onto the floor due to undertaking a RAT, there was always staff on the floor. Added to that was the capacity of the RNs to provide necessary handover information where normal PCA handover was impacted by RATs being undertaken at the start of shift rather than 15 minutes prior to the start of each shift. Ms Wickham's evidence on what she observed at shift handover is helpful in that it reveals that staff arrived on the floor at varying times, this reflecting that some staff arrived early and undertook their RAT's pre-shift whereas other staff undertook their RATs at the start of the shift. The observations of Ms Wickham are more consistent with the time keeping records which indicate that employees did not turn up early on most shifts.

[75] For the foregoing reasons I am not satisfied that a direction was issued by Menarock to its staff at the Gardens facility that they were required to attend 15 minutes prior to normal shift commencement times to undertake required RATs. It follows from my conclusion on question 1 that it is unnecessary for me to answer question 2.

[76] While I have found that no direction was issued by Menarock that staff attend work 15 minutes early, it is evident that there was some confusion on the part of staff as evidenced by the irregular early attendance revealed by the timekeeping records. Despite Menarock's claim that subsequent authorised memos confirmed that RATs were required at the start of each shift (depending on testing frequency), I am of the view that Menarock could and should have done more to clarify the position for staff at the Gardens. That they failed to do so arguably allowed confusion to persist as to what employees were entitled to in circumstances where they elected to turn up 15 minutes early to undertake a RAT.

[77] In circumstances where employees did elect to turn up 15 minutes early, a position that was at the very least tolerated if not encouraged by Menarock, it ought to have been made clear to employees what payment they would receive for such early attendance. There is no evidence that Menarock took any proactive steps to clarify entitlements in those circumstances. Ms Wickham seems to have simply ignored the issue despite observing some staff turning up early and recording it in their time sheets. She defended her approach on the basis that she had not issued a direction to staff and saw the 4 January Emprevo Message as merely engaging staff. In the circumstances I found her approach to be inadequate as the manager in charge of day-to-day operations of the facility.

[78] I hasten to add that the adverse observations I have made regarding Menarock's failure to clarify payment entitlements does not alter my answer to question 1, that being there was no direction issued to staff.

Conclusion

[79] It follows from the foregoing that the answers to the questions posed for determination are as follows;

1. *Did a direction exist which required staff to attend the workplace early to undertake RAT Testing; if so*

The answer is "No".

2. *Did the Employer pay employees in accordance with the Menarock Aged Care Services (Claremont) Pty Ltd Non-Nursing Enterprise Agreement 2018-2021.*

Having answered question 1 in the negative, question 2 does not arise for consideration.

[80] The matter is determined accordingly.



DEPUTY PRESIDENT

Appearances:

J Milligan for the Applicant.

C Holland for the Respondent.

Hearing details:

2023.
Melbourne (via Microsoft Teams):
April 26, 27.

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² Exhibit ML-1, Email from Sheridan Devlin, dated 3 January 2022, titled “Urgent”

³ Exhibit ML-18, Witness Statement of Natalia Wickham, dated 28 March 2023, at [5]

⁴ Exhibit ML-02, Letter from Josh Piper, dated 3 January 2022

⁵ Exhibit ML-04, Memo from Natalia Wickham to staff, dated 4 January 2022, titled “Covid 19 update”

⁶ Exhibit ML-18, at [6]-[7]

⁷ Exhibit ML-05, Emprevo Message to staff, dated 4 January 2022

⁸ Exhibit ML-06, Email from HSU, dated 5 January 2022, titled “RAT Testing”

⁹ Exhibit ML-08, CMT Memo to all staff, dated 21 January 2022, titled “RAT Testing and PPE”

¹⁰ Exhibit ML-15, Witness Statement of Josh Piper, dated 24 March 2023, at [4]-[5]

¹¹ Exhibit ML-07, Email from Josh Piper to HSU, dated 3 February 2022, titled “RE: SLS - 3 Feb 2022 - Letter to Josh Piper re Rapid Antigen Testing - Menarock Claremont”

¹² Exhibit ML-09, Support Centre Memo to staff, dated 14 February 2022, titled “Extension of Enhanced Precautionary Measures

¹³ Exhibit ML-10, General Staff Meeting minutes, dated 7 April 2022

¹⁴ Exhibit ML12, Letter JC Yap, dated 29 May 2022

¹⁵ Exhibit ML-10, General Staff Meeting minutes, dated 6 July 2022

¹⁶ Exhibit ML-12, Letter from Kyan Ho, dated 14 July 2022

¹⁷ Exhibit ML-10, General Staff Meeting minutes, dated 13 September 2022

¹⁸ Exhibit ML-11, Memo from April Casio, dated 27 September 2022, titled “Changes to infection Control Protocols”

¹⁹ Exhibit HSU-04, Respondent Submission, dated 9 November 2022

²⁰ Exhibit HSU-09, Witness Statement of Jodie Collins, dated 24 February 2023, at [1]

²¹ Ibid at [5]-[10]

²² Ibid at [11]

²³ Exhibit ML-16, Record of early shift attendance

²⁴ Ibid

²⁵ Exhibit HSU-10, Witness Statement of Natasha Woods, dated 24 February 2023, at [1]

²⁶ Ibid at [4]-[8]

²⁷ Exhibit HSU-06, Payslip for Natasha Woods for pay period ending 6 November 2022

²⁸ Exhibit HSU-10, at [13]

²⁹ Ibid, at [14]

³⁰ Exhibit HSU-11, Witness Statement of Tania Long, dated 24 February 2023, at [1]-[6]

³¹ Ibid at [10]

³² Ibid at [12]

³³ Exhibit ML-16

³⁴ Exhibit ML-15, Witness Statement of Josh Piper, dated 24 March 2023, at [1]-[5]

³⁵ Ibid at [12], [14]-[19]

³⁶ Ibid at [8]-[9]

³⁷ Exhibit ML-20, Witness Statement of Anica Papadopoulos, dated 24 March 2023, at [1]-[6]

³⁸ Exhibit ML-13, Natasha Woods Contract of Employment, dated 24 March 2021

³⁹ Exhibit ML-20, at [9]-[12]

⁴⁰ Exhibit ML-17, Witness Statement of JC Yap, dated 24 March 2023, at [1]-[6]

⁴¹ Ibid at [7]-[10]

⁴² Ibid at [17]-[21]

⁴³ Exhibit ML-04

⁴⁴ Ibid at [11]-[12]

⁴⁵ Ibid at [16]

⁴⁶ Ibid at [[13]-[14]

⁴⁷ Exhibit ML-19, Witness Statement of Rhea Godbluff, dated 24 March 2023, at [1]-[5]

⁴⁸ Ibid at [5]-[8]

⁴⁹ Ibid at [9]-[11]

⁵⁰ Ibid at [12]-[16]

⁵¹ Exhibit ML-18, Witness Statement of Natalia Wickham, dated 28 March 2023, at [1]-[7]

⁵² Ibid at [8]-[18]

⁵³ Exhibit ML-10

⁵⁴ Ibid at [33]-[38]