



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER ALLISON

C2022/8256

s.739 - Application to deal with a dispute

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

**Opal Packaging Australia Pty Ltd T/A Opal Fibre Packaging
(C2022/8256)**

Orora Fibre Packaging National Enterprise Agreement 2019

Melbourne

4 PM, TUESDAY, 28 NOVEMBER 2023

Continued from 20/11/2023

PN263

THE COMMISSIONER: Thank you. Good afternoon, parties. I'll take the appearances, please.

PN264

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

PN265

THE COMMISSIONER: Mr Bonello.

PN266

MS C YUEN: Good afternoon, Commissioner. Yuen, initial C, for the respondent.

PN267

THE COMMISSIONER: Thank you. Thanks, parties. Well, we're here today to hear the final evidence in this matter. The supplementary witness evidence from Ms Cassin and the witness evidence from Mr Hinds. Was there anything that either party wanted to raise before we go into the witness evidence?

PN268

MR BONELLO: No, Commissioner.

PN269

MS YUEN: No, Commissioner.

PN270

THE COMMISSIONER: Okay, thank you, and I'm assuming, with Mr Hinds not being here, we'll take Ms Cassin's evidence first and then afterwards we'll get Mr Hinds on the line.

PN271

MS YUEN: Yes, he's ready for whenever we need him to dial in.

PN272

THE COMMISSIONER: Okay, excellent, thank you. Thanks, Mr Bonello, over to you.

PN273

MR BONELLO: Thank you, Commissioner. Ms Cassin, could I get you to please state your full name, professional address, and occupation for the record?

PN274

MS L CASSIN: Certainly. Lorraine Cassin, address 251 Queensberry Street, Carlton South.

PN275

MR BONELLO: Thank you, and is this your second witness statement that you have made in this matter?

PN276

MS CASSIN: It is, yes, correct.

PN277

MR BONELLO: And I confirm with you that it is six paragraphs in length?

PN278

MS CASSIN: Correct.

PN279

MR BONELLO: And, to the best of your knowledge, your second witness statement is true and correct.

PN280

MS CASSIN: That is correct.

PN281

MR BONELLO: Thank you. Commissioner, if I may tender the supplementary statement of Ms Cassin, please.

PN282

THE COMMISSIONER: Thank you. I'll just note, I think we've actually – I should have asked my associate to jump in and do the swearing in. We've jumped straight to it. I'll get him quickly to do it, and I'll just – Ms Cassin, I'll just get you to repeat the true and accurate part after. Thanks, Jonas.

PN283

THE ASSOCIATE: Thank you, Commissioner. Ms Cassin, could you please state your full name and address for me, please?

PN284

MS CASSIN: Lorraine Cassin, 251 Queensberry St, Carlton South.

<LORRAINE CASSIN, AFFIRMED

[4.04 PM]

EXAMINATION-IN-CHIEF BY MR BONELLO

[4.04 PM]

PN285

THE COMMISSIONER: Thank you, and sorry, Ms Cassin, I'll just get you to repeat, in relation to the supplementary statement in front of you, if, to the best of your knowledge, that is true and accurate?---That is true and accurate, correct.

PN286

Thank you. I'm going to mark the supplementary statement of Lorraine Cassin as AMWU 2, that's supplementary statement of Lorraine Cassin dated 21 November 2023 consisting of six paragraphs.

**EXHIBIT #AMWU2 SUPPLEMENTARY STATEMENT OF
LORRAINE CASSIN DATED 21/11/2023 CONSISTING OF SIX
PARAGRAPHS**

PN287

Thank you. Okay, Mr Bonello, sorry. Now, over to you.

PN288

MR BONELLO: Thank you, Commissioner. No further questions, thank you.

PN289

THE COMMISSIONER: Thank you. Thanks, Ms Yuen.

CROSS-EXAMINATION BY MS YUEN

[4.05 PM]

PN290

MS YUEN: Thank you, Commissioner. Now, Ms Cassin, you prepared a statement in this proceeding dated 15 August as well, didn't you?---Just check the date. Yes.

PN291

A copy of that is on page 27 of the court book if that assists?---Yes, that's correct.

PN292

And in that 15 August statement, there's nothing that mentions a phone discussion with Mr Hinds on 7 December, is there?---No, I don't believe so. No, there's not.

*** LORRAINE CASSIN

XN MR BONELLO

*** LORRAINE CASSIN

XXN MS YUEN

PN293

So, three months later, on 21 November, you filed a further statement in this proceeding which is the one that was just admitted into evidence; that's right, isn't it?---That's correct.

PN294

Now, you don't have any notes of a phone call on 7 December with Mr Hinds, do you?---I do not, except the email that was attached to the original statement.

PN295

But no handwritten notes or typed notes of a phone call?---No, I do not.

PN296

And, would it be fair to say that, over the last year, you've had several phone calls with Mr Hinds around a range of issues: EBA, pay rates, various disputes, etcetera?---Correct. Everything that is disputed at the final level comes to our level – mine and Mr Hinds, correct.

PN297

So, what you're asking the Commissioner to understand now or take from your evidence now is that you suddenly recall very specific details of a phone call from almost a year ago now; is that right?---Sorry, what was the question? Is it nearly a year ago?

PN298

Are you suggesting that you suddenly recall very specific details from almost a year ago?---I stand by my statement at point 3, yes.

PN299

Now, at page 31 of the court book, there is a text message exchange with Mr Hinds. Do you have that in front of you, Ms Cassin?---I believe so.

PN300

Now, that text message exchange, going back and forth, you're talking about asking for disclosure and Brad's coming back and there's a bit of back and forth. Is it possible, Ms Cassin, that you might be confusing a call that you had with Mr Hinds after exchange of these 14 December text messages when you wrote your statement about the supposed 7 December phone call?---Well, I thought it was self-explanatory at my first original one because my email that was attached clearly says 'as discussed today.' I don't normally write that if it's just doing an email exchange. It refers to a verbal conversation.

PN301

And you now specifically recall the details of that conversation on 7 December, do you?---As I've pointed out in my supplementary, I'm pointing out that we had a conversation in relation to this and I was asking for evidence to be provided to Mr Horan and it was pretty clear that the evidence wasn't going to be forthcoming and I affirmed that by an email as I assumed we're going to be in disputation.

*** LORRAINE CASSIN

XXN MS YUEN

PN302

So, have you formulated your recollection of the 7 December discussion based on the email or do you actually remember specifically what you and Mr Hinds said to each other on 7 December?---I recall the conversation. I was in another pretty extensive negotiation and I stepped out of it to take the call, and I recall the conversation because I was quite alarmed for Mr Horan not being provided the information he needed to be provided.

PN303

And yet, you didn't include it in your first statement, did you, Ms Cassin?---No, I did not. No.

PN304

So, Ms Cassin, if we just go back to that page 31 of the court book which is the exchange of text messages; the second text message in the chain, Mr Hinds says towards the end, 'I will call you tomorrow,' and then in your reply, which is the last message in the chain, it says, 'Talk in morning. I'm boarding a plane.' Are you very, very confident that the discussion that you're now recalling did occur on 7 December and not after this 14 December text message exchange?---I'm very confident it occurred on 7 December. That was a continuation.

PN305

So, Ms Cassin, I have to put this to you: I do put to you that what you've set out in your supplementary statement is not an accurate account of what occurred on 7 December, is it?---It is an accurate account.

PN306

No further questions, thank you, Commissioner.

PN307

THE COMMISSIONER: Thank you. Thanks, Ms Cassin. I just have a few questions. How often do you speak with Mr Hinds?---Look, it could be – regularly. Regularly, depending on the issues, particularly – later of last year, we were discussing EBA – we were finalising the EBA, we had a number of things occurring around the country post the EBA and implementation. So, on occasions, we could talk on a regular basis, and it's only when it cannot be resolved at site level, at state level, it comes down to my level which the EBA refers to. So, we would talk regularly.

PN308

So, can I ask, in Mr Hinds statement, he says:

PN309

If I did have a discussion with Ms Cassin, I'm confident that it was extremely brief and that I told her that any concerns the AMWU may have should be raised for discussion at the site level first and not with me.

*** LORRAINE CASSIN

XXN MS YUEN

PN310

What are you saying in relation to that?---Well, it just doesn't seem – it just doesn't line up with what our email exchange puts. He clearly comes back with what he had told me verbally: that the company would give the information to Grant once the meeting had occurred. So I believe my email exchange supports the conversation took place. He supports the conversation took place, never was he saying it was brief, I don't agree with that at all, and that we were in disputation about the evidence being given towards our member and whether it was a breach of the agreement or not.

PN311

Thank you. Thank you. Mr Bonello, was there anything else you wanted to raise?

PN312

MR BONELLO: No, Commissioner. No further questions. Please release the witness.

PN313

THE COMMISSIONER: Okay, thank you. Thanks, Ms Cassin, you don't have to stay on the line any longer.

PN314

THE WITNESS: Thank you. Thank you.

<THE WITNESS WITHDREW

[4.14 PM]

PN315

THE COMMISSIONER: Thanks, Ms Yuen. Do you want to call Mr Hinds?

PN316

MS YUEN: Yes, if you give me a moment, I'll go and ask him to dial in.

PN317

THE COMMISSIONER: Okay, thank you. Hi, Mr Hinds.

PN318

MR B HINDS: Good afternoon.

PN319

THE COMMISSIONER: Now, I'm going to get my associate to swear you in or affirm you in.

PN320

MR HINDS: Yes, affirm.

PN321

THE ASSOCIATE: Thank you, Commissioner. Mr Hinds, could you please state your full name and address for the record?

PN322

MR HINDS: Bradley Craig Hinds, 572 Swan Street, Burnley, Melbourne.

<BRADLEY CRAIG HINDS, AFFIRMED

[4.15 PM]

LORRAINE CASSIN

XXN MS YUEN

EXAMINATION-IN-CHIEF BY MS YUEN

[4.15 PM]

PN323

THE COMMISSIONER: Thank you. Thanks, Ms Yuen.

PN324

MS YUEN: Thank you, Commissioner. Mr Hinds, could you please state your full name and business address for the Commissioner?---Bradley Craig Hinds, 572 Swan Street, Burnley, Melbourne.

PN325

And have you prepared a statement for the purposes of these proceedings?---Yes, I have.

PN326

Do you have a copy of that statement in front of you, Mr Hinds?---I do.

PN327

And is it six paragraphs long and dated 24 November?---Yes, it is.

PN328

Commissioner, I seek to tender that statement.

PN329

THE COMMISSIONER: Thank you. The statement of Brad Hinds dated 24 November 2023 consisting of six paragraphs, I will mark that as OPAL 5.

**EXHIBIT #OPAL5 STATEMENT OF BRAD HINDS DATED
24/11/2023 CONSISTING OF SIX PARAGRAPHS**

PN330

MS YUEN: Thank you, Commissioner. I just have one further question for Mr Hinds arising out of Ms Cassin's evidence. Mr Hinds, Ms Cassin gave evidence that you and Ms Cassin speak reasonably regularly on a range of issues; would you agree with her assessment of that?---Not really, no.

PN331

How often would you say that you and Ms Cassin speak? It's very hard to say, I know, but as a rough, say, how many times have you spoken in the last year?---Probably about – sorry, one-on-one? One-on-one direct phone calls? Probably five or six times.

PN332

Thank you, Mr Hinds. I have no further questions at this stage, Commissioner.

PN333

THE COMMISSIONER: Thank you. Mr Bonello.

CROSS-EXAMINATION BY MR BONELLO

[4.17 PM]

*** BRADLEY CRAIG HINDS

XXN MR BONELLO

PN334

MR BONELLO: Thank you, Commissioner. Good afternoon, Mr Hinds?---Good afternoon, Mr Bonello.

PN335

I've just got some questions for you today. Firstly, I can see in your witness statement – is that six paragraphs long?---Yes, dated 24 November 2023.

PN336

And each paragraph is correct, isn't it?---Yes.

PN337

Mr Hinds, at paragraph 6 of your witness statement, you refer to the discussion between you and Ms Cassin occurring on 7 November 2022; is that correct?---Could you repeat that question, please? You just broke up a bit.

PN338

At paragraph 6 of your witness statement, you refer to the discussion you had between Ms Cassin and yourself occurring on 7 November 2022; is that correct?---Correct.

PN339

Mr Hinds, did it not occur in December?---I need to go back and check. I need to go back and check the dates.

PN340

Ms Cassin's evidence - - - ?---If you give me – can you give me two minutes and I can check my phone now. Is that okay?

PN341

Well, if I put it to you, Mr Hinds: Ms Cassin's evidence is that she states - and if you refer to page 29 of the court book – you can see the email correspondence between you and Ms Cassin occurring on 7 December, so - - - ?---Yes, that must be a typo on my statement. It should have been 7 December, not 7 November.

PN342

Thank you. Mr Hinds, on page 29 of the court book, this is an email exchange between you and Ms Cassin, isn't it?---Yes. Yes.

PN343

Do you agree that there was a meeting organised for 8 December between Mr Horan and the company?---Yes, I do.

PN344

And that meeting was in relation to the incident which involved Ms Jenny McLean and Mr Horan, isn't it?---That's correct.

*** BRADLEY CRAIG HINDS

XXN MR BONELLO

PN345

If you please just read Ms Cassin's email to you again at 5:12 PM on 7 December, Ms Cassin is clearly asking you to confirm whether or not Opal will release the written allegations, evidence, and statements to the AMWU, isn't she?---Correct.

PN346

And she's asking you to confirm that disclosure occurs prior to the next meeting with Mr Horan, isn't she?---Correct.

PN347

And you respond, at 5:26 PM, and you confirm that Opal will not be disclosing the information Ms Cassin is seeking until after the scheduled meeting with Mr Horan; is that correct?---No, that's not correct. If you read my response, it clearly states that we will share it with the employee. The employee – it's then up to the employee whether he discloses that to the AMWU. The business has no obligation to share any private information with the AMWU.

PN348

You say in the email on page 29, Mr Hinds, that once the investigator collects Grant's version and assesses the matter, we will then provide Grant with the disclosure Ms Cassin is seeking; is that correct?---Absolutely.

PN349

So, it is accurate to say that you confirmed with Ms Cassin that the disclosure she was seeking would occur after the meeting with the investigator?---Ms Cassin was after disclosure to the AMWU specifically. If you read my email again, it is in reference to providing all of that necessary information to Grant himself. It is not up to the organisation to provide any information to the AMWU. That's up to

Grant on whether he decides to share that with third or fourth parties. The business has privacy obligations that they need to meet.

PN350

So, Mr Hinds, Grant – Mr Horan – never received disclosure prior to that meeting, though, did he?---He was never going to receive disclosure prior to that meeting. We were going to share with him all the relevant information post the investigation. Otherwise, we would only be sharing half the information with him.

PN351

You say in that email that once the investigator collects Grant's version and assesses the matter, we will then provide Grant with all evidence and statements. Is that not correct, Mr Hinds?---Correct, and Grant was the last person to be interviewed in that investigation.

PN352

So, is it not accurate, then, that you were noting to Ms Cassin that all the evidence and statements will be provided to Grant after the investigator collects Grant's version and assesses the matter?---Absolutely.

*** BRADLEY CRAIG HINDS

XXN MR BONELLO

PN353

Thank you. Mr Hinds, on 7 December, you had an earlier discussion with Ms Cassin, before that email correspondence, didn't you?---As I recall, yes, I did. Brief, albeit.

PN354

And, Mr Hinds, it is the case that Ms Cassin, in the discussion earlier on that day, prior to the email correspondence, raised the issue with Mr Horan, didn't she?---This is a discussion that happened 12 months ago. I mean, I get about 50-odd phone calls a day. I cannot remember, verbatim, every phone call that I receive other than I know what my response is when I am called for such matters which is that we will follow the disciplinary process. So, I am the last person in that disciplinary process chain and, to my knowledge, the process wasn't followed, and I would have directed Ms Cassin back to the original process.

PN355

So, Mr Hinds - - - ?---That – sorry to interrupt, but that is not the first time that I've redirected it back to the commencement of the disputes resolution process.

PN356

So, Mr Hinds, it could be the case then that Ms Cassin did raise the dispute with you with regards to Mr Horan and you directed her to go back to the site level; is that correct?---If she raised it with me - like I said, I get multiple phone calls a day, this is 12 months ago. If she raised it with me, I would have redirected her back to the site so that we follow the disciplinary process.

PN357

Was it your position, Mr Hinds, on 7 December, that Opal did not have to give full disclosure to Mr Horan prior to the 8 December meeting?---Like I said, the

process is that we investigate it and then we provide the employee with all relevant documentation. That's the process, so.

PN358

Would you agree that Ms Cassin had an opposing view as to your view, Mr Hinds?---I think it's irrelevant. It's the investigation process that we follow and we continue to follow. If she wants disclosure before, prior to the cessation of the investigation, it means that we're disclosing half the information which I will never support.

PN359

So, it was clear to you, Mr Hinds, that Ms Cassin didn't share your views? She had different views to you?---I can't remember the phone call verbatim, but it's highly probable.

PN360

Thank you. There was a dispute here, wasn't there, Mr Hinds?---Clearly, because this is where we are right now.

*** BRADLEY CRAIG HINDS

XXN MR BONELLO

PN361

And this issue with Mr Horan, when it was brought to your attention by Ms Cassin, needed a resolution, didn't it?---No, it didn't need a resolution, it needed a proper investigation. The allegations were what I consider extremely serious. There was allegations of bullying and harassment towards a female employee which we have very clear policy, through Opal, about how we deal with such matters. So, again, it might have been seen to Ms Cassin as something that was a slight issue, I have an opposing view, absolutely, and we will continue following Opal's policy around bullying and harassment and making sure that we investigate it thoroughly and that we deal with those matters in a serious way, as we should.

PN362

Mr Hinds, on page 29 of the court book, the email from Ms Cassin to you, she states:

PN363

As discussed today, just want to confirm that the company will send all allegations in writing to AMWU and evidence/statements before meeting with Grant Horan.

PN364

?---Yes.

PN365

Would you not say that, if this request wasn't met, that there would be a dispute which needed to be resolved in the future?---For the sake of repeating myself, I'll say it again. The business has no obligation to provide a third and fourth party any information pertaining to an investigation to an employee. It is up to that employee to share whatever information he wishes to share with whomever he

wants to share it with, and we will never breach anyone's privacy through this organisation.

PN366

But it was clear to you though, Mr Hinds, wasn't it, that this was a dispute in need of resolution at the time, on 7 December?---It will not be resolved by myself and Ms Cassin. It will go through an investigation process; we will follow the disputes resolution process and ensure that we are following Opal's policy around bullying and harassment. It was never going to be resolved by myself and Lorraine. It is serious misconduct and these matters cannot be resolved by a telephone conversation between myself and anyone else, they need to be investigated.

*** BRADLEY CRAIG HINDS

XXN MR BONELLO

PN367

But the issue wasn't concerning serious misconduct, Mr Hinds, it was concerning full disclosure, the obligation under the EBA. So, I put it to you again: in relation to the full disclosure entitlement that Mr Horan had, do you believe that, from the email correspondence of Ms Cassin, that there was a dispute in need of resolution?---You're asking two questions. There was a dispute in resolution and Ms Cassin's intent in calling me would have been to resolve it at my level. We will never resolve such matters at our level during a phone call, they will be investigated. We will provide full disclosure at the point that we are satisfied that we have collected all the evidence through the investigation process.

PN368

Thank you. No further questions, Commissioner.

PN369

THE COMMISSIONER: Thank you. Ms Yuen?

RE-EXAMINATION BY MS YUEN

[4.31 PM]

PN370

MS YUEN: Thank you, Commissioner. Just one clarification, Mr Hinds. I think, in answer to one question, you referred to the 'disputes process' and in answer to one question you referred to the 'disciplinary process'; I just wanted to clarify which process you were referring to?---It's the disputes resolution process.

PN371

Thank you. No further questions, Commissioner.

PN372

THE COMMISSIONER: Okay, thank you. Now, I think all the questions I had in my mind have been addressed as well. Thank you, Mr Hinds, you can stand down now. We'll let you go.

PN373

THE WITNESS: Thank you, Commissioner. Thank you, Mr Bonello. Thank you, Ms Yuen.

PN374

THE COMMISSIONER: Mr Bonello, Ms Yuen, were there any submissions either of you wanted to make in relation to that evidence and anything the Commission should take into account? I'm happy either for you to say, 'No, comfortable with the evidence, we put our final submissions,' which is fine, or otherwise, I can give you ten minutes if there was anything out of that evidence that you want to tie into your final submissions. So, I'm happy for the parties to indicate their views in relation to that.

PN375

MR BONELLO: Commissioner, if I may have that ten minutes you are offering just to wrap up today's evidence and to wrap up closing submissions, please.

PN376

THE COMMISSIONER: Thank you, and Ms Yuen, I'll give Mr Bonello the ten minutes and obviously, I'll give you an opportunity to reply to anything he says but would you also, from your point of view, had you had in mind making any submissions as to the final pieces of evidence?

*** BRADLEY CRAIG HINDS

RXN MS YUEN

PN377

MS YUEN: Yes, Commissioner, I had intended to make some brief submissions on what we've heard today. I just wanted to clarify that you were just after submissions about today's evidence, not more broadly that we discuss what we covered in last week's hearing.

PN378

THE COMMISSIONER: No, I'm happy with the closing submissions from last week, and part of the reason I'm being a little more flexible with this matter than normal is, obviously, because of the partial hearing of it. If there was anything substantial that you felt needed clarification for me because it might have been dealt with in the earlier hearing, but I've obviously read the transcript and everything, but I will give the parties leeway, but no, I do not want full closing submissions now. I really just want anything tied in from today.

PN379

MS YUEN: Thank you, Commissioner.

PN380

THE COMMISSIONER: Okay. Look, it's quarter to now, so if we jump back on at five to five.

PN381

MR BONELLO: Sorry, Commissioner, I wasn't sure whether you were saying we'll take a break for ten minutes or you'll give me ten minutes for my closing, but I'm prepared to proceed now.

PN382

THE COMMISSIONER: Right, sorry, I was going to give you a short break but, Ms Yuen, are you prepared as well?

PN383

MS YUEN: I'm happy to go straight ahead, yes, thank you, Commissioner.

PN384

THE COMMISSIONER: Okay. Let's go straight ahead. Over to you, Mr Bonello.

PN385

MR BONELLO: Unless you need a break, Commissioner.

PN386

THE COMMISSIONER: No, that's fine, that's fine.

PN387

MR BONELLO: So, Commissioner, the discussion between Ms Cassin and Mr Hinds satisfies a requirement of clause 15 of the agreement – or, specifically, 15.2, subclause D of the agreement. The agreement specifically obligates Opal to take certain steps prior to disciplinary meetings being held. One of those steps is found at annexure 4: subclause 4.1(e) of the agreement and clause 17.3(a)(v). Both these clauses stipulate that there is an obligation on Opal to ensure all information and details of any allegations are provided to the employee prior to disciplinary meetings taking place. I guess, this is to ensure that a fair and just process is adopted and to enable the employee the best possible chance of defending their employment against disciplinary action.

PN388

This is where we allege Opal contravened the agreement and it was the motive for Mr Horan raising the dispute on 5 December. Ultimately, the dispute has not been resolved there and has resulted in Ms Cassin discussing the matter with Mr Hinds, going up the seniority levels of management. It's evident, Commissioner, that this discussion took place, Ms Cassin raised the concern with Mr Hinds during the day of 7 December and then further took it upon herself to try and resolve it through email correspondence. It is evident that, through both the two attempts or the two discussions that occurred on that one day, the matter has not been resolved.

PN389

At paragraph 117 of the Qantas decision, it's clear that there may be little formality in these discussions and there may have been little more than a social communication of concerns, but that will meet the requirements of the dispute resolution procedure. It's very evident that Ms Cassin expressed her concerns to Mr Hinds. It's evident that she's raised the issue of Mr Horan, or the matter regarding Mr Horan, and via her correspondence, it's evident that she sought to confirm whether or not the respondent was going to disclose all information and details of the allegation prior to any meetings taking place.

PN390

Mr Hinds engaged in this discussion. He engaged, and it most certainly seems to be the case, that Mr Hinds made a decision by responding to Ms Cassin's email,

with the decision being that Mr Horan would not be given full disclosure until after the meeting had occurred. The fact that those discussions took place on that day and the decision by Mr Hinds not to give full disclosure must be sufficient enough to conclude, 1) that discussions took place on that day regarding Mr Horan, 2) a decision was made by Mr Hinds that did not resolve the dispute, and 3) by virtue of 1) and 2), that the matter could not be resolved between the discussions with Ms Cassin and Mr Hinds.

PN391

If we refer to the minimum content requirement in the Qantas decision, it's crystal clear that there are two opposing views in the discussion between Ms Cassin and Mr Hinds, it's clear that Mr Hinds ought to have known that those opposing views need a resolution. From the numerous disputes between the parties that have occurred over the years, Mr Hinds well and truly knows by now that a discussion between himself and Ms Cassin isn't to discuss the weather, it's not to discuss how their weeks have been, it's to discuss a dispute that is in need of a resolution.

PN392

In a recent decision from the Commission titled, or numbered C2022/7968, Crawford C dealt with the matter of jurisdiction, noting the Qantas decision, and further pointed out in paragraph 53 of his decision that the substance of the discussion is more important than the format. We say that this should be applied in the current circumstances. The substance of the matter concerning Mr Horan was raised with Mr Hinds and a decision was made which didn't resolve the dispute.

PN393

Further in that decision from Crawford C, at paragraph 55, in concluding the dispute resolution procedure was satisfied by the applicants, the Commissioner also notes that this is reinforced by the objects in section 3 of the Fair Work Act. The objects include providing accessibility, effective procedures to resolve grievances and disputes. In that paragraph 55 as well, Crawford C goes on, referring to the statutory direction section 577(1)(b) of the Fair Work Act, for the Commission to perform its functions and exercise its powers in a manner that is quick, in a manner that is informal and avoids unnecessary technicalities. He states that, 'These provisions are not consistent with an overly technical approach to the application of the dispute resolution procedure.'

PN394

So, to conclude, for the reasons set out before, the discussions between Ms Cassin and Mr Hinds meets the requirements of clause 15 of the agreement and the overly technical approach the respondent is pressing is one that must be avoided. It would be an inconsistent approach with the functions of the Fair Work Commission in section 577(1)(b) and inconsistent with the objects of the Act at section 3. Thank you, Commissioner.

PN395

THE COMMISSIONER: Thank you. Thank you, Ms Yuen.

PN396

MS YUEN: Thank you, Commissioner. Commissioner, I have three submissions to make in relation to the alleged conversation on 7 December. The first submission I make is, in our submission, the 7 December conversation did not happen. It's been over 11 months since the AMWU filed the F10 in this matter on 14 December 2022. At no stage has the AMWU raised the suggestion that there was a phone discussion between Ms Cassin and Mr Hinds that forms part of the disputes process.

PN397

It wasn't mentioned in the F10, it wasn't mentioned in the articulation of dispute document that was filed at the commencement of these proceedings, it wasn't mentioned in Ms Cassin's first witness statement, it wasn't mentioned in the applicant's written or oral submissions, and then suddenly, over 11 months later and less than one working day before part 3 of the jurisdictional hearing, Ms Cassin has suddenly remembered a discussion. In our submission, on the balance of probabilities, the Commission should find that no relevant discussion took place. Indeed, Ms Cassin acknowledged that she hadn't taken any notes of the discussion, she acknowledged that she'd had various discussions with Mr Hinds about various matters at different times. In light of all of that, in our submission, the Commission should find that the conversation did not happen at all.

PN398

Our second submission, and the alternative, is that, if the Commission finds that there was and Ms Cassin has had this amazing, new-found recollection of a conversation on 7 December, we say that, in any case, that discussion does not satisfy the two minimum content requirements in the Qantas decision. We reject the suggestion that the respondent is seeking to apply an overly technical approach here. To the contrary, the Qantas decision applies quite a flexible approach, but the two limbs still need to be satisfied and, in our submission, the AMWU has failed to establish that the second limb is satisfied, being that both Ms Cassin and Mr Hinds understood that there was a dispute in need of resolution.

PN399

Yes, we acknowledge that each participant had opposing views about the timing of disclosure of information or materials to Mr Horan, but, in our submission, there is no evidence that Ms Cassin and Mr Hinds both understood that those views needed to be resolved. Mr Bonello referred to, 'there was a decision made which didn't resolve the dispute.' In our submission, there was no decision made. Mr Hinds was asked to clarify when the information would be provided and he clarified that in the email on 7 December.

PN400

And, yes, they had different views about when they wanted the information provided but, in our submission, there was no understanding that those views needed to be resolved. And, very relevant, giving that this is being claimed as the third step in the dispute resolution procedure, there is no evidence that Ms Cassin made clear to Mr Hinds that there had been attempts to resolve the dispute at the workplace level. Now, in our submission, this is crucial. Mr Bonello said, 'well,

Mr Hinds should know because, when he's speaking to Ms Cassin, it should be a step three discussion.'

PN401

Well, with all due respect, in our submission, Mr Hinds and Ms Cassin might talk about the weather. They might talk about how their weeks are going. It's not until one of them make clear to the other that they need to have a discussion to resolve something that people have already tried to resolve at the workplace level that those obligations of step three of the dispute resolution procedure come into effect and become binding on the two of them to do what they need to do.

PN402

Effectively, step three is, sort of, the last line of defence in the dispute resolution process and, in our submission, it is inconsistent with the whole purpose of a dispute resolution process for the last line of defence to be not having an understanding that they were at that last line of defence, that attempts have been made to resolve it at the workplace level and, therefore, there was a requirement to resolve something. Otherwise, it's a vent, it's an exchange of views, it's a clarification, it could be any number of things which does not have the purpose of seeking to resolve opposing views or seeking to resolve a dispute, and we say it could fall into any of these categories, based on the evidence, if the evidence is accepted that there was a conversation that day.

PN403

I repeat our earlier submission that 'ought to have known' is not the test. The test is: did Mr Hinds understand that there was a dispute or opposing views that needed to be resolved. And I note that the fact that Mr Hinds would not concede, in cross-examination, that there was something to be resolved highlights this point. Mr Hinds knew that they had opposing views, he knew Lorraine wanted something that was inconsistent with what the business was doing, but he had no understanding that he was on the hook to try and resolve that. In his evidence, he said, 'well, if Lorraine did raise that with me,' he admitted he couldn't remember any discussion on 7 December specifically, he would have sent her back, sent the AMWU back to follow the proper process and have the workplace level discussions first.

PN404

THE COMMISSIONER: Can I just ask you – so, just that part about understanding that there's a dispute that needs to be resolved. It's clear Mr Hinds – and even now, it's very much known the company was – his evidence is the company was doing the right thing. So what, in that scenario, where one party is saying, 'We're in dispute,' and the other is saying, 'We're not in dispute because we're doing the right thing.' Where do you say that fits into the understanding that there is – because obviously, you can't have the whole disputes procedure derailed if one party is saying, 'No, I'm of the view that we're doing the right thing and we're going to continue to do it.' What do you say would, in that situation, would make it a scenario where the party realised there was a dispute that needed to be resolved?

PN405

MS YUEN: Yes, Commissioner, I'm, sort of, wondering whether you might pick up some of the principles from Maersk in a situation like that; where one party is trying to engage and trying to discuss or trying to seek resolution and the other party is, effectively, refusing by just saying, 'No, we're not engaging, we're not recognising, we don't want to talk about it,' I think then, potentially, the Maersk principles could come into play and the first party could take the dispute as – or, the first step as being concluded by the refusal of the other party to engage in the discussions.

PN406

But, in our submission, that's not the case at all here. In our submission, if Ms Cassin had said to Mr Hinds, and there is no evidence that she did, 'Look, we've gone through steps one and two of the process, we're here, we need to talk about this, we need to discuss this and see if we can find a way forward,' then, in our submission, would be a very, very, very different situation where, yes, Mr Hinds would have understood that there was an issue or a dispute or opposing views that needed to be resolved, but we say that was not the case in this instance.

PN407

THE COMMISSIONER: Thank you.

PN408

MS YUEN: And then, Commissioner, my final submission is that, even if the first two submissions are not accepted, in any case, I refer to my previous submissions in relation to the 5 December discussions, the 6 December email, and say that, in any case, by 7 December, it was not established that the dispute could not be resolved at the workplace level, which is a pre-condition of the third level of discussions in clause 15.2(d). That's the end of my submissions, Commissioner.

PN409

THE COMMISSIONER: Thank you. Mr Bonello.

PN410

MR BONELLO: Commissioner, I'll just touch on two things that were raised by my friend. Firstly, this, I guess, earlier discussion on 7 December has come in light in part three of this dispute because of one reason, and, look, we were not relying on such events. We had substantiated in the initial application that the email correspondence on 7 December was enough, however, in light of the question that arose from your chambers, Commissioner, and then the acknowledgement from the respondent that a discussion did not occur prior to that email correspondence, it became prudent, on us, to ensure that we gave a correct account of what occurred, hence why such evidence has been brought to light now at such a late stage.

PN411

And, just secondly, Commissioner, I just want to reiterate that, in the Qantas decision, it is very clear that it is not necessary – and I believe it's paragraph 70 – it is not necessary, with respect to those participating in the meeting or discussion, to know that they were participating in a meeting which formed part of the dispute resolution procedure. So, although Mr Hinds didn't know that he and Ms Cassin

were at step three, that is irrelevant, and it shouldn't be a reason, because he didn't know that such a meeting or discussion formed part of the dispute resolution procedure, that the second limb, as my friend puts it, has not been met. Just because he didn't know that it was a discussion for the purposes of DRP, doesn't mean that he didn't know that there needed to be a resolution in the circumstances. Thank you, Commissioner.

PN412

THE COMMISSIONER: Thank you, parties. Well, I think that concludes both our evidence and submissions in this matter. I'm going to reserve my decision and I will adjourn the matter for now. Thank you.

PN413

MR BONELLO: Thank you, Commissioner.

PN414

MS YUEN: Thank you, Commissioner.

ADJOURNED INDEFINITELY

[4.54 PM]

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