DECISION

Fair Work Act 2009
s.739—Dispute resolution

Neville Schoof

v

Hitachi Rail STS Australia Pty Ltd T/A Hitachi Rail STS Australia Pty Ltd
(C2023/4644)

COMMISSIONER LIM PERTH, 31 JANUARY 2024

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)]- jurisdictional issue – whether dispute settling procedure enlivened

[1] Mr Neville Schoof and his employer Hitachi Rail STS Australia Pty Ltd (**Respondent** or **Hitachi**) are in dispute over the interaction between overtime and penalty rates and Mr Schoof's relevant all-purpose allowances (**Allowances Dispute**).

[2] On 7 August 2023, Mr Schoof applied to the Commission pursuant to s 739(6) of the *Fair Work Act 2009* (**Act**) for the Commission to deal with a dispute in accordance with a dispute settlement procedure.

[3] Mr Schoof contends that he has raised a dispute pursuant to the:

(a) Ansaldo STS Australia Pty Ltd Enterprise Agreement 2019 (**2019 Agreement**); and

(b) Hitachi Rail STS Australia Pty Ltd Enterprise Agreement 2022 (**2022 Agreement**).

[4] The 2019 Agreement was replaced by the 2022 Agreement on 20 April 2022.

[5] Hitachi accepts that Mr Schoof has properly raised a dispute under the 2022 Agreement. However, Hitachi contests that the Commission has the power to arbitrate Mr Schoof's alleged dispute pursuant to the 2019 Agreement. This is on the basis that Mr Schoof did not enliven the jurisdiction of the Commission to deal with the dispute before the 2019 Agreement was replaced by the 2022 Agreement.

[6] The procedural history of this matter can be summarised as follows:

(a) Mr Schoof referred his disputes to the Commission on 7 August 2023 by way of a Form F10 Application.

(b) On 6 September 2023, I conducted a conciliation conference for the matter. At this conference, Hitachi informed Mr Schoof and the Commission that without making any

admissions of liability, it would be applying overtime and penalty rates to all-purpose allowances for all employees in the manner sought by Mr Schoof. Further, that this would be back paid to 1 January 2022, which is before the 2022 Agreement came into effect.

(c) Following the conference on 6 September 2023, the parties held further discussions in an attempt to resolve the matter.

(d) On 20 September 2023, Mr Schoof informed Chambers via email that the matter remained unresolved and sought for the matter to proceed to arbitration.

(e) On 16 October 2023, I held a second conference, where the parties agreed that I should determine Hitachi's jurisdictional objection to whether the Commission has jurisdiction to determine Mr Schoof's dispute under the 2019 Agreement before determining the substantive Allowances Dispute.

[7] Prior to the hearing of the matter my chambers constructed a paginated court book consisting of submissions and evidence of the parties. References to evidence are by way of the relevant page number in the court book.

[8] I conducted a hybrid hearing on 4 December 2023. Mr Schoof represented himself and gave evidence for his case. I granted leave to Ms Rachel Drew of Holding Redlich to represent Hitachi pursuant to s 596 of the Act. Hitachi relied on an unchallenged affidavit from Ms Laura Thomas.

[9] Having considered the evidence and submissions of the parties, I find that the Commission does not have the jurisdiction to deal with Mr Schoof's dispute under the 2019 Agreement.

[10] My detailed reasons follow.

2. Background

2.1 What were the events leading up to Mr Schoof's application?

[11] The evidence tendered by both parties was not contested.

[12] The 2019 Agreement was approved on 1 April 2019 and operated from 8 April 2019 until 27 April 2022.

[13] Mr Neville Schoof commenced employment with Hitachi in December 2020 as an Electrician and Communications Technician. He performs his work on a fly-in-fly-out basis. Mr Schoof was covered by the 2019 Agreement at the start of his employment.

[14] Between May 2021 and March 2022, Hitachi, its employees, and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (**CEPU**) negotiated for a replacement to the 2019 Agreement.[1]

[15] On 21 December 2021, Ms Mosese Uluicicia, Hitachi Head of Human Resources, sent an email to employees to update them on the status of negotiations. The email stated that discussions were coming to an end, with the aim to have a final bargaining meeting early in the new year. Ms Uluicicia's email further stated that:

> "…we hope to be in a position to share the proposed agreement with you shortly after that and commence the consultation process followed by the ballot to vote. We are keen to get the agreement through at the earliest and will ensure that any adjustment for the new wage increase (that will be backdated to 1 January 2022) will happen as quickly as possibly after the approval of the new Enterprise Agreement".[2]

[16] On 23 February 2022, Mr Uluicicia sent a further update email to employees, which stated:[3]

- the proposed 2022 Agreement had the CEPU's support;
- in the next few days employees would receive a voting pack with the proposed agreement, an information booklet and summary of changes;
- employees would not be requested to vote until the end of the access period, being 13 March 2022; and
- information sessions on the proposed agreement will be conducted in the week of 1 March 2022.

[17] Mr Schoof's evidence is that in February 2022, he identified an issue in the payment of his weekend allowances. He subsequently approached his site supervisor, Dane Taleni, in mid-February.[4] Mr Schoof informed Mr Taleni that he had looked at his payslips and identified an issue with how the overtime and penalty rates were paid. Specifically, Mr Schoof asked Mr Taleni whether he was supposed to receive double time on allowances.

[18] Mr Schoof's unchallenged evidence is that Mr Taleni agreed with him. Mr Schoof asked Mr Taleni on what he should do next. Mr Taleni informed Mr Schoof that he did not want to get involved in the matter and advised Mr Schoof that he needed to progress the matter with Hitachi's payroll department. Mr Schoof's evidence is that Mr Taleni said words to the effect of, "if it's a pay dispute, then it's payroll's".[5]

[19] On 2 March 2022, Mr Schoof sent an email to australiapayroll@hitachirail.com, which is the generic email for Hitachi's payroll team (**2 March Email**).[6] The email stated:

> "Good afternoon,
>
> Sorry to trouble you.
>
> I only recently noticed that my site allowance & working away allowance have been wrongly calculated since the commencement of my employment at Hitachi STS.
>
> Typically a Saturday ought to yield:

2 hours of 1.5x rate for both allowances
9.5 hours @ 2x rate for both allowances

However it is currently yielding:
8 hours at 1x rate for both allowances
3.5 hours @ 2x rate for both allowances

Likewise a Sunday ought to yield:
11.5 hours @2x rate for both allowances

However it is currently yielding:
8 hours at 1x rate for both allowances
3.5 hours @ 2x rate for both allowances

I have reviewed the following payslips for the pay periods with the weeks ending for the following dates:

1. 26/2/21
2. 12/3/21
3. 19/3/21
4. 2/4/21 (no weekends in this period but I noticed no allowances were paid on any days)
5. 9/4/21
6. 16/4/21
7. 30/4/21
8. 14/5/21
9. 28/5/21
10. 4/6/21 (missing in Sage ESS)
11. 11/6/2021
12. 18/6/21
13. 25/6/21
14. 9/7/21
15. 23/7/21
16. 30/7/21
17. 13/08/21
18. 20/8/21
19. 10/9/21
20. 24/9/21
21. 1/10/21
22. 15/10/21
23. 22/10/21
24. 5/11/21
25. 12/11/21
26. 26/11/21
27. 3/12/21
28. 17/12/21
29. 25/2/22

I have attached all relevant payslips.
I also attach a spreadsheet in which I personally calculated the shortfall per weekend on site.

27 affected payslips x a shortfall of $279.60 = Gross shortfall of ~ $7,549.20.

Perhaps I should have noticed this a long time ago. However it wasn't until I was checking to see if the new EBA rate had come into effect that I actually looked more closely at the fine detail. Many apologies.

Kind regards,

Neville Schoof."

[20] On 23 March 2022, Ms Deepti Sharma, Hitachi HR Generalist sent the below email in reply (**23 March Email**):[7]

"Hi Neville,

Thanks for your email.

We have sought legal advice on the interpretation of the EA in respect of whether you are entitled to a higher allowance than those set out in Schedule C.

We have been advised that the EA prescribes that penalty rates are to be paid on hours, they are not to be paid on allowances. Put another way, the allowance is an additional payment to be made after calculation of the hourly rate (including any penalties). The amount of the allowances set out in Schedule C remain unchanged notwithstanding any additional penalties paid on your hourly rate.

EBA Clause 4.10 provides that employees working on a roster with normal spread of hours [from] Monday to Sunday are paid the following:

4.10 Penalty Rates

Employees working on a roster with normal spread of hours Monday to Sunday will be paid the following:

(i) Saturday – will receive Saturday Penalty of 50% on first two (2) normal hours or first two (2) normal hours worked before 12 noon. All normal hours after the first two (2) hours or after 12 noon will be paid a Saturday Penalty of 100%.

(ii) Sunday – will receive Sunday Penalty of 100% on normal hours

Saturday and Sunday penalties are not payable on overtime.

Based on EBA Interpretation the Payroll System has been set up to do the calculations for employees working Monday to Sunday roster as below:

Scenario 1 – Saturday hours worked 11.5

The payment on hours will be as below:
8 hrs – Normal pay
2 hrs – Saturday Penalty Rate 50%
6 hrs – Saturday Penalty Rate 100%
3.5 hrs – OT Double time

Allowance Payment
8 hrs – Normal Pay
3.5 hrs – Double Time

Scenario 2 – Sunday hours worked 11.5
8 hrs – Normal pay
8 hrs – Sunday Penalty Rate 100%
3.5 hrs – Double time

Hence we confirm that based on the Mon to Sun roster that you have been working, there has been no underpayment or pay discrepancies.

I hope this clarifies your doubt. Thanks.

Kind regards,

Deepti Sharma
HR Generalist"

[21] Ms Satya Aralikatti was copied into the 23 March Email. Ms Aralikatti oversees the payroll department at Hitachi.[8] Ms Aralikatti was also copied into each of the below emails between Mr Schoof and Ms Sharma.

[22] On 25 March 2022 at 3:47pm, Mr Schoof sent an email to Ms Sharma stating, "*This is not my understanding of the EBA. Others on the same roster have the pay structure shown in the screenshot that I attach. I would like to have this rectified ASAP pls*" (**25 March Email**).[9] A screenshot of a redacted roster was attached.

[23] On 25 March 2022 at 4:09pm, Ms Sharma replied to Mr Schoof with:[10]

"Hi Neville,

It is very unfortunate that employees are sharing their Payslips as this is a breach of company policy. And I would not like to comment on below screenshot as we do not know under what circumstances are other getting paid [sic]. We stand by our email send you to before, hence you have been paid correctly."

[24] On 28 March 2022, Ms Sharma sent a further response to Mr Schoof:[11]

"Hi Neville,

I cannot comment on the below screenshot as there is no context and we do not know under what circumstances are others getting paid. Our email sent to you still stands and hence you have been paid correctly.

If the below is showing the pay of someone else then you need to get that person contact us directly as we are not in any position to discuss someone's pay with another person."

[25] The 2022 Agreement was approved by the Commission on 20 April 2022 and commenced operation on 27 April 2022.

[26] On 11 May 2022, Mr Schoof sent the below email to Ms Sharma (**11 May Email**):[12]

"Dear Deepti,

I hope all is well and good.

Firstly I apologise for my belated reply. I had always intended to politely engage with your previous response to my payroll query.

However, life gets in the way – site work has been busy and family commitments are pretty heavy on my R&R.

Thankfully, I eventually found time to pursue my own due diligence.

I can attach a partial excerpt of a draft analysis report. It stands at odds with your legal advice.

It explains my concerns far better than my emails.

Even in its incomplete form, it has been extremely helpful to me – in my impatience I sought to send this off as I feel it is clear enough to serve its purpose. Unless it remains unclear, I doubt I will need to pursue it's completion.

Time is moneys, I currently spend 2/3 of my life on site giving me little time to follow up on the matter – I really don't wish to wait another month.

I hope this can help you and others in payroll better understand my concerns.

It is my desire that we can cheerfully resolve these concerns.

Kind regards,

Neville Schoof"

[27] Attached to this email was a document headed "Section 3 – Analysis" (**Agreement Analysis**) which laid out Mr Schoof's analysis of the relevant clauses and his view on how they should be interpreted.[13] Relevantly, the Agreement Analysis contains the following:

"To ensure both the employee and employer arrive at a mutual understanding of the Ansaldo STS Australia Pty Ltd Enterprise Agreement (EBA), it is crucial to properly define key terms referenced therein."[14]

…

"NOTE: Unless otherwise specified (eg Clause 4.10) the quotations pertain to both the 2019 & 2022 EBA:"[15]

…

"Differences can be observed between the 2019 and 2022 versions of clause 4.10. The changes do not amount to any fundamental changes in renumeration. Rather, the changes purely relate to the manner in which the penalty rate is expressed:

- Under the 2019 EBA, payment of the first eight (or 'normal' hours) on Saturday would consist of eight ordinary hours of base rate & allowances, two hours @ 50% penalties on

ordinary hourly rate & allowances plus six hours @ 100% penalties on base hourly rate and allowances.

- Under the 2022 EBA, the Saturday renumeration remains effectively the same: 150% on the first two hours of ordinary hourly rate and allowances. 200% on the following six hours of ordinary hourly rate and allowances."[16]

[28] On 17 May 2022, Ms Sharma replied to Mr Schoof with:[17]

"Dear Neville

Thank you for your email, and for providing your document.

We have sought further legal advice on the application of the Hitachi Rail STS Australia Pty Ltd Enterprise Agreement 2022 (the EA).

We are advised that the document you have provided relies on a Fair Work Ombudsman website reference which states that "an all-purpose allowance is an allowance that is added to an employees' hourly rate" (https://www.fairwork.gov.au/taxonomy/term/468). To be clear, this reference confirms that the allowance is added after an employee's hourly rate has been calculated.

Our legal advice is that the drafting of the EA simply does not provide for penalties to be paid on allowances. We are advised that any past payments of penalty rates on allowances constitute a mistaken overpayment. Hitachi will not be seeking recovery of an overpayment in this instance.

We trust that this resolves your concerns.

Thanks

Kind regards,

Deepti Sharma"

[29] In around September 2022, Mr Schoof spoke with Mr Jason Greenslade, Director Construction – APAC for Hitachi, at Hitachi's premises in Karratha, Western Australia. Mr Schoof raised his issues with how he was being paid. Mr Schoof's unchallenged evidence is that Mr Greenslade said to him, "I will follow up on it, but I will have to run that matter past Satya [Aralikatti] – she is my EBA guru".[18]

[30] On 19 October 2022, Mr Schoof forwarded his email correspondence with Ms Sharma to Mr Greenslade.[19]

[31] Mr Schoof's Form F10 outlines the following events after this email to Mr Greenslade:[20]

(a) On 12 December 2022, Mr Schoof sent a follow-up email to Mr Greenslade as he had not received a reply.

(b) On 15 December 2022, Mr Greenslade replied to Mr Schoof, stating that he had consulted with, "HR and the legal team and confirm you are being paid correctly".

(c) On 16 December 2022, Mr Schoof replied to Mr Greenslade, asking if he could substantiate Hitachi's position with references to the enterprise agreement.

(d) On 23 March 2023, Mr Schoof sent a follow-up email to Mr Greenslade, asking if he should speak with the new Construction Manager, Sean McPartland, instead.

(e) On 23 March 2023, Mr Greenslade replied to Mr Schoof, confirming Hitachi's position that Mr Schoof was being paid correctly pursuant to the enterprise agreement.

(f) On 29 May 2023, Mr Schoof spoke with Mr McPartland in person at Hitachi's Marandoo office regarding the Allowances Dispute. Mr Schoof explained to Mr McPartland that he had been waiting for 14 months to resolve the matter and was ready to escalate the matter to the Fair Work Commission. Mr McPartland asked Mr Schoof to give him until end of July 2023 to respond before bringing the matter to the Commission.

(g) On 13 July 2023, Mr Schoof spoke with Mr McPartland in person. Mr McPartland asked Mr Schoof not to send a complaint to the Commission. Mr McPartland informed Mr Schoof that Hitachi's legal and HR team would send a response shortly that he may or may not be happy with. Mr McPartland indicated that the response would be arriving soon.

(h) On 4 August 2023, Mr Schoof began drafting his Form F10 as he received no further response from Hitachi.

[32] On 7 August 2023, Mr Schoof lodged his Form F10 for this matter.

2.2 Mr Schoof's Form F10 application

[33] In section 1.2 of Mr Schoof's Form F10, Mr Schoof identifies that the industrial instrument relevant to his application is the "Hitachi Rail STS Australia Pty Ltd Enterprise Agreement 2022 (and 2019)". Underneath his answer he only notes the ID code of the 2022 Agreement.

[34] In response to section 1.3 of the Form F10, Mr Schoof identifies the dispute settlement clause as "Hitachi STS EBA Clause 8.2 – Dispute Settling Procedure".

[35] In section 1.4 of the Form F10 for this matter, Mr Schoof identifies that the dispute relates to the following clauses:

- Clause 4.10 (Penalty Rates) of the 2019 and 2022 Agreement;
- Clause 4.11.2 (Calculation of Overtime) of the 2019 and 2022 Agreement; and
- Clause 5.11 (Delays in Payments) of the 2019 and 2022 Agreement.

[36] Clause 5.11 has identical wording in both the 2019 and 2022 Agreement. Clause 4.10 and clause 4.11.2 have minor differences in wording with regards to how they express the

relevant penalty rate (i.e. the 2019 Agreement refers to rates of time and a half, the 2022 Agreement refers to rates of 150%). Beyond these minor differences, clauses 4.10 and 4.11.2 appear to be near identical in wording.

3. The dispute settlement procedure

[37] Clause 8.2 in the 2019 Agreement relevantly provides:

> **8.2 Dispute-settling procedure**
>
> (a) If a dispute relates to a matter arising under this Agreement or the National Employment Standards, this clause sets out the procedures to settle the dispute.
>
> (b) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures of this clause.
>
> (c) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level by discussions between the employee or employees and relevant supervisors and/or management.
>
> (d) If the discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Fair Work Commission. The Fair Work Commission may attempt to resolve the dispute by conciliation or arbitration.
>
> (e) While the parties are trying to resolve the dispute using the procedures in this clause, the employee must continue to perform their work as they would normally.
>
> (f) A decision made pursuant to this clause must not be inconsistent with the Building Code 2016.

[38] This clause is identical to clause 8.2 in the 2022 Agreement.

4. Relevant legislation

[39] The Commission's power to deal with disputes is set out in s 595 of the Act, which provides:

> **595 FWC's power to deal with disputes**
>
> (1) The FWC may deal with a dispute only if the FWC is expressly authorised to do so or in accordance with another provision of this Act.
>
> (2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:
>
> (a) by mediation or conciliation;
>
> (b) by making a recommendation or expressing an opinion.

(3) 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.

Example: Parties may consent to the FWC arbitrating a bargaining dispute (see subsection 240(4)).

(4) In dealing with a dispute, the FWC may exercise any powers it has under this Subdivision.

Example: The FWC could direct a person to attend a conference under section 592.

(5) To avoid doubt, the FWC must not exercise the power referred to in subsection (3) in relation to a matter before the FWC except as authorised by this section.

[40] Subdivision B of Div 2 of Pt 6-2 of the Act concerns "Dealing with disputes". Section 738 of the Act provides:

738 Application of this Decision

This Division applies if:

(a) a modern award includes a term that provides a procedure for dealing with disputes, including a term in accordance with section 146; or

(b) an enterprise agreement includes a term that provides a procedure for dealing with disputes, including a term referred to in subsection 186(6); or

(c) a contract of employment or other written agreement that includes a term that provides a procedure for dealing with disputes between the employer and the employee, to the extend that the dispute is about any matters in relation to the National Employment Standards or a safety net contractual entitlement; or

(d) a determination under the *Public Service Act 1999* includes a term that provides a procedure for dealing with disputes arising under the determination or in relation to the National Employment Standards.

[41] Section 739 provides the Commission's power to deal with disputes as follows:

739 Disputes dealt with by the FWC

(1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.

(2) [Repealed]

(3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.

(4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

(6) The FWC may deal with a dispute only on application by a party to the dispute.

5. Submissions

5.1 Hitachi

[42] Hitachi contests that the Commission has jurisdiction to determine Mr Schoof's entitlement to penalty rates on allowances under the 2019 Agreement. This is on the basis the dispute settling procedure in the 2019 Agreement was not enlivened before the 2019 Agreement was replaced by the 2022 Agreement.

[43] Hitachi submits that Mr Schoof failed to comply with clause 8.2 of the 2019 Agreement for two reasons:[21]

(1) Clause 8.2 requires that the parties must try to resolve the dispute at the workplace level by discussions between the employee and relevant supervisors and/or management. Mr Schoof failed to do this. Mr Schoof's attempts to resolve the dispute at the workplace level were in relation to the 2022 Agreement, not the 2019 Agreement. The only references to the 2019 Agreement were in an attempt to distinguish the drafting between the 2022 Agreement and the 2019 Agreement.

(2) Mr Schoof failed to try to resolve the dispute by discussions with his relevant supervisor and/or management. Mr Schoof raised the issue with Hitachi's payroll function, which does not satisfy the dispute settling procedure.

[44] With regards to the definition of "relevant supervisor and/or management", Hitachi submits that their payroll team is not a relevant supervisor or management. Further, that:

- Even if Mr Schoof alleges that the email correspondence to Mr Greenslade satisfy the requirement of a relevant supervisor or management, that occurred on 19 October 2022, after the 2022 Agreement came into operation.

- For Mr Schoof to claim that he enlivened clause 8.2 through the 2 March Email would suggest that any email sent to the Payroll Team would activate clause 8.2 Such an interpretation would be impractical and unfairly expose Hitachi to claims from any employee (current or former) who have previously corresponded with the Payroll Team (or other Hitachi team) with a question or grievance and unfairly expand the range of possible disputes under the dispute settling procedure.

- Ms Sharma is a payroll clerk; the role of a payroll clerk is limited to explaining how the system works and is not in a position to make a change to the system.[22]

- Mr Taleni was not relevant person to raise a dispute as he wanted nothing to do with the matter.[23]

- Mr Schoof did not use express language in any of his emails to the Payroll Team or Mr Greenslade which demonstrate an intention to enliven clause 8.2 under the 2019 Agreement. In her email on 17 May 2022, Ms Sharma referred to obtaining legal advice about the 2022 Agreement. Mr Schoof made no effort to clarify his understanding that the dispute concerned the 2019 Agreement.

- Mr Schoof sought to rely on the 2022 Agreement on the understanding that the 2022 Agreement would operate from January 2022 even where approval was delayed past this date. This is because of the information booklet provided to Hitachi staff on 23 February 2023.

[45] Hitachi further submits that Mr Schoof did not validly raise a dispute under the 2019 Agreement in his Form F10.[24]

[46] Hitachi submits that Mr Schoof's inclusion of brackets around the reference to the 2019 Agreement and the general references to the 2019 Agreement in part 1.4 of the Form F10, do not satisfy compliance with clause 8.2 of the 2019 Agreement.

[47] Hitachi characterises the 2 March Email and the 25 March Email as payslip queries, and as insufficient to enliven a dispute pursuant to clause 8.2 of the 2019 Agreement.[25]

[48] Hitachi also submits that there is no live dispute between the parties. Hitachi is currently paying the penalties on allowances that Mr Schoof claims. Further, Hitachi has back paid the penalties on allowances back to 1 January 2022, which predates the approval of the 2022 Agreement, and will continue to pay this throughout the life of the 2022 Agreement. Hitachi's position is that it does not concede Mr Schoof's interpretation of the 2022 Agreement is correct, but that it is making the payments as an expression of good faith.[26]

5.2 Mr Schoof

[49] Mr Schoof presses his application on the basis that Hitachi's rectification of the issue is made without any admission of liability and is thus unenforceable. Further, that determination of the matter ties into disputes regarding other clauses in both enterprise agreements.

[50] Mr Schoof makes the following arguments in support of his position that he has enlivened the dispute settling procedure in the 2019 Agreement and thus the Commission has jurisdiction to deal with his dispute:

<u>Mr Schoof clearly tried to resolve the dispute</u>

(1) In February 2022, Mr Schoof spoke of the matter with his direct supervisor, Mr Taleni, in person at the workplace. Mr Taleni was a "relevant supervisor and/or management".

(2) Mr Taleni instructed Mr Schoof to pursue the matter with payroll. Mr Taleni considered payroll to be the most appropriate and relevant body to deal with the matter. Mr Schoof did so.

(3) Payroll forwarded the matter to HR management.

It was clear that Mr Schoof was disputing payment under the 2019 Agreement

(4) The 2 March Email disputed the payment structure of allowances Mr Schoof had received to date. The 2 March Email set out the nature of the dispute as well as the affected timeframe clearly. The 2 March Email also listed all the affected payslips, most of which fell within 2021. All the listed payslips fell within the operative time period of the 2019 Agreement. Accordingly, it is not possible that Mr Schoof could have anything but the 2019 Agreement in view when he submitted the 2 March Email.

(5) Hitachi's contention that Mr Schoof believed the 2022 Agreement was in effect during March 2022 is false. Hitachi had already issued an information and voting pack regarding the 2022 Agreement during February 2022. The notice informed employees that the 2022 Agreement was not yet in effect, and that employees would be paid at the rates prescribed in the *proposed* 2022 Agreement.

(6) The EBA Analysis delineates between the 2019 Agreement and the 2022 Agreement. This shows that Mr Schoof was well aware that the 2022 Agreement was still proposed and not yet in operation when he first initiated his dispute in February 2022.

Mr Schoof's emails to payroll were sent to the appropriate personnel, negating the need for further discussions

(7) Mr Schoof was not told that he had approached the incorrect Hitachi staff to resolve his matter.

(8) If Mr Taleni's advice to approach payroll was incorrect, it is a moot point as the matter was forwarded to Ms Sharma, who was employed at the time as a HR generalist.

(9) Ms Sharma was a relevant person for the purposes of resolving the matter. Ms Sharma's 23 March Email advised Mr Schoof that, "we have sought legal advice". This implies that Ms Sharma saw herself as an appropriate person to respond to Mr Schoof. It also implied that Ms Sharma was working as part of a team.

(10) In the 23 March Email, Ms Sharma clearly explained that Hitachi would maintain its payment structure.

(11) Ms Aralikatti was a relevant HR Manager and was copied into the 23 March Email. This indicates that Ms Aralikatti was likely involved by 23 March 2022, and would have been aware of the dispute and the response.

(12) Hitachi's contention that the dispute settling procedure could only be enlivened by raising the matter with Mr Greenslade is false. Mr Greenslade indicated to Mr Schoof that he would need to refer the matter to Ms Aralikatti as she was Mr Greenslade's "EBA guru".

(13) The purpose of the dispute settling procedure is to ensure that the employer has a fair and reasonable opportunity to understand, consider and respond to a dispute prior to the involvement of the Fair Work Commission.

(14) Relevant personnel were notified of the dispute and Hitachi demonstrated they understood the 2019 Agreement to be central to the matter through the 23 March Email; gave serious consideration to the matter (including through seeking legal advice); and responded to Mr Schoof. All of this occurred before the 2022 Agreement superseded the 2019 Agreement.

[51] With regards to Hitachi's contention that Mr Schoof did not validly raise a dispute under the 2019 Agreement in his Form F10, Mr Schoof makes the following submissions:

(1) In part 1.2 of the Form F10, he has typed, "Hitachi Rail Sts Australia Pty Ltd Enterprise Agreement 2022 (and 2019)".

(2) Both the 2019 and 2022 Agreements were attached and filed with Form F10.

(3) In part 1.4 of the Form F10, Mr Schoof has identified the clauses in dispute from both the 2019 and 2022 Agreements.

[52] Mr Schoof submits that he enlivened the dispute under the 2019 Agreement. The Commission accordingly has jurisdiction to arbitrate his dispute.

6. Consideration

6.1 The Commission's power to deal with disputes

[53] The question I must resolve is whether in Mr Schoof's particular circumstances, the Commission has the jurisdiction to arbitrate his dispute.

[54] There are several authorities that have considered the construction of the Commission's authority to arbitrate a dispute in circumstances where an agreement has ceased to operate. It is necessary to consider some of these.

[55] The first of these is *Simplot v AMWU (Simplot).*[27] At first instance, the case concerned an application made to the Commission pursuant to the disputes resolution clause in an enterprise agreement that was operative at the time. The matter remained unresolved after a conference with the member at first instance and was listed for hearing. Before the listed hearing date, the enterprise agreement was extinguished by a replacement agreement.

[56] Simplot raised a jurisdictional objection on the basis that the Commission no longer had the jurisdiction to hear and determine the dispute. At first instance it was found that the

Commission did have jurisdiction to hear and determine the dispute, as the employees had an 'accrued right' to have their dispute determined. Simplot appealed the decision.

[57] On appeal the Full Bench overturned the decision, finding that the Commission has no jurisdiction to deal with a dispute under a disputes procedure in an enterprise agreement that has ceased to operate.[28] The Full Bench further found that the framework of the Act is such that obligations are not imposed on a person and entitlements are not given to a person by an enterprise agreement unless the enterprise agreement applies to the person. Ergo, if an enterprise agreement is no longer in operation, it cannot apply to a person and the provisions of that enterprise agreement cannot be exercised.[29]

[58] The second full bench authority on the operation of s 739 is *Construction, Forestry, Maritime, Mining and Energy Union & others v Falcon Mining Pty Ltd (Falcon Mining)*.[30] *Falcon Mining* concerned a similar fact pattern to *Simplot* – on 19 June 2020, the CFMMEU and five members lodged an application under s 739(6) for the Commission to deal with a dispute in accordance with the disputes procedure term in the enterprise agreement that applied at the time.

[59] The enterprise agreement continued to operate and apply while the CFMMEU made its s 739(6) application; when the Member at first instance conducted a series of conciliation conferences; and when the Member first listed the matter for hearing. However, due to a combination of factors such as the availability of counsel; applications to produce; COVID-19; and the Member's availability, the hearing for the matter was adjourned several times. This resulted in the hearing being listed for 17 December 2021. On 7 December 2021, the Commission approved a replacement enterprise agreement.

[60] Falcon Mining subsequently raised a jurisdictional objection that the Commission could not deal with the dispute. The Member at first instance dismissed the application, applying the reasoning in *Simplot*. The CFMMEU appealed the decision.

[61] In overturning the decision, the Full Bench found that the source of the Commission's power to arbitrate a dispute is located in the Act, not the terms of an enterprise agreement.[31]

[62] In analysing the provisions of the Act that give the Commission the power to deal with disputes, the Full Bench provided the following guidance on the two different approaches to s 739 at [66]:

> Subsection (1) of s 739 provides that the section applies if a term referred to in s 738 "requires or allows" the Commission to deal with a dispute. On one view (and presumably from the *Simplot* perspective), a term of an enterprise agreement can only *require or allow* something if it is in operation in accordance with s 54, since s 52(1)(a) provides that an agreement will only apply to an employee, employer or employer organisation if (relevantly), it is in operation, and s 51 provides that an agreement does not impose obligations on or give an entitlement to a person unless the agreement applies to the person. On this view, s 739 only applies in relation to a dispute resolution term in an enterprise agreement if the agreement is in operation. An alternative view would be that:
>
> - as earlier discussed, s 738(b) does not require an agreement to be operative in order for Div 2 of Pt 6-2 to apply;

- the function of subsection (1) of s 739 is only to distinguish the application of the section, which is concerned with the *Commission's* power to deal with disputes, from that of s 740 which, by s 740(1), applies if the dispute resolution term requires or allows *a person other than the FWC* to deal with a dispute;

- s 51 is not relevant because s 739 is concerned with the power of the Commission to deal with disputes arising under dispute resolution terms, not with the obligations and entitlements of parties under the instruments in which such terms are contained; and

- in respect of a term described in s 738(b), it will be sufficient that the dispute has arisen at a time when the term is in operation, and the right to have such a dispute resolved in accordance with the term remains operative and enforceable because it is a right which accrued during the operation of the agreement.

[63] And at [67]:

> For the purpose of deciding this appeal, it is not necessary for reasons which will be explained to determine to finality which of these views is correct. We will proceed on the assumption that the former view is correct, although we consider there is much to be said for the latter view.

[64] The Full Bench also analysed how s 739(4) is to be interpreted, noting at [68]:

> The condition precedent for there to be authorisation to arbitrate under s 739(4) is that "*in accordance with the term, the parties have agreed that the FWC may arbitrate…the dispute"*. The requirement for the agreement to arbitrate to be in "*in accordance with the term"* would mean, for example, that if the relevant dispute resolution term provides that workplace discussion, and /or conciliation by the Commission, must occur before the Commission can arbitrate, the parties cannot agree to arbitration occurring before those steps have been taken. It would also mean that if the dispute resolution term provides that it applies only to disputes of a defined character, then the parties could only agree to arbitrate disputes of that character. However, subject to this qualification, s 739(4) on its ordinary meaning empowers the Commission to arbitrate the dispute once the requisite agreement exists.

[65] An example of how this analysis is to be conducted can be seen in the Full Bench decision of *Battye v John Holland Pty Ltd (JHPL) t/as Territoria Civil (Battye)*.[32] In *Battye*, the Full Bench considered the construction of a dispute resolution clause and at what point the Commission was authorised to arbitrate. In that matter, the dispute resolution clause outlined steps to resolve a dispute. If the dispute was not resolved by discussions between the parties, the matter "*may be referred to the Fair Work Commission for conciliation and/or arbitration for resolution. The decision made by the Fair Work Commission shall be binding to both the Company and affected Employee(s)*".[33]

[66] Mr Battye referred his dispute to the Commission after discussions did not resolve the issue. The matter was dealt with by conciliation conference at first instance. The parties then had further time to try and resolve the matter. The parties were not successful in resolving the matter and Mr Battye requested the matter be programmed for arbitration. In between Mr Battye referring his dispute to the Commission and his request that the Commission arbitrate the matter, a year had passed, and the relevant agreement had expired.

[67] In affirming the Member at first instance's decision that the Commission did not have authority to arbitrate the matter, the Full Bench noted:

> [19] Mr Battye acknowledges that in order to enliven the disputes resolution procedure in the 2013 Agreement, it had to have been enlivened whilst that agreement was in operation. He contends that the procedure was so enlivened by his application on 27 July 2017 which, he submits, referred the dispute to the Commission for resolution by way of both conciliation and arbitration.
>
> [20] We disagree. It seems to us, from both the language of the disputes resolution term of the 2013 Agreement and the conduct of the parties, that there was a clear bifurcation of the conciliation and arbitration functions of this dispute.
>
> [21] First, the relevant term of the 2013 Agreement (clause 45.1.4; see [8] above) speaks of a matter being referred to the Commission 'for conciliation and/or arbitration for resolution (emphasis added). The use of the word 'or' suggests a separation of the conciliation and arbitration functions. A dispute referred to the Commission under this clause may, but will not necessarily, involve both functions.
>
> [23] Second, the manner in which Mr Battye's dispute was advanced and then dealt with by the Commission also supports the proposition that there was a bifurcation of the conciliation and arbitration functions. Pursuant to Mr Battye's application of 27 July 2017, the Commission's conciliation function was engaged. Only on 27 February 2019 did Mr Battye advise that further discussions had been unsuccessful, and it was not until that point (or at the earliest on 20 December 2018) that Mr Battye sought to have the Commission exercise arbitral power under the disputes resolution settlement term of the 2013 Agreement.

[68] The Full Bench in *Battye* concluded that s 739(4) provides that the Commission may arbitrate a dispute only where the parties have agreed that the Commission may do so in accordance with a disputes resolution term in an agreement. As the relevant agreement had ceased to operate by the time Mr Battye first sought to enliven the Commission's power to arbitrate, the Commission did not have the power to arbitrate.

[69] What is clear from the above authorities is that for the Commission's power to arbitrate a dispute to be enlivened, the parties must have reached agreement in accordance with the dispute resolution term before the relevant agreement ceases to operate and apply to the parties.

6.2 Does the Commission have the jurisdiction to arbitrate Mr Schoof's dispute?

[70] Applying the principles canvassed above, I find that the parties did not reach the requisite agreement for the Commission to arbitrate the dispute before the 2019 Agreement was replaced by the 2022 Agreement.

[71] Section 595(1) and (2) of the Act provides that the Commission may deal with a dispute (other than by arbitration) only if the Commission is expressly authorised to do so or in accordance with another provision of the Act. Section 595(3) provides the Commission may deal with a dispute by arbitration only if the Commission is expressly authorised to do so under or in accordance with another provision of the Act.

[72] Pursuant to s 739(1), the Commission can only deal with a dispute if a term referred to in s 738 allows it to do so. Section 738(b) is relevant to this matter, which identifies dispute settling terms in enterprise agreements.

[73] The 2019 Agreement includes a term that provides a procedure for dealing with disputes, namely, clause 8.2.

[74] Section 739(4) sets out that if, in accordance with clause 8.2, the parties have agreed that the Commission may arbitrate the dispute, the Commission may do so. I now turn to consider the interpretation of clause 8.2 and whether the parties have reached the requisite agreement for the Commission to arbitrate.

[75] The parties focused most of their attention on whether Mr Schoof had complied with clause 8.2(c) of the 2019 Agreement and whether that was sufficient to enliven the jurisdiction of the Commission. The parties did not make submissions on the principles to be adopted in interpreting the 2019 Agreement, however the principles to be applied in construing enterprise agreements are not controversial.

[76] In interpreting an award or enterprise agreement, the task is to construe the document in a practical manner and within the industrial environment in which it was drafted.[34] The Full Court of the Federal Court in *WorkPac Pty Ltd v Skene*[35] recently affirmed this approach and other relevant precedents at [197]:

> The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378 (French J). The interpretation "… turns on the language of the particular agreement, understood in the light of its industrial context and purpose …": *Amcor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241* at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (Holmes at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (*Holmes* at 378–9, citing *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see *Kucks v CSR Limited (1996) 66 IR 182* at 184 (Madgwick J); *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); Amcor at [96] (Kirby J).

[77] In *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 2)*[36] (*Qantas*), Flick J applied the above precedents to the dispute resolution clauses in the *Licensed Aircraft Engineers (Qantas Airways Limited) Enterprise Agreement 10* and the *Jetstar Airways Engineering & Maintenance Enterprise Agreement 2018* (Qantas and Jetstar Agreements).

[78] In finding that the ALAEA had complied with the relevant dispute resolution clauses in the Qantas and Jetstar Agreements, Flick J observed that:

(1) The requirements in a dispute procedure must be construed with a degree of flexibility consistent with the industrial context in which clauses are drafted.[37]

(2) With regards to the meaning of "dispute" in both the Qantas and Jetstar Agreements, the essence of "dispute" is that there is an occasion during which there is an exchange of "opposing views" or positions. The necessity is that there is an exchange of positions "for" and "against" a particular result.[38]

(3) The terms "meeting" and "discussion" should be construed with a degree of informality and flexibility. The requirement for a "meeting" or a "discussion" obviously does not require a formally convened meeting or a formal discussion. By way of example, a dispute may best be sought to be resolved informally and during a lunch-break at which the dispute is raised with a manager or supervisor.[39]

(4) There needs to be some minimum content to the steps in dispute resolution clauses. With regards to the Qantas and Jetstar Agreements, it was not necessary for those participating in the meeting or discussion to know that they were participating in a meeting which formed part of a dispute resolution procedure. What was required was an employee (or group of employees) raising an "opposing view" to their employer at a meeting (however flexibly that term is to be construed) at which it was known or could be reasonably inferred that each the "opposing" sides knew that there was a dispute in need of resolution.[40]

[79] In another Federal Court authority examining the construction of a dispute resolution procedures in an enterprise agreements Colvin J in *Maersk Crewing Australia Pty Ltd v Construction, Forestry, Mining, Maritime, Mining and Energy Union (No 2) (Maersk)*[41]observed at [86]:

> The terms of a procedure for resolving disputes should not themselves be construed in a manner that turns them into an instrument for generating disputes as to whether the procedure itself has been followed. Such provisions must be construed having regard to their evident purpose as providing a mechanism by which to encourage discussion and resolution. They should be interpreted 'practically and with an eye to common sense' having regard to the context in which they will be applied so that they can be implemented 'in a clear way on a day-to-day basis at work sites'.

[80] Clause 8.2(a) of the 2019 Agreement explains that the clause sets out the procedures to settle a dispute if the dispute relates to a matter arising under the 2019 Agreement or the National Employment Standards. I find that the Allowances Dispute is a matter that arises under the 2019 Agreement.

[81] Clause 8.2(b) is not relevant to this matter. Clause 8.2(c) requires at first instance that the parties to the dispute must try and resolve the dispute at the workplace level by discussions between the employee and "relevant Supervisors and/or Management".

[82] Mr Schoof submits that when he raised his pay concerns with Mr Taleni in February 2022, he had discussions with a relevant supervisor pursuant to clause 8.2(c). Hitachi submits that Mr Taleni was not a relevant supervisor for two reasons. *Firstly*, Mr Taleni did not have the authority to affect change in relation to Mr Schoof's grievance. S*econdly*, Mr Taleni did not

wish to be involved in the dispute, and therefore was not a "relevant supervisor". I do not accept either of these submissions. There is nothing in the text of clause 8.2(c) that limits the definition of "relevant supervisors" in such a way, and to read in either of Hitachi's limitations into clause 8.2(c) would lead to nonsensical outcomes at a workplace level.

[83] I find that the reference to a "relevant supervisor" in clause 8.2(c) of the 2019 Agreement must be read in the context of the whole sub-clause and the industrial context that enterprise agreements govern the relationship between an employer and employees in the workplace. Clause 8.2(c) intends for discussions to occur between the employee and relevant supervisor. The supervisor must be relevant to the employee raising the dispute. As Mr Schoof's supervisor, Mr Taleni was therefore a relevant supervisor for the purpose of clause 8.2(c).

[84] As per Mr Schoof's evidence, Mr Taleni directed him to raise his dispute with Hitachi's payroll department. After sending an email to Hitachi's general payroll address, Mr Schoof's dispute was then handled directly by Ms Sharma. Hitachi's submission is that Ms Sharma is not relevant management for the purposes of clause 8.2(c), as she was just a payroll clerk whose role was to simply answer payroll questions. I do not accept this submission. Ms Sharma by her own email signature is employed in a human resources capacity.

[85] I also note that in all the correspondence between Mr Schoof and Hitachi, Ms Aralikatti was copied in. Ms Aralikatti is employed in a senior or supervisory role. It was Mr Schoof's uncontested evidence that Mr Greenslade considered Ms Aralikatti Hitachi's "EBA guru".

[86] Applying the principles of interpretation outlined above at [76] – [79], I find that the reference to "management" in clause 8.2(c) should be read broadly to include Ms Sharma and Ms Aralikatti in their roles at Hitachi.

[87] On the consideration of whether Mr Schoof properly raised a dispute with Mr Taleni, Ms Sharma or Ms Aralikatti, Hitachi submits that Mr Schoof at best has merely raised a payroll query.[42] Further, that his payroll query was only ever about the 2022 Agreement, not the 2019 Agreement.

[88] I do not accept either of these submissions. When Mr Schoof initially raised his dispute with Mr Taleni and Ms Sharma, the 2019 Agreement was in operation. In Mr Schoof's 2 March 2022 Email, he outlines:

- how Hitachi currently calculates his pay with regards to penalties and his all-purpose allowances;
- how he thinks his all-purpose allowances should be calculated;
- 27 payslips affected by the issue going back to February 2021; and
- attaches a spreadsheet calculating his contended loss.

[89] This is not a mere payroll query. This is supported by Mr Schoof's email on 25 March 2022 where he replied to Ms Sharma that, "*this is not my understanding of the EBA*", and included payslips of colleagues who were being paid in the manner Mr Schoof seeks. It was not

necessary for Mr Schoof to expressly refer to clause 8.2 or specifically use the word "dispute" in his correspondence . I find that there was an exchange of opposing views on the issue and that Mr Schoof did raise a dispute.

[90] Mr Schoof also stated in his 2 March 2022 Email, "…*it wasn't until I was checking to see if the new EBA rate had come into effect that I actually looked more closely at the fine detail.*" Objectively, as the 2022 Agreement was not in operation on 2 March 2022 and Hitachi had updated its employees on the bargaining process, I cannot agree with Hitachi's submission that Mr Schoof was confused and thought that the 2022 Agreement had come into effect. I agree with Mr Schoof's submission that he knew the 2019 Agreement still applied when he initially wrote to Ms Sharma. Further, Ms Sharma's email on 23 March 2022 includes a screenshot of the 2019 Agreement, not the 2022 Agreement, which supports the finding that both parties knew the issue concerned the 2019 Agreement.

[91] I am also not persuaded by Hitachi's submission that a finding that Mr Schoof's emails constitute the raising of a dispute would open the company to the risk of old payroll queries turning into disputes.

[92] Accordingly, I find that Mr Schoof has complied with clause 8.2(c).

[93] Clause 8.2(d) provides that, *"[i]f the discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Fair Work Commission. The Commission may attempt to resolve the dispute by conciliation or arbitration*".

[94] Neither party advanced submissions on how I should interpret clause 8.2(d). However, the clause clearly has work to do. I find that clause 8.2(d) sets out the final steps for the Commission to be authorised to arbitrate a matter under the 2019 Agreement.

[95] The requirement in clause 8.2(d) for referral of the dispute to the Commission works in tandem with the condition in s 739(6) of the Act that the Commission may only deal with a dispute upon application by a party to the dispute. However, clause 8.2(d) must be considered in the context of s 739(4) and in the consideration of when the parties agreed to arbitrate.

[96] In this matter, I find that the parties agreed to arbitrate after the first conciliation conference that was held on 6 September 2023. As was the case in *Battye,* the words in clause 8.2(d) suggest a bifurcation of the Commission's power to deal with the dispute by either conciliation or arbitration; referral to the Commission may not necessarily involve both functions.

[97] With the first conciliation conference, the Commission's power to conciliate was engaged.

[98] Mr Schoof's referral of his dispute to the Commission and the agreement to arbitrate did not occur until well after the 2022 Agreement replaced the 2019 Agreement. Accordingly, I cannot find that there was agreement to arbitrate before the 2019 Agreement ceased to operate.

[99] For completeness, I wish to address two matters. *Firstly*, it could be questioned whether the 2019 Agreement can constitute an "enterprise agreement" as referred to in s 738(b), and

whether the Commission could deal with Mr Schoof's dispute under the 2019 Agreement at all given that it was not in operation at the time Mr Schoof applied to the Commission to deal with his dispute. In this case, it is not necessary for me to reach a conclusion on this. This is because regardless of which approach to the Commission's power under s 739 is utilised, I find that there has been no agreement to arbitrate.

[100] *Secondly*, I address Hitachi's reference to *Australasian Meat Industry Employees Union v Primo Foods Pty Ltd (Primo)*[43] and that it should be distinguished from this matter. I agree with Hitachi that this current matter is distinguishable from *Primo*, though for different reasons advanced by Hitachi. In *Primo*, the AMIEU made an application pursuant to s 739(6) to deal with a dispute under the relevant in-term enterprise agreement. The dispute concerned how terms of the enterprise agreement interacted with the National Employment Standards, and the boundaries of the dispute extended to a period of time covered by the predecessor enterprise agreement.

[101] In finding that the Commission could deal with the AMIEU's dispute, Deputy President Asbury (as she was then) found that it is common for disputes in relation to the National Employment Standards to involve periods spanning current and previous enterprise agreements. Further, that a dispute lodged under a dispute settlement term in an operative enterprise agreement that involves an employee's continuous service under a previous agreement (that is inoperative when the dispute is notified), does not deprive the Commission of power to deal with the dispute under the terms of the operative enterprise agreement, where it is authorised by the Act and relevant enterprise agreement.[44]

[102] This is distinguishable from the facts in this matter, where Mr Schoof has effectively made two s 739(6) applications – one pursuant to the 2019 Agreement and one pursuant to the 2022 Agreement. The application pursuant to the 2022 Agreement meets the requirement in s 739(4). The application pursuant to the 2019 Agreement does not.

[103] For the reasons outlined above, the Commission does not have jurisdiction to deal with Mr Schoof's dispute under the 2019 Agreement. It is accordingly dismissed. Mr Schoof's dispute under the 2022 Agreement will be programmed for determination of the substantive dispute.

COMMISSIONER

Appearances:

N Schoof, Applicant
R Drew for the Respondent

Hearing details:
2023.
Perth:
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[1] Digital Court Book, p 150 at [10].

[2] Ibid, p 193.

[3] Ibid, p 192

[4] Ibid, p 132 at [2]; Transcript, 4 December 2023, at PN32.

[5] Transcript, 4 December 2023, at PN31.

[6] Digital Court Book, p 156.

[7] Ibid, p 168.

[8] Transcript, 4 December 2023, at PN89.

[9] Digital Court Book, pp 166-167.

[10] Ibid, p 173.

[11] Ibid, p 166.

[12] Ibid, p 154.

[13] Ibid, p 158.

[14] Ibid.

[15] Ibid, p 161.

[16] Ibid, pp 162-163.

[17] Ibid, pp 182-184.

[18] Ibid, p 133 at [5].

[19] Ibid, pp 180-182.

[20] Ibid, pp 15-16.

[21] Ibid, p 144.

[22] Transcript, 4 December 2023, PN45, PN69.

[23] Transcript, 4 December 2023, PN45, PN69.

[24] Digital Court Book, p 144.

[25] Transcript, 4 December 2023, PN55, PN92.

[26] Transcript, 4 December 2023, PN65 – PN66.

[27] [2020] FWCFB 5054.

[28] Ibid at [18].

[29] Ibid at [19] and [23].

[30] [2022] FWCFB 93.

[31] Ibid at [62].

[32] [2019] FWCFC 8678.

[33] Robert Battye v John Holland Pty Ltd [2019] FWC 4122 at [17].

[34] *Kucks v CSR Ltd* (1996) 66 IR at 184 ("Kucks"),

[35] [2018] FCAFC 131.

[36] [2020] FCA 951.

[37] Ibid at [61].

[38] Ibid at [62].

[39] Ibid at [65].

[40] Ibid at [70].

[41] [2020] FCA 1694.

[42] Transcript, 4 December 2023, at PN91-PN92.

[43] [2023] FWC 570.

[44] Ibid at [83].