[2023] FWC 810 [Note: An appeal pursuant to s.604 (C2023/2154) was lodged against this decision - refer to Full Bench decision dated 4 October 2023 [[2023] FWCFB 160] for result of appeal.]

DECISION

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

Jonathan Mitchell

v

University of Tasmania
(C2022/1761)

DEPUTY PRESIDENT COLMAN MELBOURNE, 4 APRIL 2023

Dispute arising under enterprise agreement – whether employer met consultation obligations in respect of COVID-19 vaccination policy – whether direction to comply reasonable – whether compensation can and should be paid to applicant – considerations of power and merit in relation to 'remedy' – dispute determined.

[1] This decision determines an application made in March 2022 by Mr Jonathan Mitchell under s 739 of the *Fair Work Act 2009* (Act) for the Commission to deal with a dispute in accordance with the dispute resolution procedure in clause 15 of the *University of Tasmania Staff Agreement 2017-2021* (2017 Agreement). The procedure in clause 15 applied to any dispute regarding the application of the terms of the 2017 Agreement and stated that, where a dispute remained unresolved at the workplace level, it could be referred to the Commission for resolution by conciliation or arbitration. The dispute in question arose in early 2022, and concerned the decision of Mr Mitchell's employer, the University of Tasmania, to introduce a policy that required employees to be vaccinated against COVID-19 as a condition of entry to the university's premises. Mr Mitchell did not wish to become vaccinated. He found the policy to be unreasonable and considered that the university had failed to consult with him about it in the manner required by the 2017 Agreement.

[2] On 15 March 2022, Mr Mitchell filed his application asking the Commission to arbitrate the dispute. The application stated that the university had not complied with its obligation to consult with employees in relation to the introduction of significant change and that the university had now required him to show cause why his employment should not be terminated. It asked the Commission to determine whether the university's direction to comply with the policy was a lawful and reasonable direction. It also sought an interim order that Mr Mitchell not be dismissed or disciplined until the application was determined. On 18 March 2022, the university terminated Mr Mitchell's employment. On 21 March 2022, Commissioner Lee made an ex-tempore decision declining to make interim orders. The application was listed for further hearing on 12 April 2022. In a decision dated 27 May 2022, the Commissioner dismissed the application on two bases: first, Mr Mitchell was no longer an employee, which meant that the 2017 Agreement no longer applied to him; and secondly, the dispute did not fall within the

scope of matters to which clause 15 applied, because the giving of lawful and reasonable directions was not a matter dealt with by the Agreement and the dispute was therefore not one about the application of the agreement.

[3] On 31 August 2022, a Full Bench of the Commission upheld Mr Mitchell's appeal against the Commissioner's decision (*Mitchell v University of Tasmania* [2022] FWCFB 165 (Hatcher VP, Catanzariti VP, Yilmaz C). It concluded that Mr Mitchell's application had identified the subject matter of the dispute as being the question of whether the university had complied with its consultation obligations under clause 12 in respect of the introduction of the vaccination requirement, that this was clearly a dispute that fell within the scope of the dispute resolution procedure in clause 15, and that the question of whether the vaccination requirement was a lawful and reasonable direction followed from Mr Mitchell's contention that the consultation requirements in clause 12 had not been met. The Bench stated, at [28]:

> "That is, Mr Mitchell's case was that, on the proper construction of the Agreement, compliance with clause 12 was a condition precedent to the lawful introduction of any *"significant change"* such that the introduction of the vaccination requirement without prior compliance with clause 12 rendered it unlawful and unreasonable. Without expressing any view about the merit of this contention, that is sufficient to render the dispute one about the application of clause 12 of the Agreement."

[4] The Full Bench further determined that Mr Mitchell's dismissal had not deprived the Commission of jurisdiction to determine his application, because his employment had subsisted at the time the application was made, and consistent with Commission authority, the fact that the 2017 Agreement had later ceased to apply to him did not prevent the Commission from determining the dispute. The Full Bench also disagreed with the Commissioner's conclusion that the most favourable outcome that Mr Mitchell could obtain was an order for further consultation, which was now moot given his employment had ended. Mr Mitchell's case was not merely about whether the university had complied with the consultation obligations in clause 12, but also the legal consequences that any non-compliance might have for the university's vaccination requirement. The Full Bench quashed the Commissioner's decision and remitted the application to him for determination consistent with its reasons.

[5] The Commissioner subsequently listed the matter for conference. Efforts to conciliate the matter were unsuccessful. Mr Mitchell then asked the Commissioner to recuse himself from determining the application on the basis that certain observations that the Commissioner had made during conciliation might raise an apprehension of basis. In a decision dated 30 November 2022, the Commissioner decided to recuse himself. The application was subsequently reallocated to my chambers.

[6] The chronology of the dispute is concisely summarised at paragraphs [2] to [10] of the Full Bench decision, which I adopt. In determining this application, I proceed on the basis that s 604 of the Act requires me to implement the decision of the Full Bench in the same manner as if it had been remitted directly to me for determination. My task then is to arbitrate the dispute that Mr Mitchell has referred to the Commission, and to do so in a manner consistent with the reasons of the Full Bench. In that regard, it is relevant to note the observations of the Full Bench about the character of the dispute referred to above, and about the questions that might need to

be answered in order to determine it. In the latter regard, at [36] of its decision, the Full Bench stated the following:

> "It seems to us that the resolution of the dispute would require the determination, at least potentially, of the following questions:
>
> (1) Was the introduction of the vaccination requirement a *"significant change"* to which the consultation requirements in clause 12 applied?
>
> (2) If so, did the University comply with clause 12?
>
> (3) If the University did not comply with clause 12, is the Agreement to be construed as invalidating the vaccination requirement such that it is not lawful or reasonable?
>
> (4) If so, what, if any, remedial orders should be granted?"

[7] Although the Full Bench said that these were *'potentially'* the questions that needed to be answered, neither party suggested that this was not the case. Mr Mitchell's submissions addressed each of these questions, as well as a further question that he posed, which was whether the university had failed to comply with the *'informal dispute resolution'* process in clause 15.4. The university's submissions also addressed these questions. I consider that by answering these questions I will resolve the dispute.

Jurisdictional objection

[8] First however it necessary to deal with a jurisdictional objection raised by the university. On 30 January 2023, some five months after the Full Bench decision was handed down, the Commission approved the *University of Tasmania Staff Agreement 2021 – 2025* (2021 Agreement), an agreement with the same coverage as that of the 2017 Agreement. When the 2021 Agreement commenced to operate on 6 February 2023, the 2017 Agreement ceased to operate, because of the effect of s 54(2) of the Act. Because it has ceased to operate, the 2017 Agreement no longer applied to anyone. The university contended that the power of the Commission to continue to deal with the present dispute under the 2017 Agreement was extinguished at that time. It relied on the decision of the Full Bench in *Simplot Australia Pty Ltd v AMWU* [2020] FWCFB 5054 (Gostencnik DP, Colman DP, Saunders DP) *(Simplot)*, which concluded that the Commission has no jurisdiction to deal with a dispute under a dispute resolution procedure in an enterprise agreement that has ceased to operate (at [18]).

[9] The university acknowledged that at paragraph [31] of its decision the Full Bench had turned its attention to this issue, referring to the decision of the Full Bench in *CFMMEU v Falcon Mining Pty Ltd* [2022] FWCFB 93 (Hatcher VP, Catanzariti VP, Easton DP) (*Falcon Mining*), which had concluded that *Simplot* was wrong, and that once the conditions prescribed in s 739 for the exercise of arbitration powers have been met, the Commission *'is seized of jurisdiction to arbitrate the relevant dispute to completion and does not lose its authority in that respect because the relevant enterprise agreement subsequently ceases to operate'*. Nevertheless, the university submitted that what the Full Bench in the present matter had determined was that the Commission was not prevented from determining Mr Mitchell's appeal by the fact that he had ceased to be employed after his application was filed in the Commission.

It had relied on the reasoning in *Falcon Mining* in reaching this conclusion. It had not however determined the question of whether the cessation of operation of the 2017 Agreement had deprived the Commission of power to determine the dispute. It could not have done so, because the 2017 Agreement ceased to operate only after the Full Bench handed down its decision. The university contended that I must determine this question for myself, and that the observations of the Full Bench concerning the application of *Falcon Mining* to a case such as this were merely *obiter*.

[10] The university submitted that, although the effect of *Falcon Mining* was that the Commission could proceed to arbitrate a dispute despite the fact that the relevant agreement had ceased to operate and no longer applied to anybody, that decision was wrong, and the correct position was the one established in the earlier Full Bench decision in *Simplot.* The university noted that a third Full Bench had recently considered the question of the Commission's power in such circumstances (*Tracey v BP Refinery (Kwinana) Pty Ltd* [2022] FWCFB 210 (Gostencnik DP, Saunders DP, P Ryan C) *(Kwinana),* as well as the Full Bench decision in the present matter, and confirmed that there was a divergence of opinion at Full Bench level and that the matter was not settled. That Full Bench in *Kwinana* had stated:

> "[45] Given the position of the respondent, this appeal is not an appropriate vehicle to consider the correctness of *Mitchell*. Both parties accept that this aspect of the appeal (both here and in the TOIL dispute appeal discussed further below) should be upheld. We therefore uphold the Former Employee Grounds. But we should not be taken as accepting that the issue raised here on appeal has been settled by the decision in *Mitchell*. *Mitchell* proceeds on the basis of an invocation of power under s 739 of the Act whereas we consider the power to arbitrate is derived not from the statute but from the terms of the instrument as s 739(4), we think, makes clear. It is in the instrument where one finds whether the parties have agreed that the Commission may arbitrate the dispute between them. It is that agreement which is the source of the power to arbitrate, and s 739 merely authorises the Commission to act upon the parties' agreement. The private arbitral power being exercised is materially different to the statutorily conferred arbitral power found elsewhere in the Act. Furthermore, we do not accept *Simplot* has now been overtaken by *Falcon Mining*. What we have is conflicting decisions about the same subject matter by differently constituted Commission Full Benches. So much was acknowledged in *Falcon Mining* itself."

[11] The university contended that the 2017 Agreement, on which Mr Mitchell's application depended as a source of power, had been replaced, and that therefore, consistent with the conclusion of the Full Bench in *Simplot*, the Commission had no power to arbitrate the dispute.

[12] The university is correct to say that the question of whether the Commission is deprived of jurisdiction to arbitrate the present dispute by virtue of the 2017 Agreement having ceased to operate was not determined by the Full Bench. Nevertheless, it is clear from [31] of its decision that the Full Bench regarded the decision in *Falcon Mining* to be correct in its conclusion that *Simplot* was wrongly decided, and that, if the Commission has jurisdiction to arbitrate a dispute at the time an application is lodged under s 739, it remains *'seized of jurisdiction'* despite the fact that the relevant agreement may later cease to operate. Although this does not form part of the *ratio* of the Full Bench decision in this matter, Mr Mitchell's application comes before me on remittal from a decision of the Full Bench. Section 607(3)(c)

states that a Full Bench may, in an appeal decision, *require* a member to deal with the subject matter of the relevant decision, and to act in accordance with the directions of the Full Bench. The Full Bench has directed Commissioner Lee, and therefore also me, to determine the application *'consistent with the above reasons'* (at [36]). To my mind, I am bound, in this particular matter, to give effect to the views of the Full Bench about the correctness of *Falcon Mining*. However, I agree with the Full Bench in *Kwinana* that the matter is not settled. In other matters members will need to decide for themselves which of the two conflicting Full Bench decisions – *Simplot* or *Falcon Mining* – is correct.

[13] The university's jurisdictional objection is inconsistent with the decision of the Full Bench in Mr Mitchell's appeal. I am therefore required by the Act to reject it, and I do so.

Questions 1 and 2: Was there 'significant change'? Was there compliance with clause 12?

[14] Both at first instance and in the appeal, the university contended that the introduction of the vaccination policy was not a *'significant change'*, and that therefore clause 12 did not require the university to consult Mr Mitchell about it. However, in the hearing before me, the university conceded that, in light of the decision of the Full Bench of the Commission in *CFMMEU v Mt Arthur Coal* [2021] FWCFB 6059, this had in fact been a significant change to which the consultation requirements in clause 12 applied. The university said that, because it had proceeded on the basis that clause 12 was not engaged, it had not ensured that Professor Black's email to staff on 23 November 2021 met each of the requirements in clause 12.2(c). It acknowledged that, when proposing the change, it had not identified the expected effects on employees and measures to mitigate adverse effects, the proposed implementation timelines, or who would be a university contact for feedback and questions, and that in these respects it had failed to comply with clauses 12.2(c)(iii), (v) and (vii) of the 2017 Agreement. The university maintained however that as a matter of substance it had engaged in meaningful consultation about the vaccination requirement.

[15] Mr Mitchell contended that the failure to comply with clause 12 was much more extensive than what was acknowledged by the university, and that the university had barely engaged in any consultation at all. I will return to the question of the extent to which the university consulted with Mr Mitchell in considering the answer to question 3.

[16] The answers to questions 1 and 2 are not in dispute. The parties now agree that the introduction of the vaccination requirement was a significant change to which the consultation requirements in clause 12 of the 2017 Agreement applied, and that the university did not meet its obligations under that clause. I consider that the parties are correct in both respects. The answers to questions 1 and 2 are *'yes'* and *'no'*.

Question 3: Did the 2017 Agreement invalidate the vaccination requirement?

[17] The third question posed by the Full Bench was whether, in the event the university had not complied with clause 12, the 2017 Agreement is *'to be construed as invalidating the vaccination requirement such that it is not lawful or reasonable'*. The question requires some modification because Mr Mitchell was very clear in his submissions in the proceeding before me that he did not challenge the lawfulness of the vaccination requirement. His contention was

rather that the requirement was not reasonable, and for this reason it was not a *lawful and reasonable direction* with which he was required to comply.

[18] The parties appear to have understood question 3 to be one concerned with whether the vaccination requirement was reasonable despite the deficiencies in the university's consultation. However, in my view the third question is first and foremost one of construction. It asks whether the Agreement is to be *construed* as invalidating the vaccination requirement, with the *consequence* that it was not a lawful and reasonable direction.

[19] The Agreement does not deal with the question of lawful and reasonable directions. But that does not mean that the Agreement, properly construed, cannot invalidate directions. If clause 12 or some other provision prohibited the university from implementing a proposal until certain steps had been taken, this might be said to invalidate a university direction that employees comply with the proposal before that step had been taken. If the agreement invalidated the direction, the consequence might be that it was not lawful, or was not reasonable. As Mr Mitchell does not challenge the lawfulness of the direction, the focus is on the effect of any invalidation on the reasonableness of the direction.

[20] In my view, several provisions of the 2017 Agreement require examination. The first is the consultation provision. Clause 12.1 recognises the *'rights'* of all employees to be *'consulted on matters which directly affect them in their employment'*, as well as the *'right'* of the university to *'plan, organise, manage, and decide upon the operations of the university'*. Clause 12.2 requires the university to consult with employees directly affected by a proposed significant change, and to do so in particular ways. Each of the obligations imposed on the university under the various sub-provisions of clause 12 is binding and must be met. Failure to comply with these obligations exposes the university to applications in an eligible court for breach of s 50 of the Act. However, there is a distinction between a clause that creates a consultation obligation and one that also prohibits change before consultation is concluded. Nothing in clause 12 provides that a proposed change must not proceed, or need not be accepted by an employee, unless or until all of the various consultation requirements of the clause have been met. In this regard, clause 12 contrasts with other provisions in the 2017 Agreement.

[21] It is very common for enterprise agreements to contain a *'status quo'* provision which prohibits an employer from implementing change, pending the determination of any dispute that is raised about the matter. Often these are found in dispute resolution clauses, but they can also appear in other provisions. The 2017 Agreement contains two such clauses.

[22] Clause 7 is entitled *'University Policies, Procedures and Guidelines'*. Clause 7(a) states that university policies, procedures and guidelines do not form part of the agreement, and that the 2017 Agreement prevails over such documents. Clause 7(b) then states:

> *"The University will consult with the Unions and Employees generally before making any changes to the employment conditions listed below. No changes shall be implemented by the University prior to the conclusion of a reasonable consultation period, normally between 4 and 6 weeks' duration, commencing from when the Unions and Employees are notified of the proposed changes. Any dispute in relation to consultation only may be referred to the FWC for resolution by conciliation or arbitration. No changes shall*

be implemented by the University prior to a dispute being resolved by agreement or by conciliation or arbitration. The employment conditions referred to above are as follows:

(i) Academic Promotion Criteria and Procedures;
(ii) Performance and Career Development Policy and Procedures;
(iii) Academic Probationary Procedures; and
(iv) Intellectual Property."

[23] Clause 7(b) is very clear that the university must consult with employees and unions *'before making any changes'*, and that *'no changes shall be implemented'* prior to consultation occurring. If the university were to give an employee a direction to comply with change of the kind contemplated by this clause without having consulted the employee, one could conclude that the direction was invalidated by clause 7. However, clause 7 is not engaged in the present case. Its prohibition on the implementation of change prior to consultation is of limited compass. It only applies in respect of the four matters identified in the provision, which are not at issue in these proceedings.

[24] Clause 15 of the 2017 Agreement also contains a status quo provision. Clause 15.3 states:

"*Until the procedures described in clause 15.4 (Internal dispute resolution) have been completed:*

(a) Work will continue in the normal manner;

(b) Management shall not change work, staffing or the organisation of work if that is the subject of a dispute, nor will any party to the dispute take any other action likely to exacerbate the dispute;

(c) The dispute shall not be referred to the FWC by any party to the dispute until the internal dispute resolution process (clause 15.4) has been completed; and

(d) The Parties will make every attempt to avoid disruption to the University's normal business operations and work processes."

[25] If clause 15.3 prohibited the university from implementing the vaccination requirement when it did so, one might conclude that it invalidated the vaccination requirement. However, this was not the case. First, the scope of clause 15.3 does not extend to the subject matter of the present dispute. The vaccination requirement was not a change in *'work, staffing or the organisation of work'*. The requirement was not about work. It was about a safety requirement that was a condition of entry to university premises. Secondly, even if *'work'* is read broadly to mean anything affecting work, the restriction in clause 15.3 only applied until the internal dispute resolution process in clause 15.4 had been completed. That occurred, at the latest, on 15 March 2022, several days before the dismissal, when Mr Mitchell referred his dispute to the Commission. He had waited until the end of the twenty day period, but clause 15.5 allowed him to refer the dispute to the Commission at any time if he believed the university was refusing to engage in that process (see clause 15.5(a)). The direction that Mr Mitchell comply with the

vaccination requirement was given at an earlier time. However, clause 15.3 did not invalidate the direction at the time the university relied upon it to terminate Mr Mitchell's employment.

[26] Both clauses 7 and 15.3 contained limited status quo provisions. Neither of these provisions applied in this case. Mr Mitchell did not contend that they did. However, both are contextually relevant to the construction of clause 12. They reinforce the conclusion that clause 12, which contained no status quo provision, did not invalidate the vaccination requirement.

[27] Mr Mitchell raised an additional question '4A', in respect of which he contended that the university had failed to observe the *'internal dispute resolution'* step in clause 15.4 of the 2017 Agreement. It is convenient to deal with this matter here. The university's view at the time was that the dispute raised by Mr Mitchell was not within the ambit of clause 15. There were discussions between the parties about the subject matter of the dispute, but when it remained unresolved, there was no meeting with the director of human resources, as contemplated by clause 15.4(b). However, in my opinion any non-compliance by the university with clause 5.4 was inconsequential. It did not prevent Mr Mitchell from referring his dispute to the Commission. When he did so, the status quo provision in clause 15.3 ceased to be engaged. Insofar as question 4A might be said to be relevant to question 3, it is clear that any failure to comply with clause 15.4 did not invalidate the vaccination requirement, nor in my view did it otherwise render the direction unreasonable.

[28] In summary of my conclusion to this point, I consider that clause 12 is not to be construed as invalidating the vaccination requirement in light of the university's failure to comply fully with that clause, nor is clause 7, clause 15, or any other provision of the 2017 Agreement to be construed in this way. This is not to excuse the university's failure to comply with clause 12 to the letter. Any failure to comply with an obligation in an enterprise agreement is a serious matter with various potential legal consequences. But those consequences did not include the invalidation, under the terms of the 2017 Agreement, of the university's direction. Recalling the reflections of the Full Bench at [28], compliance with clause 12 was not a *'condition precedent'* to the lawful introduction of any significant change.

[29] As noted above, the contentions of the parties in relation to question 3 focused on the broader issue of whether, in light of the failure of the university to meet all of its consultation obligations under clause 12, the vaccination requirement was to be regarded as unreasonable. My conclusion that the 2017 Agreement did not on its terms invalidate the direction given to Mr Mitchell does not answer this broader question, which I will now consider.

[30] Mr Mitchell's submission was that a conclusion that consultation was inadequate would of itself mean that the vaccination requirement was unreasonable. I do not accept this. The Full Bench in *Mt Arthur* stated that the deficiencies in the employer's consultation process told against a conclusion that its site access requirement (effectively, the direction) was reasonable (at [201]). These deficiencies did not automatically render the direction unreasonable but were to be weighed in the balance. The Full Bench ultimately considered them to be the most telling factor against a conclusion that the direction was reasonable in that case (at [249]).

[31] Mr Mitchell contended that the university could not pass off its non-compliance as procedural, and that the university understated the extent of its failure to consult with him about the introduction of the policy. He said that the university had made little if any attempt

genuinely to consult with him or to respond to his queries and information. It had failed to provide a written proposal that complied with the requirements of clause 12.2(c), and instead sent employees a survey document that failed to identify the conditions that applied to the proposed mandatory vaccination policy and did not indicate any measures to mitigate adverse effects on employees. The survey document did not state the consultation period or provide any timelines, nor did it identify a contact person to whom employees could provide feedback on the proposal. Mr Mitchell said that the document did not encourage true consultation and asked closed questions such as whether employees had safety concerns about the vaccinations, rather than open ones, such as whether employees had any questions or concerns of any kind relating to the proposal. The university had not provided any reply to his response to the survey document, in which, at question 5, he had set out in six paragraphs a summary of safety and other concerns he held about the proposal. Mr Mitchell submitted that the employer in the *Mt Arthur* case had done much more to consult with affected employees than had the university in the present case, and in particular had replied to each individual response from employees. He contended that the minimal steps taken by the university to consult about its proposed mandatory vaccination policy fell well short of genuine consultation, as that concept had been expounded in decisions of courts and the Commission, and that both in form and in substance, it had failed to consult him about a significant change that ultimately led to his dismissal.

[32] The university contended that despite the shortcomings in its consultation process, it had given employees, including Mr Mitchell, an opportunity to express their views so that they could be taken into account. Professor Black's message to staff and the survey document had contained a significant amount of information about the proposed introduction of a mandatory vaccination policy and the rationale for it, which was based on safety concerns and the university's risk assessment, and this correspondence had met the requirements of clauses 12.2(c)(i), (ii) and (iv). The university had had discussions with employees, shared information and sought feedback on its proposal, including from health and safety representatives and unions. It had consulted Mr Mitchell, who repeatedly indicated his opposition to the vaccination requirement on the basis of vaccine safety and efficacy. Mr Mitchell was told that the university had considered and rejected his proposal that his alternative working arrangements should continue, and he was provided with an opportunity to explain why his employment should not be terminated. Mr Mitchell's 33-page document detailed his concerns about the safety and efficacy of vaccines and reiterated his proposals for alternative working arrangements. His response was considered before the university made the decision to terminate his employment.

[33] Whether an employer's direction to an employee is reasonable is a question of fact that must be determined objectively having regard to all the circumstances. As the Full Bench said in *Mt Arthur*, it is not necessary to show that the direction in question was the preferable or most appropriate course of action, and there may be a range of options open to an employer within the bounds of reasonableness. The assessment of reasonableness will include whether there is a logical and understandable basis for the direction (see *Mt Arthur* at [259]). Plainly in this case there was such a basis. The vaccination requirement was one aimed at protecting the health and safety of the university community in the context of an extraordinary pandemic. This community was particularly susceptible to the risks posed by COVID-19 due to factors such as having a large cohort of medically vulnerable people and many communal facilities, as Mr Arnold said in his evidence. In my opinion, taking into account the broader context, and in light of the matters to which I refer below, the deficiencies in the university's consultation process did not render the vaccination requirement unreasonable.

[34] I do not accept Mr Mitchell's contention that the university barely consulted at all about the introduction of the policy. The survey and email from Professor Black on 23 November 2021 set out the nature of the proposed mandatory vaccination policy and the safety rationale that underpinned it. It was not very detailed, but this is not inconsistent with genuine consultation. Clause 12.2(2)(c)(i) required the university to advise employees of the nature of the change, not of its detail. The detail of a proposal often comes later. Professor Black's covering message to staff stated that, before it continued down the path to mandatory vaccinations, the university wanted to consult with employees and understand their views. A survey seems to me to have been a good way to do this. The survey stated that it was anonymous, therefore it is not surprising that there was no reply from the university to Mr Mitchell's response to it, in which he explained his opposition to the proposal. A large majority of the respondents to the survey were in favour of the proposal. The evidence of Mr Arnold, which I accept, was that he personally reviewed all responses that were not in support of a mandatory vaccination policy and provided a qualitative assessment of these responses to his unit for consideration. On 9 December 2021, Professor Black advised employees of the university's decision that from 15 January 2022, anyone entering campus would be required to be vaccinated or have an exemption. Under a heading *'Why have we made this decision?'*, the university explained its safety rationale. In my opinion, the university did engage in substantive consultation with employees in relation to the policy and complied with clauses 12.2(c)(i) and (ii) of the 2017 Agreement. It did not however comply with clauses 12.2(c), (v) or (vii).

[35] As to the interaction between the university and Mr Mitchell concerning the introduction of the policy, the following events, among others, took place. On 8 January 2022, Mr Mitchell advised the university that he was opting out of being vaccinated and listed his numerous safety concerns about COVID-19 vaccines. On 11 January 2022, he submitted a formal proposal for alternative working arrangement. From 15 January 2022, Mr Mitchell worked from home, in consultation with his supervisor Mr Rickards, who appears to have endeavoured to assist Mr Mitchell in various ways. On 21 January 2022, the chief people officer advised Mr Mitchell that his intentions had been noted and that his current *'interim arrangements'* would remain in place for the time being. Mr Mitchell said that he heard nothing further from the university until 11 February 2022, when the chief people officer sent him a letter entitled 'Direction to Comply'. It stated that the university understood from Mr Rickards that Mr Mitchell had indicated an intention to comply with the policy following the approval of the Novavax vaccine, and that to support him in this regard, the university would allow him until 31 March 2022 to obtain the vaccination, but that if he failed to do so, his employment could be terminated. Mr Mitchell's evidence was that he had not agreed to comply with the policy. Rather, Mr Rickards had told him that the dean of the college had inquired whether he would agree to obtain the Novavax vaccine; Mr Mitchell had told Mr Rickards that he would like someone from the university to ask him this question *directly*, that he had not looked at Novavax as closely as at other vaccines, and that if the university asked him to consider it, he would: but no one from the university had asked him to do this.

[36] On 15 February 2022 Mr Mitchell wrote to the chief people officer explaining why he did not consider the direction to be reasonable and raising a dispute under clause 15 of the 2017 Agreement. He said that, because he had been working from home successfully for a month, this could continue, and he was able to perform the inherent requirements of his job. He said that before making any decision to get vaccinated, he wanted the university to give him

'assurances' in respect of his *'very real safety concerns'*. On 18 February 2022, he received a letter from the acting chief people officer, stating that the university was looking into his situation and would revert to him the following week. On 23 February 2022, the chief people officer sent Mr Mitchell a letter, stating that it was now clear that he presently had no intention to become vaccinated and comply with the policy, and rejecting his proposal for continuing alternative working arrangements. The letter asked Mr Mitchell to show cause why his employment should not be terminated. On 4 March 2022, Mr Mitchell submitted his 33-page document. On 18 March 2022, the chief people officer sent Mr Mitchell a letter stating that, while his comprehensive written response had been noted, the university was comfortable with its policy position, there were no grounds for Mr Mitchell to be given a medical or religious exemption, his proposal for ongoing alternative working arrangements could not be accommodated, and his employment was terminated.

[37] In my assessment, although the university engaged in substantive consultation, it provided relatively little feedback directly to Mr Mitchell, and could have done better in this regard. Nevertheless, Mr Mitchell was able to put forward his response to the proposal, his reasons for objecting to it, and his proposals for steps to mitigate the adverse effects of the policy on him, including in relation to alternative working arrangements or an exemption. The university considered his responses. It permitted him to work remotely for an interim period. It was prepared to afford him additional time to comply with the policy if he wished to consider the Novavax vaccine. But it was not persuaded by Mr Mitchell's arguments in opposition to the vaccination mandate, his case for an exemption, or his proposal to continue his alternative working arrangements, which the university did not consider to be sustainable, in part because of the way it affected other staff. The interim working arrangements were a measure that mitigated the adverse effects of the policy on Mr Mitchell. I agree with Mr Mitchell that his 33-page document was not part of the consultation process per se. But it is relevant to the reasonableness of the university's decision to enforce its direction because it was one of the means by which Mr Mitchell was able to put forward his views and arguments. The university took these into account before deciding to dismiss Mr Mitchell. It did not consider the matters raised by Mr Mitchell to warrant a different course.

[38] Was the university's consultation effort something less than what was considered to have been inadequate by the Full Bench in the *Mt Arthur* case, as Mr Mitchell contended? Perhaps. But whether a direction is reasonable is not to be determined by comparing the steps taken by an employer in one case with those taken by another in a different case. Each case will turn on its own facts. In *Mt Arthur*, for example, the Full Bench concluded that the employer had not met its consultation obligations under applicable occupational health and safety laws. That has not been established in this case.

[39] In my opinion, it is relevant to take into account whether the university's full compliance with its consultation obligations under clause 12 could reasonably have been expected to make any difference to the outcome. Contrary to the submission of Mr Mitchell, I find it highly unlikely that further consultation would have led to some accommodation between the parties, either in relation to the introduction of the vaccination requirement generally, or special working arrangements for Mr Mitchell. Mr Mitchell suggested that the relevant *'test'* was whether further consultation *might* have led to a different outcome, but the High Court decision to which he refers (*Stead v State Government Insurance Commission (1986)* 161 CLR 141 at 147) concerned the question of whether a decision should be overturned on the grounds that a

person has been denied natural justice. There, it is sufficient to show that the denial of natural justice deprived the appellant of a *possibility* of a successful outcome. Natural justice is not at issue here. The question is whether a direction was reasonable. Mr Mitchell had voiced his opposition to the vaccination requirement and set out his reasons, including in relation to the safety and efficacy of vaccines. In his 33-page response to the show cause letter, he stated that he had *'shown by the available evidence that current vaccinations neither protect against infection nor transmission'*, that he had *'demonstrated that I have good grounds for my concern as to the safety of the vaccines'*, and that vaccination against COVID-19 should be a *'personal decision to be made by consultation between the individual and their doctor.'* He asked the university to *'admit'* that it had *'no scientifically based medical reason to exclude (him) from the campus'* and stated that he had decided at the current stage not to be vaccinated. He said that, if he did decide to become vaccinated, *'it will be on my time and a decision between me and my doctor.'* Mr Mitchell said in his evidence that after his dismissal, he found that a number of jobs were no longer open to him, because they required proof of vaccination. Evidently, Mr Mitchell remained unvaccinated, even though this was presenting an obstacle to obtaining alternative employment. In my view it was most improbable that Mr Mitchell was going to change his mind about getting vaccinated as a result of further consultation with the university.

[40] The university would not be swayed either. It was resolved to implement the vaccination requirement because it believed this to be in the best interests of health and safety in its workplace. It had a duty to protect vulnerable persons on campus, including the elderly. The termination letter of 18 March 2022 stated that Mr Mitchell's comprehensive response of 4 March had been noted, but affirmed the university's view that vaccination was one of the most effective measures for minimising the risk of serious illness or death from COVID-19, which remained a credible possibility in both New South Wales, where Mr Mitchell worked, and in Tasmania. The university was also resolute in its position that his temporary working-from-home arrangements were not sustainable, including because this required a colleague to increase his working hours to accommodate Mr Mitchell's absence. This is not a case where one can identify an additional fact, idea, argument, or proposal that one party might have presented to the other that could realistically have led to a different outcome. This is not at all to suggest that consultation can be disregarded if there is no reasonable prospect of a different outcome. Rather, it is a matter going to the seriousness of the failure to consult in the circumstances. In this case, I consider that further consultation would have achieved nothing.

[41] In my opinion, it would be wrong to conclude that *any* failure to consult an employee about change pursuant to an enterprise agreement renders a direction to accept the change unreasonable, particularly if the agreement does not prohibit implementation of the relevant change until consultation has concluded. It is necessary to consider all of the circumstances and to apply a sense of proportion and degree. Had I accepted Mr Mitchell's contention that there had been little if any consultation, this would have weighed in favour of a conclusion that the direction was not reasonable. But in my view, there was real and substantive consultation about the scope and effect of the vaccination policy.

[42] Mr Mitchell submitted two half-page statements from two students who stated that despite not being vaccinated, they had been permitted since 15 July 2022 to attend the university premises. The suggestion seems to be that the university relaxed its policy only some months later and that this calls into question the reasonableness of the vaccination requirement in March 2022. This is not the case. The reasonableness of the vaccination requirement is to be considered

in the context of the circumstances that applied at the time. Moreover, other than the two very brief statements, there is no evidence of the circumstances that existed in July 2022. I would also note that the reasonableness of the vaccination requirement is to be assessed in the context of March 2022, not the present day, some 12 months after the event, when public concerns about the threats posed by COVID-19 have significantly reduced.

[43] The university took a very cautious approach to safeguarding the health and safety of its community. It was an approach that placed Mr Mitchell, and others who held similar opinions to him, in a difficult position. However, in my view, the university's approach was clearly within the bounds of reasonable decision-making, if for no other reason than to protect the safety of vulnerable persons with special susceptibilities to COVID-19, including students with disabilities and older persons. The university did not consult with Mr Mitchell to the full extent required by clause 12 of the 2017 Agreement. It should have done so. However, in all the circumstances, I do not consider this failure rendered the vaccination requirement unreasonable. In my opinion, the answer to question three, either as a question of construction, or as a broader question going to the reasonableness of the direction, is *'no'*.

Question 4: What if any remedial orders should be granted?

[44] In light of my answer to question 3, it is not necessary for me to answer question 4. However, I consider that, in the interests of achieving finality in this long-running matter, it is appropriate that I proceed to determine question 4, in the event that, contrary to my conclusion, the answer to question 3 is *'yes'*.

[45] Mr Mitchell contended that the Commission should make three compensation orders. First, he sought an order that the university pay to him the wages and entitlements that he would have expected to receive had he not been dismissed, assessed from the date of his termination on 18 March 2022 until the commencement of his new job with the University of Sydney on 25 July 2022. Secondly, he sought an order that the university pay him an amount of $5000 in *'general damages'* for the hurt and distress that he suffered as a consequence of his dismissal. Thirdly, he asked the Commission to order the university to pay him a further amount of $5000 in order to secure greater awareness of and compliance with the Act.

[46] Mr Mitchell submitted that the Commission had power to issue all three orders because s 595(3) of the Act allows the Commission to deal with a dispute by arbitration *'including by making any orders it considers appropriate'*. However, the full text of this section states:

> *"The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act."*

[47] Section 739(4) is the provision of the Act under which the Commission is authorised to arbitrate the present dispute. That section states that if in accordance with a term of the kind referred to in s 738 (which includes a dispute resolution provision in an enterprise agreement), *'the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.'* Section 739(5) then states that, despite s 739(4), the FWC *'must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.'* A *'fair work instrument'* includes an enterprise agreement. If a dispute resolution procedure allows the

Commission to arbitrate a dispute, the Commission may do so, but subject to the terms of the agreement. The Commission is not free to do whatever it thinks is fair and just. The role that it plays under the dispute resolution procedure depends on the agreement of the parties, as objectively manifested in the text of the agreement.

[48] What role has been conferred on the Commission by clause 15 of the 2017 Agreement? Clause 15.1 provides that the university, employees, and unions have an interest in *'the proper application of this Agreement'*, and that the procedures in the clause apply to *'any dispute raised by an Employee, Union, or the University regarding the application of the terms of this Agreement'*. Clause 15.5(b) states that the Commission *'may resolve the dispute by conciliation in the first instance, and by arbitration if conciliation fails to resolve the dispute.'*

[49] In my opinion, the ordinary meaning of a dispute resolution clause that requires or allows the Commission to arbitrate a dispute about the *application* of an agreement is that the Commission is expected to determine how the agreement *applies*. This may require the Commission to determine the meaning of a disputed provision, to apply the terms of the agreement to the facts of a dispute, to make findings about factual disputes, or to undertake some combination of these things. The orders that Mr Mitchell seeks would not determine how the 2017 Agreement applied to him. He was not entitled to compensation, or to a process that would lead to an award of compensation. Instead of determining how the 2017 Agreement applied to Mr Mitchell, the orders he seeks would create new rights.

[50] It is important to understand that the compensation orders sought by Mr Mitchell are fundamentally different from orders that are sometimes made by the Commission in s 739 matters to the effect that an employer is to make back-payment of monies due to an employee under a term of an agreement. Such orders resolve disputes about the correct application of the agreement, such as disputes about a worker's correct classification, or whether the preconditions for the payment of an allowance have been met. Very often there is no need for payment orders because the Commission will resolve the dispute simply by answering a factual or interpretative question. But sometimes a secondary dispute might then arise about how the Commission's determination is to be given effect in terms of payments and the Commission may issue a further decision, or order, quantifying these amounts. In such matters, the Commission determines how the agreement applies. The Commission may make an order that employees receive the payments to which they were entitled under the agreement.

[51] There is nothing to prevent an enterprise agreement from stating that the Commission can resolve disputes by creating new rights to general compensation payments in respect of a particular matter. An agreement could state that, if an employee has been unfairly treated, the Commission may order the employer to pay the employee an amount in compensation. Such a clause would be an exotic beast. I have not encountered one. In my view, the reason for their rarity is that it is not generally within the contemplation of the framers of industrial agreements that the Commission will resolve disputes under enterprise agreements by making such orders. But if that is what the parties have agreed to, they are free to include such a provision in their agreement. No such provision was contained in the 2017 Agreement.

[52] Some enterprise agreements contain dispute resolution procedures that extend beyond the application of the agreement and allow the Commission to arbitrate any disagreement concerning the employment relationship. In such a case, it might be that, on a proper

construction of the particular agreement, a dispute about how an employee has been treated could be resolved by an order in the nature of compensation. But clause 15 of the 2017 Agreement was not such a provision.

[53] Mr Mitchell pointed to the Commission's general obligation to exercise its powers in a manner that is fair and just (s 577), and to take into account equity, good conscience, and the merits of the matter (s 578(b)). But in determining a dispute about the application of an agreement, what fairness and equity require is that the Commission give effect to the agreement of the parties. It would be unfair and unjust for the Commission to purport to exercise powers that are not vested in it by the agreement. The Full Bench noted at [35] of its decision that, if Mr Mitchell's case were to be upheld in full, this could lead to a range of potential orders, and referred in this regard to s 595(3); it noted however that this was subject to any limitation in the 2017 Agreement. The relevant limitation is that the 2017 Agreement, properly construed, does not confer on the Commission the power to order compensation payments of the kind sought by Mr Mitchell. There is nothing in the text of the 2017 Agreement to suggest that this was within the contemplation of the framers of the agreement. The orders that Mr Mitchell seeks are not reasonably incidental to the application of the 2017 Agreement (see *Deakin University v Rametta* [2010] FWAFB 4387 at [45]).

[54] Mr Mitchell's case was not just about whether the university had complied with its consultation obligations under clause 12, but also the legal consequences this would have for the university's vaccination requirement. Consultation was a matter covered by the agreement, and the dispute extended to the legal consequences of a failure to observe them. But Mr Mitchell now seeks to extend the scope of the dispute by a further step to include circumstances that occurred after his application was made and after his employment with the university ended. However broadly one might seek to map the limits of the dispute that Mr Mitchell lodged in the Commission, it did not extend to anticipated economic loss, hurt and distress that he might suffer if the university were to proceed to dismissed him. This is territory that is remote from the 2017 Agreement and the s 739 application.

[55] In my opinion, the 2017 Agreement does not authorise the Commission to make the compensation orders that Mr Mitchell seeks. But if such power existed, it would plainly be discretionary, and I would not exercise the discretion in this case, for the following reasons.

[56] First, a discretion to award compensation would be exercisable by reference to the Commission's general obligation to take into account equity, good conscience, and the merits of the matter (s 578). In my assessment these considerations tell against an award of compensation in favour of Mr Mitchell. In this case, there was a conflict between the vaccination requirement of the university, which was a measure conscientiously adopted in the interests of the safety and welfare of the university community, and the personal convictions of Mr Mitchell. The university resolved that conflict by favouring collective interests over Mr Mitchell's personal interests in the context of an unprecedented pandemic. The university's decision was taken in good faith and for a good reason. Reasonable minds may differ as to whether its response was the most appropriate or preferable one. But it was within the realm of reasonable decision-making in the circumstances. So too was the requirement that staff attend the workplace to carry out their contractual obligations. The university was not prepared to continue to grant Mr Mitchell special working arrangements so that he did not have to attend the workplace. It was not required to make such concessions, nor do I consider that it ought

reasonably to have done so. Mr Mitchell had every right to his personal opinions, and to act in accordance with them. He also had a choice. He did not have a contraindication for COVID-19 vaccinations or some other special interest that made it unreasonable for the university to expect him to comply with the policy. He could have decided to become vaccinated. But he did not wish to do so. Although Mr Mitchell said that he would have been prepared to consider the Novavax vaccine if the university had asked him to, I do not consider that Mr Mitchell was seriously open to this possibility. Mr Mitchell is an intelligent and rational person. It is improbable that, for no good reason, he would have ignored this possibility if it had been a realistic one. Moreover, he had looked at the Novavax vaccine, just not as closely as at the others. I do not consider that further consultation on this matter would have had a realistic prospect of a different outcome.

[57] My assessment is that equity, good conscience, and the merits of the matter would not be served by ordering the university to pay compensation to Mr Mitchell in these circumstances. To do so would afford undue priority to Mr Mitchell's personal interests over the bona fide efforts of the university to protect the health and safety of its community. It would be unfair. This is so, despite the deficiencies in the university's consultation.

[58] Secondly, because there was nothing to prevent Mr Mitchell from becoming vaccinated other than his own opinions about the desirability of doing so, there is a question about the causation of the loss to which Mr Mitchell refers. It was the university that took the decision to dismiss Mr Mitchell. But if Mr Mitchell had chosen to comply with the vaccination requirement, he would not have been dismissed. The direction that was given to him by the university was not one that he was unable to comply with.

[59] Thirdly, I am not satisfied that Mr Mitchell made all reasonable efforts to mitigate the lost remuneration which he identifies as the basis for the first compensation order he seeks. Mr Mitchell stated in his evidence before the Commissioner that following his dismissal he was affected by anxiety and depression as a result of the way he had been treated. He contended that it was therefore reasonable that he did not immediately begin to look for work. I accept that he was very upset by his dismissal. That is understandable. But I am not persuaded that Mr Mitchell could not reasonably have applied for jobs in this period. Mr Mitchell stated that later he applied for a number of university-related jobs before finding new employment but did not say how many or when. Further, because of his personal choice not to become vaccinated, he limited the jobs for which he was eligible to apply. The state of the evidence is not sufficient for me to conclude that Mr Mitchell mitigated his loss. Further, I would not see any discretionary reason to award compensation in respect of Mr Mitchell's reactions to his dismissal, or to award 'exemplary' compensation, because the conduct of the university does not warrant it.

[60] Fourthly, I consider that the compensation that Mr Mitchell seeks is remote from the dispute that he brought to the Commission in March 2022. The s 739 application lodged on 15 March 2022 asked the Commission to determine whether the direction was lawful and reasonable, and to issue an interim order to prevent his dismissal pending the determination of that question. Before the Full Bench in August 2022, Mr Mitchell contended that the proper course, if his application was ultimately upheld, would be for the Commission to restore the status quo by ordering his reinstatement and then guiding and directing the parties to conduct proper consultation. It was only in the proceedings before me that Mr Mitchell contended that

compensation would be an appropriate remedy, as he had now become *'reconciled'* to his new job and had decided that his relationship of trust and confidence with the university had been adversely impacted such that reinstatement was no longer appropriate. The critical changes in Mr Mitchell's situation are matters of perception and personal choice that arose long after his employment with the university had ceased.

[61] Fifthly, as I have said above, I do not believe that further or more fulsome consultation would have made any difference to the ultimate outcome. If, contrary to my conclusion, the vaccination requirement and the direction of the university to Mr Mitchell were unreasonable, it would have been because of the deficiencies in a consultation process which in my opinion nevertheless involved substantive consultation. I would regard an order for compensation to be a disproportionate remedy in the circumstances.

[62] The Full Bench considered that if Mr Mitchell's case were to be upheld in full, there could be a range of potential orders. I have concluded that the university's vaccination requirement was not invalidated by the 2017 Agreement and was not unreasonable notwithstanding its failure to comply fully with its consultation obligations under clause 12 of the 2017 Agreement; that in any event, clause 15 does not permit the Commission to award the compensation that Mr Mitchell seeks; and that even if it did, I would not award compensation in this case on the discretionary grounds set out above. I do not consider that it is appropriate to make any *'remedial'* orders.

[63] Instead, it is appropriate to affirm in this decision that the university was required to comply with each of the obligations imposed on it by clause 12 of the Agreement and that it did not do so. Mr Mitchell maintained throughout the dispute that the university had not met its consultation obligations. He was correct. Mr Mitchell's position on this matter has been vindicated.

Conclusion

[64] The answers to the questions posed for determination are as follows:

(1) Yes.

(2) No.

(3) No.

(4) Not applicable; alternatively, none.

DEPUTY PRESIDENT

Appearances:

M. Mitchell for the applicant
R. Collinson for the respondent
Hearing details:

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