



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER JOHNS

C2023/4517

s.739 - Application to deal with a dispute

**National Tertiary Education Industry Union
and
Victoria University
(C2023/4517)**

Victoria University Enterprise Agreement 2019

Sydney

11.00 AM, THURSDAY, 31 AUGUST 2023

Continued from 08/08/2023

PN1

THE COMMISSIONER: Thank you. Good morning, parties. Mr Hurley, can you hear and see me?

PN2

MR HURLEY: I can, Commissioner.

PN3

THE COMMISSIONER: Yes, very good. And, Mr Ruskin, you can see me?

PN4

MR RUSKIN: Yes, thank you.

PN5

THE COMMISSIONER: Very good. Mr Hurley, any objection to the university being represented in the matter?

PN6

MR HURLEY: The applicant does object to the university being represented by Mr Ruskin. I'm happy to make a handful of brief submissions on that point if that will be - - -

PN7

THE COMMISSIONER: No, I will need to hear from Mr Ruskin first.

PN8

MR HURLEY: Thank you, Commissioner.

PN9

THE COMMISSIONER: Mr Ruskin, on 596?

PN10

MR RUSKIN: Thank you, Commissioner. I seek leave for permission to appear under section 596(2)(a) on the basis that the Commission may grant permission for a person to be represented if it would enable the matter to be dealt with more efficiently having regard to the complexity. The applicant is seeking interim orders that the university effectively halts its voluntary separation program pending completion of consultation.

PN11

In order to grant these orders the Commission must be satisfied there is a serious question to be tried as to the applicant's entitlement to relief, and the balance of convenience favours the granting of the interlocutory order. These are, we say, complex legal questions that the Commission and the parties must work through.

PN12

In putting forth its arguments the university will seek to rely on previous case law by the Commission, in particular interpreting clause 64.3. It will involve comparing this clause with other similar but not identical clauses that's been relied upon in the materials. The complexity of the matter is evidenced by the length of the court book of over 500 pages. There is - - -

PN13

THE COMMISSIONER: Mr Ruskin, you know very well that the size of a court book is not any indication of the complexity of the matter. It just means lots of people have filed lots of stuff.

PN14

MR RUSKIN: Well, in this case we have a sophisticated applicant who has filed material which is not irrelevant to the proceedings, but there is a lot of material. So I think that is a factor, Commissioner.

PN15

Considering the technical legal issues that arise in determining the interlocutory application we submit the matter would be dealt with more efficiently by legal representation. We submit it would be unfair not to allow Victoria University to be represented in these circumstances, because it is unable to represent itself effectively in accordance with subsection (b) of 596(2). The university doesn't employ legal employment counsel that specialises in employment law. Mr Haritou is not a lawyer. Before you is Mr Hurley who is a lawyer, and he will be the advocate, and that will give the union an advantage in these proceedings. We further submit that subsection (c) - - -

PN16

THE COMMISSIONER: Sorry, Mr Ruskin, so you're relying principally on (c) then, 596(c), fairness between the parties?

PN17

MR RUSKIN: Yes. The union with many employees of significant industrial action experience, and it's been a party in two such cases similar to this, which has been referred to in their materials, and that gives them advantage, and we submit that pursuant to *Worrell v FWC* the requirements of 596(2) are satisfied. I would like to assert that we would as legal representative be able to assist the Commission synthesise the issues involved to ensure the matter is dealt with more efficiently and effectively. Please the Commission.

PN18

THE COMMISSIONER: Thank you. Mr Hurley, is it right that you're legally trained?

PN19

MR HURLEY: That's correct, Commissioner. I was admitted to practice last year.

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THE COMMISSIONER: And have you practiced privately before that?

PN21

MR HURLEY: Yes. I was at Corrs Chambers Westgarth until about a month ago when I started employment at the NTEU.

PN22

THE COMMISSIONER: Well, why shouldn't fairness between the parties dictate that I should grant permission pursuant to section 596(2)(c)? Do you maintain your objection or not?

PN23

MR HURLEY: We maintain our objection, Commissioner.

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THE COMMISSIONER: All right, then go for it.

PN25

MR HURLEY: Primarily represented by me, and I will make a concession against (indistinct). I am a relatively junior legal practitioner. I have no experience in advocacy or appearing before tribunals or courts. I have a restricted practicing certificate and I was admitted to practice last year.

PN26

Mr Ruskin is a partner at a large law firm. Victoria University is a large organisation that has around \$400m in revenue each year. It has seasoned and experienced workplace relations professionals, including Mr Haritou, who in his witness statement outlines an extensive and I think (indistinct) career in workplace relations, including working - I understand that his previous experience involved working at a trade union before coming to Victoria University.

PN27

Victoria University has in-house legal counsel. While it's the case that they may not necessarily be dedicated employment lawyers it's still the case that they are lawyers and presumably competent and experienced ones. The university has put forward nothing that indicates why any of those individuals are so incapable of representing Victoria University that it will give rise to fairness to go up against a lawyer who is more or less just out of law school.

PN28

I think the other point as well, Commissioner, is that even if the jurisdictional requirement in 596(2)(c) or (a) as is relied on, and (indistinct) (b) by the university, it doesn't follow that the Commission should exercise its discretion to grant permission. There's a number of matters that - the fact that there are problems associated from our perspective in making out those jurisdictional requirements; some matters that also go to discretion.

PN29

Another thing that's important to bear in mind that this is a relatively simple dispute between two parties that are covered by the enterprise agreement and negotiate the enterprise agreement, and therefore familiar with the enterprise agreement. The university relies on the fact that previous case law is going to be considered by the Commission, and that's an interim order referring to principles such as there's a serious question to be tried and the balance of convenience.

PN30

I think the fact that there will be previous Commission decisions considered in this case does not mean that this is a legally complex case. That's something that

routinely happens in most Fair Work Commission proceedings. The principles in relation to interim relief are well settled, they're established and they don't raise any novel issues of legal interpretation. And the volume of the court book - it's long, but it's got two copies of Victoria University's annual report in there which (indistinct) out the length by quite a bit. Unless I can be of further assistance, Commissioner, on that point I don't propose to make any further submissions on this point.

PN31

THE COMMISSIONER: Thank you. Mr Ruskin?

PN32

MR DEBETS: Apologies, Commissioner, if I can just say one thing.

PN33

THE COMMISSIONER: Mr Debets, no. I think you've got an advocate.

PN34

MR DEBETS: It was on that point, Commissioner. Just to qualify something so there's no confusion. Mr Hurley is the advocate. If it pleases the Commission I was just going to participate in the cross-examination of Mr Haritou, and that's primarily because - that's because he's deposing conversations which took place between him and Mr Hurley. So we just thought that that would be simpler and more straightforward than Mr Hurley cross-examining Mr Haritou about conversations that they were both a part of. So I just wanted to qualify that that is what's proposed in terms of how we proceed, but otherwise is Mr Hurley is - - -

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THE COMMISSIONER: And are you legally qualified, Mr Debets?

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MR DEBETS: Yes.

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THE COMMISSIONER: We will come to the issue about cross-examination in a minute. Mr Ruskin, anything in reply?

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MR RUSKIN: Well, Mr Hurley has capably and professionally outlined the reasons why we should be not granted representation, which he has done well. I think it shows that he is not incapable of articulating a case as a lawyer. The fact that there are two lawyers at the table against Mr Haritou who is not, and the fact that if Mr Debets is there, even if he is only speaking for a short bit he is going to be participating, which under the practice note is representation. So there are two qualified lawyers appearing in these proceedings, and if Mr Haritou were to be a witness to be cross-examined, although that's not determinative, he would also be advocate. So in the circumstances we put forward and those additional points we seek leave to appear, Commissioner.

PN39

THE COMMISSIONER: Thank you, Mr Ruskin. I have before me an application pursuant to section 596 of the Fair Work Act for the respondent Victoria University to be represented by a lawyer. The application is advanced on the basis primarily on section 596(2)(a) and 596(2)(c).

PN40

In the circumstances of this matter having considered the material which has been filed I am satisfied that the matter is invested with complexity. I am further satisfied that I would be assisted in the efficient conduct of the matter if I allow Victoria University to be represented.

PN41

Being satisfied of those two matters I must then consider whether I should overall exercise my discretion to allow the respondent to be represented. Having also regard to section 596(2)(c) and noting that the NTEU, applicant in the matter, is represented by someone who I actually think is a quite commanding advocate and compelling advocate in the matter, and also seeks to be represented by a second solicitor, to my view fairness between the parties dictates that I should allow the respondent to be represented, and I grant Mr Ruskin permission pursuant to section 596.

PN42

MR RUSKIN: Thank you, Commissioner.

PN43

THE COMMISSIONER: Gentlemen, we have a digital tribunal book. Other than the materials which were filed overnight, and I will come to those in a minute, is there anything missing from the digital tribunal book. Mr Hurley?

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MR HURLEY: Not from our perspective, Commissioner, no.

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THE COMMISSIONER: Thank you. Mr Ruskin?

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MR RUSKIN: No, Commissioner.

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THE COMMISSIONER: All right. Then what I propose to do is mark as an exhibit in the proceedings each of the documents which appear in the digital tribunal book as they correlate with the tabs in the digital tribunal book. So for example the Form F10 will be exhibit 1. The applicant's submissions on interim relief will be exhibit 2. The respondent's submissions on interim relief will be exhibit 3, and so forth, so forth.

EXHIBIT #1 FORM F10

EXHIBIT #2 APPLICANT'S SUBMISSIONS ON INTERIM RELIEF

EXHIBIT #3 RESPONDENT'S SUBMISSIONS ON INTERIM RELIEF

PN48

Coming then to the materials which were filed at 6.15 pm yesterday evening it comprises a witness statement from Mr Michael Haritou and attachments described as MH1, MH2, being the draft master change plan and the draft People & Culture change plan. Mr Hurley, any objection to me receiving the material?

PN49

MR HURLEY: No objection to receiving the material, Commissioner, provided -
- -

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THE COMMISSIONER: All right - - -

PN51

MR HURLEY: - - - we're afforded an opportunity - sorry.

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THE COMMISSIONER: It sounds like it's a conditional acceptance.

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MR HURLEY: We would seek as a matter of procedural fairness, Commissioner, the opportunity to cross-examine Mr Haritou in relation to that material filed to explore that material and clarify and provide further context.

PN54

THE COMMISSIONER: Mr Ruskin?

PN55

MR RUSKIN: Well, the purpose of filing the material was merely to assist the Commission in understanding that the university's changed its position in relation to VSPs, the professional staff. That is to say that it is not proceeding with VSPs for professional staff and is going back to the drawing board and commencing the process of consultation under section 64.

PN56

So it's a draft. They're draft documents, they're not finalised. We have provided them on a confidential basis to the union, but their purpose is - we didn't I suppose really need to provide it, but it enforces the position the university will be putting and has put that we will not proceed with VSPs in this process for professional staff. The issues we think before the Commission now are limited to considering the process for VSPs in respect of a small cohort of academic staff.

PN57

THE COMMISSIONER: I think there's 32 of those or something.

PN58

MR RUSKIN: That's right, Commissioner.

PN59

THE COMMISSIONER: What's the utility of the cross-examination, Mr Hurley?

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MR HURLEY: The (indistinct) that give - the material filed last night doesn't give the full picture of the context in which those documents were created. We would seek to explore in particular Ms Woods's notes that the meeting of August 16 and also the document itself and its (indistinct). We say that that document is not consultation in respect of whether or not there should be VSPs offered to professional staff at all. Rather it's a document about a major workplace change that arises out of a decision to offer and field and consider those expressions of interest for a VSP and to make decisions about which jobs could be abolished.

PN61

So it's either we say consultation in respect of a second and subsequent major workplace change that's inherited in the first one that we say Victoria University didn't consult about, or it's consultation about the implementation of the former proposal after a decision was made to introduce it. And there's a separate obligation under the enterprise agreement that covers that, and that's subsequent. And so we would seek to explore those issues in cross-examination.

PN62

THE COMMISSIONER: Mr Ruskin, subject to what you have to say I am inclined to admit the document and allow cross-examination just in relation to this document and not in relation to other witnesses obviously, because we don't normally do that on interim order applications. But subject to what you have to say that's what I propose to do.

PN63

MR RUSKIN: Commissioner, perhaps we should withdraw the documents and not rely upon them. What we want to be clear to reduce the areas of dispute between the parties as best we can, and if that isn't clear we can make it clearer, we are withdrawing from the process of VSPs for the professional staff entirely.

PN64

In light of a better understanding of the areas of professional staff and the needs of the university we want to go back to the beginning. The VSPs that were tendered or proposed for professional staff was to test out the waters on interest. But in light of what we now see as issues the university does not wish to - it wants to start at the beginning. I can't put it any easier than that. And so in other words we want to start at clause 64 with respect to professional staff entirely. Therefore we are not proceeding with VSPs, we are proceeding with a proposal, which is yet to be finalised and will be, as to whether there should be change in respect of those areas of the university in which some professional staff are employed.

PN65

THE COMMISSIONER: I must say your client could have avoided all of this if they had done that in respect of all staff earlier on, way back before 28 June.

PN66

MR RUSKIN: Well, Commissioner, I hear what you say on that and we say to that that we do have a view that offering VSPs to start with is not something, and we've argued this, that gives rise to major workplace change. Indeed it was only two years ago that the university offered VSPs to a number of staff with no

demure from the NTEU and 40 or so staff left. So it surprises the university that that's the case, but it is the case, and we do want to narrow the dispute.

PN67

THE COMMISSIONER: Okay. Mr Ruskin, what do you want me to do with the document that's currently before me? Do you want to rely upon it or do you want to withdraw it?

PN68

MR RUSKIN: I won't rely upon it.

PN69

THE COMMISSIONER: All right. And I don't need to deal with that document. I will set it aside, and therefore there's no need to cross-examine in respect of it because it's no longer relied upon by the university. The other thing I wanted to address as a preliminary matter is you will see in the digital tribunal book there are two parts.

PN70

There's part A which is the substantive part of the materials filed in response to the directions that I issued, being the directions of 8 August. Then there is a part B, which are the materials which were filed, if you like, the NTEU seeking an interim order in respect of in advance of the hearing about the interim order. That was made not necessary because of an undertaking given by Victoria University. I just want to hear from the parties about what I should do with the materials in part B of the digital tribunal book, do I include them or not. Do you have a view about that, Mr Hurley?

PN71

MR HURLEY: We would seek to rely on each of those three statutory declarations filed pursuant to that interim order, for the interim order. (Indistinct) probative evidence on the ultimate dispute.

PN72

THE COMMISSIONER: All right, thank you. Mr Ruskin?

PN73

MR RUSKIN: Our position is clear that we are not proceeding. We have not proceeded with finalisation of VSPs for those 32 academic staff. We have made that clear in the materials. That's still our position. I don't know that it's germane to the interim order that we're before the Commission today.

PN74

THE COMMISSIONER: What I propose to do is admit the materials in part B and I will necessarily give them the weight that they deserve, if any, in the consideration of the matter. The digital tribunal book comprises both part A and part B. Are there any other preliminary matters I need to deal with?

PN75

MR HURLEY: I might raise one matter, Commissioner. We came prepared to have Ms Woods and Professor Klugman swear to the veracity of their witness statements. It (indistinct) necessary today or can I - - -

PN76

THE COMMISSIONER: The usual practice on an interim application is that the materials go in and there's not an opportunity to cross-examine, and submissions are just made in respect of those matters. That's the usual practice. I don't propose to veer from the usual practice. Mr Ruskin, do you have a view about that? You don't require them for cross-examination?

PN77

MR RUSKIN: No. I completely agree, Commissioner. That was our understanding.

PN78

THE COMMISSIONER: Yes, thank you. Any other preliminary matters, Mr Hurley?

PN79

MR HURLEY: Not from the applicant, Commissioner.

PN80

THE COMMISSIONER: No. Any other preliminary matters, Mr Ruskin?

PN81

MR RUSKIN: No, Commissioner.

PN82

THE COMMISSIONER: All right. I have one. Is there any merit in going into conference before we hear all this out?

PN83

MR RUSKIN: Yes.

PN84

THE COMMISSIONER: Mr Hurley?

PN85

MR HURLEY: If the university is happy to go into conference we are too, Commissioner.

PN86

THE COMMISSIONER: All right. I think that's a sensible way forward. What we will do is adjourn the interim application hearing. We will turn off the transcript. I would like to have some separate discussions with the parties. I think I would like to start with the applicant. You should read nothing into that, I always start with an applicant because it's their matter.

OFF THE RECORD

[11.36 AM]

ON THE RECORD

[1.27 PM]

PN87

THE COMMISSIONER: Thank you, parties. By application dated 31 July 2023 the National Tertiary Education Union made an application to the Fair Work Commission to deal with a dispute in accordance with a dispute settlement procedure under the Victoria University Enterprise Agreement 2019. In pursuance of a resolution of that dispute the NTEU made an application for interim orders. I programmed that matter for hearing this morning.

PN88

Following dealing with formal matters, the procedural matters, I suggested to the parties that there might be some advantage in having continuing discussions aimed at resolving the dispute. Both parties took a practical application of that suggestion and voluntarily participated in discussions facilitated by me.

PN89

That time has been usefully spent and the dispute has been resolved on the following basis. Without conceding any obligation to do so under the Victoria University Enterprise Agreement 2019 the respondent, Victoria University, will:

PN90

(1) Pause implementation of its proposal to make redundant 32 to 34 academics who have volunteered for a redundancy, herein referred to as the affected academics, pending consultation as to whether a decision should be made to implement a voluntary redundancy program for affected academics.

PN91

(2) Announce that pause to affected academics.

PN92

(3) Meet with and by 8 September 2023 provide on a confidential basis a draft change management plan to affected academics as it is relevant to each individual, the NTEU and other nominated representatives, including the information outlined in clause 64.3(c) of the enterprise agreement to the extent that such information is available, and information not limited to (a) information about the affected academics on a deidentified basis; (b) the classifications of the affected academics; (c) the disciplines where the affected academics work; (d) evidence of any reduction in student loads that are relevant to affected academics; (e) if the voluntary redundancy resulted in a restructure the details of any restructure; (f) if the voluntary redundancy will result in the discontinuance of a course or discipline the details of that result in discontinuance; (g) to the extent that they exist before and after organisational charts on a deidentified basis; (h) an explanation of where the work performed or duties undertaken by affected academics made voluntarily redundant will be performed in the future. (For example does the work or duties disappear or is it picked up by others).

PN93

(4) Provide the NTEU and affected academics until 15 September 2023 to consider formulate alternatives and mitigatory measures, and where necessary internally consult in respect of the VR program for affected academics, and provide their views in writing.

PN94

(5) Give prompt consideration to matters raised in writing by the affected academics, the NTEU and/or their representative directly related to the VR program for affected academics, and provide a response in writing to any matters raised by 22 September 2023.

PN95

(6) (Indistinct) after steps 1 to 5 are complete make a decision as to whether to implement the VR program for affected academics.

PN96

(7) Consult with affected academics and the NTEU and any nominated representatives to determine those matters to be adopted in order to implement that change, including means of avoiding or mitigating detrimental outcomes for the affected academics.

PN97

That is the basis upon which I understand the matter is to be resolved. Am I correct in that understanding, Mr Hurley?

PN98

MR HURLEY: Thank you, Commissioner, yes, in light of Mr Ruskin's comments earlier today and those matters, yes.

PN99

THE COMMISSIONER: Thank you. Mr Ruskin, am I correct in that understanding?

PN100

MR RUSKIN: Yes, thank you, Commissioner.

PN101

THE COMMISSIONER: Mr Hurley, on that basis does the NTEU discontinue the proceedings before me?

PN102

MR HURLEY: We do, Commissioner, yes.

PN103

THE COMMISSIONER: Thank you. Then I will accept that as an oral notice of discontinuance. I will waive compliance with the rule and the Commission will close its file. The Commission is adjourned. Good afternoon.

ADJOURNED INDEFINITELY

[1.32 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

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