



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER WILSON

B2023/1015

s.437 - Application for a protected action ballot order

**"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
and**

**The Trustee for Engineering and Maintenance Solutions Unit Trust T/A
Engineering and Maintenance Solutions Pty Ltd
(B2023/1015)**

Melbourne

2.00 PM, MONDAY, 25 SEPTEMBER 2023

PN1

THE ASSOCIATE: This Commission is now in session in the matter of B2023/1015, section 437 application by the Australian Manufacturing Workers' Union, for hearing.

PN2

THE COMMISSIONER: Good afternoon, parties. Thank you for joining. If I can start by taking the appearances, please, first of all from the AMWU.

PN3

MR A BONELLO: Good afternoon, Commissioner. In appearance is Bonello, initial A, for the applicant.

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THE COMMISSIONER: Thank you, Mr Bonello. And who do I have appearing for Engineering and Maintenance Solutions.

PN5

MR M GABSCH: Engineering and Maintenance Solutions. Yes, so Mark Gabsch, director. And I have Michael and Michelle as parties to understand the process and what happens.

PN6

THE COMMISSIONER: Thank you very much for announcing the appearance. Now, parties, obviously this afternoon's hearing is to deal with the application which has been made by the AMWU for a protected action ballot order. The obligation the Commission has is to determine the matter within two working days after the application is made. The application itself was made on Friday, so there's a need for me to move expeditiously and have it determined by the end of tomorrow. So thank you for making yourself available for a hearing this afternoon, that is appreciated.

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The other reason that there's a need for a hearing is that the material which was provided by the respondent to the Commission indicated that the application was opposed and that it was opposed on the basis that the employer did not believe the union was genuinely trying to reach agreement.

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Sometimes in these matters an objection is also raised to some of the questions which have been framed and proposed for the order. I understand in this matter that there is no such objection, so there's no need for me to determine the content of the questions. And the only issue itself is whether or not the order should be issued and, in particular, in light of the objection that the employer puts forward.

PN9

What I propose to do in a moment is to turn to Mr Bonello from the AMWU to take me through the steps the union has been taking to reach agreement. And then I'll turn to you, Mr Gabsch, to respond as the company sees fit. And then Mr Bonello will have a right of reply to the things that are put forward by the

company. Before we go too far into the hearing, I just wanted to check with both of you whether there are any questions or concerns that any of you have about the proceedings this afternoon, and then we'll deal with those matters, those preliminary issues, before moving into the body of the hearing. So first of all with you, Mr Bonello, any questions or concerns you want to raise?

PN10

MR BONELLO: Commissioner, if I may just firstly raise the objection itself made by the respondent. The objection from the applicant's point of view is not clear. The objection at the top of the page refers to the applicant is not genuinely trying to reach an agreement, but then at the third paragraph it refers to that the negotiations and discussions continue in a genuine manner.

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Lastly, the final paragraph refers to the objection being on the basis that the discussions are midstream. So in the applicant's view it's actually unclear what the objection is, and we'd appreciate that if the respondent can better articulate the objection which will help us respond more promptly.

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THE COMMISSIONER: Thank you. I understand what you have to say. I don't seek a response immediately from Engineering and Maintenance Solutions on that subject, but it is something that they will need to deal with at the appropriate moment. So, Mr Gabsch, are there any questions or concerns you want to address at the moment?

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MR GABSCH: No.

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THE COMMISSIONER: Right.

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MR GABSCH: Sorry. No questions or concerns.

PN16

THE COMMISSIONER: Thank you. Well, I understand the objection you've made, Mr Bonello, and as I said we'll deal with that in the proper manner. But can I take you to the contention as to whether or not you're genuinely trying to reach agreement, and if you can give me your views on those subjects, that would be appreciated.

PN17

MR BONELLO: Thank you, Commissioner. And just in giving my submissions today, I ask if you can bear with me. I am in the midst of the flu, and, unfortunately, my colleagues at the union are not able to participate today given their commitments in the Commission. So I will do my best, and apologies if my speech seems to be impaired slightly.

PN18

THE COMMISSIONER: We'll see how you go and if it becomes too much we can break or make other arrangements for you.

PN19

MR BONELLO: Thank you. So ultimately, Commissioner, in terms of section 443(1)(b), the Fair Work Commission must make a protected ballot action order in relation to a proposed enterprise agreement if the Fair Work Commission is satisfied that each applicant has been and is genuinely trying to reach an agreement with the employer of the employees who are to be balloted. We say the Fair Work Commission should be satisfied that the 'genuinely trying' test has been successfully reached by the applicant.

PN20

So the parties have been in negotiations since 23 June 2023, and they have bargained on numerous occasions including 23 June, 18 July, 17 August and 1 September in pursuit of their claims. Unfortunately, to date despite the applicant's best endeavours to reach an agreement, the parties remain apart on a number of key issues, including allowances, back pay and the accrual of RDOs. So the parties - - -

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THE COMMISSIONER: Just one moment there, please. So that was allowances. What were the other matters?

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MR BONELLO: Back pay and the accrual of RDOs.

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THE COMMISSIONER: Thank you. Please proceed.

PN24

MR BONELLO: Commissioner, the parties remain in disagreement with those items, and given the disagreement, agreement has not been able to be reached. Now, by virtue of our 437 application, we say the AMWU have standing to make this application and for the order to be made.

PN25

Just in reference to the objection made by the respondent - well, no, sorry, I'll leave that for a bit later. In the matter of *Total Marine Services v the Maritime Union of Australia* [2009] - and I do apologise for not sending the citation, Commissioner, to your chambers but I can do so if requested. It was noted there that:

PN26

The relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations, and the steps taken in order to try and reach an agreement.

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At all times during the bargaining process, Commissioner, commencing on 23 June 2003, which I believe is the notification time. The applicant has served its log of claims. The applicant has genuinely participated in negotiations and discussions. The applicant has responded to each and every inquiry and has made the applicant's position very, very well known to the respondent. So we say that the test has been met in that matter, and I should have said that was paragraph 32 of the decision in 2009. So, Commissioner, I will leave it at that, and I'm happy to answer any questions you may have.

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THE COMMISSIONER: The question I do have is I thought I had the document here, but I don't. Could you just give me that citation again, please, for Total Marine Services?

PN29

MR BONELLO: Absolutely, Commissioner. I'll just get that for you in one moment. That citation is 189 IR 407.

PN30

THE COMMISSIONER: Just one moment, please. We're just having a little slow internet day here, unfortunately. So I've got the citation, so please go on and I'll load it as you're speaking.

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MR BONELLO: Sure, Commissioner. As I said, I'll leave it at that. They are my submissions.

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THE COMMISSIONER: I see. All right.

PN33

MR BONELLO: Yes, thank you.

PN34

THE COMMISSIONER: Just one moment. I have that. Thank you. What can you tell me about the log of claims that was served by the union on Engineering and Maintenance Solutions in June? And then what can you say about the negotiations that have transpired on the four occasions since then?

PN35

MR BONELLO: Commissioner, I can confirm that the applicant has been bargaining obviously in line with our claims and the company's claims that have been, I guess, a factor in this bargaining sense, but in terms of the agreed matters that have been agreed to based on both claims, I possibly will need a further time to get those particulars, but I'm not too sure what you're asking, Commissioner.

PN36

THE COMMISSIONER: I think you've probably given me what I need in some respects, and no doubt Mr Gabsch will as well. Just going back to what you did say, you say that despite your best endeavours there's no agreement reached on the

matters of allowances, back pays and accrual of RDOs. Do I take it from that submission that there were matters agreed with the company?

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MR BONELLO: Yes, Commissioner. Yes, they have been agreed to.

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THE COMMISSIONER: Can you tell me what any of those might be?

PN39

MR BONELLO: I won't be able to tell you the full extent. I do understand wages have been agreed to. Wage increases, I should say. And I do apologise, Commissioner, I will need a certain time to get further particulars in regards to more of the agreed matters. I guess Mr Gabsch could assist in this as well.

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THE COMMISSIONER: Thank you, but I take it from what you say that there were more than one matter agreed, and one of those matters that was agreed was the wages increases.

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MR BONELLO: Yes, Commissioner, yes, yes.

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THE COMMISSIONER: Sure.

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MR BONELLO: There have been matters agreed to and there are matters not agreed to, which has been the motivation for this application.

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THE COMMISSIONER: The application relates - well, that's not correct. There's presently an agreement which applies which is the Engineering and Maintenance Solutions Enterprise Agreement 2016, and your F34B refers to the nominal expiry date of that as being 4 October 2019. So both those things are correct, I'm assuming.

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MR BONELLO: Yes, Commissioner.

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THE COMMISSIONER: Sure.

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MR BONELLO: I can double-check for you, but I am assuming that is correct.

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THE COMMISSIONER: Then there was a question I had for you about the proposed order. Do you have a copy of the proposed order in front of you?

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MR BONELLO: Yes, Commissioner, I do.

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THE COMMISSIONER: Actually, just one moment, I just need to double-check something. It's a good thing I did check it. The application you've made - I just want to check that the electronic version is the same as my printed version. At item 2.3 of the application form, the F34, the question is:

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On which date does the applicant propose the vote will close?

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And you say:

PN53

The proposed date by which voting in the protected action ballot is to close is 28 days from the date of any order made by the Commission.

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I'm not quite sure why but the draft order document which came from Deputy President Hampton's chambers has changed that 28 days to 30 days. But, ultimately, the question I wanted to ask you is this, that ordinarily the Australian Electoral Commission requires 30 working days from the date of the order. And I just wanted to check through those elements with you, which if an order were to be made is it strictly 28 days on your application from the date of the order, or is it 30 working days from the date of the order.

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MR BONELLO: I believe, Commissioner, we have commenced putting 30 days in these applications. It may well be a typographical error made by the admin staff of the union. So if it pleases you, Commissioner, we are content in changing that to 30.

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THE COMMISSIONER: I understand.

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MR BONELLO: I should say, pursuant to your powers to amend applications, 586 I believe, Commissioner - - -

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THE COMMISSIONER: Sure.

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MR BONELLO: - - - under which we kindly make that request.

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THE COMMISSIONER: I think ultimately the reason I'm raising the question is if an order were to be made we can specify frankly whatever we like in the order, but what I don't wish to occur is that you take it off to the Australian Electoral Commission and they say, 'Well, we can't possibly do it within that time,' whatever it is, and then you have to come back to the Commission for a

variation. So that's the reason I was raising it, but we can deal with that at a later point, if need be.

PN61

MR BONELLO: Thank you.

PN62

THE COMMISSIONER: Thank you. What I'll do now, Mr Gabsch, is just turn to you and see what you have to say about things. It might be appropriate first to start off with the question that was posed by Mr Bonello at the start of the proceedings which ultimately is a question of clarification of the actual objection.

PN63

MR GABSCH: So I'll refer to Engineering and Maintenance Solutions as EMS. Sorry, my voice is also not so good because I've caught the cold, hence I'm ruffled up. But basically in June this year we were provided with the Metals Labour Hire Agreement 2023 to 2026. We're part of a labour hire group and, as such, that negotiation took place at a group level. We were presented with that EBA and then I notified the union that they failed to negotiate or discuss an appendix in relation to nine employees that have covered off on the Sugar Australia site.

PN64

So this is what this has all come down to. So the actual body of the main agreement is not in dispute. I don't think it has been. What we're talking about in terms of the log of claims is in relation to nine employees on the Sugar Australia site. So that was to form an appendix on this agreement. Otherwise, we were prepared to sign off on the agreement back in June 2019 - sorry 2023.

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But subsequently because that was omitted, we started a conversation and requested a log of claims from the union, which was then provided. That discussion has then occurred. As far as I'm aware, we've proceeded with those discussions in good faith. And I thought we had things resolved until an email was received from the Union delegate on September 20, and basically started to make claims of non-compliance with this and failure to meet certain agreements and discussions, and that wasn't the understanding I had at the time.

PN66

So it basically threw the log of claims back on the table, and at that point we had - the labour rate increases had already been agreed. The allowances were agreed to either meet the - stipulated by the award or if it was better off as they currently receive them to put those in place. We looked at that.

PN67

We also talked about basically an all-purpose allowance to eliminate all these allowances. A calculation was put forward. I showed them how I came up with a number, broke it down, and subsequently I've had no response to that in terms of what they deem will be fair as an all-purpose allowance.

PN68

So subsequently I honestly don't know where we're at. I thought we had an agreement in terms of the way forward. Documents have been presented on multiple occasions. And then I received the email and then was advised by Mr Zeljko, who's the union delegate, that a meeting could now not occur until 4 October I think it is, because - yes, 3 or 4 October because he and Richard, who is the site delegate, were not available due to being on annual leave. And then all of a sudden I received this notice.

PN69

Now, I understand the purpose of the process. If we, you know, achieve an impasse then this gives the guys the right to take further action. Now, up until this point I didn't think we'd achieved that impasse. I thought we were progressing quite well. The agreement has always been to implement the wage rate increases in the first full paid period of October. We were still two weeks away from that, and as far as I knew there was only minor issues to be resolved. Then to receive this was just a bit of a sideward step from my point of view, in terms of the open and outward negotiation process.

PN70

So, you know, I don't think we've hampered or strung out the process for any due reason. There's no intention for us to do that. We've already advised our clients there will be an increase coming in the first full pay period of October, so everyone's prepared for that. In terms of the process, I believe if they want to genuinely discuss things, then tell us what the issues are because right now I do not know what the issues are. They've not been presented.

PN71

THE COMMISSIONER: Mr Gabsch, are you saying that, so far as you understood, there had been agreement reached as to when the wage increases were applied from?

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MR GABSCH: We've always had an annual increase around October.

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THE COMMISSIONER: No, that's not what I asked you. What I asked you is do you say that there was agreement about when the wage increases would apply from?

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MR GABSCH: Was it agreed in writing? I'd have to go back and check that, but there's been discussion around the increase occurring in October.

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THE COMMISSIONER: Was it agreed verbally?

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MR GABSCH: Yes, and that's what we plan to do.

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THE COMMISSIONER: Okay. Who was it agreed with?

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MR GABSCH: That would have been agreed with Zeljko and Richard at the time.

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THE COMMISSIONER: Do you recall when that was agreed?

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MR GABSCH: This is going back, I don't know, probably a couple of months.

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THE COMMISSIONER: Okay.

PN82

MR GABSCH: I can go back and see if there's emails to support that statement.

PN83

THE COMMISSIONER: So assuming that's correct, when do you understand the wage increase has been agreed to commence from?

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MR GABSCH: Say again, sorry?

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THE COMMISSIONER: Assuming what you say is correct - - -

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MR GABSCH: Yes.

PN87

THE COMMISSIONER: - - - what do you understand is the date that the wage increase will apply from?

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MR GABSCH: It would've been, I think, 4 October. Monday, whenever that is. 2 October. Is that correct, Michelle?

PN89

MS FREY: That's correct. It's for the pay period from the 2nd of October to the 15th. We do fortnightly pays with the pay date on 18 October.

PN90

THE COMMISSIONER: Thank you. Let me just check. Mr Bonello says that there are three things that you're not agreed on: allowances increases; back pay; and accrual of RDOs. I assume the question of back pay is the day of operation for the wage increase?

PN91

MR GABSCH: The issue on back pay would have come into play if they had have exceeded past 2 October but at this stage we were on track to achieve that date so there would be no issue around back pay. It was never discussed.

PN92

THE COMMISSIONER: And the matter of allowances? What's your understanding on that claim?

PN93

MR GABSCH: So the matter of allowances was the award would form the minimum basis. If the current present side allowance was (indistinct) that's what we'd stipulate in the appendix.

PN94

THE COMMISSIONER: And do you have any recollection of where matters might be up to on accrual of RDOs?

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MR GABSCH: So the accrual of RDOs was just around the understanding when we actually get two RDOs and we'd agreed to that process, by which we represented. But the way the wording is in the EBA is a little bit unfortunate because it talks about 13 RDOs accrued over a period of 12 months. That's great if someone works for 12 months. But if they only work for six of those 12 months, the way the EBA reads and is stipulated, they'd be entitled to 13 RDOs. So we sought clarification around that process.

PN96

THE COMMISSIONER: Okay. You said as well that – at some stage the union contacted you and told you that a meeting mightn't take place until 4 October. What was that meeting to discuss?

PN97

MR GABSCH: So it was to talk about the last email which I received from Ritchie on 20 September, which was outlining a number of grievances and issues and concerns of ours, as you say, allowances, all-purpose allowance that was put forward. There was no counter offer to that. So I then reached out to respond to that, suggested that we needed to catch up and complete that discussion so we could understand where both parties are currently situated. Then I had a response from Zeljko, who represents the AMWU, that the meeting would not be available to happen till 3 or 4 October. So my response to the union was on the same day as I received the email on 20 September. The response I then received back from Zeljko was on the 21st, the following day.

PN98

I thought I heard you say – I'm sorry, go ahead.

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MR GABSCH: I was not aware that either of those guys were heading off (indistinct) so it's just unfortunate.

PN100

THE COMMISSIONER: All right, but in respect of the – where things stood in late September, you expected there would be further bargaining, particularly on the matter of allowances. Have I got that right?

PN101

MR GABSCH: I didn't think there was. We had agreed that the award was either the minimum or (indistinct) - - -

PN102

All right – I'm still confused. If everything had been agreed, what was going to be discussed in the next meeting?

PN103

MR GABSCH: So there was no next meeting. So the only thing I had presented differently from the agreed outcome was an all-purpose allowance. Now that was presented to us by the AMWU as an option to eliminate the need of all these individual allowances so I went through that process of calculating what the all-purpose allowance would entail based on historical numbers, last year and the previous years, to what allowances actually had been paid to come up with a number, to equate that date to a dollar-per-hour rate. So that was presented for discussion. I'm not sure where their current position is on that.

PN104

That was presented to them on 15 September. I can forward the email correspondence if that will help but on 15 September, we talked about the income protection. We talked about the all-purpose allowance, how that was determined, and basically I said, 'Let me know if you have any comments. I will be focussed on the EBA next week and the following to get the process rolling'. So either way we will commit to implementing the rates, come the first full pay period in October '23. In that statement I give it them in writing that that's what we'd agreed to do.

PN105

THE COMMISSIONER: Am I correct, though, in thinking that where things were left after 15 September you had not at that stage actually reached agreement on all these matters?

PN106

MR GABSCH: No, well, there was agreement on the allowance. There was an option put forward in terms of the all-purpose allowance to cover off all the trouble that was an option. So would you say we were locked in? Probably not.

PN107

THE COMMISSIONER: All right.

PN108

MR GABSCH: There was discussion around what the income protection level was going to be because there was the option for the guys to increase the income protection from \$1,800 per week to \$2,000. We can if they were going to salary sacrifice. The salary sacrifice would have been \$3.75. We agreed to absorb that to give them the \$2,000 per week coverage with no salary sacrifice.

PN109

All right, thank you. That probably completes the questions I have for you. Yes, I think it does. All right, thank you. What I'll do is turn back to you, Mr Bonello, just to see if you're able to respond on these matters.

PN110

MR BONELLO: Commissioner, I've just received very brief instructions as my friend alluded to Zeljko is away. But I can confirm that the back pay was not agreed for 1 October. That was – what was the AMWU's position that that be paid from 1 July this year and in regard to the allowances, again, very brief instructions but we are seeking back pay in regard to those allowances as well for a certain period; the period, I am still waiting for further instructions. But in any sense, Commissioner, and as the respondent alluded to, there has been no in-principle agreement as yet.

PN111

We do remain apart on these issues and hence, the meeting that was set up for 5 October, I believe, is for the purposes of bargaining. So in that respect I'd like to say that the test is whether or not the applicant has been and is genuinely trying to reach an agreement. I think from the submissions today from the parties, it's clear that meaningful, genuine discussions and negotiations are taking place. The test is not whether there is an impasse of such but whether the parties have genuinely tried to agree or reach an agreement. So on that basis, Commissioner, I think the union have standing to make this application and the order should be made.

PN112

THE COMMISSIONER: Can I put this to you: some of the things which Mr Gabsch said would be probably borderline accusations of failure to bargain in good faith. Now, what do you say about those things?

PN113

MR BONELLO: Commissioner, we remain in the position that the applicant has and - - -

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THE COMMISSIONER: Yes, I know that, but I'm the one who's got to make a decision. Now, what is it about these – you've both had opportunity to provide documentation to the Commission by 10 o'clock this morning. Neither of you did so. So I'm going to be dealing with things which are said to me this afternoon. The accusation has been made about the union, Mr Bonello, that you effectively have been changing your mind throughout the negotiation period.

PN115

MR BONELLO: Commissioner, if I may seek time to seek further instructions – I apologise and I understand that was a period that you gave us to submit materials. Although it is not relevant, I've unfortunately been handed this case quite late notice and probably under not the best health, I guess, to be here today but in any sense, you know, work does go on. If I may seek instructions, Commissioner, and revert back in hearing or in writing as it pleases you.

PN116

THE COMMISSIONER: All right, thank you. I think that would be appropriate. Just one moment. Mr Gabsch, the same has to go for you, that you were given an opportunity to provide written information but you didn't, and so that places me at a disadvantage. I need to be clear about what you're saying. What actually are you saying about the back pay? Was there ever agreement that – sorry, was it the case that the union put forward that the claim was that the wage increase be paid from early October and you agreed to that?

PN117

MR GABSCH: The AMWU will not be able to present any documentation, correspondence to make claim that they sought a pay in July - - -

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THE COMMISSIONER: Was that actually the question I asked you?

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MR GABSCH: So in that email correspondence and verbal discussions we commit for the first full pay period of October to make the payments.

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THE COMMISSIONER: Well, was that the union's claim?

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MR GABSCH: Was that the union's claim, that we had agreed on that date?

PN122

THE COMMISSIONER: Did the union claim, 'We want a wage increase from early October'?

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MR GABSCH: No, they did not claim that.

PN124

THE COMMISSIONER: So what did they claim?

PN125

MR GABSCH: Well, in fact they actually claimed nothing. Historically we've always paid in the first full pay period of October. They know that.

PN126

THE COMMISSIONER: All right. Look, parties, this is not in a good state. The AMWU wants an order from you and I can't – an order from me, rather. Mr Gabsch, that order would need to be granted if two things are satisfied: first of all that the union has standing to make the application, which I'm satisfied they do and secondly, that they are genuinely trying to reach an agreement. Now, if you're putting forward to me that they are not genuinely trying to reach agreement, you're going to have to do better than simply say, 'We've got these understandings'. Understandings are not claims and they are not agreement. But then again you've made accusations to the union which deserve an answer which effectively is whether or not there's been a failure to bargain in good faith. Now, if I'm satisfied that there has been – if I'm satisfied that it's just simply that

bargaining is a bit of a shambles, but it's edging along, then that in fact would probably get to genuinely trying to reach agreement.

PN127

If I'm satisfied, though, that it's a situation in which claims put by the union have been agreed in the sense of, 'We've shaken hands and there are not going to be further claims on the subject', but then they change their mind then I doubt very much I would be satisfied of those things. So I'm going to stand the matter down until 4 o'clock, Mr Bonello and Mr Gabsch, and in that time if you have anything further you wish to put to me, then my preference would be that it's in writing and that I will then resume at 4 o'clock and you can make such submissions as you want about the situation at that time. Is that a way to proceed, Mr Bonello?

PN128

MR BONELLO: Yes, Commissioner, thank you.

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THE COMMISSIONER: All right, and Mr Gabsch?

PN130

MR GABSCH: Thanks, Commissioner.

PN131

THE COMMISSIONER: All right, in that case we'll adjourn. Thank you.

SHORT ADJOURNMENT

[2.39 PM]

RESUMED

[4.00 PM]

PN132

THE COMMISSIONER: Thank you, parties, for rejoining and thank you for the material that's been filed on behalf of the EMS and also the correspondence from the AMWU this afternoon. I take it from what you have written, Mr Bonello, you wanted an opportunity to be able to consider the documents that have since been filed by the respondent and then put some submissions on those subjects. Is that the case?

PN133

MR BONELLO: Yes, Commissioner, that is the case.

PN134

THE COMMISSIONER: All right. Is there anything before I turn to Mr Gabsch you wanted to say before he speaks, beyond what we've discussed already?

PN135

MR BONELLO: Yes, Commissioner – I've quickly read or perused the material filed by the respondent. It's still very unclear as to the position of the respondent, well, as to what they are putting forward in respect of how we have breached the good-faith bargaining principles, pursuant to section 228. It is unclear, Commissioner. I cannot see what claims they're referring to – what claims they're referring to that we have changed position over and quite frankly, it's hard for us to respond to this allegation without knowing the particulars.

PN136

THE COMMISSIONER: Thank you, I understand what you say. In fairness I think to all concerned, I think I was the first one to use the words, 'good faith bargaining', in referring to those principles so in my own good faith to the parties I need to, I guess, make that clear, that that wasn't verbiage that the respondent put forward. Having said that, Mr Gabsch, you've provided I think five documents to me since we last spoke. Is there anything you wanted to say about those documents?

PN137

MR GABSCH: I think they support our position in relation to the discussions that have occurred and then the final discussion, which basically I believe has led to the submission of the actual application.

PN138

THE COMMISSIONER: Thank you. There was just one question I had, which for my own context, there's correspondence to and from Richie, which I understand to be Richard Risnusi. Is that who it is? Who is he?

PN139

MR GABSCH: He's the site organiser at Sugar.

PN140

THE COMMISSIONER: Right. Again, for my own context, my understanding is that the potential agreement will cover no more than nine employees, is that correct?

PN141

MR GABSCH: The appendix covers no more than nine, correct. So this is an appendix to the main agreement. The main agreement covers another 20-odd people. Historically we've always had an appendix attached to the main agreement, which is why you'll see in the early correspondence I suggested to Zeljko that he reaches out and sorts out the appendix because it was not included in the documentation that was sent to us to actually lodge this part of the EBA to (indistinct).

PN142

THE COMMISSIONER: Do you know when you provided to employees the notice of employee representational rights?

PN143

MR GABSCH: It would have to be back in April, I think. It's well and truly covered, though.

PN144

THE COMMISSIONER: All right. I'm glad to hear. Could you provide me a copy of that in due course, please?

PN145

MR GABSCH: Yes.

PN146

THE COMMISSIONER: All right. Thank you. Mr Bonello, is there anything you wanted to say in response?

PN147

MR BONELLO: Commissioner, will the request I made be granted? Otherwise if not I will provide submissions now. Otherwise I'd much prefer to peruse the material. But, Commissioner, if I may again articulate that it's very unclear to the applicant where the respondent is submitting that we have – and I'm using the words which you referred to – where we have breached those good-faith bargaining principles. It's unclear to me where I respond in that respect.

PN148

THE COMMISSIONER: All right, I hear what you say. In respect of the opportunity to have time to consider the documents and respond, I think that is appropriate. I don't wish to shoe-horn you to a position which you are not informed about. So having seen the documents which have been provided now by Engineering and Maintenance Solutions, how long do you think you might need to – in order to peruse the documents and provide a response?

PN149

MR BONELLO: I do understand that your time is – you're working with two working days, Commissioner, so - - -

PN150

THE COMMISSIONER: Can I just pause you there? There is authority, not in respect to protected action ballot orders but there is authority in respect of the section 418 protected industrial action section. There is authority to the effect that the Commission is obliged to provide you with procedural fairness and the obligation to provide procedural fairness in some respects is a carve-out as far as reasonably practicable within two days terminology. So certainly you'll have longer than you need but if you start saying you need two weeks, that might be a bit different.

PN151

MR BONELLO: Sure, well, Commissioner, if I may at least get a few days, possibly the end of this week to respond – but as well in line with that request I further, you know, make the request that the materials provided by the respondent be articulated in a way that clearly substantiates what their concerns are because right now I'm looking at six or seven documents, a whole bunch of emails and there's nothing clear to me what the position of the company is.

PN152

THE COMMISSIONER: Right – look, I hear you in that respect, Mr Bonello. If I can break down matters, what I would propose to do is give you until – the union that is – the close of business on Wednesday this week to provide its submissions about anything further you wish to provide to me. That would be to the close of business Wednesday 27 September 2023. In respect of the – if I can put it this way – proper articulation from the employer as to their objections, I'm against you in that respect. You've got what's been provided. You are in a situation where you can respond to those things.

PN153

As to whether you see those are serious complaints, that's for you to put forward. I'm not here to advocate that either party provides me with additional information, save and except for the notice of employee representational rights. I'll explain why that is in a moment. So you'll have – you'll be responding to the documents which are on the file at the moment shortly. In respect of the notice of employee representational rights, I just want to understand the scope of the bargaining, if I can put it that way – the formality of how that scope was formed and then how that relates to the current situation. Does that sound clear, Mr Bonello?

PN154

MR BONELLO: Sorry, Commissioner – I thought that was a question for the respondent.

PN155

THE COMMISSIONER: Yes, okay.

PN156

MR BONELLO: Sorry, if you can repeat that, please?

PN157

THE COMMISSIONER: All right. What I'm saying is that the file is closed with the exception of the notice of employee representational rights. The union will have to provide submissions according to its knowledge but also the documents which have been put forward by the EMS today and also the notice of employee representational rights. That's all I'm trying to say.

PN158

MR BONELLO: Yes, yes.

PN159

THE COMMISSIONER: All right, so in terms of sequencing, you'll have an opportunity until 4 pm on Wednesday the 27th. I'll then give the respondent until the close of business on Thursday the 28th to have one final response. Now, to be clear, Mr Gabsch, that's not an opportunity to provide further documents. It's merely to rebut any arguments that Mr Bonello might put forward in his material.

PN160

MR GABSCH: Understood.

PN161

THE COMMISSIONER: All right. Well, thank you, parties. I'll now adjourn the Commission and proceed on the basis which I've put forward. In the meantime, I will ask for transcript to be provided urgently on this matter to the parties, which may well not be until Wednesday, to be quite honest, but we'll do our best. We'll now adjourn.

ADJOURNED INDEFINITELY

[4.15 PM]