



Fair Work  
Australia

**TRANSCRIPT OF PROCEEDINGS**

*Fair Work Act 2009*

21312-1

**VICE PRESIDENT LAWLER**

**B2009/13**

**s.437 - Application for a protected action ballot order**

**Australian Municipal, Administrative, Clerical and Services Union  
and  
Hunter Water Corporation  
(B2009/13)**

**Sydney**

**2.23PM, WEDNESDAY, 14 OCTOBER 2009**

PN1

THE VICE PRESIDENT: Mr Warren you're seeking leave to appear for Hunter Water?

PN2

MR R WARREN: I am.

PN3

THE VICE PRESIDENT: Ms Right, you're appearing for the AMCSU.

PN4

MS WRIGHT: Yes that's right your Honour, and with me is MS ARROWSMITH who is our Secretary.

PN5

THE VICE PRESIDENT: Hello Ms Arrowsmith. Is there any objection to leave being granted to Mr Warren?

PN6

MS WRIGHT: No.

PN7

THE VICE PRESIDENT: Yes, leave is granted.

PN8

MR WARREN: Thank you.

PN9

THE VICE PRESIDENT: Mr Warren is there any substantive objection that is going to be raised by Hunter Water?

PN10

MR WARREN: The only issue and obviously you would appreciate that I got reasonably short instructions on the matter and haven't been able to attend before your Honour and I apologise for that. The issue that your Honour has to be satisfied with is in Section 443(1)(b), satisfied that each applicant has been and is genuinely trying to reach an agreement. I'm instructed to put to the Tribunal a number of facts and if I could just hand up a bundle of documents? It goes to the issue of the Tribunal being satisfied that there is a genuine - - -

PN11

THE VICE PRESIDENT: If I can just summarise the position, there is no jurisdictional or technical objection but there is an objection, the sole objection to the granting of the orders sought is a challenge to whether or not there has been a genuine attempt to make an agreement?

PN12

MR WARREN: Yes, as to whether the Tribunal can be satisfied that there has been a genuine attempt to reach an agreement.

PN13

THE VICE PRESIDENT: Yes.

PN14

MR WARREN: With respect to the other parts of the application it appears from looking at the application that it complies with the various parts of the Act. There

is no objection raised with respect to the form of the application. I'll have something to say shortly with respect to essential services. The bundle of documents I've handed to your Honour I've also given to my friend. One sees firstly there is a letter dated 26 August 2009.

PN15

THE VICE PRESIDENT: Ms Wright do you have any objection to these being marked as an exhibit subject to any objection you wish to raise in due course?

PN16

MS WRIGHT: No, your Honour.

### **EXHIBIT #1 RESPONDENT'S BUNDLE OF DOCUMENTS**

PN17

THE VICE PRESIDENT: Yes Mr Warren?

PN18

MR WARREN: Thank you. The first document in exhibit 1 is a letter from the Australian Services Union over the hand of Ms Arrowsmith to one of the general managers at Hunter Water. I note the list of outstanding matters on the second page from the SB log of claims. I note there are 17 matters there, and I note and I'll come to it shortly that there is no claim there for redundancy pay or any provisions relating to redundancy pay to be inserted in the agreement.

PN19

On the third page of exhibit 1 is then a letter in response to that letter. It's addressed to Ms Arrowsmith from Ms Martin. I note that in that letter Hunter Water in the first paragraph confirming the outstanding matters and available dates. The second paragraph, with regard to the outstanding items indeed there is an additional item added as in the understanding of Hunter Water there was a right of entry clause claim and one will look at number 18 on the list.

PN20

Then the next paragraph, towards the end it says "Can you please confirm that the above represents the complete list which is involved with items from the SB log of claims that you consider outstanding by close of business tomorrow. We haven't burdened the Tribunal with the great list of correspondence but for the purposes of my point to be made to the Tribunal we note the next document is a letter of 8 September and once again on the last page, the last dot pointed point "We also understand that there are no outstanding issues from the SB log of claims with the exception of your request for inclusion of any S provisions".

PN21

The last document is a document that was an email which was sent by Ms McManus, the branch secretary of the Australian Services Union. Following a meeting of the Australian Services Union members at Hunter Water last Friday I'm instructed that some several days prior to last Friday's meeting that there was an approach made by Ms Arrowsmith for there to be included in the agreement a provision with respect to redundancy pay that is currently found within the policy of the Hunter Water Corporation but which is required by the union now to be put into the agreement.

PN22

THE VICE PRESIDENT: The unions are seeking to have incorporated into the agreement that which is the current policy in relation to redundancies.

PN23

MR WARREN: That's right. To be moved from a condition of policy and obviously policy can be amended and changed as policy changes to one of being cemented in the agreement. This had not been raised prior to this time even though there had been numerous correspondence and discussions between the parties as to the extent of the claims raised. In the short time available to Hunter Water prior to that union meeting the union were advised that Hunter Water did not concede to that point. We note in McManus' email that really the fundamental issue that brought the matter to a stop with respect to the meeting is the new claim for redundancy pay.

PN24

Hunter Water wishes me to put to the Tribunal that this is demonstrating a lack of genuineness and a lack of genuine capacity to pursue an agreement when new matters are raised so shortly prior to meetings and after some several months of negotiations when the matter had not been raised. It is a concern on the part of Hunter Water that new matters are raised at such a late stage when the parties have been clearly under the understanding, both parties, as to what the matters were that were to be negotiated between them.

PN25

THE VICE PRESIDENT: Can I just make sure I've got this clear though. The redundancy claim as you've described it was raised and Hunter Water, albeit in a relatively short period of time considered the claim and rejected it?

PN26

MR WARREN: Yes, that's right.

PN27

THE VICE PRESIDENT: It rejected it for whatever reasons it had, but one of the objections it has to the claim is that it is being raised at the 11th hour?

PN28

MR WARREN: One of the objections it has - - -

PN29

THE VICE PRESIDENT: It has that to the claim but also then reasserts that as an objection to the granting of this application.

PN30

MR WARREN: To genuineness on the part of this applicant to be seeking an agreement in those terms. That is indeed the sole objection that we raise to the Tribunal. If the Tribunal is against us on that submission we would raise with the applicant, in the presence of the Tribunal of course that there is within the current agreement a provision which goes to the commitment for essential services to ensure that public safety and health are at all times met at times when industrial action may be in place and it is a serious commitment that was we understand given on the last occasion the agreement was negotiated.

PN31

The agreement is still in force. Although its nominal expiry date has passed the agreement is there and we would seek, if the Tribunal is against us on our submission with respect to a genuine attempt - - -

PN32

THE VICE PRESIDENT: Confirmation that that obligation is going to be met.

PN33

MR WARREN: That there would be a commitment from the Australian Services Union that that obligation found within the agreement. I can hand up a copy of that commitment. I've extracted some parts of the agreement. It's a rather weighty document. It contains the first page of the agreement. It's a State registered agreement which is now a preserved collective agreement.

PN34

I note that one of the parties is the Australian Services Union. I note on the page numbered in the bottom right hand corner number 1, clause 5 Commitment to Essential Services that there is a broad commitment there with respect to essential services, public health and protection of the environment et cetera and then annexure A is included in the document. There is a serious concern on the part of Hunter Water that that be met.

PN35

THE VICE PRESIDENT: Thank you. Ms Wright can we just deal with it in reverse order? Is this an issue? I can't imagine that the union will be wanting to do things that are going to pose a risk to public safety because that will just mean the termination of the industrial action I think.

PN36

MS WRIGHT: I think that's the position your Honour but in any event I don't really believe that this is relevant to the question before you today.

PN37

THE VICE PRESIDENT: No it's not. You're quite right about that but Mr Warren has asked the question. You're not obliged to answer it if you don't want to but if you can give an answer that may be better or may not be, I don't know.

PN38

MS WRIGHT: Your Honour, the position that we're in - - -

PN39

THE VICE PRESIDENT: If you don't wish to answer the question feel free. You're quite right, it's not relevant to today's application.

PN40

MS WRIGHT: I don't want to be unhelpful in relation to either the role that you're playing today your Honour in making this decision or in relation to Mr Warren's client, but I really don't have the authority to make the sort of commitment that Mr Warren is asking me to make today.

PN41

THE VICE PRESIDENT: Well, I think the position is this Mr Warren. This enterprise agreement has a status at law. Whatever status it has, it has, and if

there is a debate about it, it will be determined in an appropriate court or potentially this Tribunal in some circumstances but not in any way that could be binding upon a Chapter 3 court. To the extent that the agreement is binding it embodies an existing commitment that is no doubt enforceable in some fashion. To the extent that it's not, it's not and I think Ms Wright's position is that she doesn't have any particular instructions and the agreement will stand as it stands.

PN42

MR WARREN: I think you your Honour.

PN43

THE VICE PRESIDENT: I don't think that ought to be interpreted as some indication that the Australian Services Union is abandoning this agreement or is maintaining some position that it is no longer bound by that agreement.

PN44

MR WARREN: It would be an unfortunate circumstance if that was the case and I don't take what Ms Wright has said to be that case. I'm raising it with the Tribunal on the express instructions of the Managing Director of the Hunter Water Corporation and I raise it and I not your Honour's comments.

PN45

THE VICE PRESIDENT: It's been raised and it's been dealt with.

PN46

MR WARREN: Thank you your Honour.

PN47

THE VICE PRESIDENT: In relation to the substantive objection that the Tribunal can't be satisfied that the union has been genuinely trying to reach an agreement with the employer of the employees who are to be balloted. Ms Wright I think there is probably a need for some evidence from you but it's a matter for you. I don't know whether or not you're proposing to put Ms Arrowsmith in the box and deal with that issue by way of evidence.

PN48

MS WRIGHT: Yes, I think that's the way forward your Honour. I call Ms Arrowsmith.

PN49

THE VICE PRESIDENT: Ms Arrowsmith feel free to take whatever you need to take with you into the witness box and if you need to leave at some point to retrieve a paper from the table feel free to do that as well.

**<NAOMI ARROWSMITH, AFFIRMED** [2.36PM]

**<EXAMINATION-IN-CHIEF BY MS WRIGHT** [2.37PM]

PN50

MS WRIGHT: Ms Arrowsmith have you prepared a short statement for the purposes of today's hearing?---I have.

PN51

Your Honour I'd like to hand up a copy of that statement. Your Honour I'd like to tender that statement.

PN52

THE VICE PRESIDENT: Any objection Mr Warren?

PN53

MR WARREN: No objection your Honour.

**EXHIBIT #2 STATEMENT OF NAOMI ARROWSMITH**

PN54

THE VICE PRESIDENT: You adhere to the correctness of the facts recorded in this statement Ms Arrowsmith?---Yes.

PN55

MS WRIGHT: Ms Arrowsmith what has your role been in relation to bargaining with Hunter Water Corporation?---I've been the bargaining representative for Australian Services Union members employed at Hunter Water Corporation.

PN56

You've heard what Mr Warren has said in relation to the issue of redundancy. Can you tell us when the issue of redundancy was first raised by the Australian Services Union?---In the original log of claims served on the company on the 7th of April. The, there was a dot point there about job security as an employee condition of employment, retaining employees' conditions of employment. Job security was linked directly to the redundancy policy and there was discussions, not at the initial meetings but certainly about part way through, half way through the negotiations. Say some months into the negotiations.

PN57

In your statement you say that negotiations have been held on 16 occasions commencing on 10 February?---That's correct.

PN58

Are you able to tell us approximately when the issue of redundancy was first raised?---I would imagine on the 21st of April when we explained our log of claims to the company. The serving of the log of claims took place on the 7th of April. The company too those, the log of claims to consider and then they asked for an explanation and we went through the log of claims and it would have been explained then.

PN59

Your Honour I do have a copy of the letter that Ms Arrowsmith was just referring to, dated 7 April. I do only have one copy, but given the importance of it I would like to tender it so perhaps I could give the copy to my friend to read.

\*\*\*\* NAOMI ARROWSMITH

XN MS WRIGHT

PN60

THE VICE PRESIDENT: Yes.

PN61

MR WARREN: Thank you.

PN62

MS WRIGHT: I tender that letter.

PN63

MR WARREN: I have no objections.

**EXHIBIT #3 LETTER OF 07/04/2009 FROM MS ARROWSMITH  
TO MS MARTIN**

PN64

MS WRIGHT: You've told us the issue of redundancy was raised during a number of meetings. Have there ever been any other occasions when the issue of redundancy has been raised?---I've had verbal discussions with Phil Donnan who is one of the senior managers in the human resources department of Hunter Water Corporation. I've spoken to him by telephone and had discussions.

PN65

THE VICE PRESIDENT: Was this prior to 26 August?---Yes it is.

PN66

Ms Arrowsmith you've heard the way Mr Warren has put the objection?

PN67

MS WRIGHT: Yes.

PN68

THE VICE PRESIDENT: There is a letter of 26 August in exhibit 1 that attached a list of outstanding matters and inferentially it's put that redundancy is not there. There is a confirmation back from Hunter Water on 27 August and then redundancy, on Mr Warren's version, becomes an issue after that. What's your response or explanation?---The fact that that's not in that, that redundancy is not referred to in the correspondence is an oversight by me. I'm the person who signed that letter. It has been an issue and an ongoing issue and I've had discussions with Phil, as I said Phil Donnan from Hunter Water Corp about how important that redundancy policy going into the agreement was to our members, and that was on several occasions by telephone.

PN69

That was before 26 August?---Yes it was.

PN70

Your simple explanation is oversight?---I signed that letter so it's an oversight by me.

PN71

THE VICE PRESIDENT: Okay. Anything further Ms Wright?

\*\*\*\* NAOMI ARROWSMITH

XN MS WRIGHT

PN72

MS WRIGHT: No further questions your Honour.

PN73

THE VICE PRESIDENT: Mr Warren? Would like a short adjournment to get some instructions?

PN74

MR WARREN: I would like to do that your Honour.

PN75

THE VICE PRESIDENT: You understand that the legislation obliges the Tribunal to deal with these matters within two working days if it's at all reasonably practicable and hence the short listing puts pressure on everyone. I understand you may need to get some instructions.

PN76

MR WARREN: If your Honour will give me 10 minutes I'll make a phone call.

PN77

THE VICE PRESIDENT: Certainly. I'll adjourn for 10 minutes.

**<SHORT ADJOURNMENT**

**[2.42PM]**

**<RESUMED**

**[3.04PM]**

PN78

THE VICE PRESIDENT: Are you in a position to proceed Mr Warren?

PN79

MR WARREN: Your Honour I am, I've spoken to Mr Donnan.

PN80

THE VICE PRESIDENT: Sorry, you've spoken to?

PN81

MR WARREN: Mr Donnan, the person mentioned by Ms Arrowsmith as the person she has spoken with.

**<CROSS-EXAMINATION BY MR WARREN**

**[3.04PM]**

PN82

MR WARREN: Ms Arrowsmith you indicate in your letter that has become exhibit 3, do you have a copy of that with you? You indicate at the top of the second page of that letter that job security was an employment condition that was sought by your members to be included in the agreement. Do you see that?---Yes.

PN83

You know don't you that minutes of these meetings, of the negotiating meetings are kept?---Yes, yes.

PN84

Indeed I understand that they are taken by a representative from Hunter Water Corporation?---Yes.

PN85

They are circulated and amongst the persons who get on is you?---Yes.

PN86

Can I suggest to you and this is on instructions from Mr Donnan who you have mentioned, that he tells me that the issue of job security was raised by the unions in the context of labour hire operations and a concern that labour hire persons if they were to be hired should receive the same benefits as Hunter Water Corporation and the union sought undertakings with respect to labour hire companies. What do you say about that?---That is one of the things that was discussed, yes.

PN87

Can I suggest to you further that the issue of redundancy pay and a claim for it to be inserted in the agreement is not found in any of the minutes of any of the meetings that you have identified in your statement which range from, certainly you indicated on 21 April that job security was raised. As I understand it, it was in the context of labour hire and from that time forward there is no minute of any issue of redundancy pay being raised in any of the negotiations in the minutes? ---Well I don't have a copy of those minutes in front of me to be able to read them and to confirm that. I know that there were discussions took place. I also know that those minutes that were kept were also a record of what tasks people were supposed to carry out, but I know that the job security, as redundancy, was an issue that was discussed.

PN88

Can I suggest to you that it was discussed very, very early in the piece and it was then abandoned?---No, it has never been abandoned. There were a lot of issues that were discussed early in the piece and as you can see that some of the outstanding from the correspondence that you presented that there was still some 17 matters outstanding as late as, I think that was late August that correspondence.

\*\*\*\* NAOMI ARROWSMITH

XXN MR WARREN

PN89

Can I suggest to you that it was not a slip of your pen in not including, it was not included because it has been abandoned?---No, that's not correct.

PN90

Can I further suggest to you that you have not raised it orally with Mr Donnan since very early, back in February of this year?---No, that is no, absolutely not correct.

PN91

I see. Can I further suggest to you that the first time you raised it orally with Mr Donnan was last week prior to the meeting?---Absolutely not correct.

PN92

I see. Thank you.

PN93

THE VICE PRESIDENT: Ms Arrowsmith when you've raised it with Mr Donnan was that only in meetings amongst those listed in paragraph 7 of your statement, exhibit 2, or did you raise it in other discussions outside those meetings?---They've been raised in other discussions outside of those meetings.

PN94

Or both?---Both, but other discussions outside of those formal single bargaining unit meetings.

PN95

Do you agree that the claim for redundancy that is being pressed at the moment is a claim to merely incorporate into the agreement the redundancy entitlements that are found in existing Hunter Water policy?---That's correct, the current policy.

PN96

Ms Wright, do you have any re-examination?

PN97

MS WRIGHT: No your Honour.

PN98

THE VICE PRESIDENT: Can I just ask you this? As you sit there today?  
---Yes?

PN99

What are the issues that separate the union and Hunter Water?---Two issues. Having the redundancy policy included in the agreement is one and the other is the amount of the pay offer, in particular for the third year of the agreement.

PN100

Does that mean that there has been a resolution in relation to the other outstanding matters that have been listed?---Yes. We even formed two subcommittees to work on some of the larger parts of Hunter Water's claim which was a new pay structure and the consolidation of the three documents, or five documents including the other unions, so we formed two subcommittees to try and non have the core agreement bogged down with those negotiations and we got to a point where there is the two outstanding matters as far as our members are concerned.

\*\*\*\* NAOMI ARROWSMITH

XXN MR WARREN

PN101

Doing the best you can, what's your recollection of Mr Donnan's response to you on the occasions when you raised redundancy?---They don't want, they said that they didn't, or Phil Donnan said that he did not want policy, Hunter Water policy incorporated in the agreement. I've explained to him that it's an extremely important issue for our members to have in particular the current redundancy policy included in the agreement. His response is that - - -

PN102

Because the policy can be changed?---Because the policy can be changed. He said he wouldn't change the policy without consultation. I said it's not the consultation that we're concerned about, it's the current entitlements that we're concerned about.

PN103

Anything arising from that on your part Mr Warren?

PN104

MR WARREN: No thank you your Honour.

PN105

THE VICE PRESIDENT: Ms Wright?

PN106

MS WRIGHT: No thank you.

PN107

THE VICE PRESIDENT: Thank you Ms Arrowsmith, you're free to go back to the bar table.

PN108

THE VICE PRESIDENT: Mr Warren I'm just concerned as to what the correct way forward is. Should we be getting Mr Donnan on the phone to give some evidence? Can I just reveal my provisional thinking?

PN109

MR WARREN: Thank you, your Honour.

PN110

THE VICE PRESIDENT: The mere fact that a claim, a new claim is advanced during the course of bargaining, including at a late stage does not automatically mean that the party raising the claim is not genuinely trying to make an agreement. Rather it would have the capacity to constitute evidence in support of such a proposition and whether it established the proposition would depend upon all the circumstances of the particular case. By that I mean that one can readily conceive of circumstances where new claims are raised not in good faith but merely to frustrate the conclusion of an agreement so that there can be an opportunity to take industrial action and apply pressure to achieve a better wages outcome for example.

PN111

I'm just having some difficulty seeing how in this particular case even if Mr Donnan was accepted, that one could characterise the union's conduct as amounting to conduct that allowed an inference to be drawn that the union was not genuinely trying to reach an agreement for the following reasons. This is not a new claim in a pure sense but rather it's an attempt to formalise what is an existing entitlement policy albeit a policy that can be changed. Secondly, redundancy entitlements are not a piece of industrial exotica. It's a pretty stock standard category of entitlement that unions typically seek to include in agreements.

PN112

MR WARREN: I'm sorry to interrupt your Honour but there are issues of redeployment as well within this policy which go to more than just simply, it is a package of redundancy payments, voluntary redundancy payments, forced redundancy payments as a last resort, redeployment options, salary to be maintained during redeployment. It's a package a little bit more than just your standard redundancy clause. I just raise that point.

PN113

THE VICE PRESIDENT: Mind you it's not uncommon for redundancy provisions to have redeployment options such as compulsory redundancy as a last resort and the like.

PN114

MR WARREN: I understand that.

PN115

THE VICE PRESIDENT: That was the second point. The third point is that the advice in the email of 12 October to members which was forwarded to you by Mr Donnan which forms part of exhibit 1, it just has the ring of industrial truth to it. One can well imagine that members would regard this as a significant item and

that it would be apt to be inclined to express the view recorded in that email. Finally, to make out your objection really involves me in rejecting, would necessarily involve me in rejecting Ms Arrowsmith's evidence that the failure to include redundancy in the list of outstanding issues was an oversight on her part.

PN116

It seems to me that although there are connections between that evidence and the evidence about the issue being raised with Mr Donnan, the two are not inextricably linked and I just have difficulty seeing how I could properly find on the basis of Mr Donnan's evidence that Ms Arrowsmith was just telling lies when she said it was an oversight. It struck me that she wasn't telling lies.

PN117

MR WARREN: Your Honour I don't think that Mr Donnan in his telephone conversation with me is suggesting that Ms Arrowsmith was telling lies. He may well have been suggesting that she may have been incorrect in her memory, but I don't think I could leave on the record any suggestion that Mr Donnan is saying that Ms Arrowsmith is telling lies.

PN118

THE VICE PRESIDENT: All right.

PN119

MR WARREN: I don't think their relationship has got to that stage.

PN120

THE VICE PRESIDENT: If one then accepts that evidence that it was an oversight and that at all times this was a material issue at least in Ms Arrowsmith's own mind, I'm struggling to see how that could then be found that the raising of the claim at the time it was raised is indicative of the union not genuinely not trying to make an agreement. It's in the context of those thought bubbles if I can describe them that way, that I ask you whether or not that we need to have evidence from Mr Donnan and if you think we do then we should get a VoicePoint in here and get him on the phone.

PN121

MR WARREN: I don't believe that Mr Donnan's oral evidence would in any way differ from what I have informed the Tribunal of. I don't believe it would necessarily, and if your Honour is of the view that your Honour has expressed now, and I'm not - - -

PN122

THE VICE PRESIDENT: I express those as provisional views only because there are practical issues here. Do we have to adjourn to give Mr Donnan an opportunity to give evidence in person and so on and so forth.

PN123

MR WARREN: I understand your Honour. It is an issue that I was instructed to raise and we understand your Honour's current understanding of our position and I don't believe hearing face-to-face or oral evidence over the telephone from Mr Donnan would change the submission I'm putting and therefore it would not necessarily change your Honour's preliminary indication to us and I wouldn't want to put - - -

PN124

THE VICE PRESIDENT: I just simply wanted to leave, make sure that you were equipped with the knowledge of what my provisional thinking was so that you can make the appropriate call on whether or not you wish to call evidence from Mr Donnan. It's a matter for you whether you do or you don't.

PN125

MR WARREN: I am making that call on my feet, with all those immunities. I make that call and if the evidence of Mr Donnan is as he has expressed it on the phone to me and as I have accurately expressed it to this Tribunal, and with your Honour's hearing of Ms Arrowsmith's evidence and understanding of Ms Arrowsmith's evidence I don't believe Mr Donnan's face-to-face evidence or oral evidence would take your Honour any further.

PN126

THE VICE PRESIDENT: Fine. Thank you Mr Warren I appreciate the candour of counsel. Does that mean the evidence is concluded?

PN127

MR WARREN: It is.

PN128

THE VICE PRESIDENT: Are there any further submissions that you wish to make Mr Warren given that you're sort of the moving party so far as the objection is concerned?

PN129

MR WARREN: Just one, more by way of observation your Honour. We note that there is an application by the AMWU. We note it's not listed before your Honour, for very good reasons.

PN130

THE VICE PRESIDENT: It was only received today.

PN131

MR WARREN: Yes, by us today as well and it's listed for tomorrow. If your Honour is of a mind to, when your Honour announces your decision here I would like to make a submission with respect to the AMWU if that's possible.

PN132

THE VICE PRESIDENT: Fine, certainly.

PN133

MR WARREN: I understand that the ETU is part of the single bargaining unit.

PN134

THE VICE PRESIDENT: There will be an application from them as well.

PN135

MR WARREN: When the Hunter Water Corporation received the Australian Services Union application it was anticipated that there might be another two. We've only got another one at this stage.

PN136

THE VICE PRESIDENT: Look, it's a matter for the parties but there is no need to convene a physical hearing to deal with these successive applications

necessarily depending upon the position, particularly the position that Hunter Water takes, and they can be done by telephone to the extent that that would be a convenient course.

PN137

MR WARREN: Thank you your Honour.

PN138

THE VICE PRESIDENT: Ms Wright I don't need to hear from you in all the circumstances. This is an application by the Australian Services Union for a protected action ballot order. An application made pursuant to Section 437 of the Fair Work Australia Act 2009. Mr Warren of counsel appears for the respondent employer, Hunter Water Corporation and sought to take one objection only to the making of the order for the granting of the application, namely that the Tribunal could not be satisfied that the requirement in Section 443(1)(b) had been met, namely that Fair Work Australia 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. There has been a discussion or an exchange between the Bench and the bar table in relation to this and these reasons should perhaps be read in conjunction with that exchange. There is a statement from Ms Arrowsmith, Assistant Secretary of the Australian Services Union who has been the bargaining representative for the employees of Hunter Water for the purposes of negotiating a new collective agreement. Her statement at exhibit 2 sets out a brief summary of the circumstances that have obtained in relation to negotiation and I note that negotiations have been held on 16 occasions since February of this year.

PN139

The primary - I withdraw that. The basis upon which Hunter Water's objection is advanced as being the alleged late introduction of a claim for redundancy entitlements, exhibit 1 is a bundle of documents that contains correspondence passing between the parties and some relevant emails. On 26 August 2009 the ASU wrote to Hunter Water and included a list of 17 outstanding matters from the single bargaining unit log of claims. Redundancy does not appear amongst that list of matters.

PN140

A letter of 28 August 2009 to Ms Arrowsmith from Ms Marvin of Hunter Water refers to the letter from Ms Arrowsmith and notes:

PN141

*With regards to your list of outstanding items, we note that there may be some items -*

PN142

And I note the plural:

PN143

*- SBU consider outstanding that have been omitted from this list. We have included these in the list below.*

PN144

And there follows then a list with 18 items, that includes as the eighteenth item the right of entry clause. There is no reference to redundancy in either of those lists. Exhibit 1 also includes an email from the ASU to, one infers from the

addressing of the email, relevant members which records the outcome of the meeting of members of the preceding Friday, which:

PN145

*Overwhelmingly we voted to reject Hunter Water's offer.*

PN146

The email notes the biggest concerns raised by members were redundancy entitlements and the capacity for those entitlements to be taken away, and a dissatisfaction with the pay increase offered by Hunter Water. I fully accept that the late raising of claims may be indicative that a union is not genuinely trying to reach an agreement and that the raising of such claims is designed to frustrate the conclusion of an agreement. It does not follow, however, that the mere raising of a related claim automatically means the union is not genuinely trying to reach an agreement. And the complexion that is to be placed on the late raising of claims must depend upon all the circumstances of the case.

PN147

In this particular case I am not satisfied that the omission of redundancy from the list of outstanding items in the correspondence to which I have referred, and the subsequent raising of redundancy as a big item, is a proper basis to conclude that the ASU is not genuinely trying to reach an agreement. Ms Arrowsmith gave evidence that in fact redundancy had been raised during the negotiations, and specifically raised with Mr Donnan - that's D-o-n-n-a-n - both during some of the meetings listed in paragraph 7 of her statement and in other conversations. Mr Warren, after an adjournment for the purpose of obtaining instructions from Mr Donnan, undertook the cross-examination in which he suggested that Ms Arrowsmith had only raised redundancy very early in the negotiations, in fact in February, and that redundancy had thereafter been abandoned and that there had not been a raising of redundancy as an issue in the later meetings.

PN148

Ms Arrowsmith rejected that suggestion. Mr Warren has been offered an opportunity to call evidence from Mr Donnan, but has declined to do so, no doubt given the provisional indications that I gave that it seemed to be difficult, even if Mr Donnan's evidence was accepted, to conclude that the union was not genuinely trying to reach agreement in the particular circumstances of this case. There are two relevant circumstances that cause me, in particular, to express that provisional view. Firstly, the claim for redundancy is not a new claim in the sense that employees of Hunter Water have an existing entitlement to redundancy under Hunter Water policy and the claim that is being advanced seeks to incorporate into the agreement the existing policy entitlements. And in that sense the claim is not something wholly new.

PN149

Secondly, Ms Arrowsmith gave evidence, on which she was not challenged, that the failure to include redundancy in the list of outstanding items in the correspondence, to which I have referred, was an oversight on her part. I can see no basis to reject that evidence and I accept it. I would add, moreover, that a claim for redundancy is an unremarkable claim in the sense that redundancy is a topic commonly addressed in collective agreements. In all the circumstances I am not satisfied that the ASU is not genuinely trying to reach an agreement with

Hunter Water and accordingly I am not prepared to uphold the objection advanced on behalf of Hunter Water.

PN150

I am otherwise satisfied that the requirements of the Act have been met and Mr Warren, on behalf of Hunter Water, took no issue in relation to the other requirements of the Act and accordingly, I propose to grant the application and to make an order. In terms of the order that has been proposed, is there any issue in relation to the content of the order, Mr Warren?

PN151

MR WARREN: No there isn't, your Honour.

PN152

THE VICE PRESIDENT: The draft order. Ms Wright, 3.2 in the draft order?

PN153

MS WRIGHT: I'm sorry, your Honour?

PN154

THE VICE PRESIDENT: Clause 3.2. I just don't have all the submissions at my fingertips. But are those employees now excluded? They were under the WorkChoices regime, but I'm not sure that they are under the Fair Work regime. This used to be a standard clause in pre Fair Work orders and they used to refer to AWAs and no doubt somebody has updated the individual agreement based transitional instrument. But I'm just not sure that there's any statutory warrant to exclude that class of employees.

PN155

MS WRIGHT: Sorry, we can strike 3.2 in the order.

PN156

MR WARREN: I think your Honour is right in that observation.

PN157

THE VICE PRESIDENT: Yes. Now I'm going to embarrass myself by asking a question that I shouldn't be asking, which is about why it's confined to members of the ASU. Unless that's a shorthand way of saying the employees for whom there are bargaining representatives?

PN158

MS WRIGHT: That is a shorthand way of saying it's the employees for whom we are bargaining agent.

PN159

THE VICE PRESIDENT: Right. Well, that's fine. Now, have you spoken to the Electoral Commission about the - can I just say, the form of order that will be issued will be different to this form. There are, not unreasonably, the parties have sought to adapt the sort of standard form of order that was being used by the Commission prior to the commencement of the new legislation. But there are some things that do not need to be in the order as a result of the change in the legislation. For example, item 2. That's something that happens by operation of statute now. But the Electoral Commission has asked the tribunal to allow, if I can now recollect, it was 20 working days unless there's a pre-agreed time table to give them enough time to make sure that the ballot is going to be finished in time.

PN160

MS WRIGHT: Yes.

PN161

THE VICE PRESIDENT: And if there's an arrangement by which for an earlier close date, that's fine. And the Electoral Commission's approach is that they will conduct the election as expeditiously as possible. And if it finishes earlier, it finishes earlier.

PN162

MS WRIGHT: Yes.

PN163

THE VICE PRESIDENT: So have you spoken to them at all, or is that the date

- - -

PN164

MS WRIGHT: We have provided them with a copy of the application. I'll just get instructions about that. So we have emailed them a copy of the application, but we haven't spoken to them specifically about the timing issue.

PN165

THE VICE PRESIDENT: So in that case what I'll do is this. Is I will - what I'll be proposing to do is this, subject to your submission. Is to make provision for the 20 working days that they ask for, which will mean that it will be a date after 6 November, unless I hear from you before the end of the afternoon that you've got the agreement from the AEC for an earlier date.

PN166

MS WRIGHT: All right.

PN167

THE VICE PRESIDENT: And that will mean either that there will be an earlier date if you notify me before the end of the afternoon, and I'll wait until 5 before the order issues, or alternatively you can seek to have the AEC conduct the ballot in an expeditious time that will see it concluded before the date that will be substituted in item 4.

PN168

MS WRIGHT: Yes, okay. Thank you, your Honour.

PN169

THE VICE PRESIDENT: Now, could I just ask you about the questions. I've got a personal view about the emerging juris prudence in relation to questions. But there are a number of Full Bench decisions now which I regard myself as bound by sitting as a single member. Do you wish to re-visit question one in particular? The question is, does that adequately disclose the nature of the industrial action of the employees being asked to approve what's a portion of work and the only question is whether or not Ms Arrowsmith would like to confine that in some fashion. I'm not going to force you to do it, but you might find yourself in strife in due course if you haven't. Secondly, in question 8, I assume that's a ban on attaching signage to buildings?

PN170

MR WARREN: Mm.

PN171

THE VICE PRESIDENT: Or is that industrial action the form of attaching signage to buildings? Presumably signage they don't want to see?

PN172

MS WRIGHT: That's right. In the form of.

PN173

THE VICE PRESIDENT: Bans on attaching signage?

PN174

MS WRIGHT: No, industrial action in the form of attaching signage about the campaign.

PN175

THE VICE PRESIDENT: Yes.

PN176

MR WARREN: That wasn't the way I read it, your Honour, I must say. If that is the case, then there will clearly be concerns on the part of Hunter Water with respect to what might be posted all over their buildings.

PN177

THE VICE PRESIDENT: Well - - -

PN178

MR WARREN: And to what extent that that interference with that attachment might then involve interference with an industrial campaign. It raises all sorts of issues. If, for example, the members of the ASU decide to hang a banner from the top floor - - -

PN179

THE VICE PRESIDENT: I imagine that's exactly what they're imagining they're planning to do, Mr Warren.

PN180

MR WARREN: I could imagine that too. But it may provoke issues of interference with an industrial campaign, but we'll cross that route when we come to it. When the banner is taken down.

PN181

THE VICE PRESIDENT: Just off the top of my head, Mr Warren, what we are here involved in is a step in a process, the end result of which from the union's perspective will see industrial action being protected. What does that mean? It means that the action will not be amenable to being - - -

PN182

MR WARREN: Subject to suitable - - -

PN183

THE VICE PRESIDENT: No. Well, being restrained.

PN184

MR WARREN: Yes.

PN185

THE VICE PRESIDENT: Or subject to an order that it stop.

PN186

MR WARREN: Yes.

PN187

THE VICE PRESIDENT: That in no way, though, is going to provide some statutory power to do things as part of the union and it will in no way, it seems to me, interfere with your client's rights in relation to its property.

PN188

MR WARREN: And to the piece of the ..... market's property.

PN189

THE VICE PRESIDENT: Yes, exactly. Now, one can imagine all sorts of scenarios that can give rise to quite tricky legal questions. An employee attaches a sign to their council motor vehicle, council instructs them to take it off, they refuse the instruction, they then are disciplined for that, terminated. And they would then say well, I was engaging in industrial action and it was not unprotected. It was protected industrial action - - -

PN190

MR WARREN: Whether it be protected or otherwise.

PN191

THE VICE PRESIDENT: Yes. And then the employer would say well, you were given a lawful direction to take it down and the fact that you are engaging in industrial action doesn't mean, doesn't absolve you from your obligation to comply with lawful requirements.

PN192

MR WARREN: And it is a reasonable requirement, and away you go.

PN193

THE VICE PRESIDENT: Yes. And then there'd be a debate about whether in normal circumstances it was harsh, unjust or unreasonable, of course.

PN194

MR WARREN: Yes.

PN195

THE VICE PRESIDENT: But at the moment I'm not persuaded that this is, that I should be refraining from - sorry - not permitting this question to go forward because your client's rights are not directly infringed or inhibited by it.

PN196

MR WARREN: I understand what your Honour is saying.

PN197

THE VICE PRESIDENT: I think now you are going to get some instructions from Ms Arrowsmith about - Ms Arrowsmith, you should feel free to talk directly, if you want. It doesn't all need to be written through Ms Wright. But if you'd like to do that as well. About question 18 might suffer from the same problems, if not worse. Bans and limitations in relation to what. And I think there is in fact a decision that says, just referring to bans and limitations without specifying what their bans and limitations are about, may fall foul of the requirement to specify the nature of the industrial action.

PN198

MS WRIGHT: Your Honour, we're in your hands in relation to those observations. I mean, these are what I'm instructed to pose today.

PN199

THE VICE PRESIDENT: No, Ms Wright, I'm not going to do that. It's your call. I'm not devising the questions. I'm simply flagging a potential problem with questions 1 and 18. Actually, I shouldn't do that. You're quite right. I've got to make a call. I have a difficulty with 18. I have difficulties with 1 and 18 as on the existing authorities not adequately disclosing the nature of the industrial action that the employees are being asked to approve.

PN200

MS WRIGHT: Yes. And your Honour, as I look through the list I think that we have been reasonably specific from 2 through to 17.

PN201

THE VICE PRESIDENT: You certainly have.

PN202

MS WRIGHT: And we would actually be happy to strike 1 and 18 away from the draft orders sought.

PN203

THE VICE PRESIDENT: I think in relation to item 6 I have come to the view in the past that there is no power in the tribunal to make an order of that sought. If you'd like to point to a power, you can. The power seems to reside in the ballot agent to do that, or to require that. If you want to make a contrary submission, feel free.

PN204

MS WRIGHT: No. We'd be happy to strike clause 6 as well.

PN205

THE VICE PRESIDENT: And there seems to be a fetish amongst members of registry staff and parties, to want to limit the period within which orders are enforced. And that seems to be a hangover from the pre WorkChoices legislation that required, specifically awards, to have a period within which they operated, and then there's another provision that said unless they were revoked or set aside, that they continue to operate beyond that nominal period. But there's no warrant for that and, I think, in relation to an order of this sort, in relation to most orders that are made. So is there anything further from you, Ms Wright?

PN206

MS WRIGHT: No thank you, your Honour.

PN207

THE VICE PRESIDENT: From you, Mr Warren?

PN208

MR WARREN: No your Honour, thank you.

PN209

THE VICE PRESIDENT: right. Mr Warren, I take it that there is some prospect that you will be, your retainer will extend to the other application or applications that are going to have to be dealt with?

PN210

MR WARREN: It would have if I were available tomorrow afternoon. I'm not. We understand the statutory injunction - - -

PN211

THE VICE PRESIDENT: Well, can you just indicate to Hunter Water and those that instruct you that if they're not going to be pressing any substantive objection, that there is no need to attend physically.

PN212

MR WARREN: Thank you, your Honour.

PN213

THE VICE PRESIDENT: And we can conduct the hearing by telephone.

PN214

MR WARREN: And Hunter Water will contact your associate accordingly, your Honour.

PN215

THE VICE PRESIDENT: Fine, thank you.

PN216

MR WARREN: Thank you.

PN217

THE VICE PRESIDENT: So Ms Wright, I may or may not hear from you before 5 o'clock in relation to the date of closing. If I do, the order will be amended accordingly. If I don't, it will be 20 working days. The tribunal is adjourned.

**<ADJOURNED ACCORDINGLY**

**[3.45PM]**

<b>LIST OF WITNESSES, EXHIBITS AND MFIs</b>
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<b>EXHIBIT #1 RESPONDENT'S BUNDLE OF DOCUMENTS .....</b>	<b>PN16</b>
<b>NAOMI ARROWSMITH, AFFIRMED.....</b>	<b>PN49</b>
<b>EXAMINATION-IN-CHIEF BY MS WRIGHT .....</b>	<b>PN49</b>
<b>EXHIBIT #2 STATEMENT OF NAOMI ARROWSMITH .....</b>	<b>PN53</b>
<b>EXHIBIT #3 LETTER OF 07/04/2009 FROM MS ARROWSMITH TO MS MARTIN.....</b>	<b>PN63</b>
<b>CROSS-EXAMINATION BY MR WARREN.....</b>	<b>PN81</b>
<b>THE WITNESS WITHDREW .....</b>	<b>PN107</b>