



DECISION

Fair Work Act 2009
s.739—Dispute resolution

Anthony Gilbert Hicks

v

Woolworths Group Limited and Woolworths (South Australia) Pty Limited
(‘Woolworths’) T/A Woolworths Supermarkets
(C2023/7987)

COMMISSIONER LIM

PERTH, 30 MAY 2024

Alleged dispute about any matters arising under an enterprise agreement – jurisdictional objection – whether dispute is hypothetical – no jurisdiction – application dismissed

1. Introduction

[1] On 19 December 2023, Mr Anthony Hicks made an application to the Commission pursuant to s 739(6) of the *Fair Work Act 2009* (**Act**) for the Commission to deal with a dispute in accordance with the dispute settlement procedure in the *Woolworths Supermarkets Agreement 2018* (**Agreement**).

[2] Mr Hicks is an employee of Woolworths Group Limited and Woolworths (South Australia) Pty Limited (‘Woolworths’) T/A Woolworths Supermarkets (**Woolworths** or **Respondent**). Mr Hicks asserts that there is a dispute between the parties regarding the correct classification for a Woolworths Duty Manager under the *General Retail Industry Award 2020* (**Award**).

[3] Woolworths contends that the Commission does not have the jurisdiction to deal with the dispute.

[4] On 9 February 2024, I issued a Notice of Listing and Directions to the parties regarding Woolworths’ jurisdictional objections. I conducted a hearing on 20 March 2024. Mr Hicks represented himself and gave evidence. Permission was granted to Woolworths to be represented by Mr Matthew Minucci of Counsel.¹

[5] Prior to the hearing of the matter my chambers constructed a paginated court book consisting of submissions and evidence of the parties. References to evidence are by way of the relevant page number in the court book.

[6] For the reasons that follow, I have determined that Mr Hicks’ application should be dismissed.

2. Procedural history

[7] It is helpful to set out the history of this matter upfront.

[8] In Mr Hicks' Form F10 application filed on 19 December 2023, he states that "this dispute is about whether Retail Employee Level 6 is the correct classification for a duty manager in a Woolworths store with departments".²

[9] Mr Hicks' Form F10 also relevantly provides that Woolworths considers all non-salaried duty managers (and employees engaged in this role on a "higher duties" basis) to fall under the Retail Employee Level 6 Classification in the Agreement and in the Award. However, he says that the correct level should be Employee Level 8 in the Award.³ Mr Hicks also provides reasons why a Duty Manager should be classified at a Level 8 in the Award.

[10] It should be noted that the Agreement does not contain a classification equivalent to Level 8 in the Award.

[11] At 3.1 of Mr Hicks' Form F10 application, he identifies that the relief he is seeking is, "A determination that, under the General Retail Industry Award 2020, the correct classification for a duty manager in a Woolworths supermarket with departments would be Retail Employee Level 8. Pursuant to section 206 of the Fair Work Act 2009 (Cth), the relevant employees are entitled to the Award rate for that classification."

[12] On 24 January 2024, Woolworths filed a response to Mr Hicks' application. It relevantly provides that:

- (a) Mr Hicks is employed in a role that is classified as Retail Employee Level 1 under the Agreement. Mr Hicks has never been employed in the role of Duty Manager.
- (b) Duty Manager is an example of a job title with the classification of Retail Employee Level 6 in the Agreement (clause 3.3).
- (c) Up until approximately late 2019, Woolworths engaged employees with the job title of Duty Manager. However the role of Duty Manager was removed from Woolworths' operating model in approximately mid-2019. The duties performed by a Duty Manager were distributed across other store leadership positions.
- (d) Woolworths objects to Mr Hicks' application on the following grounds:
 - (i) There is presently no matter in dispute which might be the subject of an exercise of arbitral power. This is because Mr Hicks has never performed the role of Duty Manager and Woolworths do not presently employ anyone under the Agreement in the position of Duty Manager. Mr Hicks' dispute is therefore entirely hypothetical.
 - (ii) Mr Hicks has not properly followed the dispute resolution clause in clause 22 of the Agreement.
 - (iii) To the extent that Mr Hicks seeks a determination by way of interpretation of the classification provisions under the Award and/or a finding that Woolworths have breached section 206 of the Act, such an outcome would involve an exercise of judicial power outside of the Commission's jurisdiction.

[13] On 30 January 2024, I conducted a conference with the parties. The matter did not resolve. Mr Hicks was asked to confirm the question he seeks determination on. Mr Hicks subsequently advised my chambers that he seeks determination of, “under the Award, what would be the correct classification for a duty manager in a Woolworths supermarket with departments”?

[14] Woolworths subsequently advised chambers that they maintain their first and third jurisdictional objections to Mr Hicks’ application.

3. Evidence

[15] Mr Hicks’ evidence is as follows:

- (a) He has been employed by Woolworths since April 2018. He has been based at the Woolworths Victoria Park supermarket for the entirety of his employment with Woolworths. Until 2022, he performed roles that were classified at his substantive level in the Agreement, Retail Employee Level 1.⁴
- (b) At the start of 2022, he began to perform higher duties in the position of Service Supervisor. Later, he commenced working as an Online Supervisor. Most of his shifts are in one of these positions.⁵
- (c) Mid-way through 2022, he was given an alarm code for all areas of the store. Shortly after, he was also given the combination for the safe.⁶
- (d) On 13 June 2023, he completed the online component of the “Leading the Store” training. Prior to this, his Store Manager at the time showed him how to correctly use Woolworths’ portal for logging safety incidents. On 15 June 2023, he completed the practical component of the “Leading the Store” training.⁷
- (e) He is confident that he performed work as a Duty Manager on 12 August 2022, 7 October 2022 and 18 May 2023.⁸

[16] Mr Hicks also gave evidence that there is a ‘co-disputant’ in this matter. Mr Hicks says that his co-disputant has also worked as a Duty Manager on a higher duties basis. However, he does not wish to reveal his co-disputant’s identity to Woolworths.⁹

[17] Woolworths called Mr Cedar Hogberg, Woolworths Team Experience Partner, to give evidence. Mr Hogberg’s evidence about Woolworths’ operations and the Duty Manager role is that:

- (a) He has worked for Woolworths since 2010 across a variety of roles from checkout to leadership. In 2020, he transferred into the role of Employee Relations Advisor.¹⁰
- (b) In his substantive role he is responsible for providing HR support to Woolworths’ “Zone 2” in Queensland. This encompasses 68 stores in Brisbane and the Sunshine Coast.
- (c) Between 2018 to 2019, Woolworths implemented a staggered restructure of leadership positions in Woolworths supermarkets that was finalised around September 2019.¹¹
- (d) Prior to this restructure, each Woolworths supermarket was led by a Store Manager, with an Assistant Store Manager reporting to the Store Manager. Each department

within the supermarket was led by a Team Manager, who reported to the Store Manager or Assistant Store Manager.¹²

- (e) At some supermarkets, there were also Duty Managers. However, many supermarkets did not have anyone appointed to this position. Instead, Team Managers would act in the Duty Manager role on an as needed basis. Where a supermarket had a Duty Manager, the Duty Manager was typically a part-time role that reported to the Store Manager.¹³
- (f) Duty Managers were responsible to providing whole-of-store leadership where the Store Manager or Assistant Store Manager were absent. Duty Managers were also a point of escalation for any incidents or customer complaints that could not be managed by a relevant Team Manager.¹⁴
- (g) After the restructure, the Duty Manager role was removed. All Woolworths employees who were employed as a Duty Manager were offered redundancy or the opportunity to be considered for redeployment into an alternative role. There are no longer any employees engaged in the position of Duty Manager in Woolworths supermarkets.¹⁵

[18] Regarding Mr Hicks, Mr Hogberg's evidence is as follows:

- (a) Woolworths' time and attendance system is called Kronos, which records each employee's substantive position and instances where they engage in duties that carry a higher rate of pay than their ordinary classification under the Agreement. This is to determine whether the team member is entitled to a higher duties allowance.
- (b) Mr Hicks' Kronos record shows that Mr Hicks commenced employment with Woolworths as a Junior Retail Employee Level 1. Mr Hicks shortly after transitioned to Retail Employee Level 1. Throughout his employment, Mr Hicks's substantive position has remained Retail Employee Level 1. Mr Hicks has never been employed in a Retail Employee Level 6 position. Further, he has never been employed in the position of Duty Manager.¹⁶
- (c) Mr Hicks has performed higher duties during his employment with Woolworths. Woolworths' records show that he has performed higher duties in Retail Employee Level 3 and Retail Employee Level 4 roles, as well as Clerical Officer Level 3.

4. Relevant legislation

[19] The Commission's power to deal with disputes is set out in s 595 of the Act, which provides:

“595 FWC's power to deal with disputes

- (1) The FWC may deal with a dispute only if the FWC is expressly authorised to do so or in accordance with another provision of this Act.
- (2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:
 - (a) by mediation or conciliation;
 - (b) by making a recommendation or expressing an opinion.

- (3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

Example: Parties may consent to the FWC arbitrating a bargaining dispute (see subsection 240(4)).

- (4) In dealing with a dispute, the FWC may exercise any powers it has under this Subdivision.

Example: The FWC could direct a person to attend a conference under section 592.

- (5) To avoid doubt, the FWC must not exercise the power referred to in subsection (3) in relation to a matter before the FWC except as authorised by this section.”

[20] Subdivision B of Div 2 of Pt 6-2 of the Act concerns “Dealing with disputes”. Section 738 of the Act provides:

“738 Application of this Division

This Division applies if:

- (a) a modern award includes a term that provides a procedure for dealing with disputes, including a term in accordance with section 146; or
- (b) an enterprise agreement includes a term that provides a procedure for dealing with disputes, including a term referred to in subsection 186(6); or
- (c) a contract of employment or other written agreement that includes a term that provides a procedure for dealing with disputes between the employer and the employee, to the extent that the dispute is about any matters in relation to the National Employment Standards or a safety net contractual entitlement; or
- (d) a determination under the *Public Service Act 1999* includes a term that provides a procedure for dealing with disputes arising under the determination or in relation to the National Employment Standards.”

[21] Section 739 provides the Commission’s power to deal with disputes as follows:

“739 Disputes dealt with by the FWC

- (1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
- (2) [Repealed]
- (3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.
- (4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

- (5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.
- (6) The FWC may deal with a dispute only on application by a party to the dispute.”

5. Relevant provisions of the Agreement

[22] Clause 22 of the Agreement provides the following dispute resolution process:

“22. Resolving disputes

22.1 Parties to discuss

- (a) A dispute between a team member (or team members) and Woolworths, including a dispute in relation to
 - i. a matter arising under the Agreement; or
 - ii. the NES;should be discussed in first instance at the workplace level between the team member (or members) and their relevant supervisors or management.
- (b) At any stage, Woolworths and a team member or team members may appoint another person to accompany and/or represent them for the purposes of this clause, including a trade union listed in clause 1.3.
- (c) If the dispute remains unresolved, the dispute may be referred to Woolworths People Advisory for it to be escalated to an appropriate representative of Woolworths to assist in resolving the dispute, which may be a more senior member of management or a representative from the Woolworths Culture & People team.
- (d) If, following escalation under clause 22.1.c, the dispute remains unresolved then the matter may be referred to a senior representative of Woolworths (such as the relevant Employee Relations Manager, Head of Workplace Relations or General Manager) for further discussions.

22.2 Referral to FWC

- (a) If the dispute still remains unresolved, then either party may refer the dispute to the FWC for resolution.
- (b) The FWC may deal with a dispute in two stages:
 - i. the FWC will first attempt to resolve the dispute through conciliation;
 - ii. where the matter cannot be resolved by conciliation, at the request of one or both parties, the FWC may arbitrate the dispute.
- (c) In any proceedings before the FWC pursuant to this clause, the FWC may take any or all of the following actions in order to resolve the dispute:
 - i. Convene conciliation conferences of the parties or their representatives at which the FWC is present;
 - ii. Require the parties or their representatives to confer among themselves at conferences at which the FWC is not present;
 - iii. Request but not compel a person to attend and/or give evidence at proceeding;
 - iv. Request but not compel a person to produce documents;
 - v. Where either party requests, make recommendations about particular aspects of a matter about which they are unable to reach agreement.
- (d) Any determination by the FWC following an arbitration must be in writing and must give reasons for the determination.
- (e) In the exercise of its functions under this clause, the FWC must not issue interim orders, ‘status quo’ orders or interim determinations.

- (f) The parties are entitled to be represented, including by legal representatives, in any proceedings under this clause.
- (g) If the FWC arbitrates a dispute, any determination made by the FWC is a decision for the purposes of Division 3 of Part 5.1 of the Fair Work Act and can be appealed.”

[23] Clause 3.3 and Appendix A of the Agreement sets out the classification structure:

“3.3 Classifications

- (a) Woolworths will classify all team members who are covered by this Agreement according to the structure that is contained in Appendix A of this Agreement. Woolworths will advise team members of their classification, and of any changes to their classification or job title, in writing.
- (b) The classification by Woolworths will be according to the skill level (or levels) that are required to be used by the team member in order to perform the principal functions of their employment as determined by Woolworths.
- (c) Woolworths will not require any team member, regardless of their classification, to clean toilets unless the team member has been specifically engaged by Woolworths in a cleaning role.
- (d) Below is a summary of the classifications and some of the example job titles that are included in each classification:

Woolworths Store Teams – All Departments	
Classification	Examples of job titles within this classification
Retail Employee Level 1	Team Member Stocktake Team Member Store Cleaner Trolley Collector (no ride-on equipment) Personal Shopper Store Security/Loss Prevention Officer
Retail Employee Level 2	Trolley Collector (ride-on equipment)
Retail Employee Level 3	Team Support Stocktake Team Support/Team Leader Skilled non-tradesperson
Retail Employee Level 4	Service Supervisor (up to 15 team members)
Retail Employee Level 5	Service Supervisor (more than 15 team members)
Retail Employee Level 6	Team Manager Duty Manager
Tradesperson Level 4	Qualified Tradesperson (e.g. Qualified Baker or Butcher)
Tradesperson Level 5	Qualified Tradesperson Team Support
Clerical Assistant Level 1	Clerical Assistant
Clerical Officer Level 2	Store Services Assistant
Clerical Officer Level 3	Store Services Officer

“Appendix A: Classifications

Retail Employee Level 6

- (1) An employee performing work in or in connection with Woolworths retail supermarket operations at a higher level than a Retail Employee Level 5.
- (2) Indicative job titles which are usually within the definition of a Retail Employee 6 include:

- Section/Department manager with 5 or more employees (including self),
- Manager/Duty Manager in a shop without Departments/Sections (may be under direction of person not exclusively involved in shop management),
- Assistant or Deputy or 2IC Shop Manager of a shop with Departments/Sections”

[24] The higher duties allowance is provided for in clause 5.2 as follows:

“Clause 5.2 Allowance Table

...

Higher duties allowance - Team members engaged for more than 2 hours during 1 day or shift on duties carrying a higher rate than their ordinary classification are to be paid the higher rate for such day or shift.

If engaged for 2 hours or less during 1 day or shift on duties carrying a higher rate than their ordinary classification, the team member is to be paid the higher rate for the time they worked on those duties only.”

6. Submissions

6.1 Hicks

Written submissions

[25] In his written submissions, Mr Hicks says that his dispute is clearly not hypothetical as Woolworths continues to engage employees in the Duty Manager role on a “higher duties” basis. These employees are classified and paid for their work at the Retail Employee Level 6 Agreement rate for a Duty Manager. Mr Hicks believes that under the Award (and the Award’s higher duties clause), these employees would be appropriately classified at Retail Employee Level 8.

[26] Mr Hicks says that the only restrictions that can be imposed on the raising and resolution of disputes are the constraints in the Agreement’s dispute resolution clause. Mr Hicks further says that clause 22 of the Agreement does not specify that a dispute must be relevant to the team member who raises the dispute, nor does it prescribe that the dispute must in relation to the employee’s personal circumstances.

[27] Mr Hicks contends that it is not necessary for him to establish a rational connection between the dispute and his circumstances. However, even if it were, he says that he has performed higher duties in the position of Duty Manager and it is reasonably foreseeable that he may do so in the future.

[28] With regards to his anonymous co-disputant, Mr Hicks says that clause 22 of the Agreement permits an employee to nominate a representative for a dispute and he has been appointed to represent his co-disputant for the purposes of this matter. Mr Hicks submits that his co-worker has worked shifts as a Duty Manager and has been paid at Retail Employee Level 6 under the Agreement. Therefore, there is a rational connection between his co-disputant’s circumstances and this dispute. Mr Hicks further submits that it is not necessary to reveal his co-disputant’s identity and relies on Bromberg J’s comments in *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*¹⁷ (**Energy Australia**) at [85]:

“...I appreciate that, as a practical matter in some circumstances, the ascertainment of the nature of a dispute may require the identification of an aggrieved employee. But that practical consideration, which is likely to have no application in an enterprise-wide dispute as to the application or interpretation of the EA (as this case demonstrates), does not support the much wider proposition that it was intended that, as a jurisdictional precondition of general application, an employee must be involved and identified as a disputant party. That is particularly so given that there are practical considerations which tend in the opposite direction. It may be expected, particularly in disputes involving many employees, that a single employee will be reluctant to be singled out and identified as the lead disputant. The anonymity which employees may desire and which may be provided by their representation through a union ought not be regarded as inimical to the objectives of cl 28. To the contrary, anonymity tends to facilitate the airing of employee grievances and thus enhances the opportunity of those grievances being resolved in line with the purpose of cl 28.”

Oral submissions

[29] At the hearing, Mr Hicks appeared to re-characterise his argument and submitted the following:

- (a) When he refers to ‘duty manager’, he is referring to the ‘common sense industrial reality where [Woolworths] still have duty manager[s]’.¹⁸ A person who acts up into Retail Level 6 under the Agreement is understood to be the duty manager in the sense they are the person in charge at that particular point in time.¹⁹
- (b) Regardless of whether the higher duties clause refers to tasks or positions, the higher duties clause refers to classification descriptions.²⁰
- (c) Under the Award and in accordance with the higher duties clause, a person performing ‘duty manager’ duties should be paid at Level 8 under the Award based on the description of positions under the Award.²¹

[30] Mr Hicks submitted that this was an evolution of his dispute in response to Woolworths narrowly defining what a ‘duty manager’ is.²²

6.2 Woolworths

Written submissions

[31] Woolworths says that the operation of clause 22 of the Agreement is contingent upon the existence of a dispute as defined by clause 22.1(a). A “dispute” for the purposes of clause 22 must be “between a team member (or team members) and Woolworths”. Woolworths concedes that a dispute is not limited to matters arising under the Agreement or the NES, however, the clause does not permit an employee to raise a dispute in relation to anything and everything.

[32] Woolworths says that for a dispute to fall within the parameters of clause 22, it must be real and not hypothetical; and have a rational connection to the particular circumstances of the employee who is raising the dispute.

[33] Woolworths submits that Mr Hicks’ dispute is entirely hypothetical as Woolworths does not employ anyone in the position of Duty Manager and there is no prospect of any employee being required to work as a Duty Manager in the future. The Commission has no power to answer a hypothetical dispute or resolve a theoretical dispute.²³

[34] Further, Woolworths contends that Mr Hicks does not have standing to raise a dispute on behalf of other employees who may have performed the role of Duty Manager, as clause 22 does not provide Mr Hicks with the ability to raise a dispute on another employee's behalf.

Oral submissions

[35] At the hearing, Woolworths submitted that I should not accept Mr Hicks' revised characterisation of his dispute for the following reasons:

- (a) Mr Hicks' recharacterization of the dispute is due to him realising that Woolworths' materials dispose of his original case.²⁴
- (b) Mr Hicks has been put on notice from the start what Woolworths' case is, which has remained consistent throughout the proceedings.²⁵
- (c) Mr Hicks' recharacterized dispute has not gone through the dispute resolution procedure in the Agreement and the Commission therefore lacks jurisdiction to deal with it currently.²⁶

[36] Woolworths also contended that the Commission cannot make a finding in an arbitral context that would allow for payment of an allowance that goes beyond the levels or rates that are contemplated in the Agreement.²⁷

7. Consideration

[37] I turn to consider the construction of clause 22 of the Agreement. In interpreting an award or enterprise agreement, the task is to construe the document in a practical manner and within the industrial environment in which it was drafted.²⁸ The Full Court of the Federal Court in *WorkPac Pty Ltd v Skene*²⁹ recently affirmed this approach and other relevant precedents at [197]:

The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378 (French J). The interpretation "... turns on the language of the particular agreement, understood in the light of its industrial context and purpose ...": *Ancor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (Holmes at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (*Holmes* at 378–9, citing *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see *Kucks v CSR Limited* (1996) 66 IR 182 at 184 (Madgwick J); *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); *Ancor* at [96] (Kirby J).

[38] Clause 22.1 provides that a dispute between a "team member (or team members) and Woolworths" "[includes] a dispute in relation to" a matter arising under the Agreement or the NES. This is a broad definition of dispute. However, I find that the purpose of clause 22 is to provide a resolution mechanism for disputed circumstances that actually exist or are about to occur.

[39] I accept Woolworths' evidence that it has not engaged employees as Duty Managers on a permanent (or otherwise) basis since 2019 and that there is currently no one employed as a Duty Manager under the Agreement.

[40] With regards to the question that Mr Hicks poses, being, "under the Award, what would be the correct classification for a duty manager in a Woolworths supermarket with departments", Mr Hicks has throughout the proceedings asserted that employees who perform the duties that used to attach to the Duty Manager role when it existed are "acting up" into the Duty Manager role. This may be how it is discussed at the shop floor level, but this is not how the Agreement is to be read.

[41] The higher duties allowance in clause 5.2 provides that where employees engage in duties "carrying a higher rate than their ordinary classification" they are to be paid the higher rate. The classifications in the Agreement are Retail Employee Level 1 – 6; Tradesperson Level 4 – 5; Clerical Assistant Level 1; and Clerical Officer Level 2 – 3. Clause 3.3 then provides *examples* of job titles within each classification. Duty Manager and Team Manager are examples of job titles within Retail Employee Level 6; they are not fixed roles or classifications.

[42] This means that when an employee performs duties that used to be contained within the Duty Manager role, they are not acting up into the Duty Manager role; they are performing Retail Employee Level 6 duties and compensated for that by being paid at the Retail Employee Level 6 rate.

[43] There is therefore no Duty Manager role to make determinations about, either on a substantive or higher duties basis. Mr Hicks' argument as originally formulated is therefore a hypothetical dispute, and I find outside the jurisdiction of the Agreement's dispute resolution clause.

[44] For completeness, I address Mr Hick's misconceived reliance on *Energy Australia* for the proposition that he did not need to name his co-worker for them to be 'co-disputant'. *Energy Australia* involved a dispute being pressed by a union that was a party to the relevant enterprise agreement. The union was representing employees of the respondent by virtue of their constitutional coverage. For Mr Hicks to represent a co-worker under clause 22 of the Agreement, they must appoint him. Mr Hicks has not provided any evidence to the Commission of any co-worker appointing him to be their representative in this matter, nor any direct evidence relating to the circumstances of the purported co-disputant.

[45] I now turn to Mr Hicks' re-characterised dispute. At the crux of it, Mr Hicks' grievance is to do with the rate of pay for employees who perform a certain subset of duties on a higher duties basis pursuant to clause 5.2 of the Agreement. Mr Hicks says that people who perform this subset of duties should be paid at Level 8 of the Award rather than Retail Employee Level 6 of the Agreement.

[46] I do find that Mr Hicks' position that his characterisation of his dispute has changed due to Woolworths progressively narrowing the definition of Duty Manager role cannot be sustained. As set out in [12] of this decision, Woolworths' argument has been clear from the outset and the only thing that has changed is that Woolworths has provided evidence in support of its contentions.

[47] However, regardless of whether Mr Hicks' re-characterised dispute is a brand-new dispute that needs to go through the steps in clause 22.1 to be within jurisdiction or whether it is a permitted evolution to Mr Hicks' original dispute, it must be dismissed. That is because I agree with Woolworths that the Commission cannot make an arbitrated finding in this matter

that would allow for payment of an allowance that goes beyond the levels or rates that are contemplated in the Agreement.

[48] As noted at [11] of this decision, in Mr Hicks' original Form F10 application he sought to rely on section 206 of the Act, which provides that the base rate of pay under an enterprise agreement must not be less than the relevant modern award rate. Mr Hicks dropped his reliance on this clause after the conference on 30 January 2024. However, he did not fill the gap in his argument explaining how the Award can be relevant to his grievance in the context of the dispute resolution clause.

[49] Though the definition of "dispute" under clause 22 is not confined to disputes regarding the Agreement, Mr Hicks' re-characterised dispute *does* pertain to a matter in the Agreement. It is therefore bound by the parameters of the Agreement. Retail Employee Level 6 is the highest classification in the Agreement. There is no Retail Employee Level 8. There is a Level 8 in the Award, but the Award is expressly not incorporated into the Agreement.³⁰ I am not satisfied that clause 22 of the Agreement vests the Commission with the arbitral power to effectively make a section 206 assessment and determination.

[50] Mr Hicks' re-characterised dispute must therefore also be dismissed. An order to this effect will issue separately.



COMMISSIONER

Hearing on the papers.

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¹ [2024] FWC 592.

² Digital Court Book (DCB), page 14, [1].

³ Ibid, page 15-16, [7].

⁴ Ibid, page 33, [3].

⁵ Ibid, page 33, [4].

⁶ Ibid, [5].

⁷ Ibid, [6].

⁸ Ibid, [7] – [9].

⁹ Ibid, page 34, [11] – [16].

¹⁰ Ibid, pages 48 – 49, [4] – [5].

¹¹ Ibid, page 49, [8].

¹² Ibid, page 50, [11].

¹³ Ibid, page 50, [12].

¹⁴ Ibid, page 51, [13] – [14].

¹⁵ Ibid, page 51, [16].

¹⁶ Ibid, page 53, [19].

¹⁷ [2017] FCA 1245.

¹⁸ Transcript, PN97.

¹⁹ Ibid, PN98.

²⁰ PN109.

²¹ Ibid, PN98, PN109, PN111, PN114, PN117.

²² Ibid, PN167.

²³ *National Union of Workers v Stanley Black & Decker Pty Ltd* [\[2018\] FWC 1339](#) at [38] (Colman DP); *Australian Salaried Medical Officers Federation (132N) v The Royal Children’s Hospital T/A The Royal Children’s Hospital* [\[2023\] FWC 639](#) at [30] (Johns C).

²⁴ Transcript, PN129.

²⁵ Ibid, PN120.

²⁶ Ibid, PN131.

²⁷ Ibid, PN142.

²⁸ *Kucks v CSR Ltd* (1996) 66 IR at 184 (“Kucks”),

²⁹ [2018] FCAFC 131.

³⁰ Clause 1.5(a) of the Agreement.