DECISION

Fair Work Act 2009
s.739—Dispute resolution
s.217—application to vary an agreement to remove an ambiguity or uncertainty

United Workers' Union

v

Coles Group Supply Chain Pty Ltd
(C2024/3893)

and

Application by Coles Group Supply Chain Pty Ltd
(AG2024/2466)

DEPUTY PRESIDENT EASTON SYDNEY, 30 SEPTEMBER 2024

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)] – redundancy terms – automation of distribution centres over a five-year period – whether employer required to give 16 weeks' notice of the closure of whole site – whether employer can give a lesser period of notice to employees who are not required to work until the last day of operation – interpretation made according to orthodox interpretation principles.

Application to vary an agreement to remove an ambiguity or uncertainty – ambiguity or uncertainty found after considering the terms of the agreement, extrinsic evidence and the industrial history - objectively obtainable mutual intention – no objectively discernible common intention – a distinct likelihood that a variation as sought would give effect to a new and substantive change to the agreement – application dismissed.

The Dispute

[1] The United Workers' Union has referred a dispute about the redundancy terms of the *Coles Smeaton Grange (UWU) Regional Distribution Centre Enterprise Agreement 2020* **(the Agreement)**. The dispute could not be resolved by way of conciliation and proceeded to arbitration. Coles Group Supply Chain Pty Ltd made a counterapplication to vary the Agreement pursuant to s.217 of the *Fair Work Act 2009*.

[2] This decision deals with both matters.

[3] In 2018 Coles announced that it would build two new automated distribution centres in Queensland and New South Wales that would lead to the closure of five existing distribution centres (**DCs**) over a five-year period. This plan to replace the five DCs is known internally within Coles as "Project Broccoli."

[4] The workers involved in this dispute work at the Smeaton Grange Distribution Centre in south-west Sydney, which will be the fourth of the five DCs to close. At the heart of the dispute is the requirement in the Agreement that Coles must give 16 weeks' notice of the full site closure.

[5] The central question is whether Coles is required to give 16 weeks' notice of termination of employment to every employee once the closure date is known, or whether Coles can give a lesser period of notice to employees who are not required to work all the way until the last day of operation.

[6] In simple terms Coles argued that it was required to give 16 weeks' notice of the closure of the whole site, but once that notice was given Coles could give a shorter amount of notice of termination to employees who were not required to work for the whole 16-week period. The UWU argued that anybody who is made redundant due to the closure of the site is entitled to the full 16 weeks' notice of termination regardless of when their employment finishes.

[7] Coles argued in the alternate that if the relevant terms of the Agreement do not carry the meaning they said it does, then the Commission should vary the Agreement so that it does convey their intended meaning.

The Contested Terms

[8] The dispute centres around the interrelationship between the notice of termination provisions (clause 15) and the forced redundancy provisions (clause 34) in the Agreement.

[9] Clause 15 deals with Notice of Termination, and clause 15.6 deals with notice of termination by the employer:

> **"15.6 Notice of termination by Company**
>
> 15.6.1 In order to terminate the employment of a team member the Company must give the team member the following notice:

Period of continuous service	Period of notice
Less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 5 years	3 weeks
5 years and over	4 weeks

> 15.6.2 In addition to the notice above, team members over 45 years of age at the time of the giving of the notice with not less than two years continuous service, shall be entitled to an additional week's notice.
>
> 15.6.3 Payment in lieu of the notice must be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

15.6.4 For the avoidance of doubt, where the Company makes the decision to terminate the employment of a permanent full-time or permanent part-time member due to a retrenchment related to the full Site closure, the Company will provide in writing to the affected team member sixteen (16) weeks' notice (to be worked)."

[10] Clause 34 includes various provisions relating to "employment security." Clause 34.4 includes provisions relating to redundancy:

(a) Clauses 34.4.1 to 34.4.3 set base conditions that apply to all redundancies;
(b) clauses 34.4.4 to 34.4.7 deal with an initial voluntary redundancy process that appears to have applied shortly after the Agreement was made;
(c) clauses 34.4.8 and 34.4.9 deal with any subsequent voluntary redundancy programs during the life of the Agreement; and
(d) clause 34.4.10 deals with involuntary redundancies including redundancies relating to the full site closure.

[11] Clause 34.4.10 is in the following terms:

"34.4.10 Involuntary (Forced) Redundancy

34.4.10 Any redundancy that is not a voluntary redundancy will be an involuntary (forced) redundancy. A permanent team member who is involuntarily retrenched resulting in the team members position being made redundant will be entitled to:

(a) Notice of termination as per clause 15.6.1 and 15.6.2 unless the forced redundancy relates to full site closure then the notice prescribed in clause 15.6.4 applies;

(b) Four (4) weeks' severance pay per year of completed continuous service (including casual service with the Company but not including any 'agency' or labour hire service), and if the team member is over the age of 45 years as at the date of termination, an additional one (1) weeks' pay per year of service to a maximum of ten (10) weeks' pay; and

(c) The severance pay under clause 34.4.10(b) will not exceed eighty (80) weeks' pay.

(d) Part-time team member's severance pay will be pro-rated based on rostered hours at the time of termination."

[12] Before the final vote to make the Agreement a "Team Member Information & Voting Pack" was given to voting employees. The voting pack included the following description of the redundancy terms:

"16 weeks' notice – Site closure

In addition to the enhanced severance pay, permanent team members will be provided a minimum of 16 weeks' notice (to be worked) if their employment will be terminated due to a forced (involuntary) redundancy resulting from the full site closure of the Smeaton Grange RDC. This ensures that all team members directly retrenched as a

result of the full site closure receive more than the standard 4 weeks or 5 weeks (if you are 45 years of age or over) notice of termination".

The uncontroversial history

[13] Project Broccoli involves the closure of five distribution centres – three in NSW and two in Queensland. Four separate enterprise agreements apply to the five distribution centres. The UWU is a party to each agreement. The SDA represents the majority of workers in the single agreement that applies to the two Queensland DCs.

[14] Unsurprisingly, after Coles' plan was announced redundancy entitlements became a significant bargaining item during subsequent bargaining rounds for each DC.

[15] The first agreement to be renegotiated applied to the Goulburn DC in New South Wales. In 2019 the parties agreed that Coles would give 16 weeks' notice of the closure of the Goulburn DC.

[16] The agreement for Smeaton Grange was renegotiated in 2020 and 2021. A similar requirement was inserted in the Smeaton Grange enterprise agreement in February 2021.

[17] The Goulburn DC closed in October 2021. Employees at Goulburn were given 16 weeks' notice of the closure and some employees finished employment during the 16 weeks without payment for the balance and without controversy.

[18] After the closure of the Goulburn DC an agreement was struck for the two Queensland DCs in similar terms to the Goulburn and Smeaton Grange DCs. The Queensland DCs closed in 2023 and the same process applied: workers were given 16 weeks' notice of the closure of the site, some workers then dismissed during the 16 week period but did not receive payment for the balance of the notice.

[19] In 2022 a new agreement was made for the Eastern Creek DC in NSW. The redundancy terms of that agreement are similar to the terms for the other DCs.

Coles' Evidence

[20] Coles relied on evidence from Mr Robert Rondinelli, who is the Head of Employee Relations for Coles Supermarkets Australia Pty Ltd. Coles Group Supply Chain Pty Ltd and Coles Supermarkets Australia Pty Ltd are both subsidiaries in the Coles Group Limited.

[21] Coles told the National Union of Workers – NSW Branch (now the UWU) about Project Broccoli in 2018. In 2019 tried to negotiate redundancy arrangements that would apply to the three distribution centres in New South Wales that were due to close. An in-principle agreement was reached with the UWU but members at Smeaton Grange voted down the proposal.

[22] Therefore Coles negotiated separate redundancy provisions, albeit in fairly common terms, in each of the agreements that applied to the sites.

[23] Mr Rondinelli was a bargaining representative for Coles for each of the respective agreements. Mr Rondinelli said that each respective agreement was negotiated in contemplation of each distribution centre closing in the foreseeable future.

[24] Mr Rondinelli described in detail the bargaining process for the Goulburn DC agreement. He said that the UWU advanced a claim during bargaining similar to the in-principle agreement that had been supported by members at the Goulburn DC but voted down by members at the Smeaton Grange DC.

[25] Mr Rondinelli said of the origins of the 16-week notice provision:

> "In early November 2019 I started to make a series of internal inquiries relating to Coles' appetite to include in any Goulburn EA a 16 week notice of full site closure. From my internal discussions and considerations, I formed the view that Coles would need at least 16 weeks in order to properly discharge its obligations with suppliers, transport carriers and other external parties in order to close the Goulburn DC. I was authorised by the business to include in any future conditional offer for the Goulburn site a commitment to provide Goulburn team members with 16 weeks written notice of the site closure once a definite decision had been made by the business. The notice was not an increase in notice of termination entitlements of more than 5 weeks (the maximum under the existing Goulburn EA at the time) for all team members, but as a consequence, only for those forcibly retrenched as at the site closure date."

[26] The agreed redundancy provisions for the Goulburn DC are very similar to the redundancy provisions for Smeaton Grange. Mr Rondinelli said of the redundancy terms for the Goulburn DC:

> "The 16 weeks' notice of site closure provided under the Goulburn EA was not intended to operate as each individual team member's actual notice of termination. The purpose of the clause was to provide notice of the date of full site closure, and accordingly notice of termination for those team members forcibly retrenched as at the site closure date. The notice was always specified and intended to be worked. Notice of termination for all team members was not a matter Coles would or did agree to increase, as it required the flexibility to downsize the workforce in leadup to site closure…"

[27] Mr Rondinelli said that parties began negotiating the Agreement in June 2020. The Goulburn DC agreement had been approved but the Goulburn DC was still operating.

[28] Mr Rondinelli said that the negotiations at Smeaton Grange were "difficult from the outset." Members took protected industrial action in November and December 2020. On 23 December 2020, obviously in the full heat of a Christmas warehouse strike, Coles proposed new wording for the redundancy provision that included:

> "16 weeks' notice will be provided to team members retrenched **due to and at** Full Site Closure (to be worked)"
>
> [Emphasis added]

[29] Mr Rondinelli said that he included the words due to and at full site closure "to make clear that the clause operated as advance notice to all team members of the closure of the site itself."

[30] The Agreement for Smeaton Grange was eventually approved by a majority of employees on 27 February 2021.

[31] Four months later, in June 2021, Coles announced that the Goulburn DC would cease operation in October 2021. Mr Rondinelli said that staff at the Goulburn DC were then retrenched on various dates across the 16 week-period which, he said, "reflected what [he] understood to be the common intention of the relevant provisions." Mr Rondinelli said "neither the UWU nor any team member raised a dispute concerning those provisions."

[32] After the Agreement was made for Smeaton Grange, Coles then negotiated a new agreement for the Queensland DCs. Mr Rondinelli said that the SDA was the "primary union in bargaining" for the Queensland DCs and represented almost 70% of employees in Queensland. The UWU was a minority union for those negotiations. The redundancy provisions agreed upon for Queensland were in similar terms to the provisions agreed for Goulburn and Smeaton Grange.

[33] The Queensland DCs closed in 2023. Mr Rondinelli said that the closure process in Queensland "included a phased closure of the site with tranched retrenchments across the 16-week period [which] reflected what [he] understood to be the common intention of the relevant provisions."

[34] Mr Rondinelli said that negotiations with the UWU for the Eastern Creek DC occurred in 2022. By this time the Goulburn DC had closed after a 16-week phased closure process. The redundancy provisions in the Eastern Creek DC agreement are very similar to the other agreements.

The UWU's evidence

[35] The UWU led evidence from Ms Sharon Eurlings, who has been employed as an organiser since 2020. Ms Eurlings gave evidence about the bargaining for the Agreement at Smeaton Grange. During negotiations members at Smeaton Grange pressed for 16 weeks' notice of redundancy for all forced redundancies. Ms Eurlings said that during the negotiations Coles would not commit to 16 weeks' notice for all forced redundancies but was willing to provide 16 weeks' notice once a closure date is announced, but that the 16 weeks' notice would have to be worked out. An in-principle agreement was reach on this basis.

[36] Ms Eurlings said there were limited discussions about staged redundancies:

> "At none of the bargaining meetings which I attended was there any discussion or disclosure from Coles' representatives of an intention to terminate staff in stages once site closure had been announced. There was discussion about staged redundancies, whether forced or voluntary, prior to the announcement of site closure, but the understanding during discussions was always that that workers still employed once closure was announced would be entitled to 16 weeks notice of redundancy which they would work.
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> Similarly, at no bargaining meeting I attended was there any discussion about how after closure was announced, staff could still be given 4-5 weeks' notice of termination. Nor

> was there discussion about how employees could be given both 16 weeks notice of site closure, and then 4-5 weeks' notice of termination individually. The discussion during bargaining was always that once site closure was announced, staff being made redundant would be given 16 weeks notice and they would be required to work those 16 weeks."

[37] When cross-examined Ms Eurlings said that she was not involved in bargaining for the Goulburn Agreement and at the time she was involved in bargaining for Smeaton Grange she did not know the details of the Goulburn Agreement, apart from the fact that Goulburn has a 16-week notice period.

[38] Ms Alycia Economidis is employed by the UWU as a Co-ordinator in the Logistics Portfolio and gave evidence in the proceedings. Ms Economidis was also involved in the bargaining for the Agreement that applies to Smeaton Grange. Ms Economidis said that from late-2020 onwards there was limited discussion about the 16-week notice term:

> "I recall that the conversations during this period focussed primarily on the main impasses of bargaining, especially redundancy pay and voluntary redundancies. I do not recall there being any significant discussion regarding the 16 weeks' notice provision."

[39] Mr Andrew Giles is also employed by the UWU as a Co-ordinator in the Logistics Portfolio and provided a statement in these proceedings. Mr Giles gave evidence about his dealings with Coles in relation to the closure of the Smeaton Grange site.

Coles' Submissions

[40] Coles argued that the 16 weeks' notice period only applies to the cohort retrenched at the date of the site closure. If a team member is retrenched in the lead up to the site closure, including during the 16 weeks' notice period given by Coles, they receive standard notice period of up to 5 weeks' notice depending on their age and length of service.

[41] Coles said that this interpretation is preferable because:

(a) the textual consideration support the construction. The reference to "full" site closure operates to condition both the broader concept of "site closure" and the otherwise ambulatory meaning of the word "relates";

(b) the contextual consideration support the construction. Clause 5.9 commits the UWU to provide flexibility to deal with operational needs and variations including the downsizing of the workforce and the transition to site closure. Clause 34.4.8 also includes a reference to the pending site closure, noting that permanent team member headcounts will reduce over time. These terms contemplate a phased downsizing process in the lead up to a full site closure;

(c) the supporting context of the other agreements made for the other distribution centres establish a common understanding between bargaining parties that "make plain that the 16 weeks' notice of termination entitlement extends only to team members retrenched due to and at full site closure."

[42] Coles also relies on a purposive construction given that the terms were negotiated in the context of a known closure of the site. Coles said the agreed terms set a 16 week "outer limit" for site closure, whilst allowing for a phased downsizing of the workforce during that period. Coles said that the UWU's construction fails at a textual level because it has no regard to the express flexibilities granted to Coles in the lead up to the site closure, nor the genesis of the term in earlier agreements, nor to the weight of what is said to be a common understanding.

[43] Coles argued that the processes applied to the closure of the Goulburn DC and the Queensland DCs reflected the common understanding of the parties to all the agreements. The phased closure with tranched redundancies during the 16-week period for Goulburn was exactly what the parties intended for Goulburn, and what the parties intended for Smeaton Grange and the others. Coles relied heavily on the fact that after the phased closure with tranched redundancies at Goulburn, the UWU agreed on the same terms (and therefore the same process) for the Queensland DCs and for Eastern Creek.

[44] Coles also argued that the UWU's interpretation fails at a textual level because it gives no work to the conditioning word "full" in clauses 15.6.4 and 34.4.10.

[45] In the alternate Coles has applied to vary the Agreement under s.217 to remove ambiguity arising from the competing reasonable constructions to "bring the agreement's text in line with Coles' construction."

[46] Coles argued that when considering whether the terms of an agreement are ambiguous the Commission is not constrained in the matters to which it may have regard by the principles developed for the interpretation of enterprise agreements. Coles relied upon the reasoning of the Full Court in *Bianco Walling Pty Ltd v CFMMEU & Ors* [2020] FCAFC 50, (2020) 275 FCR 385.

[47] Coles argued that ambiguity is readily evidenced by the dispute before the Commission about the meaning of the relevant terms.

[48] The real question, Coles said, is one of discretion: whether the Commission should exercise discretion to vary the Agreement in the way Coles contends. The evidence of surrounding circumstances is said to weigh in favour of Coles' application.

[49] Coles relies on the surrounding circumstances of the bargaining and agreements relating to other DCs, particularly the Goulburn DC. Coles argued that the commonality of conditions and approaches agreed for the other sites evidence the common understanding and intention of the parties to the Smeaton Grange agreement.

[50] This is particularly so when one recognises that each agreement was made in the understanding that each DC would be closing in the life of the agreement and each agreement records a commitment by the UWU to flexibilities around downsizing and transitioning to site closures.

[51] In relation to the Smeaton Grange agreement Coles relies on particular representations made by the bargaining representatives about the 16-week notice provision in December 2020:

> "… The UWU's draft conditional offer expressed the 16 week notice claim as "16 weeks' notice will be provided at Full Site Closure (to be worked)". Coles amended that drafting to reflect its "clear position" that the 16 week notice period would apply to "team members retrenched due to and at Full Site Closure". That wording featured in each subsequent conditional offer exchanged between the UWU and Coles, and in the access period materials provided to employees."

[52] Coles said:

> "Four things emerge from those matters. First, no employee will be materially disadvantaged by the proposed variation: the vastly more generous redundancy pay terms included in each Impacted DC agreement provide (and were intended to provide) appropriate protection for impacted employees. Second, the materials exchanged between Coles and the UWU in each bargain (including Smeaton Grange) reveal Coles' position to have been clearly communicated. Third, that clearly communicated position was in turn communicated to team members prior to each vote (including at Smeaton Grange). Fourth, despite various differences in wording across the various agreements, no-one – not a single employee, nor the UWU, nor the SDA – has until now raised any concern about the site closure notice terms' intended operation. When understood in light of two site closures, that fact tells strongly of a common understanding."

UWU Submissions

[53] The UWU submitted that the terms of the Agreement require Coles to give 16 weeks' notice to all employees who are made redundant due to the site closure, or provide appropriate compensation for the balance of the period if work cannot be provided.

[54] The UWU suggested that Coles has altered its position about whether the 16 weeks' notice of closure of the site counted as notice of termination of employment. Initially Coles claimed that the notice of site closure did not override the operation of the NES notice of termination provisions. Later on Coles accepted that the 16 weeks' notice was notice of termination. The UWU said that Coles' assertion that their latter position was the clear shared understanding of both parties during the bargaining is undermined by the fact that the latter position does not even appear to have been Coles' consistent position.

[55] The UWU submitted that there was no ambiguity in relation to the relevant clauses and that the ordinary meaning of the words read as a whole and in context is clear and supports the construction advanced by the UWU. Accepting Coles' construction would result in the effective rewriting of the Agreement.

[56] The UWU said that clause 15.6.4 unambiguously relates to an individual employee's notice of termination rather than a collective entitlement. The clear and ordinary meaning of clause 15.6.4, in context, is to provide a distinct notice period for each permanent employee that is made redundant for reasons relating to the full site closure.

[57] The UWU said the phrase "forced redundancy [relating] to full site closure" is not confined to just employees who are at work on the last day that the site operates, but applies to the broader category of employees who are made redundant for reasons "relating to" the full site closure. Employees who are terminated as the site ramps down during the 16-week notice period are nonetheless redundant for reasons "relating to" the full site closure.

[58] The UWU argued that "relating to" the full site closure extends to the whole of the 16-week notice period but accepted that the forced redundancy of employees prior to the giving of the notice of the full site closure would not be related to the full site closure.

[59] The UWU argued that the addition of the words "to be worked" show that the notice period is intended to be worked by the employee and that employees are to be provided with 16 weeks of work.

[60] The UWU submits that its construction of the relevant provisions is not contrary to other provisions of the Agreement that provide for gradual downsizing of staff and the need for flexibility in the lead up to site closure. On the UWU's construction the Agreement still allows Coles to reduce staff in stages. The only requirement is that a longer notice period or appropriate pay in lieu be provided.

[61] The UWU argued that, to the extent required, its construction is supported by the objective background facts. It argued that the 16-week notice period was not simply a follow-on from the Goulburn DC agreement but was a specific claim made by workers at Smeaton Grange. The terms of the agreement are a compromise of the workers' claim insofar as the 16 weeks' notice would only apply to redundancies related to the full site closure. The differences between the bargaining at Goulburn and at Smeaton Grange, the rejection of Coles' initial proposal for a single redundancy agreement for all the distribution centres that were due to close, show that the conditions for Smeaton Grange were separately considered. Further, these mattes show that the construction of similar clauses in other agreements have limited, if any, weight in determining the construction and shared understanding of clauses in the Smeaton Grange agreement. Similarly, the processes applied for the closure of the Goulburn DC have no weight in the present matter, most importantly because the closure of the Goulburn DC took place after the Smeaton Grange agreement was made and therefore could not have been something contemplated in the making of the Agreement.

[62] None of the materials provided to employees prior to the vote suggested or indicated that the 16 weeks' notice would only apply to employees who are terminated on the final day of operations.

[63] The UWU also submitted that its construction is industrially and commercially sensible in that it allows Coles sufficient flexibility to ramp down its operations while providing an extended period of work to employees in circumstances where a major employer is ceasing operations. The UWU said that the limitations in the Agreement are particularly reasonable because they strike a balance between providing employees additional notice to look for other employment and give the employer time to plan such redundancies as they would relate to a known period that could be planned in advance.

[64] The UWU also submitted that it is inherently unlikely that all employees were 'sold' to vote on and accept and enterprise agreement that provided 16 weeks' additional notice, but that that notice would only apply to a handful of employees yet unidentified who would be terminated on the final day of operations.

[65] In relation to Coles' application to vary the Agreement, the UWU submitted that Coles bears the burden of persuading the Commission that there is ambiguity or uncertainty and that the discretion to vary should be exercised as sought by Coles.

[66] The UWU said there was no ambiguity in the present case because the words of clauses 15.6.4 and 34.4.10 are not capable of more than one meaning, nor does the extrinsic evidence regarding the common understanding of the terms at the time of bargaining make an ambiguity apparent.

[67] The UWU said that there was no uncertainty because the meaning of the words are not uncertain, nor is there any latent ambiguity.

[68] Even if ambiguity or uncertainty is found, the UWU argued that the Commission would not exercise its discretion to vary the agreement as sought by Coles because the objectively ascertained common intention of the parties was to provide all employees forcibly redundant due to site closure with 16 weeks' notice. The UWU submitted that there is "insufficient-to-no" evidence to support Coles' assertion that there was a common intention between the parties for the 16 weeks to operate in the way they say.

Order of determination: dispute or variation?

[69] Coles relied heavily on the reasoning of the Full Court of the Federal Court in *Bianco Walling Pty Ltd v CFMMEU & Ors* [2020] FCAFC 50, (2020) 275 FCR 385 (**Bianco Walling**). This matter had an interesting history: the employer had three divisions that operated as separate business units, with each unit being organisationally and operationally distinct (at [23]). One particular division had made four generations of enterprise agreements with its workforce (at [33]). Only employees of that division voted to make each agreement and over several years nobody had ever suggested that employees in the other two divisions were covered by the agreements. After the fourth agreement was made a union (that had not been involved in the making of any of the agreements) claimed that the coverage of the agreement extended to other divisions because of the wording of the coverage clause. The employer applied to the Commission to vary the agreement to make it plain that the agreement only applied to one particular division (at [7]).

[70] At first instance the Commission found that in order to consider varying the agreement the Commission must interpret the existing terms to determine whether there is ambiguity or uncertainty. The Commission applied orthodox interpretation principles from *AMWU v Berri Pty Limited* [2017] FWCFB 3005, (2017) 268 IR 285 (**Berri**). In applying these principles the Commission found that the terms of the agreement were not ambiguous, finding that the coverage clause "means what it says" (at [45]). The Commission accepted that applying the ordinary meaning of the words "would not be consistent with the industrial relations practice or intention of [the employer] or its employees, and that the issue has arisen only recently by virtue of a trade union not covered by the agreement advancing that proposition" (at [47]). After

interpreting the agreement the Commission was not satisfied that there was any ambiguity and therefore found that it had no power to vary the agreement.

[71] In other words, the Commission at first instance recognised that the ordinary meaning of the words used in the agreement did not reflect the industrial reality or the intention of the employer or its employees. Despite this recognition the Commission thought it was bound by interpretation principles to disregard the surrounding circumstances and the industrial reality and apply the terms of the agreement according to their ordinary meaning.

[72] Ultimately the Full Court found that the Commission's approach was erroneous (at [92]-[93]) and that it was not necessary for the Commission to interpret the agreement in order to reach a conclusion concerning the presence of ambiguity or uncertainty (at [67]). The Full Court made the following observations about the practical consequences of its findings:

> "[68] There are practical consequences for the FWC's ascertainment of ambiguity or uncertainty for the purpose of s 217 being different in character from the interpretation of an enterprise agreement. One is that there was no need for the FWC to feel constrained in the matters to which it may have regard by the principles developed for the interpretation of enterprise agreements. Moreover, the FWC is obliged, in performing its functions or in exercising its powers in relation to a matter under the FW Act, to take into account, amongst other things, "equity, good conscience and the merits of the matter" — see s 578 of the FW Act. Furthermore, the FWC is not bound by the rules of evidence and procedure in relation to a matter — see s 591 of the FW Act. Each of those provisions applies to the discharge by the FWC of its functions under s 217(1). **The consequence is that, far from being precluded from having regard to evidence of the parties' common intention and to the history of cl 1.2, the Deputy President was permitted to have regard to them as part of the "equity, good conscience and the merits" of the matter**."
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> [Emphasis added]

[73] On judicial review the Full Court did not consider whether there was in fact any ambiguity or uncertainty in the terms of the agreement.

[74] Coles argued in the alternative that if I find that the ordinary terms of the Agreement do not bear the meaning Coles propounds then I can and should vary the Agreement. In varying the Agreement using the power available under s.217 I can consider the wider circumstances and industrial realities so that the terms of the agreement reflect the industrial reality and the intentions of the parties.

[75] In this context a question arises as to which application should be considered and determined first.

[76] In *Australian Federated Union of Locomotive Employees v Aurizon Operations Ltd* [2023] FWCFB 193 (**Aurizon**) a Full Bench dealt concurrently with two similar kinds of applications. The union party to the relevant enterprise agreement referred a dispute to the Commission via s.739 and the employer party applied under s.218A to vary the agreement to remove a claimed obvious error, defect or irregularity.

[77] The Full Bench chose to consider and determine the variation application before determining the dispute application. At [68] the Full Bench explained their reasoning for doing so:

> "Although Aurizon seeks that its variation application only be determined in the event that the dispute application is determined contrary to its position, we consider it is convenient to consider and determine the variation application first, for two reasons:
>
> (1) These matters were referred to a Full Bench, on Aurizon's application, on the basis that 'early guidance can be given concerning the proper construction and application of s 218A'. We do not consider therefore that the determination of the variation application should only be dealt with on a contingent basis.
>
> (2) The task of construing the expression 'known workings' in order to determine the dispute application is of such difficulty that we would prefer to resolve the dispute by varying clause 77.1 in appropriate terms should we have the power to do so."

[78] In *Aurizon* the Full Bench found that s.218A was not available (at [77]), but that the term of the agreement is plainly ambiguous and an application under s.217 could easily have been made (at [79]).

[79] By the same reasoning my preference is to resolve the variation application before the dispute application (see also *Application by Qantas Airways Limited & QF Cabin Crew Australia Pty Ltd* [2023] FWC 1566 at [13] where Commissioner P Ryan took the same approach in comparable circumstances).

Consideration – s.217 general principles

[80] In *Monash University* [2023] FWC 1148 at [85] (**Re Monash**) Deputy President Bell assembled the following summary of principles for discerning whether there is ambiguity or uncertainty in an enterprise agreement:

(a) the process of ascertaining ambiguity or uncertainty in an enterprise agreement is "distinct" from the process of construction, the latter of which involves determining the "true meaning" of a provision: *Bianco Walling,* [66] – [67];
(b) ambiguity exists when a provision in an enterprise agreement is capable of more than one meaning: *Bianco Walling,* [67];
(c) ambiguity may be apparent on the face of the document or may only become apparent when extrinsic evidence is adduced: *Bianco Walling,* [67];
(d) a provision may be ambiguous even though capable of interpretation: *Bianco Walling,* [67].
(e) evidence of the parties "common intention" and the history of the impugned provisions are matters the Commission is permitted to have regard to in ascertaining whether ambiguity or uncertainty exists: *Bianco Walling,* [68].
(f) the mere existence of rival contentions as to the meaning or application of a provision or provisions in an enterprise agreement is unlikely to be sufficient to indicate ambiguity or uncertainty for the purposes of s 217: *Bianco Walling,* [70].
(g) and while the mere existence of rival contentions is insufficient to permit a finding of ambiguity or uncertainty, the Commission "will generally err on the side of finding an

ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention" (original emphasis): *Bianco Walling*, [70] citing *Re Tenix Defence Systems Pty Ltd Certified Agreement 2001-2004* [2002] AIRC 531 at [31];

(h) the words "ambiguity" and "uncertainty" are not synonymous: *Bianco Walling*, [75]:

> "There may, for example, be uncertainty in an enterprise agreement even when its terms are not ambiguous. The uncertainty may arise from the application of the unambiguous terms to a given set of circumstances. The distinction between patent ambiguity (linguistic ambiguity) and latent ambiguity (ambiguity in application) provides an illustration by analogy" (citations omitted)"; and

(i) a form of "uncertainty" can extend to the common law analogy of uncertainty, where a provision might be found to be void, because no definite meaning can be put on that provision. However, "uncertainty" in s.217 is not so limited: *Bianco Walling*, [77].

[81] Many authorities say that the Commission should err on the side of finding ambiguity or uncertainty which, despite appearances, is not an encouragement for the Commission to unduly intervene into agreements made by bargaining parties. The power to vary an agreement is limited to removing the ambiguity or uncertainty and therefore the Commission can err on the side of finding ambiguity or uncertainty because the breadth of the Commission's intervention is strictly limited. In this regard the observations of the Full Bench in *CFMMEU & ors v Specialist People Pty Ltd* [2019] FWCFB 6307 (**Specialist People**) are apposite:

> "[42] Once ambiguity or uncertainty has been identified, the Commission must then consider whether to exercise its discretion to vary the agreement. The Commission has discretion to "remove ambiguity or uncertainty", not to give effect to a new and substantive change to the agreement. Applications that seek the latter must be made under s 210 of the FW Act. A decision of the Commission under s 217 to remove uncertainty or ambiguity should **give effect to the substantive agreement** that was ambiguously or uncertainly reduced to writing in the terms of the enterprise agreement."
>
> [Emphasis added]

Is there ambiguity or uncertainty in the Agreement?

[82] Coles relies upon the existence of the present dispute as proof of ambiguity or uncertainty within the terms of the Agreement. As the above summary shows, the mere existence of rival contentions is not sufficient.

[83] In my view the terms of clauses 15.6 and 34.4.10 can be read in more than one way and are capable of more than one meaning. By the very terms used these clauses regulate the amount of notice of termination that must be given to employees who are involuntarily retrenched. Amongst other things the clauses refer to forced redundancies that relate to full site closure:

(a) If workers are given 16 weeks' notice of a full site closure there is a fairly compelling argument to say that any retrenchment that occurs after the notice is given is a retrenchment relating to the full site closure; or

(b) On the other hand there is an argument available on the terms of the Agreement to say that even after 16 weeks' notice is given of the closure of the site, only those employees who work through to the end of the 16 week period are retrenched because of the full site closure (because their employment ended when the site fully closed). This interpretation makes clause 15.6.4 slightly circular because on that construction clause 15.6.4 really only notes the fact that employees who are given 16 weeks' notice of the closure of the site, and who in fact work for the 16 weeks, will have received and worked 16 weeks of notice.

[84] When one considers the extrinsic evidence and industrial history it is much easier to recognise that there is ambiguity or uncertainty in the terms of the Agreement. The industrial history in which the Agreement was made is particularly compelling: comparable terms were included in all of the agreements made while implementing Project Broccoli. The UWU actively negotiated each agreement on behalf of its members and then was involved in the implementation of the deals it made. The UWU was a bargaining representative for each agreement, which means it did not literally vote for or make any agreements. However in my view it is somewhat artificial to consider the Smeaton Grange agreement in isolation from the other agreements and the industrial history or context. It is also somewhat artificial to see the Agreement and one between Coles and its voting employees divorced from the UWU's role as a representative.

[85] There is uncertainty about the terms of the Smeaton Grange agreement because the way in which the UWU now says the terms operate is at odds with how the terms have operated or been inserted into each of the other agreements made in contemplation of the full site closure of each other distribution centre.

[86] The present situation is not unlike the *Bianco Walling* matter. The ordinary terms of the Agreement have a reasonably clear meaning and if I was confined to applying standard interpretation principles then one particular meaning, being the construction advance by the UWU, would prevail as the actual and true meaning. The other construction advance by Coles is available on the terms of the Agreement but is significantly weaker.

[87] In this circumstance there is power available under s.217 to vary the terms of the Agreement to remove the ambiguity or uncertainty. One possible outcome is that the Commission could vary the terms of the agreement in a way that the weaker construction prevails over the stronger construction – so much seems to be implied by the Full Court's reasoning in *Blanco Walling*.

[88] The relevance then of the "common intention" of the parties becomes immediately obvious. It is difficult to imagine circumstances where it would be appropriate for the Commission to impose the weaker construction on all the parties to the Agreement unless the Commission was satisfied that the variation reflected the 'common' intention of the parties when the original agreement was made.

[89] In *Re Monash* at [111]-[128] Deputy President Bell helpfully reviewed the authorities on the relevance of the "common intention" of the parties to enterprise agreements, concluding at [128]:

> "But hypothetical and less common examples aside, other than 'consent' applications under s.217 or variations to allow an enterprise agreement to conform with a provision that has been formally construed, **I am not aware of any decision of the Commission that suggests that the discretion under s.217 is largely unfettered or that the relevance of an antecedent common intention is anything other than significant**."
>
> [Emphasis added]

[90] On appeal the Full Bench in *Monash University v NTEIU* [2023] FWCFB 181 (the **Monash Appeal**) endorsed the Deputy President's conclusion:

> "[25] … the Deputy President's observation that common intention was a 'significant' consideration in the exercise of discretion under s 217 of the Act, was entirely consistent with the authorities. It is to be recalled that the Deputy President did not accept the NTEU's primary submission that discretion under s 217 can only be exercised to give effect to a variation that reflects the common intention of the persons who made the relevant enterprise agreement. The rejection of that contention is consistent with previous decisions of the Commission identifying common intention as one of the matters to which the Commission should have regard. Indeed that mutual or common intention could be a factor to consider and, where appropriate, a significant factor in the exercise of the discretion, was a matter the University accepted as the Deputy President noted at [119] of his decision.
>
> …
>
> [28] Therefore, the Deputy President's conclusion that common intention was a significant consideration in the exercise of his discretion to vary the Agreement to remove the identified ambiguity and uncertainty, and his observation that the circumstances in which the Commission would exercise discretion without evidence of mutual intention are "limited", finds support in the authorities and is entirely orthodox."

[91] The Full Bench in the *Monash Appeal* (at [26]) endorsed the findings of Vice President Watson in *Re Australian and International Pilots Association* (2007) 162 IR 121, viz:

> "The discretion of the Commission in the case of an ambiguity or uncertainty involves two questions. First, is it appropriate to vary the agreement? If so then secondly, what variations are appropriate? Similar considerations will often be relevant to both questions and hence the two questions frequently overlap. It is well established that a significant factor is the objectively ascertained mutual intention of the parties at the time the agreement was made [citing *Re Tenix Defence Systems Pty Ltd Certified Agreement 2001-2004* [2002] AIRC 531]. It is not appropriate to rewrite an agreement or install something that was not inherent to the agreement when it was made [citing *Construction, Forestry, Mining and Energy Union v Linfox Transport (Australia) Pty Ltd*]. These

> principles reflect the notion that an agreement is made by the parties usually without any arbitrated content or independently determined standards of industrial fairness. The exercise of the discretion conferred on the Commission in relation to an ambiguity or uncertainty does not give rise to a general discretion to determine a matter based on industrial fairness [citing *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Qantas Airways Ltd* (2001) 106 IR 307]. **The task is to place the parties in the position they intended by their agreement - insofar as the wording of the agreement does not reflect that intention.** Although a significant factor, the objectively ascertained mutual intention of the parties is not the only consideration. However it would be unusual for other considerations to weigh in favour of a variation that was inconsistent with the intention of the parties [citing *Community and Public Sector Union v Telstra Corporation Ltd* (2005) 139 IR 141]."
>
> [Emphasis added].

[92] The Full Bench in the *Monash Appeal* (at [27]) also endorsed the reasoning in *Specialist People* cited above. Both decisions make it abundantly clear that the Commission should only be varying an agreement under s.217 if it is satisfied that the variation reflects the original substantive agreement.

[93] The objectively obtained mutual intention is a significant but not determinative consideration when identifying the original substantive agreement that has been ambiguously or uncertainly reduced to writing.

[94] In *Re Monash* the Deputy President considered in detail several authorities on objectively obtained mutual intention (see [136]-[149]). His Honour's analysis was summarised and endorsed in the *Monash Appeal*:

> "[33] ... the Deputy President concluded at [141]-[143] that a search for an 'objectively determined' common intention is a search for 'actual mutual intention' assessed by reference to objective evidence "in the sense that [a court] does not merely accept what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention".
>
> In describing this as a way to ascertain common intention in relation to an enterprise agreement, the Deputy President was correct. Contrary to the University's contention, on our reading of the decision, the Deputy President did not find that that which must be established is actual or subjective mutual intention, rather than objectively ascertained mutual intention. The Deputy President's reference to 'actual intention' is not to a subjective intention but rather to objectively identified actual mutual intention. So much is clear from [143] of the decision where the Deputy President says that he "would approach that task 'in the sense' described by Kiefel J above, namely as a search for actual mutual intention through a prism of considering and weighing the admissible evidence probative of actual intention".
>
> [34] At [144] of the decision the Deputy President acknowledges that a common intention may be objectively identified by engaging with the terms of an enterprise agreement and at [145] he notes that whichever approach is adopted, common intention

in the context of an enterprise agreement is not lightly found. At [151] of the decision the Deputy President records that the University acknowledged the evidence did not point to any meeting of minds."

[Footnotes omitted]

[95] In concluding that the common intention cannot be lightly found, DP Bell said at [145]-[147]:

"[145] "Common intention" - however approached - for the purposes of an enterprise agreement is not lightly found. As Justice Gray stated in *Australian Liquor, Hospitality and Miscellaneous Workers Union v Prestige Property Services Pty Ltd* (2006) 149 FCR 209, "[c]are must be taken, however, to distinguish a common understanding from common inadvertence" and that "[t]here can be no meeting of minds, no consensus, if no-one has thought about the issue."

[146] In *Shop Distributive and Allied Employees' Association v Woolworths Ltd* (2006) 151 FCR 513, another decision by Gray ACJ, his Honour considered a submission that past conduct of the parties might lead to a finding of common understanding. His Honour stated at [31]:

"… There is authority that, if a provision has appeared in a series of agreements between the same parties, and if they can be shown to have conducted themselves according to a common understanding of the meaning of that provision, then it can be taken that they have agreed that the term should continue to have the commonly understood meaning in the current agreement. ... It is necessary to take great care in the application of this limited principle, to avoid infringing the general principle that the conduct of parties to an agreement cannot be taken into account in construing the agreement. For the limited principle to operate, there must be clear evidence that the parties have acted upon a common understanding as to the meaning of the relevant provision and not for other reasons, such as common inadvertence as to its true meaning."(emphasis added)

[147] His Honour observed that, in addition to "inadvertence" that might otherwise explain a past practice, there might also be instances involving "an act of generosity on the part of the [employer], from which it has now resiled." The observations of Gray J have been endorsed by Full Court decisions. To the list of "inadvertence" and "generosity", I would perhaps add guarded disagreement. Disputes about the operation of provisions of enterprise agreements are often resolved on a situational basis without the parties reaching agreement about the substantive future operation of the provision. The fact that the (disputed) provision of the enterprise agreement is then restated without amendment in a subsequent enterprise agreement does not indicate a common intention – it may indicate no more than an "agreement to disagree" in the interests of industrial peace at that point in time."

Is there an identifiable objectively obtained mutual intention?

[96] In this matter it cannot be said that there was clear evidence that the parties acted upon a common understanding. I am satisfied that Mr Rondinelli and others in the Coles camp subjectively intended the Agreement to operate in the way Coles said it must in these proceedings. Moreso I am satisfied that Mr Rondinelli and others subjectively intended that each of the four agreements that apply to the five DCs would operate in the way Coles said they should and in fact have operated (outside of Smeaton Grange). The industrial context in which the Smeaton Grange Agreement was made, Coles' behaviour and the UWU's behaviour within that industrial microclimate are all consistent with Coles having this subjective intention. As is clear from the authorities, the test is objective not subjective.

[97] The text of the Agreement does not itself reveal a common intention poorly recorded.

[98] The two key pre-agreement representations in relation to the Smeaton Grange agreement relied on by Coles, viewed objectively, do not provide clear evidence of a common intention.

[99] Coles placed great emphasis on its proposed wording sent to the UWU on 23 December 2020 during a period of protected industrial action by UWU members (see [28] above) and in particular the insertion of the words "due to and at" in the phrase "retrenched **due to and at** Full Site Closure (to be worked)".

[100] These additional words do record a tighter connection between the full closure and the higher notice period than the final words in clause 15.6.4 ("due to a retrenchment related to the full Site closure") or clause 34.4.10 ("the forced redundancy relates to full site closure"). However these additional words still leave open the possibility that "at Full Site Closure" could mean at the point in time when staff are given notice of the full site closure or could mean at the point in time when the site actually closes. That is, the proposed clause confers an entitlement on employees who are retrenched "due to" an event, and by the additional words confines the entitlement (on Coles' construction) to employees who are retrenched due to the event but also "at" a particular point in time (the full site closure). In objectively considering the possible meaning of the proposed clause it seems open to understand the reference to an employee "retrenched … at Full Site Closure" to mean an employee who is given notice of retrenchment at the time that the full site closure is announced.

[101] As such it is not objectively apparent from the words used in Coles' proposal that the UWU (as the bargaining representative and recipient of the proposed wording) shared the same intention.

[102] Similarly the words used by Coles in the Team Member Information & Voting Pack (see [12] above) do not evidence a clear intention. The references to "a forced (involuntary) redundancy resulting from the full site closure" and "directly retrenched as a result of the full site closure" carry the same uncertainty as the words "due to and at" full site closure.

[103] In *Re Monash* the Deputy President found at [150] that the evidence in that matter did not establish a common intention concerning the ambiguous term of the disputed agreement. Having so found, the Deputy President collated the following principles for exercising the discretion available under s.217:

> "[155] Without limiting what might be appropriate in all the circumstances of a particular matter, the factors guiding the discretion to vary an enterprise agreement to remove and ambiguity or uncertainty might include, as appropriate:
>
> • The absence of an antecedent "common intention" or "substantive agreement". The presence of this factor would ordinarily be a matter of significant weight in favour of variation and, equally, its absence a significant factor for refusal;
> • The variation would not "give effect to a new and substantive change to the agreement" (citing *Specialist People* at [42]). This is a significant factor for refusal, if not satisfied;
> • The exercise of the power of variation granted by s.217 is only for the purpose of removing "an ambiguity or uncertainty" (citing *Bianco Walling* at [3]; *Specialist People* at [42] and [50]). A variation extending beyond that required to remove an ambiguity or uncertainty would be beyond the jurisdiction conferred by s.217;
> • The views of the employer and employees (and, for the latter, including the views expressed on their behalf by an applicable union) (citing *Porter v MFESB* at [58](3); *Re Australian and International Pilots Association* (2007) 162 IR 121 at [17]; *Re Energy Safe Victoria* [2020] FWCA 6718 at [9]);
> • The utility of the amendments (citing *Specialist People* at [50]);
> • The stage of bargaining between the parties, where relevant (citing *Re Australian and International Pilots Association* (2007) 162 IR 121 at [35]). Where an enterprise agreement has expired, it would be generally preferrable for the parties to endeavour to reach an agreed position rather than having the Commission determine a variation for the expired agreement;
> • The timing of an application for variation, including delay;
> • The specified date in which the variation is sought to be effective; and
> • The power under s.217 "does not give rise to a general discretion to determine a matter based on industrial fairness" (citing *Re Australian and International Pilots Association* (2007) 162 IR 121 at [17])."

[104] In the present circumstances most of these factors strongly point against varying the Agreement. There is no objectively discernible common intention and therefore a distinct likelihood that a variation as sought would give effect to a new and substantive change to the agreement. Although there is ambiguity or uncertainty in the terms of the agreement the variation sought by Coles is beyond the power available under s.217.

[105] As such I am not prepared to exercise the available discretion to vary the Agreement and Coles' application is dismissed.

Determination of the Dispute

[106] As alluded to above, the ordinary meaning of the key provisions of the agreement are consistent with the UWU's construction. Clauses 15.6.4 and 34.4.10 are directed to the amount of notice of termination of employment that must be given to employees who are terminated "due to a retrenchment related to the full site closure" (clause 15.6.4). If the intention of the longer notice period provision was to only give workers certainty about the end date of the site, then there is no reason to refer to the provision in the notice of termination clause.

[107] When Coles gave or gives notice that the Smeaton Grange site will fully close on a particular date then the notice of termination of employment/retrenchment given by Coles to each of the permanent employees is related to the full site closure.

[108] Assuming that 16 weeks' notice is given, employees who work until the last day of operation will be retrenched due to the full site closure. Such employees will have received 16 weeks' notice of termination of employment. The words "(to be worked)" make it clear that employees who are given 16 weeks' notice will be required to actually work the 16 weeks in order to receive 16 weeks payment.

[109] Crucially, if an employee is given 16 weeks' notice of termination of employment due to full site closure, the standard notice provisions in clauses 15.6.1 to 15.6.3 are no longer available to Coles in the event of redundancy. That is, after 16 weeks' notice is given, Coles is not able to end the employment due to redundancy by giving a shorter amount of notice.

[110] There are several reasons why this is so based on the ordinary meaning of the words of the key clauses.

[111] Firstly, it is reasonably clear that once the full site closure date is announced any retrenchments that take place during the 16 weeks are related to the full site closure. It seems safe to assume that Coles is not going to need the same number of permanent employees 16 weeks before the closure than they will need 16 days or even 16 hours before the closure. The reduction in Coles' staffing requirements in the 16-week period is inescapably related to the fact that the site will be closed. Coles will be directing less and less stock to Smeaton Grange as the closure date gets closer. This reduction will occur because the site will be closing on a known date. Staffing requirements will reduce as the activities in the Smeaton Grange DC reduce to zero on a known date. The reduction in staffing requirements, and any resultant redundancies prior to the last day, are still related to the full site closure on the known date.

[112] Secondly, the additional notice period in clause 15.6.4 is activated at the point that Coles gives the notice. It is clear that clause 15.6.4 requires Coles to give 16 weeks' notice of the closure of the site to all of the permanent employees employed at that point in time. From that moment onwards all employees are on notice of the specific end date of their employment due to the full site closure. If nothing else is said by Coles about termination of employment, then on the last day every permanent employee will finish their employment in accordance with the notice. The giving of the 16 weeks' notice meets the requirements of clause 15.6.4 and, quite literally, gives notice to each recipient that they are a person whose position will be redundant due to the full site closure. Absent very clear wording to the contrary, an employee who is made redundant during the final 16 weeks does not lose the status of being a person whose position is redundant due to the full site closure.

[113] On Coles' construction there is the possibility, if not the likelihood, that the employment of some or most of the workers would finish earlier than the date of the full site closure - which makes the 16 weeks referred to in the agreement the maximum possible period to be worked rather than the minimum notice period the workers might receive. In other words, on Coles' construction the 16-week period is the ceiling and on the UWU's construction the 16-week period is the floor. If the 16-week period is a ceiling that can be reduced then one would expect the circumstances in which the ceiling could be reduced to be clearly articulated in the Agreement itself.

[114] The outcome of this favoured construction is not particularly flexible for Coles. Coles relied on clause 5.9 and the UWU's commitment to provide flexibility to deal with operational needs and variations including the downsizing of the workforce and the transition to site closure. However, the ordinary meaning of the specific terms of clauses 15.6.4 and 34.4.10 cannot be objectively displaced or read down by the generalised commitment to flexibility in clause 5.9.

[115] Therefore, by application of long-established interpretation principles I must conclude that the ordinary meaning of the key provisions of the Agreement mean that all employees made redundant relating to site closure are entitled to 16 weeks' notice of termination, including those employees who are made redundant during the 16-week notice period.

Closing remarks

[116] For the reasons given my findings align with the established principles by which the present matters must be adjudicated. As the authorities referred to above make abundantly clear – the Commission is not to vary enterprise agreements or interpret agreements in a way that sets new entitlements based on notions of industrial fairness.

[117] Coles is understandably aggrieved because it genuinely believes that the construction prosecuted in this matter by the UWU is not consistent with the deal Coles thought it had made with the UWU for all five DCs that were marked for closure. Some of the UWU's bargaining power and leverage in relation to the closure of the five DCs came from the fact that it could negotiate and deliver agreements that provided strong redundancy entitlements for its members and in exchange could provide Coles with some necessary flexibility as it ramped down its operations at those DCs. The root of Coles' complaint is that it does not have access to flexibilities it thought it had paid for in the Smeaton Grange agreement. As a result there is significant dissonance between the closure of Smeaton Grange compared to the other DCs.

These concerns are very much related to notions of industrial fairness and, by long established authorities, cannot sway the outcome of these proceedings.

DEPUTY PRESIDENT

Appearances:

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