[2024] FWCFB 318

DECISION

Fair Work Act 2009
s.604—Appeal of decision

Aurizon Operations Limited
v
Cameron Webb
(C2024/1482)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT WRIGHT

BRISBANE, 25 JULY 2024

Appeal against decisions [[2024] FWC 296 and [2024] FWC 513] of Deputy President Cross at Sydney on 5 February 2024 and 5 March 2024 in matter number C2022/130 – dispute settlement procedure in enterprise agreement – requirement to provide an employee against whom findings of misconduct were made with a copy of an investigation report – requirements of procedural fairness.

Introduction

[1] Aurizon Operations Limited (***Aurizon***) arranged for an investigation to be conducted in relation to allegations against one of its employees, Mr Cameron Webb, who is a member of the Australian Rail Tram and Bus Industry Union (***RTBU***). An investigation report was prepared by an external investigator, who found that Mr Webb had engaged in the conduct alleged against him. Aurizon accepted the findings of the investigator and invited Mr Webb to show cause as to why his employment should not be terminated.

[2] On 9 January 2024, the RTBU filed an application (on behalf of Mr Webb) in the Fair Work Commission (***Commission***) under s 739 of the *Fair Work Act 2009* (Cth) (***Act***) for the Commission to deal with a dispute in relation to the investigation concerning Mr Webb. Aurizon objected to the application on the basis that the Commission did not have jurisdiction to deal with the dispute because the relevant steps in the dispute resolution procedure in clause 54 of the Aurizon NSW Coal Operations Enterprise Agreement 2021 (***Enterprise Agreement***) had not been followed. Aurizon also contended that the investigation had already been completed, with the result that there was no utility in the relief sought by Mr Webb – access to the investigation report – because it was not relevant to, nor required for, Mr Webb to respond to Aurizon's show cause letter.

Deputy President's decisions

[3] In his first decision, published on 5 February 2024,[1] Deputy President Cross concluded that the Commission had jurisdiction to deal with the dispute because the relevant steps of the dispute resolution procedure at clauses 54.1 and 54.2 of the Enterprise Agreement had been followed.[2] The Deputy President rejected Aurizon's contention that the relief sought by Mr Webb was inconsistent with the requirement in the Enterprise Agreement that disciplinary inquiries and investigations be confidential.[3] The parties were directed by the Deputy President to confer about any outstanding issues concerning production and access to the investigation report by Mr Webb.[4]

[4] Following publication of the First Decision, Aurizon resisted production of the investigation report to Mr Webb. The RTBU sought to have the matter relisted before the Deputy President. The RTBU also filed an application for an order for the production of documents, seeking production of the investigation report with the names of employee witnesses redacted.

[5] On 14 February 2024, a hearing was held in relation to the application for an order for the production of documents. Aurizon contended that ordering it to provide the investigation report to Mr Webb was beyond the authority of the Commission and would be specifically inconsistent with clause 12 of the Enterprise Agreement. Aurizon also contended that the Commission should not exercise any discretion it had to order the production of the investigation report to Mr Webb.

[6] In his second decision, published on 5 March 2024,[5] the Deputy President observed that the dispute had developed to be a dispute regarding the failure of Aurizon to provide a redacted copy of the investigation report to Mr Webb.[6] The Deputy President concluded that clause 12.1 of the Enterprise Agreement required that the investigation report be disclosed to Mr Webb to ensure that he was fully aware of the allegations against him and he was afforded an opportunity to provide an informed response to the allegations.[7] The Deputy President ordered Aurizon to produce the investigation report with the names of employee witnesses redacted.[8]

[7] On 15 March 2024, by consent, Justice Hatcher stayed the order requiring production of the investigation report pending the hearing and determination of this appeal, or until further order of the Commission.[9]

Summary of Aurizon's appeal grounds and submissions

[8] Aurizon seeks permission to appeal against the First Decision, the Second Decision and the related order requiring Aurizon to provide the investigation report to Mr Webb. In summary, Aurizon submits that the Full Bench should:

(a) conclude that the procedural steps required by clause 54.1 of the Enterprise Agreement were not completed, and therefore the Commission did not have jurisdiction to proceed to arbitration;

(b) conclude that because of clause 12.2 of the Enterprise Agreement, Aurizon was not permitted to and therefore could not be ordered to produce the investigation report to any party in resolution of the dispute;

(c) alternatively conclude that the Deputy President erred in determining that Aurizon had failed to comply with its obligations under clause 12 of the Enterprise Agreement and that the investigation report was "required" to be provided or should be provided in the exercise of such discretion as the Deputy President had; and

(d) quash the order made by the Deputy President.

[9] Aurizon relies on six grounds of appeal, having decided not to press ground two in its notice of appeal.[10]

[10] Ground one contends that the Deputy President erred in finding at [56] of the First Decision that Mr Webb had complied with the relevant steps of the dispute resolution procedure at clause 54 of the Enterprise Agreement before filing his application in the Commission on 9 January 2024 because:

(a) contrary to [47] to [49], the correct construction of clause 54.1 of the Enterprise Agreement requires a discussion to have occurred between the employee (or their representative) and the relevant supervisor during which the parties attempt to resolve the dispute, and it is insufficient compliance with the first step in clause 54.1 for one party to attempt to contact the relevant supervisor; and

(b) contrary to the findings at [50] and [51], there was no relevant discussion between Mr Webb's representative and the relevant supervisor (Mr Morgan) on 8 January 2024 prior to Mr Webb's representative speaking to more senior levels of management, such that the two-stage process in clause 54 of the Enterprise Agreement was not satisfied.

[11] Because the first step of clause 54.1 of the Enterprise Agreement was not complied with, Aurizon submits that the Commission had no power to deal with the dispute and it should have been dismissed on jurisdictional grounds.

[12] By ground three, Aurizon contends that the Deputy President erred at [54] of the First Decision because the Commission was not permitted by s 739(5) of the Act to grant relief requiring the investigation report to be disclosed to Mr Webb because that relief is inconsistent with the terms of clause 12.2 of the Enterprise Agreement.

[13] Clause 12.2 of the Enterprise Agreement provides that the investigation is confidential. That obligation must, so Aurizon submits, necessarily apply to all aspects of the investigation process including any report prepared as part of the investigation.

[14] Aurizon submits that "confidential" means secret. It is submitted that this obligation of secrecy cannot be observed if any information from the investigation itself, necessarily including the final investigation report, is disclosed on any basis, including a redacted basis. Further, Aurizon contends that it is impractical to proceed on the basis that disclosure in any form, redacted or otherwise, would not immediately cause the disclosure of sensitive and

confidential material which the confidentially obligation is specifically designed to protect; namely the information provided confidentially by witnesses.

[15] It is submitted that it would be wilful blindness not to predict the obvious reality that a stakeholder in an investigation who receives an investigation report with names redacted but other details disclosed would not be in a position to immediately understand who had provided what information. If incorrect conclusions were drawn because of the redacted material, that might result in a worse outcome which was even more profoundly inconsistent with the objective of confidentiality.

[16] Aurizon submits that clause 12.2 of the Enterprise Agreement is a critical element of a carefully constructed regime for managing sensitive disciplinary matters. Just as Aurizon would be precluded from disclosing the investigation report to an aggrieved complainant who was disappointed by a determination that allegations were not substantiated, Aurizon submits that it is not permitted to disclose the investigation report to Mr Webb in this matter. Further, if Aurizon is not permitted to disclose the investigation report to Mr Webb, an obligation which it says is enforceable against it by the complainant and the witnesses, it must follow from the injunction in s 739(5) of the Act that disclosure of the investigation report is not an available outcome in the dispute proceedings. It is contended that this is both a jurisdictional obstacle (given the limited relief sought by Mr Webb) and a substantive reason why the relief should not have been ordered.

[17] Ground four contends that the Deputy President erred at [36] to [38] of the Second Decision because, as a matter of fact and law, the disciplinary process involving Mr Webb is at the "Disciplinary Outcomes" stage for the purpose of clause 12.4 of the Enterprise Agreement and the process contemplated by clause 12.1 is complete.

[18] Aurizon submits that, at [38] of the Second Decision, the Deputy President found that the matter was not at the "Disciplinary Outcomes" stage because it was at the stage where Mr Webb was afforded the opportunity to show cause. It is contended that this finding was made in error and is in fact illogical. Aurizon submits that clause 12 of the Enterprise Agreement identifies a two-stage process:

(a) First, an investigation is carried out. During that process, the Enterprise Agreement places particular obligations on Aurizon, including to ensure the investigator applies the principles of natural justice and due process. Those concepts are informed by the subclauses in clause 12.1 of the Enterprise Agreement.

(b) Secondly, following a clause 12.1 investigation procedure – and not before – a disciplinary process may commence pursuant to clause 12.4 of the Enterprise Agreement ("Disciplinary Outcomes"). That engages different natural justice requirements set out in clause 12.4.1, including the "opportunity to show cause".

[19] The Deputy President's finding is contended to be illogical because:

(a) the dispute (by the stage of arbitration) solely concerned delivery of the investigation report, the creation of which represented the end of the clause 12.1 procedure; and

(b) unless the clause 12.1 stage was completed there could be no disciplinary process.

[20] Aurizon submits that a show cause process is an aspect of a disciplinary process and not an investigation process, and for obvious reasons is not contemplated in clause 12.1 of the Enterprise Agreement.

[21] By ground five, it is contended that the Deputy President erred at [47], [48] and [53] of the Second Decision because:

(a) on a correct construction of clauses 12.1, 12.1.1 and 12.1.2 of the Enterprise Agreement there is no requirement and in fact no authority for the investigation report to be disclosed to Mr Webb as:

(i) the requirements of clause 12.1 of the Enterprise Agreement are not relevant to and do not inform the subsequent "Disciplinary Outcomes" process required by clause 12.4 of the Enterprise Agreement;

(ii) clause 12.4 by its terms does not require or permit the provision to any person of a report prepared following the completion of an investigation conducted pursuant to clause 12.1 and it is impermissible to infer such an obligation by reference to externally derived concepts of natural justice and due process; and

(iii) the conclusion is inconsistent with clause 12.2 of the Enterprise Agreement;

(b) Aurizon provided Mr Webb with natural justice and due process in compliance with clause 12.1 of the Enterprise Agreement during the investigation process which has been completed; and

(c) Aurizon has otherwise complied fully with its obligations under clause 12.4 of the Enterprise Agreement as it relates to the "Disciplinary Outcomes" stage of the disciplinary process.

[22] It is contended that the Deputy President's error identified by ground four led directly to the errors identified in ground five by reference to paragraphs [47], [48] and [53] of the Second Decision. These paragraphs refer to "allegations" against Mr Webb and state that the provision of the investigation report is necessary so that Mr Webb can respond to the allegations. However, Aurizon submits that the "allegations" were provided to Mr Webb on 8 January 2024 within the investigation process, as required by clause 12.1 of the Enterprise Agreement; the allegations were discussed with Mr Webb during his interview with the investigator on 9 January 2024 and Mr Webb also provided a written response to the allegations, denying them; the investigation concluded and findings were made by the investigator; and the findings were communicated to Mr Webb on 23 January 2024 and Mr Webb was asked to show cause why termination of his employment should not occur.

[23] Aurizon submits that the fundamental error – the failure to conclude that the process had moved to that prescribed by clause 12.4 of the Enterprise Agreement – meant that the Deputy President improperly had regard to the obligations outlined in clause 12.1 of the Enterprise Agreement when those obligations did not inform the show cause process under clause 12.4. It

is submitted that the Deputy President's consideration of whether he should require the investigation report to be disclosed should be limited to an enquiry as to whether any aspect of clause 12.4 of the Enterprise Agreement could have required production of the investigation report as sought by Mr Webb, and whether in any event clause 12.2 prevented this from occurring. Aurizon submits that no such "requirement" exists in clause 12.4 of the Enterprise Agreement, and the Deputy President should have concluded that Aurizon was not required (or permitted) to produce the investigation report during the show cause process.

[24] Aurizon submits that the Deputy President's conclusion at [47] and [48] of the Second Decision to the effect that Aurizon had denied Mr Webb natural justice was erroneous, however in any event it was irrelevant. It is submitted that clause 12 established a separate "code" for the procedure to be followed at the investigation stage and at the disciplinary stage. In resolving the dispute under the Enterprise Agreement (which by clause 54.1 of the Enterprise Agreement and ss 595 and 739 of the Act was the only permissible arbitral function), Aurizon submits that the Deputy President was not authorised to resolve the dispute by reference to externally-derived standards of natural justice or procedural fairness. It is submitted that the Deputy President was required to ascertain the requirements of clause 12 and whether they had been met. If they had, that was an end to it.

[25] By ground six, Aurizon contends that, even if jurisdiction could be established, the Deputy President erred at [50] to [53] of the Second Decision in exercising his discretion to order production of the investigation report because:

(a) Mr Webb had already been afforded natural justice in relation to the allegations during the investigation which occurred pursuant to clause 12.1 of the Enterprise Agreement;

(b) provision of the investigation report to Mr Webb (or his representative) for the purposes of the disciplinary process contemplated by clause 12.4 of the Enterprise Agreement was unnecessary and of no utility having regard to the limited rights available to Mr Webb pursuant to that process;

(c) the finding at [52] is inconsistent with clause 12.2 of the Enterprise Agreement which requires Disciplinary Enquiries and Investigations to be confidential; and

(d) the Deputy President failed to give appropriate weight to the evidence of Mr Morgan on behalf of Aurizon and submissions made on its behalf as to why the dispute should not be resolved by requiring Aurizon to provide the investigation report to Mr Webb.

[26] Aurizon submits in ground seven that the Deputy President erred in paragraphs [53] to [55] of the Second Decision and by issuing an order for the production of documents because the power in s 590(2) of the Act is a power for the Commission to inform itself in resolving a matter before it and is not a power which authorises the making of an order as final relief.

Summary of RTBU's submissions

[27] The RTBU submits that permission to appeal in respect of the First Decision should be refused on the basis that Aurizon elected not to file any appeal until 12 March 2024, some 38 days after publication of the First Decision and outside the statutory period of 21 days.

[28] As to the first ground of appeal, the RTBU submits that the uncontested factual matrix is that Aurizon's manager, Mr Mitchell Morgan, received two telephone calls at 12:18pm and 1:03pm on 8 January 2024 from Mr Hart of the RTBU. Mr Morgan did not answer either call notwithstanding separate voicemail messages being left for him on each occasion, nor did he return Mr Hart's calls after being sent a follow-up email at 1:30pm on 8 January 2024 alerting Mr Morgan of the attempted contact by phone.

[29] The RTBU submits that it is open to the Full Bench to infer, on the balance of probabilities, the following:

(a) Mr Morgan did not engage with the RTBU following telephone calls made to him at 12:18pm and 1:03pm, nor did he respond to the voicemail messages left for him on each occasion.

(b) At 1:30pm Mr Morgan received an email from the RTBU alerting him to the attempted contact by telephone. Again, Mr Morgan did not engage with this email in a timely manner as required by clause 54.1 of the Enterprise Agreement.

(c) The RTBU's contact with Mr Daniel Kadziela, General Manager Aurizon NSW Coal, at 2:48 PM on 8 January 2024 did not provoke a timely response from Mr Morgan.

(d) Mr Morgan's silence in effect frustrated the terms of clause 54.1, but did not necessarily defeat the RTBU progressing matters in accordance with clause 54.2 of the dispute resolution procedure.

[30] The RTBU did "attempt" to raise by way of discussion with Mr Morgan the issues that gave rise to the dispute. The Deputy President's First Decision at [48(b)] accordingly must be the preferred conclusion in circumstances where a non-responsive person could simply defeat the dispute settlement procedure by electing to ignore efforts to raise issues in dispute. Such an outcome would be contrary to the intention of such a provision contained in the dispute settlement procedure.

[31] Clause 54.1 of the Enterprise Agreement outlines a two-step process for raising a dispute. Mr Webb satisfied those requirements when the RTBU initiated contact with Mr Morgan at 12:18pm and again at 1:03pm on 8 January 2024, together with the voicemail messages left and the email sent at 1:30pm on the same date.

[32] As to ground three, the RTBU submits that the requirement in clause 12.2 of the Enterprise Agreement for "disciplinary inquiries and investigations … [to] be confidential" must be construed in the context of clause 12 as a whole. Clause 12 outlines a process which relevantly includes the possibility of an internal investigation in relation to a matter that may lead to disciplinary action being taken against an employee. The clause specifically requires the principles of natural justice and due process to be adopted as part of any such process. Keeping aspects of the investigation secret from Mr Webb would result in a manifest denial of procedural fairness.

[33] The RTBU submits that the notion that Aurizon is striving to keep secret elements of the investigation report such as the name of the complainant or the particulars of the allegations is manifestly absurd, because the identity of the complainant is known to Mr Webb as are the allegations made by the complainant.

[34] As to ground four, the RTBU submits that clause 12 of the Enterprise Agreement encompasses the entirety of what is deemed as "disciplinary matters", which include procedural matters and disciplinary outcomes. Those provisions start with the concept of ensuring procedural fairness and due process. It is submitted that those protections must continue throughout the life of the matters that are the subject of clause 12. The RTBU contends that an employee in Mr Webb's position must be able to shape the mind of the decision-maker in respect of relevant matters which may be contained within an investigation report concerning alleged misconduct.

[35] As to ground five, the RTBU submits that Aurizon's contentions seek to establish an artificial boundary and limitation of the protection afforded by clause 12, namely, to afford employees a fair go all round in accordance with procedural fairness.

[36] As to ground six, the RTBU submits that the Deputy President found that a failure to provide a copy of the report to Mr Webb denied him natural justice and due process and that his legitimate interest in protecting his employment was given less weight than the interests of participants in the investigation. Such an erosion of Mr Webb's rights as protected under clause 12.1 of the Enterprise Agreement is contrary to the principles of due process and procedural fairness.

[37] As to ground seven, the RTBU submits that the Deputy President was empowered to make an order requiring Aurizon to produce a copy of the investigation report, and make it available to Mr Webb, pursuant to ss 590 or 595(3) of the Act. It is also submitted that the order was made in accordance with the relevant Fair Work Commission Rules.

[38] The RTBU submits that the Deputy President correctly held that the Commission has jurisdiction to deal with the dispute and that Mr Webb was denied procedural fairness by Aurizon refusing to provide a redacted copy of the investigation report. It is submitted that the appeal does not attract the public interest and should be dismissed.

Consideration

[39] Insofar as the appeal concerns the proper construction of the Enterprise Agreement or whether the Commission has jurisdiction to deal with the dispute, it is to be determined by the 'correctness standard'.[11] Therefore, if the answer given by the Deputy President to a constructional or jurisdictional question was correct, then any error made in the reasoning process will not result in the appeal being upheld. If we conclude that it was wrong, the appeal may be upheld, and the Full Bench may substitute the correct answer.[12]

[40] The principles of interpretation of enterprise agreements are well established[13] and need not be recited in this decision.

[41] The following provisions of the Agreement are relevant:

"**12 DISCIPLINARY MATTERS**

12.1 Process: Any Internal Investigation In relation to a matter or incident by the Company that may lead to disciplinary action being taken against an employee must apply the principles of natural justice and due process, Including:

12.1.1 The employee being made fully aware in writing of the allegations that are the subject of investigation;

12.1.2 The employee being provided with sufficient information to enable the provision of an informed response;

12.1.3 The employee being informed of their entitlement to have a Union representative present and/ or a witness /support person at any meetings/interviews, if so requested;

12.1.4 The employee being given reasonable time to prepare a response to the allegations that are the subject of the investigation;

12.1.5 Records of conversation and RU OK conversations are an informal counselling tool that do not form a part of the disciplinary process. This clause does not limit the Company's ability to use these informal counselling tools which may lead to the commencement of a formal discipline process.

12.2 Confidential: Disciplinary Inquiries and Investigations shall be confidential.

12.3 Investigations: Employees under investigation may be subject to the following action during the investigation: 12.3.1 Suspension from duty with no reduction of pay; or 12.3.2 Placed on alternative duties; or 12.3.3 Re-assessed and returned to normal duties.

12.4 Disciplinary Outcomes

12.4.1 Following the procedure In Clause 12.1 employees may be subject to the following discipline outcomes:

(i) Verbal warning with a file note entered on the employee's personnel file; or

(ii) Written warning or reprimand; or

(iii) Temporary reduction in position, classification level and pay (for a period of up to twelve (12) months). When this option is implemented, the employee will be required to undertake work activities in accordance with the classification level to which they have been regressed; or

(iv) Suspension from duty without pay, or

(v) Dismissal, with or without notice as applicable.

12.4.2 In assessing what disciplinary outcome an employee may be subject to, the Company will:

(i) Assess and place appropriate weight to relevant matters only; and

(ii) Give the employee a reasonable opportunity to provide reasons to the Company as to what the appropriate disciplinary outcome should be, taking into account their employment history, including years of service, performance, discipline and their plans for Improving their performance/ conduct.

(iii) Where the Company has elected to suspend the employee from duty or dismiss the employee with or without notice, as a disciplinary outcome, the Company will provide the employee with written Information as to why a verbal or written warning, reprimand, or temporary reduction in position is not an appropriate outcome and allow the employee the opportunity to respond.

12.4.3 Employees who wish to dispute the outcome of a disciplinary procedure, except where the discipline involves dismissal, must follow the procedure set down in **Clause 54** of this Agreement.

…

54 DISPUTE SETTLING PROCEDURE

54.1 In the event of a dispute about a matter arising under this Agreement, or In relation to the NES, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employee's representative concerned and more senior levels of management as appropriate.

54.2 If a dispute arises under Clause 54.1 and is unable to be resolved at the workplace, and all appropriate steps under the above Clause 54.1 have been taken, a party to the dispute may refer the dispute to the FWC.

54.3 Where the dispute remains unresolved, the FWC may exercise any method of dispute resolution permitted by the Act that it considers appropriate to resolve the dispute.

54.4 The Company or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.

54.5 Subject to Clause 54.6, while the above procedures are being followed, all work shall continue as normal prior to the dispute occurring.

54.6 Normal operations will not continue where a genuine and serious safety concern makes it unsafe to continue normal operations and is the issue in dispute.

54.7 The ultimate terms of the settlement of the dispute shall not be affected in any way, nor shall the rights of any person involved in the dispute be affected or prejudiced by the fact that normal work has continued without interruption."

Ground 1

[42] Ground one is concerned with whether the preliminary steps in the dispute settling procedure in clause 54 of the Enterprise Agreement were followed. In this regard, we agree with the following observations by a Full Bench of the Commission in *Australian Workers' Union v MC Labour Services Pty Ltd*:[14]

> "[37] It may be that situations will arise where it is genuinely impossible for a party to comply with a mandatory step in a dispute resolution procedure, and that the effect of this is that the Commission or other independent person cannot attempt to settle the dispute. This might be an issue for the Commission to examine when considering whether to approve an agreement under s.185 of the FW Act. However, once an agreement has been approved, and a dispute is referred to the Commission under it, it would not be permissible for the Commission to recast or ignore certain components of the dispute settlement procedure. Section 186(6) is not a source of power to do this. An enterprise agreement comes into operation seven days after it is approved by the Commission. Once in operation, the agreement is presumed to be valid, until such time as the decision of the Commission to approve the agreement is overturned on appeal, or the agreement is otherwise found by a court to be invalid. The various terms of an enterprise agreement are also assumed to be valid, with the exception only of unlawful and certain other terms, which have no effect as a result of s.253 of the FW Act."

[43] The first sentence of clause 54.1 of the Enterprise Agreement imposes an obligation on the parties to a dispute to "attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor". The requirement is not to attempt to have discussions; it is an obligation to attempt to resolve the dispute by discussions.

[44] Similarly, the second sentence of clause 54.1 imposes an obligation on the parties, in the event that the first level of discussions between the employee and their supervisor has not resolved the matter, to "endeavour to resolve the dispute … by discussions between the employee or employee's representative concerned and more senior levels of management as appropriate".

[45] Clause 54.2 permits a party to the dispute to "refer" the dispute to the Commission if the dispute has been "unable to be resolved at the workplace, and all appropriate steps under the above Clause 54.1 have been taken".

[46] Neither party has sought to cavil with the Deputy President's observation that the ordinary (dictionary) meaning of "discussion" is:[15]

> "1. the act of discussing; critical examination by argument; debate.
>
> 2. a written or spoken text type or form which offers a balanced presentation of different points of view on an issue."

[47] We consider that the word "discussions" in the first and second sentences of clause 54.1 of the Enterprise Agreement has the first ordinary meaning set out above ("the act of discussing; critical examination by argument; debate"). There is no suggestion in the text, context or purpose of clause 54.1 that any such discussions must be in person or cannot be undertaken in writing. The second ordinary meaning of "discussion" does not fit the context of discussions between parties in dispute with a view to resolving the dispute.

[48] The relevant facts in relation to ground one may be summarised as follows:

(a) On 8 January 2024, Mr Webb received a letter of allegations from Aurizon in relation to conduct in which he allegedly engaged on 9 and 15 December 2023.[16] The letter

directed Mr Webb to attend an information gathering meeting at 9:00am on 9 January 2024.[17]

(b) At 12:18pm and again at 1:03pm on 8 January 2024, Mr Hart telephoned Mr Mitchell Morgan, Regional Operations Manager – Wollongong Operations NSW and South East Queensland, to raise concerns about the disciplinary process involving Mr Webb. Mr Morgan did not answer either call. On both occasions Mr Hart left a voice message on Mr Morgan's mobile service.[18]

(c) At 1:30pm on 8 January 2024, Mr Hart sent an email to Mr Morgan in the following terms:[19]

> "Hi Mitchell,
>
> We represent Mr Webb in respect of the current letter of investigation dated 8 January 2024.
>
> I have attempted to contact you this afternoon and have left a couple of voice messages on your mobile phone (…) requesting you call me back.
>
> The purpose of my call is to discuss the meeting that has been scheduled for 9am, Tuesday 9 December at the Sage Hotel in Wollongong with Kieran Plasto from Resolvere.
>
> Noting the provisions contained at Clause 12 of the Aurizon NSW Coal Operations Enterprise Agreement 2021 (the Agreement), in particular the term requiring adherence to the principles of natural justice and due process, we are concerned that the proposed interview may not comply with the terms of the Agreement to the extent that Aurizon is required, pursuant to clause 12.1.1, to fully provide Mr Webb in writing, the allegations being put to him and that, in accordance with clause 12.1.4, Mr Webb is given reasonable time to prepare a response. We say that any such prepared response is to be in writing.
>
> Unless there is any further or specific information that Aurizon seeks to rely on and present to Mr Webb, we propose that Mr Webb prepare a written response to the allegations contained in your letter of today's date, in lieu of the proposed meeting with Mr Plasto.
>
> Can you provide your response to the above before 4:30pm today to the above proposal.
>
> Kind regards,
> Jason"

(d) At 2:48pm on 8 January 2024, having not received a response from Mr Morgan, Mr Hart sought to escalate the RTBU's concerns by contacting Mr Daniel Kadziela – General Manager Aurizon NSW Coal.[20]

(e) At 2:51pm on 8 January 2024, Mr Hart sent an email to Mr Kadziela in the following terms:[21]

> "Hi Dan,

As discussed, we would be grateful if the scheduled meeting is cancelled for reasons set out below.

Can you come back to me with your response to our request before COB today.

Many thanks,
Jason"

(f) At 4:11pm on 8 January 2024, Mr Hart received an email from Mr Morgan in the following terms:[22]

"Hi Jason,

Thank you for reaching out, and apologies for missing your calls this afternoon.

With regard to Clauses 12.1.1 and 12.1.4 of the Aurizon NSW Coal Operations Enterprise Agreement 2021 (the Agreement), Aurizon has provided a full copy of the allegations in writing to Mr Webb, and has provided reasonable time for Mr Webb to prepare a response.

Aurizon has requested Mr Webb attend the meeting to respond to allegations provided to him, to which Mr Plasto may ask questions to seek further clarity about the allegations.

I believe it reasonable to request Mr Webb attend the meeting at the proposed time.

Regards,
Mitch"

(g) At 4:30pm on 8 January 2024, Mr Hart sent a follow-up email to Mr Morgan in the following terms:[23]

"Hi Mitchell,

Just to confirm, is Cameron is [sic] receipt of all materials and evidence that Aurizon seeks to rely on as part of this investigation?

For abundant clarity, can you confirm whether Ms … has made an audio or video recording of the alleged discussion held on 15 December 2023 with Mr Webb and if so, whether she has provided a copy of that recording to Aurizon?

Finally and for completeness, can you confirm that you are directing Mr Webb to attend tomorrow's interview with Mr Kieran Plasto from Resolvere?

Regards,
Jason"

(h) At 5:42pm on 8 January 2024, Mr Hart received a further email from Mr Morgan. It stated:[24]

> "Hi Jason,
>
> Cameron has been made fully aware in writing of the allegations that are the subject of the investigation, and has been provided with sufficient information to enable the provision of a response.
>
> Cameron has been directed to attend the meeting as per the letter provided to Cameron today.
>
> Regards,
> Mitch"

(i) At 6:07pm on 8 January 2024, Mr Hart sent another email to Mr Morgan. It stated:[25]

> "Hi Mitchell,
>
> Regrettably, you have not responded to my direct question about whether Ms … has provided audio or video footage obtained on 15 December 2023.
>
> Your failure to respond raises significant concerns about the fairness of proceeding with tomorrow's meeting.
>
> Unless you unequivocally provide a response before 830am Tuesday 9 January, we put you on notice that we will file a dispute with the fair work commission to have the merits of the investigation process determined. And until the
> matter is determined we won't be proceeding with the meeting.
>
> Your urgent response is required.
>
> Regards
> Jason"

(j) At 8:51am on 9 January 2024, Mr Hart prepared and filed an application in the Commission on behalf of Mr Webb in relation to his dispute with Aurizon.[26] The application described the dispute in the following terms:[27]

> "1. Employer has failed to adhere to principles of procedural fairness, pursuant to clause 12 of the Agreement.
>
> 2. Employer has failed to make the Applicant 'fully aware in writing' of the allegations and subsequent questions that it seeks to rely on as part of the investigation, pursuant to clause 12.1.1.
>
> 3. The Employer has failed to adhere to clause 12.1.2 concerning the provision of sufficient information for the Applicant to make an informed response to the allegations being put to him.
>
> 4. The Employer has failed to provide, in accordance with clause 12.1.4, reasonable time to prepare a response to the allegation, including but not limited to seeking advice and support from his representative."

(k) Aurizon accepts that its dispute with Mr Webb evolved from a dispute about the matters described in the application to one primarily focused on the refusal of Aurizon to provide Mr Webb with a copy of the investigation report.[28] Mr Webb maintains that this constitutes a continuing failure by Aurizon to comply with the obligation of procedural fairness pursuant to clause 12 of the Enterprise Agreement.

(l) On 9 January 2024, Mr Webb and Mr Hart attended the information gathering meeting with Mr Plasto.[29]

(m) On 23 January 2024, Mr Webb and Mr Hart attended an "outcome" meeting with Mr Morgan and Mr Peter Hamilton. Mr Morgan read from a "show cause" letter, inviting Mr Webb to provide a written response as to why his employment should not be terminated. Mr Hart then requested a copy of the investigation report on which Aurizon had relied to substantiate the allegations against Mr Webb. Mr Morgan advised that the investigation report was confidential. Mr Hart suggested that Aurizon could redact the names of any witnesses.[30]

(n) By email sent to Mr Morgan on 23 January 2024, Mr Hart made a written request to Aurizon for a copy of the investigation report.[31]

(o) By email sent to Mr Hart on 24 January 2024, Aurizon refused to provide a copy of the investigation report to Mr Webb on the ground that it was confidential.[32]

(p) By email sent to Mr Morgan on 24 January 2024, Mr Hart disagreed with Aurizon's position in relation to the confidentiality of the investigation report and asked a number of questions in relation to the investigation and the findings made against Mr Webb.[33]

(q) By email sent to Mr Hart on 25 January 2024, Mr Morgan stated, amongst other things:[34]

> "As I am sure you can appreciate, concerns are often raised where there is an absence of a witness. In these circumstances, ancillary information (for example, contemporaneous reports, credibility of the parties, documentary evidence, etc.) can be considered to determine whether an allegation is, or is not, substantiated. The Investigator considered relevant ancillary information in reaching his determination (including [the Complainant's] evidence, the evidence of witnesses who observed [the Complainant] immediately following the incidents and Cameron's text message and responses) in reaching his finding that the incident is more likely than not to have occurred as alleged. I have accepted the findings of the independent, external, and appropriately qualified investigator."

[49] There is no dispute that the second step in clause 54.1 of the Enterprise Agreement was met before the RTBU filed the application in the Commission. The issue between the parties, both at first instance and on appeal, is whether the first step in clause 54.1 was completed. The Deputy President found that the first step in clause 54.1 was satisfied by:[35]

> "(a) The attempt by the RTBU to contact Mr Morgan at 12:18pm and again at 1:03pm on 8 January 2024, and the two voicemail messages left; and
>
> (b) The email sent by Mr Hart to Mr Morgan at 1:30pm on 8 January 2024."

[50] We would add to the matters relied on by the Deputy President in (a) and (b) above the email communications between Mr Hart and Mr Morgan at 4:11pm, 4:30pm, 5:42pm and 6:07pm on 8 January 2024. In those email communications there was critical examination by argument of the matters in dispute between Mr Webb and Aurizon. The email communications therefore constituted "discussions" between the parties to the dispute within the meaning of the first sentence of clause 54.1 of the Enterprise Agreement. The object of those "discussions" was to resolve the matters in dispute between Mr Webb and Aurizon. We do not consider that the steps provided for in clause 54.1 of the Enterprise Agreement are so rigid as to prohibit consideration of ongoing communications between an employee (or their representative) and the employee's supervisor, after some brief intervening discussions between the employee's representative and appropriate levels of (more senior) management, in assessing whether the parties have complied with their obligation to attempt to resolve the matter by discussions before referring the dispute to the Commission. We are satisfied that "all appropriate steps under … Clause 54.1 [were] taken" before the application was filed in the Commission on the morning of 9 January 2024. The Deputy President was correct to find that the Commission had jurisdiction to deal with the dispute.

Ground 3

[51] Clause 12.2 of the Enterprise Agreement provides that "Disciplinary Inquiries and Investigations shall be confidential". We accept Aurizon's contention that the word "confidential" in clause 12.2 means secret. This obligation of secrecy is binding on Aurizon and its employees (covered by the Enterprise Agreement) who are involved in a disciplinary inquiry or an investigation under clause 12 of the Enterprise Agreement. We also accept that the obligation of secrecy extends to an investigation report prepared as part of a disciplinary inquiry or an investigation. However, there is no express right or obligation conferred or imposed on Aurizon by clause 12.2 to prevent or prohibit Aurizon from providing a copy of an investigation report to an employee against whom findings have been made. Any such employee would be obliged by clause 12.2 to keep the content of the report secret.

[52] Aurizon accepts that an employee who is the subject of an investigation or disciplinary inquiry will have to be advised of the allegations made against them prior to the investigation and in the investigation itself.[36] Yet Aurizon contends that the Enterprise Agreement does not contemplate that the required confidentiality can be observed if *any* information from the investigation is disclosed on any basis.[37] We disagree.

[53] The basis on which allegations, with sufficient particulars to ensure the employee understands the allegations being made against them, can be framed and communicated by Aurizon to the employee is because other people (usually employees of Aurizon) have provided information to Aurizon in the course of an investigation or inquiry. Similarly, it will almost always be the case that questions will be put to an employee during the course of an investigation or inquiry. Those questions will often be based on information provided by a complainant or witness during the course of the investigation or inquiry. However, if Aurizon's contention about the obligation of secrecy in clause 12.2 of the Enterprise Agreement were correct, Aurizon would not be permitted to provide such information or ask such questions to the employee the subject of the investigation. This would make the whole regime imposed by clause 12 unworkable. This context provides strong support for our view that, on its proper

construction, the obligation of secrecy in clause 12.2 prohibits (a) employees from disclosing to any other person information provided by or obtained by them during the course of a disciplinary inquiry or investigation and (b) Aurizon from disclosing to any person not involved in the investigation or inquiry information obtained during the investigation or inquiry.

[54] We reject Aurizon's contention that clause 12.2 prohibits Aurizon from providing a copy of the investigation report to Mr Webb. As the Deputy President correctly stated, if the investigation report is to be provided to Mr Webb, "The appropriate time to ensure compliance with Clause 12.2 and Clause 12 as a whole, is when production and access issues are being considered".[38]

Grounds 4 and 5

[55] Clause 12 of the Enterprise Agreement deals with "disciplinary matters" by addressing two related but discrete processes. First, clauses 12.1 to 12.3 govern disciplinary investigations and inquiries. Secondly, clause 12.4 governs disciplinary outcomes. As is made clear in the first sentence of clause 12.1, an investigation or inquiry "may lead to disciplinary action being taken against an employee" [emphasis added]. The converse is also true, because it may be found in a disciplinary investigation or inquiry that the employee did not engage in the conduct alleged against them, or the conduct was of a trivial nature, in which case no disciplinary action may be taken against the employee.

[56] The investigation "process" required to be followed in accordance with clause 12.1 is one in which the employer "must apply the principles of natural justice and due process". This is an important protection for employees who are subjected to disciplinary investigations. It includes, without limitation, the requirements set out in clauses 12.1.1 to 12.1.4. In addition, as the Deputy President explained by reference to *Coutts*,[39] the principles of procedural fairness include the following:

> "Subject to any relevant statutory modification or variation, it is well-established that a person liable to be directly affected by an administrative decision to which the rules of procedural fairness apply must be given an opportunity of putting information or submissions to the decision-maker. For that right to have substance, the person affected must be given an opportunity of ascertaining the relevant issues, which requires the decision-maker to identify for the person affected any issue critical to the decision which is not apparent from the nature of that decision or the terms of the statute under which it is made. The obligation extends to informing the affected person of the nature and content of adverse material that is credible, relevant and significant obtained from sources other than the affected person, as well as of any adverse conclusion reached by the decision-maker in respect of which the affected person had no notice. The affected person must be given an adequate opportunity to address such new material and/or any unexpected conclusions by further information and submission… Generally speaking, however, and subject naturally to the particular statutory context, procedural fairness does not require that a decision maker adopt an 'open file' policy which would have the effect of disclosing every submission or piece of evidence to an affected party … Ultimately, the fundamental issue here is whether the applicant was given a reasonable opportunity to address issues relevant to his interests." [emphasis added]

[57] It is common ground that clause 12.1 of the Enterprise Agreement applied to the investigation conducted into the allegations against Mr Webb, notwithstanding that Aurizon appointed an external investigator to undertake the investigation. It is accepted that this was an

"internal investigation" within the meaning of clause 12.1, as distinct from an "external investigation" conducted by, for example, a regulator.

[58] Clause 12.4 provides that "Following the [investigation] procedure in Clause 12.1 employees may be subject to the following disciplinary outcomes". This sentence reinforces the point that the disciplinary outcome process is different from, and takes place after the conclusion of, the investigation process under clause 12.1. Clause 12.4 goes on to provide a number of specific protections for employees in relation to Aurizon's assessment of the disciplinary outcome, including an obligation on Aurizon to assess and place appropriate weight on relevant matters only (clause 12.4.2(i)), a right for the employee to be given a reasonable opportunity to provide reasons to Aurizon as to what the appropriate disciplinary outcome should be (clause 12.4.2(ii)), and a right for the employee to respond to any proposal to dismiss or suspend them from duty with or without notice, following receipt by the employee of written information from Aurizon as to why a verbal or written warning, reprimand or temporary reduction in position is not an appropriate outcome (clause 12.4.2(iii)). Unlike the investigation "process" in clause 12.1, there is no requirement in clause 12.4 for Aurizon to "apply the principles of natural justice and due process" when assessing "what disciplinary outcome an employee may be subject to". This is understandable in circumstances where clause 12.4 expressly sets out a number of specific protections for employees, the object of which are to ensure that employees have a fair opportunity to be heard on the question of what disciplinary outcome should be imposed after an investigation has been concluded.

[59] The Deputy President observed that the matter is "not at the disciplinary outcomes stage (Clause 12.4) because it is clearly at the stage where the Applicant is afforded the opportunity to show cause, which has not occurred".[40] We take this to mean that the disciplinary outcome has not been determined by Aurizon, which is plainly correct. However, there can be no doubt that the disciplinary outcomes process in clause 12.4 has begun because the investigation has been completed, findings have been made against Mr Webb, and Mr Webb has been asked to show cause as to why his employment should not be terminated.

[60] The Deputy President found that Aurizon denied natural justice and due process to Mr Webb by failing to provide the investigation report to him.[41] An investigation report records findings and conclusions in relation to the allegations made against an employee in an investigation. It follows that an investigation report can only be prepared once an investigation has been undertaken. That is, an investigation process under clause 12.1 must be completed before an investigation report can be finalised and provided to the relevant decision maker(s) within Aurizon for consideration as to whether a disciplinary outcome of some kind may be warranted. We therefore do not consider that the requirements of natural justice and due process in clause 12.1, which must be applied during an investigation, apply to the investigation report itself. Further, it is clear that the matter has moved beyond the investigation stage under clause 12.1 and is now at the stage where Aurizon will decide, in accordance with the process set out in clause 12.4 of the Enterprise Agreement, whether to impose some type of disciplinary outcome on Mr Webb. As explained above, clause 12.4 does not impose an obligation on Aurizon to "apply the principles of natural justice and due process" when assessing, under clause 12.4, what, if any, disciplinary action should be taken against Mr Webb. There is no express or implicit requirement within the process governed by clause 12.4 for Aurizon to provide a copy of the investigation report to Mr Webb as part of its deliberation as to whether disciplinary action should be taken against him. For these reasons, we agree, with respect, that

the Deputy President erred by finding that clause 12.1 required that the investigation report be disclosed to Mr Webb.[42]

[61] Notwithstanding our conclusion that clause 12 of the Enterprise Agreement did not require Aurizon to provide a copy of the investigation report to Mr Webb, we agree with the Deputy President's finding that Mr Webb was not afforded natural justice and due process during the investigation process under clause 12.1. As the Deputy President explained by reference to *Coutts*, the requirements of natural justice extend to "informing the affected person of the nature and content of adverse material that is credible, relevant and significant obtained from sources other than the affected person…"[43] Mr Morgan informed Mr Hart on 25 January 2024 that the investigator "considered relevant ancillary information in reaching his determination (including [the Complainant's] evidence, the evidence of witnesses who observed [the Complainant] immediately following the incidents and Cameron's text message and responses) in reaching his finding that the incident is more likely than not to have occurred as alleged".[44] This was "adverse material that is credible, relevant and significant obtained from sources other than the affected person". Accordingly, in order to comply with the requirements of "natural justice and due process" under clause 12.1 of the Enterprise Agreement, the investigator appointed by Aurizon was required to put the substance of this adverse material to Mr Webb during the investigation process and prior to making a finding that "the incident is more likely than not to have occurred as alleged".

[62] It is uncontroversial that the substance of this adverse material was not put to Mr Webb for his response. It would be prudent for Aurizon to take a step back from the current show cause process and re-open the investigation so that the substance of the adverse material is put to Mr Webb for his response before any findings are made by the investigator.

<u>Grounds 6 and 7</u>

[63] The foundation for the Deputy President to exercise his discretion under s 590 of the Act to order that the investigation report be produced to Mr Webb was the anterior conclusion that Mr Webb had a right under clause 12 of the Enterprise Agreement to be provided with a copy of the investigation report. In light of our conclusion that Mr Webb did not have such a right, we agree that the Deputy President erred in ordering production of the report under s 590 of the Act. Section 590 of the Act is directed towards the Commission informing itself in relation to a matter before it. Having regard to the context of the present dispute where the matter in issue is whether Mr Webb had a right under the Enterprise Agreement to be provided with a copy of the investigation report, we consider that it would be impermissible to use the power under s 590 of the Act to make an order for the production of the investigation report where there is no right under the Enterprise Agreement to obtain a copy of the report.

Conclusion

[64] As to the appeal against the First Decision, the initial issue which arises is whether we should grant an extension of time to file the appeal. Matters usually treated as relevant to a consideration of whether an extension should be granted include whether there is a satisfactory reason for the delay, the length of the delay, the nature of the grounds of appeal and the likelihood that one or more of those grounds would be upheld if time was extended, and any prejudice to the respondent if time were extended.[45] We would be inclined to provide the

requisite extension if we considered that the appeal had sufficient merit to attract the grant of permission to appeal. However, for the reasons stated, we do not consider that the grounds of the appeal advanced by Aurizon in relation to the First Decision, being grounds one and three, are likely to be upheld. Accordingly, we decline to extend time to file the appeal against the First Decision.

[65] As to the Second Decision, we consider that it is in the public interest to grant permission to appeal. We have identified error in the decision and consider that it has wide application to investigation procedures under the Enterprise Agreement and similar provisions in other agreements.

[66] We order as follows:

(a) The application to extend time to file the appeal against the First Decision is rejected.

(b) The appeal against the First Decision is dismissed.

(c) Permission to appeal is granted in respect of the Second Decision.

(d) The appeal against the Second Decision is upheld.

(e) The Second Decision is quashed.

(f) The order made by the Deputy President on 5 March 2024[46] requiring production of the investigation report is quashed.

[67] In accordance with s 607(3)(b) of the Act, we make a further decision in relation to the matter that is the subject of the appeal against the Second Decision and determine, for the reasons set out above, that:

(a) Mr Webb does not have a right under clause 12 of the Enterprise Agreement to be provided with a copy of the investigation report.

(b) The application for an order for the production of the investigation report under s 590 of the Act is dismissed.

(c) The application for the Commission to deal with the dispute is dismissed.

VICE PRESIDENT

Appearances:

Mr D. Williams, solicitor, appeared for Aurizon Operations Limited.
Mr J. Hart, Industrial Officer of the RTBU, appeared for Mr Cameron Webb.

Hearing details:

2024
Sydney
13 May.

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[1] [2024] FWC 296 (***First Decision***)

[2] Ibid at [50]-[53], [56]

[3] Ibid at [54]-[55]

[4] Ibid at [57]

[5] [2024] FWC 513 (***Second Decision***)

[6] Ibid at [35]

[7] Ibid at [48]

[8] PR772011

[9] PR772407

[10] Aurizon's submissions dated 11 April 2024 at [30]

[11] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30

[12] *Rail Commissioner v Rogers* [2021] FWCFB 371 at [61]

[13] See for example *James Cook University v Ridd* [2020] FCAFC 123 at [65]; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [197]; *AMWU v Berri Limited* [2017] FWCFB 3005 at [114]

[14] [2017] FWCFB 5032

[15] First Decision at [49]

[16] Appeal Book at p 91 [4]-[5]

[17] Appeal Book at p 95

[18] Appeal Book at pp 91-92 [8]

[19] Appeal Book at pp 92 [9] and 103

[20] Appeal Book at p 92 [10]

[21] Appeal Book at pp 92 [11] and 105

[22] Appeal Book at p 92 [12]

[23] Appeal Book at p 111

[24] Appeal Book at pp 92 [13] and 111

[25] Appeal Book at pp 93 [14] and 114

[26] Appeal Book at p 93 [15]

[27] Appeal Book at p 53

[28] Aurizon's written submissions on appeal dated 11 April 2024 at [32]

[29] Appeal Book at p 93 [16]

[30] Appeal Book at p 93 [18]-[19]

[31] Appeal Book at pp 93 [20] and 119

[32] Appeal Book at p 120

[33] Appeal Book at p 122

[34] First Decision at [26]

[35] First Decision at [51]

[36] Aurizon's written submissions dated 11 April 2024 at [51]

[37] Aurizon's written submissions dated 11 April 2024 at [52]

[38] First Decision at [55]

[39] *Coutts v Close* [2014] FCA 14 at [114]; Second Decision at [41]-[46]

[40] Second Decision at [38]

[41] Second Decision at [47]-[48]

[42] Second Decision at [48]

[43] Second Decision at [46]

[44] Second Decision at [47]

[45] *Snyder v Helena College Council* [2019] FWCFB 815 [11]

[46] PR772011