

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

1032599-1

VICE PRESIDENT LAWLER

B2011/4108

s.424 - Application to suspend or terminate protected industrial action - endangering life etc.

**State of Victoria
and
CPSU, the Community and Public Sector Union
(B2011/4108)**

Melbourne

10.15 AM, TUESDAY, 24 JANUARY 2012

Continued from 21/12/11

PN158

THE VICE PRESIDENT: Good morning. First of all, apologies to counsel and the parties and others that have attended for the late start this morning. A certain set of circumstances have occurred that were entirely my fault that are responsible for that delay and I apologise. I note your appearance, Mr Borenstein, for the union, and Mr Wood, for the State of Victoria. I take it there's no objection for permission to appear be granted? There's isn't?

PN159

I can tell the parties that the Bench that's been constituted for this matter consists of myself, Senior Deputy President Acton, and Commissioner Roe. Commissioner Smith will remain available to assist the parties in relation to any prospect of a negotiated resolution. I think with the 21 days past, and I assume that counsel are in agreement that the only way the matter can be resolved by consent now is through a consent workplace determination.

PN160

It strikes me that an early thing that ought to occur is a preparation exchange of proposed draft determinations. I was interested to know what the reaction of counsel was to that.

PN161

MR BORENSTEIN: Your Honour, perhaps, I can tell your Honour where we're up to with that.

PN162

THE VICE PRESIDENT: Yes.

PN163

We've had discussions about what would be a useful opening step in relation to the arbitration.

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THE VICE PRESIDENT: Yes.

PN165

MR BORENSTEIN: The document around which the parties are arguing, or negotiating is some 200 pages.

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THE VICE PRESIDENT: Yes.

PN167

MR BORENSTEIN: Some of it is routine, some of it is particular schedules for particular parts of the workforce.

PN168

THE VICE PRESIDENT: I should say that I've been kept apprised in the most general way by Commissioner Smith about the course of the negotiations, only because he reports to me in the capacity as panel head to keep me informed about what he's up to on that and other matters.

PN169

MR BORENSTEIN: Yes. We're not - - -

PN170

THE VICE PRESIDENT: So I have no particular knowledge beyond this: I understand that the parties had made substantial progress in discussions thus far. There was still some significant matters that separated them.

PN171

MR BORENSTEIN: Yes.

PN172

THE VICE PRESIDENT: But that a (indistinct) - or a comment about the nature of a lot of the material not being contentious - you didn't use that word, Mr Borenstein, but I think that's the affect of it, I imagined - say I imagined - - -

PN173

MR BORENSTEIN: What we're interested - what we're interested - sorry, your Honour.

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THE VICE PRESIDENT: Yes.

PN175

MR BORENSTEIN: What we were interested to do was to come as quickly as possible between the parties - - -

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THE VICE PRESIDENT: Yes.

PN177

MR BORENSTEIN: - - - to a position where we can identify the matters that are agreed as required under the Act - - -

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THE VICE PRESIDENT: Yes.

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MR BORENSTEIN: - - - and the matters that require determination.

PN180

THE VICE PRESIDENT: Yes.

PN181

MR BORENSTEIN: And some efforts have been made between the parties to try and get to that point without an outcome and for that reason we thought - and I should also tell your Honour that there are some 20-odd other bargaining representatives who filed bargaining representative notices who aren't here today. I don't think they were notified about today's hearing - - -

PN182

THE VICE PRESIDENT: Yes.

PN183

MR BORENSTEIN: - - - and they may wish to be heard in terms of an arbitration, we're not sure. But can I hand up to your Honour a minute of a proposed direction which we discussed with our friends and which is acceptable to them. And the idea of it is that the parties and the other 20-odd people being invited or directed to attend on Commissioner Smith - - -

PN184

THE VICE PRESIDENT: Yes.

PN185

MR BORENSTEIN: - - - at a time convenient to him - - -

PN186

THE VICE PRESIDENT: Yes.

PN187

MR BORENSTEIN: - - - to sit down and specifically go through the document and identify those things that are agreed, those that are not. And your Honour will see in paragraph 1(c) there's an additional element which is that the State of Victoria has flagged that there are some clauses in respect of which they may wish to raise a jurisdictional objection under re AEU, and - but they haven't told us which clauses they are. And so this process would also produce an identification of the clauses that they say they want to raise the issue - - -

PN188

THE VICE PRESIDENT: I think I should ask Mr Wood now, shouldn't I?

PN189

MR BORENSTEIN: Well - - -

PN190

THE VICE PRESIDENT: Mr Wood - - -

PN191

MR BORENSTEIN: I'm content for you to ask him, if you can get an answer out of him I'll be more than happy.

PN192

THE VICE PRESIDENT: Mr Wood, that's a matter on which senior counsel has no doubt turned to his mind with some care. You must be in a position to adopt a - at least a general position in respect of re AEU. Let me just see if my memory is serving me correctly. Melbourne Corporation and the High Court tells us that there's no constitutional power to interfere with the operations of the State. Re AEU doesn't extend that principle to apply to every employee of the State, but what it does say is that it's for the State to decide what the total number and mix of its workforce is like.

PN193

MR WOOD: Exactly.

PN194

THE VICE PRESIDENT: And so I assume that the re AEU arguments depend upon an argument that says what you're seeking to achieve here is seeking to foist onto us some limitation on how we choose the sizing composition of our workforce.

PN195

MR WOOD: That's as we imagine we'll be instructed to put the argument, but I need to get my final instructions on the argument.

PN196

THE VICE PRESIDENT: I just - do you say that arises solely and without further ado from the wages claim?

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MR WOOD: No.

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THE VICE PRESIDENT: Right.

PN199

MR WOOD: Subject to instructions, no.

PN200

THE VICE PRESIDENT: Okay. Are you able to shed any further light then on how it does - - -

PN201

MR WOOD: The clauses - without - this is all subject to final instructions - - -

PN202

THE VICE PRESIDENT: Yes.

PN203

MR WOOD: - - - but the sort of clauses that might impose an issue are the sort of clauses that you have suggested might cause an issue and those are the sort of clauses to deal with - I think as you've just observed, your Honour - - -

PN204

THE VICE PRESIDENT: The State doesn't want to say anything about it at the moment.

PN205

MR WOOD: Exactly. Exactly.

PN206

THE VICE PRESIDENT: Well, the State is going to need to adopt a position fairly promptly about that.

PN207

MR BORENSTEIN: I beg your pardon, your Honour?

PN208

THE VICE PRESIDENT: The State is going to need to adopt a position fairly promptly about that.

PN209

MR BORENSTEIN: We - we - - -

PN210

THE VICE PRESIDENT: You can't - you can't proceed during a directions preparation period totally on the basis that, "Well, we'll articulate that argument if and when it feels convenient to those that instruct you."

PN211

MR BORENSTEIN: We understand that.

PN212

THE VICE PRESIDENT: Yes.

PN213

MR BORENSTEIN: The intention is that in this process that's in the directions that this would be identified.

PN214

THE VICE PRESIDENT: Mr Wood, are you - do you share that goal as the directions?

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MR WOOD: We would hope to be able to deal within that timeframe.

PN216

THE VICE PRESIDENT: Okay. Good.

PN217

MR WOOD: We don't - - -

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MR BORENSTEIN: It's not as though it's something that came up yesterday obviously.

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THE VICE PRESIDENT: No, no. And it's - - -

PN220

MR BORENSTEIN: And what we would - and in relation to item 2 in the directions, your Honour, we've discussed this and we would ask for the matter to be relisted in approximately two weeks time to keep the matter moving.

PN221

THE VICE PRESIDENT: Yes.

PN222

MR BORENSTEIN: So that, hopefully, there will be something that the parties can tell the Tribunal in two weeks time: these are the items that are agreed; these are the items that are not agreed; these are the re AEU items, and then we would propose, subject to the Tribunal's view, that after that instead of each party preparing their unproposed determination there be a document which would be largely uncontentious and the points of disagreement would be marked in the document.

PN223

THE VICE PRESIDENT: Look, if you're able to do that - - -

PN224

MR BORENSTEIN: I think that would be much better than having any number of, sort of, thick versions - - -

PN225

THE VICE PRESIDENT: Competing - yes - the tree felling competition.

PN226

MR BORENSTEIN: Yes.

PN227

THE VICE PRESIDENT: Yes.

PN228

MR BORENSTEIN: So subject to this form of direction being acceptable to your Honour - - -

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THE VICE PRESIDENT: Well, that's certainly acceptable to me. Mr Wood, do you have any objections to it?

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MR WOOD: No, your Honour, other than to, perhaps, hand up to your Honour an identification of the 20 other bargaining representatives, and those are persons who will have to be either directed or requested to attend.

PN231

THE VICE PRESIDENT: Yes. Do they - do these bargaining representatives, do any of them act for more than one - sorry - for more than themselves?

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MR WOOD: Yes. Three of them do. Sorry, two of them do and one of them acts for only others. So Mr Chatfield, who is about two-thirds of the way down.

PN233

THE VICE PRESIDENT: Yes.

PN234

MR WOOD: Acts for himself and one other; Ms Napier, acts for herself and one other; and Mr Backasi, is a representative of the Australian Institute of Marine and Power Engineers. He obviously doesn't represent himself but he represents eight marine surveyors - - -

PN235

THE VICE PRESIDENT: Yes.

PN236

MR WOOD: - - - employed by the Department of Transport.

PN237

THE VICE PRESIDENT: Okay. Well make the assumption that there will be some appropriate communication from my Chambers to these bargaining representatives so they can have an opportunity of participating on the next occasion.

PN238

MR WOOD: In my discussions with my learned friend, Mr Bornstein, we thought it more appropriate to come back on the - I think it's 14 February rather than 7 February. That's three weeks rather than two weeks, but we've agreed to two weeks on the basis that if there were some things that still need to be done, including things involving these other 20 bargaining representatives, then - - -

PN239

THE VICE PRESIDENT: Yes.

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MR WOOD: - - - there will be the capacity for Commissioner Smith to tell you that there are - - -

PN241

THE VICE PRESIDENT: I'm inclined to think that the practical way to proceed is to ascertain what agreed course or set of directions can be reached between the two major parties, and then to provide the other bargaining representatives with an opportunity to respond to whatever timetable emerges from that process, rather than necessarily having their input at the initial argument stage, if I can put it that way. So that they need to be accorded procedural fairness but that can be satisfied by giving them an opportunity to comment on any agreed set of directions or partially agreed set of directions that are reached between the major parties.

PN242

I don't think that it's appropriate for the Tribunal if it's going to act practicably to ignore the fact that if you just take away those - not more than, what is it, 25 individuals who are represented by the people on this list that the remaining 35,000 individuals are represented by Mr Borenstein. And, obviously, the State of Victoria is omnipresent as the employer, but it's - I don't know that it's appropriate to have the tail wagging the dog, and provided there's some opportunity for those bargaining representatives to have their say and to persuade us to a different course, the requirements of procedural fairness will be satisfied.

PN243

MR WOOD: We would think so. Are you suggesting, your Honour, that they ought be consulted about these directions or the directions after these directions?

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THE VICE PRESIDENT: No, they will be consulted at directions after these directions.

PN245

MR WOOD: I thought we were at one on that. I just wanted to make sure we weren't at cross purposes.

PN246

THE VICE PRESIDENT: No, these - the proposed today are a practical set of directions that are designed to allow the parties that represent 99.999 per cent of the bargaining parties, if I can put it that way, work out a practical way forward for the - an efficient hearing, which is really what this is ultimately about if you can't reach a settlement.

PN247

MR WOOD: From our perspective that's what's it about.

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THE VICE PRESIDENT: Anything further from you, Mr Borenstein?

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MR BORENSTEIN: No, your Honour, we're in agreement with the date around 7th if you can fit that in.

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THE VICE PRESIDENT: Yes. Well, no - this will be - the matter will fitted in on 7th in any event. So I'll stand the matter over until the 7th until - at 9.30am, for a further mention and I make directions in accordance with the minute of proposed direction handed up by Mr Borenstein with the date in item 2 being 14 February 2012. Anything further from you, Mr Wood?

PN251

MR BORENSTEIN: Did your Honour say the 7th or the 14th?

PN252

THE VICE PRESIDENT: 14th - sorry, 7 February 2012. Mr Wood, I didn't hear you pressing too hard for that extra week, and given the approach we're going to take about the bargaining representatives, I think an earlier return rather than a later return is preferable.

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MR WOOD: Yes. We're content with that on the basis that if it's not resolved by the 7th we may be able to deal with the matter on the papers - - -

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THE VICE PRESIDENT: Yes.

PN255

MR WOOD: - - - or by short appearance, or it just depends where we're at.

PN256

THE VICE PRESIDENT: Well, hopefully - hopefully, two weeks is enough time for the parties to, at least, identify if they're not in agreeance.

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MR BORENSTEIN: We would hope so.

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MR WOOD: We would hope so.

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THE VICE PRESIDENT: Yes. Okay. Well, the Tribunal is adjourned and apologies again for keeping the parties waiting.

<ADJOURNED UNTIL TUESDAY, 7 FEBRUARY 2012

[10.29AM]