[2023] FWC 683[Note: An appeal pursuant to s.604 (C2023/7275) was lodged against this decision - refer to Full Bench decision dated 26 April 2024 [[2024] FWCFB 235] for result of appeal.]

DECISION

Fair Work Act 2009
s.739—Dispute resolution

Health Services Union
v
Mercy Hospitals Victoria Ltd
(C2022/6450)

COMMISSIONER MIRABELLA — MELBOURNE, 3 NOVEMBER 2023

Alleged dispute about matters arising under an enterprise agreement – health industry.

[1] On 21 September 2022, the Health Services Union (Victoria No. 1 Branch) trading as the Health Workers Union (HWU) filed an application (application), in its own capacity, under s.739 of the *Fair Work Act 2009* (Act) for the Fair Work Commission (Commission) to deal with a dispute of a collective nature involving Mercy Hospitals Victoria Ltd (Mercy) pursuant to clause 17 of the *Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025*[1] (Agreement).

[2] Clause 17 of Section 1 of the Agreement (clause 17) is broadly expressed, empowering the Commission to deal with disputes between the parties in relation to matters arising under the Agreement and the National Employment Standards (NES), as well as regarding requests for additional parental leave and for flexible working arrangements, with clause 17.5 making specific provision for a dispute of a collective nature to be referred to the Commission.

[3] The HWU made its application raising a dispute regarding clause 29.3 of Section 1 (clause 29.3). The dispute relates to the proper interpretation of clause 29.3 and the ultimate conclusion as to whether Mercy is required to make a penalty payment to certain employees because Mercy delayed in paying their nauseous work allowance and educational incentive allowance under the Agreement.

[4] The dispute has been the subject of two conferences and a hearing before me. The parties have filed and served outlines of submissions and witness statements pursuant to my directions, to which I have had regard in determining the questions before me.

[5] The questions for the Commission to determine are as follows:

Question 1: Are each of the delayed payments by Mercy to eligible employees of:

a. The nauseous work allowance under clause 11 (Section 2)

b. The educational incentive allowance under clause 16 (Section 2)

an 'underpayment' under clause 29.3 (Section 1) of the Agreement?

Question 2: If the answer to Question 1 is yes, is Mercy required to make a penalty payment and if so, how is the penalty payment calculated?

Introduction

[6] The HWU in their Form F10 application provided the following context to the dispute:

- The Agreement was approved with an effective commencement date of 20 April 2022.
- The HWU and the Victorian Hospitals Industrial Association (VHIA), on behalf of Victoria's public health services (including Mercy), reached an in-principle agreement regarding the Agreement in March 2021.
- The time between reaching the in-principle agreement and the Agreement's approval consisted largely of drafting the Agreement, with its basis changing very little.
- The public health services who are party to the Agreement were aware for over 12 months of the in-principle agreement and therefore had time to prepare for the new payment obligations under the Agreement before it was approved.
- Relevant to this dispute, the Agreement provides for back pay of certain allowances from 1 July 2021.

[7] On 5 May 2022, Mr Danny Harika, an HWU Organiser, emailed Ms Margaret Barrett, an HR Business Partner for Mercy, asking for clarification regarding when the back pay would take effect, with Ms Barrett replying that she would need to check an 'estimated date regarding the backpays'.

[8] The HWU argues that Mercy failed to pay the allowances to employees on the days these entitlements fell due, that this constitutes an 'underpayment', that Mercy did not comply with the Agreement to correct the underpayment within the requisite time period, and that for each day the allowances went unpaid, a penalty of 20% of the underpayment should be incurred by Mercy and paid to the employee who had been underpaid.

[9] Mercy raises jurisdictional objections and argues that the HWU is not a proper party to the dispute. It also argues, amongst other things, that clause 29.3(a) provides preconditional steps for determining whether Mercy is obliged to pay a penalty to employees for underpayment of the allowances. It submits that in the alternative, the conditions in clause 29.3(c) are met so that there is no failure to act that would trigger a penalty payment on any underpayments. Mercy further contends that if I find it is required to pay a penalty, the penalty under clause 29.3 is calculated per annum.

The Agreement

[10] The Agreement applies to Mercy and other health services in Victoria in respect of a wide class of employees, including pathology collectors, laundry hands, technicians, cooks and allied health assistants. It covers rates of pay over four years, backdated from 1 July 2021 until 1 July 2024.

[11] Section 1 of the Agreement deals with the general employment conditions applying to all employees. Essentially, this dispute concerns the interpretation of clause 29.3 in Section 1 of the Agreement which deals with underpayments. Clause 29.3 sits within clause 29 which is titled 'Payment of Wages'. Clause 29.3 is as follows:

> '(a) Where an Employee considers that they have been underpaid as a result of error on the part of the Employer, the Employee may request that the Employer rectify the error or validate the payment.
>
> (b) Where an Employee is underpaid by reason of Employer error and the amount of such underpayment is less than 5% of the Employee's fortnightly wage, the underpayment will be corrected in the next pay period.
>
> (c) Where the underpayment exceeds 5% of the Employee's fortnightly wage, the Employer must take steps to correct the underpayment within 24 hours and to provide confirmation to the Employee of the correction.
>
> (d) If the Employer does not take the action required under subclause 29.3(b) and subclause 29.3(c) above, the Employee will be paid a penalty payment of 20% of the underpayment, calculated on a daily basis from the date of the entitlement arising until all such moneys are paid. In addition, the Employer will meet any associated banking or other fees/penalties incurred by the Employee as a consequence of the error where those fees exceed the 20% penalty payment.
>
> (e) Subclause 29.3(d) will not come into effect:
>
>> (i) if the payment of wages or other monies owed falls on a public holiday, until the expiration of such public holiday; or
>>
>> (ii) where the Employee or Employer disputes whether the monies are owed to the Employee; or
>>
>> (iii) where the underpayment is the result of Employee error, which includes, but isn't limited to circumstances where the Employee hasn't complied with the Employer's policies dealing with the completion or approving of timesheets; or
>>
>> (iv) where the Employee agrees to defer the correction of the underpayment until the next pay period; or
>>
>> (v) if any unforeseen event outside the control of the Employer frustrates their ability to meet the requirements of this clause.'

[12] Section 2 of the Agreement deals with conditions of employment for health and allied services employees and dental assistants. Clause 11 in Section 2 provides a nauseous work allowance of $350 for certain employees. Clause 16 in Section 2 provides certain employees an educational incentive allowance of $500.

[13] The dispute resolution procedure is at clause 17 and is as follows:

‘17. Dispute Resolution Procedure

17.1 Resolution of disputes and grievances

(a) For the purpose of this clause 17, 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 an additional 12 months parental leave; or

(iv) a request for flexible working arrangements.

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

17.2 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 an Employee:

(i) has a reasonable concern about an imminent risk to his or her health or safety;

(ii) has advised the Employer of the concern; and

(iii) has not unreasonably failed to comply with a direction by the Employer to perform other available work that is safe and appropriate for the Employee 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 this clause.

17.3 Dispute settlement facilitation

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

(i) investigating the circumstances of the dispute; and

(ii) participating in the processes to resolve the dispute, including conciliation and arbitration.

(b) An Employee who is part of the dispute will be released by the Employer 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 Employer.

17.4 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 Employee/s and the relevant supervisor; and

(ii) if the dispute is still unresolved, by discussions between the Employee/s and more senior levels of local management.

(b) The discussions at subclause 17.4(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 Commission for conciliation and, if the matter in dispute remains unresolved, arbitration.

17.5 Disputes of a collective character

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

17.6 Conciliation

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

(b) Conciliation before the Commission is complete when:

(i) the parties to the dispute agree that it is settled; or

(ii) the Commission 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 Commission 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.

17.7 Arbitration

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

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

(c) Subject to subclause 17.7(d) below, a decision of the Commission is binding upon the persons covered by this Agreement.

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

17.8 Conduct of matters before the Commission

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 Commission will conduct the matter in accordance with sections 577, 578 and Subdivision B of Division 3 of Part 5-1 of the Act.'

Agreed facts

[14] Under the Agreement, the following allowances were payable by Mercy to eligible employees employed by Mercy and covered by the Agreement:

- A nauseous work allowance in the amount of $350, payable on the first full pay period on or after (FFPPOA) 1 December 2021;
- A second nauseous work allowance in the amount of $350, payable on FFPPOA 1 July 2021;
- A third nauseous work allowance in the amount of $350, payable on FFPPOA 1 July 2022;
- An educational incentive allowance in the amount of $500, payable from FFPPOA the operative date of the Agreement; and
- A second educational incentive allowance in the amount of $250, payable on FFPPOA 31 March 2022.

(together the allowances).

[15] Mercy paid the allowances to eligible employees in the period of 24 August 2022 to 31 August 2022.

The HWU's submissions

[16] The HWU's submissions included the following.

[17] The HWU submits that Question 1 and 2 should both be answered in the affirmative and that with regard to the second part of Question 2, the HWU submits that the penalty payment should be calculated as 20% of the value of the allowance, payable per day from the date the allowance was due to be paid, until the date the allowance was paid in full.

[18] The HWU submits that the correct date for the first of the allowances was the first pay on or after the new Agreement came into effect.[2] The HWU adopted the methodology applied by Mercy so that the relevant due dates for the various allowances for the employees were 4 May 2022, 11 May 2022, 20 July 2022 and 27 July 2022.[3]

Question 1

Are the allowances underpayments under clause 29.3?

[19] The HWU submits that when the allowances were not paid on the date the Agreement required them to be paid, this constituted an underpayment, and that underpayment of allowances is included within the scope of clause 29.3 of the Agreement. The HWU submits this was contemplated during the bargaining for the Agreement, looking to the evidence of Mr Cameron Granger, Senior Industrial Officer for the HWU.[4]

[20] The HWU further submits that the title of clause 29, 'Payment of Wages', does not prevent a finding that delayed payment of allowances constitutes an underpayment for the purposes of clause 29.3. The HWU supports this submission by looking to the broad interpretation of the word 'wages' in caselaw[5] and the language used in the surrounding clauses.

Question 2

What Mercy was required to do in response to the underpayment

[21] The HWU submits that Mercy was required to take steps that have the effect of correcting the underpayment within 24 hours. The HWU submits in the alternative that clause 29.3(c) requires Mercy to take steps that could reasonably achieve the result of correcting the underpayment within 24 hours and which demonstrate a genuine intention by Mercy to attempt to achieve this result. The HWU submits that this requires that multiple steps be taken, as 'steps' is expressed as plural.

[22] The HWU submits that the steps required to be taken cannot be actions of any kind, no matter how small or insignificant, because it submits the purpose of these provisions is to deter employers from underpaying employees and to promote swift corrections of any underpayments.

[23] The HWU agrees with Mercy that it is clause 29.3(c) which applies to this dispute, rather than clause 29.3(b).[6]

[24] The HWU submits that the only action taken by Mercy to correct the underpayments was an email from Ms Barrett, sent on 5 May 2022 (5 May 2022 reply email) in reply to an email from the HWU seeking an update on when entitlements under the Agreement would be back paid. In the 5 May 2022 reply email, Ms Barrett stated, 'I will need to check an estimated date regarding the backpays'. The HWU submits that Mercy failed to respond to a further follow up email they sent to Mercy on 12 May 2022. The HWU submits it followed up again with Mercy about the back pay at the Health & Allied, Managers & Admin Agreement Implementation Committee meeting on 21 July 2022 and the reply received from Mercy was that Mercy would follow up (21 July 2022 response).

[25] The HWU submits that providing a response to an employee or their representative that Mercy will follow up on underpayments or they will need to do something to follow up does not satisfy the requirement to 'take steps to correct the underpayment within 24 hours'. The HWU submits that without any evidence of actual follow up by Mercy, the 5 May 2022 reply email was merely an acknowledgment of the need to follow up. The HWU submits that the 5 May 2022 reply email does not satisfy the implicit requirement to take more than one step to correct the underpayment.

[26] The HWU further submits that the 21 July 2022 response from Mercy was merely a promise of a follow up rather than 'actual follow up'.

The calculation of the penalty payment

[27] The HWU submits that clause 29.3(d) provides for a penalty of 20% of the underpayment to be incurred by Mercy and paid to the employee for each day that the entitlement goes unpaid.

[28] In reaching the above interpretation, the HWU submits that 'calculated on a daily basis' has its plain meaning, read as a whole and in context and that this interpretation is supported by a deterrent purpose underlying clause 29.3(d) in establishing a penalty for underpayments.

[29] In the alternative, the HWU submits that if I do not consider that 'calculated on a daily basis' has its plain meaning, I should look to the industrial context of the words, and points to caselaw regarding the interpretation of the phrase for the purposes of overtime.[7]

[30] The HWU submits that in adopting either interpretation principle, the meaning of clause 29.3(d) is the same.

[31] The HWU points to the example that if Mercy fails to make a $350 payment owed to an employee on its due date, a penalty of $70 applies each and every day until Mercy pays the $350 to the employee. The HWU submits if it takes Mercy two days to fulfil the $350 underpayment, the penalty is $140 and if it takes 100 days to fulfil the underpayment, the penalty is $7,000.

Mercy's submissions

[32] Mercy's submissions included the following.

[33] Mercy raises a jurisdictional objection they 'understand has [n]ever been run before'.[8] That is, Mercy raises a question regarding the constitutionality of Part 6-2 of the Act, with specific reference to the Commission's ability to arbitrate a dispute under s.739.

[34] Their submission is that the consequence of the Act being anchored by s.51(xx) of the *Australian Constitution* as opposed to s.51(xxxv), as had been the case for predecessor Acts prior to 2007, is that the Commission lacks the jurisdiction to arbitrate a dispute under the Agreement because there has been no 'agreement' by the parties to do so as required by the decision in *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (the Private Arbitration Case).[9]

[35] Mercy did not press this jurisdictional objection but did raise it at the hearing 'so that we're not shut out at the appeal stage from running it there',[10] and submits at a footnote in its written submissions 'that a Commissioner of the Fair Work Commission (Commission) is, at first instance, entitled to assume validity'.[11]

[36] On the issue of the constitutionality of relevant provisions of the Act, the HWU says the submission is misconceived because it proceeds from an incorrect premise; that is, that the HWU is not a party to the Agreement.

[37] Mercy in contending that the HWU is not a party to this dispute notes that the Commission is empowered to arbitrate in s.739 disputes only by application by a 'party' to the dispute pursuant to s.739(4) of the Act.

[38] Mercy submits that the correct view of the dispute raised is that three of Mercy's employees have separately raised a dispute with Mercy regarding the delay in paying a single

allowance, being the nauseous work allowance, rather than the HWU having raised a dispute as a party principal.

[39] Mercy contends that, on their conception of the dispute, there are a total of seven relevant payments made to three employees, being Mr Andrew Hargreaves, a Theatre Technician; Mr Nicholas Barbante, also a Theatre Technician; and Mr Timothy Hodges, a Patient Services Assistant (the three employees).

[40] I will proceed, as has every other member of the Commission, to accept that s.739 of the Act validly permits me to arbitrate the type of dispute that arises in this matter.

[41] Mercy submits that Question 1 and the first part of Question 2 should be answered in the negative, and that the second part of Question 2 should be answered as follows:

> *If yes, the penalty payment is to be calculated as: [Value of the payment] x 0.20 x ([Number of days delayed] / 365) = Penalty*

[42] Mercy submits that clause 29.3(a) establishes the following preconditions that must be satisfied prior to any consideration of clause 29.3(c):

- The underpayment must be the result of an error,
- The employee makes a request for rectification of the underpayment, and
- The employee's state of mind is such that they consider they have been underpaid.

The underpayment must be the result of an error

[43] Mercy contends that the delay in making the payment to the three employees was not an 'error' for the purposes of clause 29.3 and that there is no evidence that the relevant employees so contended. Further, they contend that at all times there was an understanding that the allowances were payable, and that they did perform actions in order to make the payments.

[44] Mercy supports this contention by pointing to the Oxford English Dictionary (2nd ed) definition, which it submits that for it to be in error, a mistake needs to have infected the payment process, for example, through a miscalculation. Mercy submits that it requires it to have been 'wrong about something'.

[45] Regarding the 220 employees under the HWU's characterisation of the dispute, Mercy submits no evidence has been led as to whether a request was made at the time an error was present.

A clause 29.3(a) 'request' has not been made for each payment

[46] Mercy contends that on the evidence before me, it is not clear that each of the three employees requested that Mercy rectify the error or validate the payment prior to the allowances being paid.

[47] Mercy submits that as for the approximately 220 employees to which the HWU says the dispute pertains, there is no satisfactory evidence that each of these employees made any request to Mercy required by clause 29.3(a). It submits that it is unlikely that a discussion held during the implementation process for a new enterprise agreement can be characterised as the type of request necessary to enliven clause 29.3.

The 'state of mind' requirement for clause 29.3

[48] Mercy contends that clause 29.3(a) requires that each employee at all applicable times 'consider that they [had] been underpaid' as a result of the error. Mercy contends that if the dispute is between Mercy and approximately 220 of its employees, the HWU has not provided sufficient evidence to determine whether those employees 'considered' they had been underpaid, noting that there is not even evidence as to the identity of these employees.

[49] Mercy acknowledges that in relation to the dispute regarding the three employees, it is likely they had the requisite state of mind and have provided evidence of such.

Not an underpayment – Mercy 'took steps'

[50] Mercy submits that it met its obligation under clause 29.3 by taking steps to correct the underpayment, even in respect of the approximately 220 employees under the HWU's characterisation of the dispute.

[51] Mercy submits that 'tak[ing] steps' for the purposes of clause 29.3 requires Mercy to set the process in train that will ultimately rectify the error (the first part of the obligation), and later notify the employee that it has done so (the second part of the obligation).

[52] Mercy submits that where an employee notified them of an underpayment, they appear to have responded immediately, pointing to the evidence of Ms Tamara Kingsley, Group Employee Relations Manager of a related entity of Mercy, and two of the three employees, thereby satisfying the first part of the obligation.[12] Mercy further submits that it immediately notified each employee and the HWU of the rectification, thereby satisfying the second obligation in clause 29.3(c).

[53] Mercy submits that if it was required to complete the correction of the underpayment or take all steps necessary to effect payment within 24 hours, then the drafters of the Agreement would have written this.

[54] Mercy submits that non-compliance with the clause would instead look like Mercy ignoring or dismissing the complaint made or Mercy taking steps that do not serve to correct the underpayment and it submits it did not do this.

The calculation of the penalty

[55] Mercy submits that if I find that a penalty payment under clause 29.3 is required to be paid, the penalty is calculated as follows:

[Value of the payment] x 0.20 x ([Number of days delayed] / 365) = Penalty

[56] Mercy submits I should construe clause 29.3(d) in a sensible and just manner and makes the following submissions:

- A breach of the Agreement is punishable under the Act, which comprehensively covers the Agreement and its application.
- The provision for unanticipated banking fees in clause 29.3 supports Mercy's submission that it is more plausible that the 20% penalty in clause 29.3(d) is calculated per annum, because it is unlikely the parties would have provided for banking fees that exceed 20% of a given allowance each day. Mercy submits that if the drafter did mean this, the clause would be more explicit; for example, by providing that the entitlement would be 'payable at 20% of the value of the entitlement each day'.
- Caselaw indicates that I am required to adopt a construction that achieves a sensible industrial outcome that avoids injustice and absurdity,[13] and that the HWU's construction of clause 29.3 is absurd. Mercy submits that this is because the Agreement was negotiated in the context of the parties operating in the public health system and it cannot have been intended that an employer party to the Agreement could be liable for penalties worth millions of dollars for a delay of payment of a relatively small amount, especially while the payment was still in the process of being implemented.
- The industrial context of the Agreement provides no support for the suggestion that the parties intended a duplicate penalty regime to that provided in the Act,[14] and that the Act is intended to cover the field in providing a deterrent to contraventions of industrial instruments. Mercy submits that the Act does not provide a penalty interest on the payment of debt; that is, an above-commercial interest rate to act as an incentive to quickly rectify a non-payment of an allowance and that this is what clause 29.3(d) provides.

The HWU's submissions in reply

[57] The HWU's reply submissions include the following.

[58] The HWU submits in reply that it is the proper party to the dispute for the following reasons:

- The HWU submitted the originating Form F10 application to the Commission which names the HWU as the Applicant, and it considered itself to be a party to the dispute able to utilise the dispute resolution procedure in clause 17 of the Agreement.
- Clause 17.5 allows disputes of a collective character to be dealt with more expeditiously by early reference to the Commission and that this is a dispute of a collective nature.
- The Private Arbitration Case was decided in the context of a different statutory regime. The HWU submits that the terms of the Agreement are now given legal efficacy and

enforceability by the Act, and that the terms of the Agreement are also themselves enforceable.

- The HWU is a party to the Agreement as it is defined as a 'party' to the Agreement in clause 6.1(ee) and it is subject to many obligations within the Agreement.
- It would be nonsensical and absurd for clauses 69.5(d) and 70.5 to refer the HWU to clause 17 of the Agreement if the HWU was not a party to the Agreement as these clauses are only relevant to 'parties'/'a party' to the Agreement. The HWU notes that clause 69.5(d) also directly refers to it as one of the 'parties'.

[59] The HWU submits that if I do not find them to be a party to the dispute, then I should find that they were able to refer the dispute to the Commission by virtue of being a representative for a collective of employees and refers to clause 17.4(c) which empowers either 'a party to the dispute or representative' to refer a dispute to the Commission for conciliation or arbitration.

[60] They submit that the collective of employees in this dispute includes but is not limited to the three employees and that it is not necessary to name each employee that forms part of the collective, pointing to the Full Bench decision in *Australian Rail, Tram and Bus Industry Union v Asciano Services Pty Ltd t/a Pacific National*.[15] The HWU submits that the employees who form part of the collective were identified with sufficient particularity as being employees who were entitled to receive the allowances and that Mercy was able to list the employees who form part of the dispute.[16]

[61] The HWU submits that clause 17.5 contains no requirement that the members of the collective be named as individual parties to an application or that they have been named during the dispute resolution process.

[62] The HWU submits that Ms Barrett's correspondence with her colleagues regarding when the allowances were to be paid[17] indicates Mercy understood that the HWU was communicating with them about the allowances on behalf of a collective of employees.

The effect of clause 29.3(a)

[63] The HWU submits that clause 29.3(a) is not a precondition for underpayment recovery and, accordingly, there is no requirement, as Mercy submits, that an employee must consider themselves underpaid, that the employee must make a request that the underpayment be rectified or that there must be employer error present at the time of the request being made.

[64] The HWU contends that underpayments exist because an employee has been underpaid, not because the employee considers themselves underpaid or because they have requested the underpayment be rectified.

[65] The HWU submits that Mercy submitted no evidence to support the argument that clause 29.3(a) is a precondition to underpayment recovery and that the language of the clause makes it clear that it is not a precondition, for the following reasons:

- They submit that clause 29.3(a) in providing that an employee ‘may’ request the employer rectify the error indicates that there is no requirement for this request.

- The HWU compares the right to request rectification to other ‘workplace right[s]’ that are protected under Part 3-1 of the Act regarding general protections, like the right to make an inquiry.

- They submit that clause 29.3(a) is not mentioned elsewhere in the clause.

- They submit that although clauses 29.3(b) and 29.3(d) both use the word ‘error’, this concept is not defined or limited by reference to clause 29.3(a), whereas clause 29.3(c) does not even contain the word ‘error’.

Employee ‘state of mind’ requirement

[66] The HWU submits that an employee’s opinion has no bearing on the factual basis of whether or not they have been underpaid.

Employee ‘request’ requirement

[67] The HWU submits that in a situation where they had already raised the issue of the underpayment of the allowances on behalf of collective employees, if each employee was required to request that their own underpayment be rectified in order for the penalty to be incurred, this would be an industrially unsensible, unjust and absurd result as it would require each of the 220 employees Mercy has identified as being affected to individually notify Mercy, which would be ‘extremely inefficient’ and would risk overwhelming Mercy’s systems.

[68] The HWU further argues that Mercy’s construction of clause 29.3 is absurd, unsensible and unjust in a situation where, as Mercy acknowledged,[18] they were already aware of the failure to pay the allowances on time.

Whether an ‘error’ is required

[69] The HWU submits that an employer error is not a precondition for the penalty payment to become an obligation.

[70] The HWU supports these submissions by looking to the language of clause 29.3. Firstly, it submits that clause 29.3(c), as opposed to clause 29.3(b), makes no mention of the word ‘error’. Further, it submits that although ‘error’ is mentioned in clause 29.3(d), this reference is in the second sentence of this clause where the requirement to meet any associated banking or other fees or penalties is set out as being ‘a consequence of the error’. The HWU submits that the absence of a reference to ‘error’ in clause 29.3(c) was deliberate and shows that underpayments of a lesser value than 5% (clause 29.3(b)) and those over 5% (clause 29.3(c)) were intended to be treated differently. The HWU submits that as a result an employer error is not a precondition for the penalty payment to become an obligation and that, instead, the precondition is the existence of an underpayment.

[71] The HWU looks to the modern use dictionary definition of 'error' provided in the Oxford English Dictionary (2nd ed) which refers to error being 'either of something not wholly voluntary, and so excusable, or of something imprudent as well as blameable'.[19] The HWU submits that the delay in paying the allowances could be characterised as a 'transgression', a 'wrongdoing', 'imprudent' and 'blameable'. They say that this, combined with the definition of 'employee error' provided in clause 29.3(e)(iii), supports the HWU's contention that non-compliance with policy by Mercy is an example of error for the purposes of this dispute.

The requirements of Mercy under clause 29.3(c) (including to 'take steps')

[72] The HWU disputes that Mercy 'took steps' for the purposes of clause 29.3(c), and disputes Mercy's construction of the clause.

[73] The HWU submits that the language of the clause is plain and has its ordinary meaning,[20] and looks to the Oxford English Dictionary definition of 'to take steps'.[21]

[74] The HWU reasserts that the clause requires the employer to take steps that could reasonably achieve the aim of correcting the underpayment within 24 hours, and which demonstrate a genuine intention by the employer to attempt to achieve this result, and that Mercy's mere confirmation of receipt followed by extended inaction was insufficient. The HWU submits that, at the very least, Mercy was required to initiate and perform moves in a course of action towards attaining the end of correcting the underpayment by the deadline of the expiry of 24 hours.

[75] The HWU submits that the requirement to 'take steps' requires multiple steps be taken and that the only evidence of any possible step being taken is Ms Barrett's 5 May 2022 reply email. Although the HWU submits that this email was not itself an example of taking steps, no other evidence of a further action within 24 hours has been adduced.

[76] The HWU submits it opposes Mercy's submission that clause 29.3(c) is satisfied by merely responding to notification in an email and then, at some later and indeterminate date at Mercy's own discretion, taking the further steps to effect correction of the underpayment. The HWU submits that the timeline provided in Ms Kingsley's witness statement,[22] instead of showing that Mercy took sufficient steps, shows that Mercy took a series of circuitous actions which led to the payment being made after four months of 'inexplicable delay', which demonstrates that Mercy cannot have acted in any reasonable sense to correct the underpayment within 24 hours or with the urgency it submits is required by clause 29.3(c).

The requirements of clause 29.3(c) as compared to clause 29.3(b)

[77] The HWU submits that Mercy's construction of clause 29.3(c) would create an absurd outcome in which the response required to correct the greater underpayment in clause 29.3(c) would be less onerous on the employer than that required for the lesser underpayment in clause 29.3(b).

[78] The HWU submits that if I find that clause 29.3(c) is ambiguous, I should adopt the principles stated by the Full Bench of the Commission in *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited.*[23] The HWU submits that clause 29.3 is

expressly intended to deal with underpayment and sets out a penalty regime of increasing severity proportionate to the underpayment, so as to deter employers from underpaying employees and from delaying rectification of the underpayment.

[79] The HWU supports this contention by looking to the arrangement of clause 29.3, in that clause 29.3(b) deals with underpayments that are less than 5% of the employee's fortnightly wage, which is the less serious scenario, and which can be rectified in the next pay cycle, whereas underpayments over 5% of that wage require the employer to begin to deal with them within 24 hours.

[80] The HWU submits that the effect of clause 29.3(d) in the above scenarios is that where the underpayment is less than 5% of the employee's wage, non-correction of the underpayment will result in the penalty being due if no correction is made in the next pay period; whereas, where the amount is greater than 5% of the employee's wage, the penalty will be due within 24 hours of non-performance of the steps in clause 29.3(c). The HWU submits that this is because clause 29.3(c) logically must provide for more onerous obligations on Mercy than clause 29.3(b). The HWU submits that if Mercy's construction of the meaning of 'take steps' as being merely to 'set the process in train that will ultimately rectify the error' is preferred, clause 29.3(c) would impose a lesser penalty than clause 29.3(b) which it submits would be an absurd outcome.

Calculating the penalty

[81] Regarding Mercy's calculation of the penalty, the HWU submits that:

- Mercy made no submissions on why division by 365 should be applied to the calculation of the penalty, other than suggesting that the provision for banking and similar fees implies the calculation must reach a much smaller total.

- If a smaller underpayment had been corrected more quickly compared to this matter, then on the HWU's construction of the penalty, the banking fees could have exceeded the penalty payment, thereby countering Mercy's submission that it is unlikely the parties would have provided for banking fees that exceed 20% of a given allowance each day.

- Mercy's calculation of the penalty is not supported by the plain language of the Agreement.

- Nothing in the text of the clause suggests the penalty should be reduced in any way or that it should be calculated per annum.

- It cannot be the case that the parties intended to create an underpayment penalty scheme with such minimal penalties.

- A penalty should 'be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business', looking to the High Court of Australia decision in *Australian Building and Construction Commissioner v Pattinson*.[24]

- The underpayment provisions in clause 29.3 are permitted matters as they relate to wages, allowances and the employment relationship.

- The HWU understands there are no examples of employers covered by the Agreement having paid a penalty under 29.3(d) in line with the method of calculation put forward by Mercy and that no examples of this have been tendered by Mercy, but that the HWU is aware of instances where the penalty has been paid in line with their construction of the calculation.[25]

Consideration

[82] The principles to be applied to the interpretation of an enterprise agreement are well articulated and settled.[26] The first step is to determine whether the disputed terms of the agreement have a plain meaning or are instead ambiguous or susceptible to more than one meaning. The language of disputed terms is to be construed objectively, having regard to both context and purpose, and a narrow or pedantic approach to interpretation is to be avoided.

[83] The Full Bench in *United Firefighters Union of Australia v Emergency Services Telecommunications Authority T/A ESTA*[27] considered the application of these principles in relation to matters of ambiguity and said:

> **'[35]** As stipulated in *Berri*, the starting point for interpreting an enterprise agreement is to have regard to the ordinary meaning of the words used. Further, the text must be interpreted in the context of the agreement as a whole. Principles 7 and 10 elicited in *Berri* emphasise that ambiguity in a provision within an enterprise agreement must be identified before one is to have regard to evidence of the surrounding circumstances. However, principle 8 makes it clear that, in determining whether ambiguity exists, one may have regard to evidence of the surrounding circumstances. That is, such evidence can be used to identify and resolve any ambiguity.'

[84] I have applied these principles without repeating them.

Are the allowances underpayments?

[85] Under the Agreement, the allowances were payable by Mercy and were in fact eventually paid to eligible employees by Mercy. Further, in the 5 May 2022 reply email, Mercy uses the word 'backpays' to refer to the allowances that had not been paid as required by the terms in the Agreement. Accordingly, the ordinary meaning of the word 'underpayment' would include the unpaid allowances.

[86] Mercy's submission that Question 1 is to be answered in the negative is not premised on any objection to the inclusion of allowances within the scope of 'Wages' in Part D of Section 1 of the Agreement. Accordingly, the HWU's submissions that the underpayments of the allowances are included within the scope of clause 29.3 were not opposed. The accepted, expanded legal definition of 'wages'[28] supports the finding that the reference to 'Wages' in Part D is inclusive of other financial payments made to employees and does not exclude allowances from the scope of clause 29.3.

Who are the parties?

[87] It is the HWU that has made the application. Mercy says that the HWU cannot make the application because they are not a party to the Agreement for the purposes of s.739(4) of the Act and that it is the three employees of Mercy who have separately raised the issue of a delay in the payment of the nauseous work allowance and who would be eligible to raise a dispute each as a party to the Agreement. The HWU submits that it is a party to the Agreement and the application concerns a dispute of a collective nature as per clause 17.5.

[88] For the following reasons, I find that the HWU is a party to the dispute and that the dispute falls within the scope of disputes that the Agreement allows the Commission to deal with.

[89] The plain and simple words of the Agreement support the characterisation of the HWU as a party to the Agreement. Clause 6 in Section 1 of the Agreement provides definitions for certain words and phrases used in the Agreement. At clause 6.1(ee), it is made clear that the definition of a 'party' to the Agreement includes the HWU:

> '(ee) **Party** means the Employer, Employees and the HWU who are covered by this Agreement.'

[90] At clause 6.1(v), 'HWU' is defined as:

> '(v) **HWU** or **Union** means Health Services Union Victoria No 1 Branch, trading as the "Health Workers Union".'

[91] I accept the HWU's submissions that the union in giving notice that it wants to be covered by the Agreement strengthens its proposition that it along with other parties has voluntarily submitted to the arbitral jurisdiction of the Commission.

[92] The dispute settlement procedure makes specific reference in clause 17.5 to 'Disputes of a collective character'. This clause makes provision for an early reference to the Commission of a dispute that is of a collective character and where there has been a genuine attempt at the workplace level to resolve the dispute. The application was filed by the HWU and made to reflect the entitlement of employees who were eligible to receive the allowances.

[93] Regarding this dispute, the HWU did not materialise out of thin air. It had been in discussions with Mercy on behalf of the approximately 220 eligible employees on the issue of the underpayments. This application made by it as a party to the Agreement, and relying on clause 17.5, need not name every single eligible employee.[29]

[94] At clause 69.5(d) of Section 1, the reference to 'parties' seeking to resolve matters relevant to that clause includes the HWU as a party and both clauses 69.5(d) and 70.5 of Section 1 specifically refer the HWU to clause 17.

[95] Further, references in the dispute resolution provisions to the HWU as a 'representative' does not bar the HWU from being a party itself. The Agreement specifically makes it a party and the alternate narrow interpretation could result in clause 17.5 being effectively redundant.

Clause 29.3(a)

[96] The lateness of the payment of the allowances has given rise to a dispute regarding whether a penalty interest rate applies to the late payment of the allowances and if a penalty interest rate applies, how this is to be calculated.

[97] Clause 29.3 of the Agreement is concerned with 'Underpayment'. I do not accept Mercy's submissions that clause 29.3(a) establishes threshold matters that must be satisfied prior to any consideration of clause 29.3(c), the interpretation of which is central to the dispute in this matter.

[98] Firstly, clause 29.3(a) uses the word 'may'. That is, where an employee considers that they have been underpaid as a result of an error, they may request the employer rectify the error or validate the payment. The word 'may' in this instance allows something to occur, but it does not mandate it. Otherwise, the drafters could have used, as they have in clause 29.3(c), a word like 'must' to mandate certain actions.

[99] Clause 29.3(a) merely states an obvious workplace right. That is, if a worker thinks they have not been paid correctly, they can ask for, what is in their view, the correct payment. The existence of an underpayment is one of fact. It does not rely on an employee raising it as an underpayment to make it so.

[100] Finding that clause 29.3(a) does not establish any preconditions for the consideration of clause 29.3(c) means that I do not need to make findings regarding the preconditions that Mercy says need to be satisfied.

Clause 29.3(c)

[101] It is agreed between the parties that clause 29.3(c) is the pertinent clause regarding whether Mercy complied with the Agreement so as not to raise the issue of penalty interest payments in clause 29.3(d).

[102] Clause 29.3(c) is relevant to this dispute as it concerns underpayments exceeding 5% of an employee's fortnightly wage and there is no dispute that the underpayment exceeds the 5% threshold.

[103] The HWU broadly submits that the only action taken by Mercy within the relevant 24 hours to correct the underpayment was to send an email replying to the HWU. The HWU says Mercy has not taken the steps as contemplated in clause 29.3(c) to correct the underpayment.

[104] HWU Organiser Mr Harika had sent the following email to Ms Barrett from Mercy on 5 May 2022:

> 'Hi Margaret

Can you please give me some detail as to when the wage increases, and back pay will take affect for the 2021-2025 EBA?

Kind Regards,

Danny Harika'

[105] In response, Ms Barrett sent the 5 May 2022 reply email which was as follows:

'Good afternoon Danny,

My understanding is the wage increase will take effect from the next pay period. I will need to check an estimated date regarding the backpays.

Regards

Margaret Barrett'

[106] There is a series of communication between the HWU and Mercy over the months following the HWU's 5 May 2022 email and the 5 May 2022 reply email from Mercy.

[107] The wording of clause 29.3(c) says that steps must be taken to correct the underpayment within 24 hours. The HWU relies on the 5 May 2022 reply email to submit that this was the only action taken by Mercy and that the reference to steps taken implies more than one step is required. The email produced above is part of the communication between the HWU and Mercy. It refers to the author's 'understanding' of when the wage increase will take effect and that the author will need to check 'an estimated date regarding the backpays'. The communication discusses part of the process to rectify the underpayment. This is doing something with a view of rectifying the underpayment, that being the ultimate objective of the communication. Mercy submits that all that is required is to 'set the process in train that will ultimately rectify the error'.[30]

[108] On balance, I am persuaded by Mercy's submission. The online dictionary Dictionary.com provides the following definition of the phrase 'take steps':[31]

'Begin a course of action, as in *The town is taking steps to provide better street lights…*'

[109] Further, the Collins English Dictionary definition of 'take steps' is as follows:[32]

'To undertake measures (to do something) with a view to the attainment of some end'

[110] Mercy says that clause 29.3(c) cannot mean that all steps that need to be taken to correct the underpayment must be taken within 24 hours. They say if the intention was that complete rectification of the underpayment is required, the wording of the clause would so specify. I am persuaded by that submission.

[111] The preceding clause, clause 29.3(b), is concerned with underpayments that are less than 5% of the employee's fortnightly wage. Rectification of this type of underpayment is mandated with the words 'the underpayment **will be** corrected in the next pay period' [emphasis added]. Where the Agreement at clause 29.3(c) could have easily followed the wording of the preceding clause, it did not. The ordinary meaning of the words read as a whole and in context of the Agreement mean that rectification of the underpayment needed to begin within the 24-hour period of the payment being due.

[112] The HWU submits that the steps required to be taken by the employer could reasonably achieve the aim of correcting the underpayment within 24 hours.

[113] I do not accept this interpretation of the meaning of the words in the clause. If the intention of the clause was to ensure correction of the underpayment within 24 hours, the clause could have simply stated that the underpayment must be corrected within 24 hours.

[114] The HWU submits that logic dictates that clause 29.3(c) provides a more onerous obligation to correct an underpayment than clause 29.3(b) because it 'makes sense' for larger underpayments to be repaid faster.[33]

[115] The earlier clause mandates that the correction of the underpayment **will** be made in the next pay period, whilst clause 29.3(c) states that 'the Employer must take steps to correct the underpayment within 24 hours …'. The urgency here is not to correct the underpayment within 24 hours but to impose an obligation on the employer to act within 24 hours to begin the process of rectification. Further, to give the words 'take steps' the meaning asserted by the HWU would be an impractical and narrow interpretation.

[116] In the alternative, the HWU says that ''take steps to correct the underpayment' should be understood as requiring the employer to do all within its power to correct the underpayment, that is, effectively to effect or authorise the payment within 24 hours'.[34] The HWU says that the words 'take steps' 'may be thought to reflect the short timeframes involved. It may be thought to be improbable that an underpayment could in fact be corrected within 24 hours … and the language of 'taking steps' accommodates delays in processing payments that were nevertheless authorised by the employer within 24 hours'.[35] The HWU's statement that this interpretation makes sense is an assertion that is not supported by the plain meaning of the words of clause 29.3(c) and the wording of surrounding clauses. The HWU's interpretation that the steps that need to be taken within 24 hours are intended to accommodate delays in processing payments is impractical in its narrow interpretation of factors that could go to correcting the underpayment within 24 hours.

[117] I find that the 5 May 2022 reply email is the start of a course of action that is steps taken to rectify the underpayment. As is evidenced by the correspondence between the parties, Mercy continued to take steps to rectify the underpayments of the allowances. There would also appear to be some recognition from the HWU that a course of action is required to correct the underpayment. In his email to Mercy on 31 May 2022, Mr Steven Reilly, Industrial Organiser for the HWU, asks, 'What stage is Mercy Health currently at right now? This way we can relay it back to our members.'[36]

[118] That it took four months for the rectification to be completed does not reflect well on Mercy's internal processes, particularly that of its human resources team.

[119] Clause 29.3(d) applies a penalty payment in circumstances where 'the Employer does not take the action required under subclause 29.3(b) and subclause 29.3(c)'.

[120] The action required in clause 29.3(c) is to 'take steps to correct the underpayment'. As I have found above that Mercy did take such steps, clause 29.3(d) cannot apply so as to impose a penalty payment for the underpayment of the allowances. Accordingly, the calculation of any penalty interest rate is not required.

[121] For the above reasons, I determine the dispute as follows:

Question 1: Are each of the delayed payments by Mercy to eligible employees of:

a. The nauseous work allowance under clause 11 (Section 2)

b. The educational incentive allowance under clause 16 (Section 2)

an 'underpayment' under clause 29.3 (Section 1) of the Agreement?

Answer: Yes

Question 2: If the answer to Question 1 is yes, is Mercy required to make a penalty payment and if so, how is the penalty payment calculated?

Answer: No, Mercy is not required to make a penalty payment. Accordingly, no penalty payment needs to be calculated.

COMMISSIONER

Appearances:

Mr A. White for the HWU.

Mr S. Wood KC for Mercy.

Hearing details:

2023

Melbourne

3 May.

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[1] AE515689.

[2] Transcript of the hearing on 3 May 2023 at PN 181.

[3] Ibid at PN 181-184.

[4] Witness statement of Cameron Granger filed 21 March 2023, [6].

[5] *Visscher v Teekay Shipping (Australia) Pty Ltd (No 4)* [2012] FCA 1247; 297 ALR 674, [81].

[6] Transcript of the hearing on 3 May 2023 at PN 235.

[7] *James Cook University v Ridd* [2020] FCAFC 123, [65]; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426, [378]-[379]; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536, [197]; *Australian Maritime Officers' Union, The (001N) v RiverCity Ferries Pty Ltd T/A RiverCity Ferries* [2021] FWC 6302, [95].

[8] Transcript of the hearing on 3 May 2023 at PN 7.

[9] (2001) 203 CLR 645; Mercy's outline of submissions filed 4 April 2023, [7]-[10]; transcript of the hearing on 3 May 2023 at PN 315-326.

[10] Transcript of the hearing on 3 May 2023 at PN 11.

[11] Mercy's outline of submissions filed 4 April 2023, 1.

[12] Witness statement of Andrew Hargreaves filed 21 March 2023, [11]; witness statement of Nicholas Barbante filed 21 March 2023, [11]; witness statement of Tamara Kingsley filed 4 April 2023, [37]-[38].

[13] *Kucks v CSR Ltd* (1996) 66 IR 182, [184]; *Amcor Limited v Construction, Forestry, Mining and Energy Union Minister for Employment and Workplace Relations v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241, [96].

[14] *Fair Work Act 2009* (Cth) ss.545(2)(b), 546(1), 547.

[15] [2017] FWCFB 1702, [15].

[16] Witness statement of Tamara Kingsley filed 4 April 2023.

[17] Ibid, 768.

[18] Mercy's outline of submissions filed 4 April 2023, [38].

[19] Oxford English Dictionary (2nd ed, 1989) 'error' (def 5).

[20] *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited* [2014] FWCFB 7447, [44].

[21] Oxford English Dictionary (online at 12 April 2023), 'step, n.1'.

[22] Witness statement of Tamara Kingsley filed 4 April 2023.

[23] [2014] FWCFB 7447, [44].

[24] *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 96 ALJR 426, [17].

[25] Witness statement of Gavin Sharpe filed 21 March 2023.

[26] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited* [2017] FWCFB 3005; *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited* [2014] FWCFB 7447.

[27] [2017] FWCFB 4537.

[28] *Visscher v Teekay Shipping (Australia) Pty Ltd (No 4)* [2012] FCA 1247; 297 ALR 674, [81].

[29] *Australian Rail, Tram and Bus Industry Union v Asciano Services Pty Ltd t/a Pacific National* [2017] FWCFB 1702, [15].

[30] Mercy's outline of submissions filed 4 April 2023, [65].

[31] Dictionary.com (online at 3 November 2023), 'take steps'.

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[32] Collins English Dictionary (online at 3 November 2023), 'take steps, def 1'.

[33] Transcript of the hearing on 3 May 2023 at PN 242.

[34] Ibid at PN 238.

[35] Ibid at PN 239.

[36] Witness statement of Steven Reilly filed 21 March 2023, [5].