



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER JOHNS

C2023/7258

s.739 - Application to deal with a dispute

**Mr Alexander Lew
and
State of Victoria T/A Office of Public Prosecutions
(C2023/7258)**

Victorian Public Service Enterprise Agreement 2020

Melbourne

10.30 AM, THURSDAY, 28 MARCH 2024

Continued from 06/12/2023

PN1

THE COMMISSIONER: Thank you. Good morning, parties. Can I have the appearances, please.

PN2

MR A LEW: Good morning, it's Alexander Lew representing myself as the applicant in the substantive dispute.

PN3

THE COMMISSIONER: Thank you, Mr Lew. Are you on video, I can't see you?

PN4

MR LEW: I should be, yes.

PN5

MR C MCDERMOTT: Commissioner, whilst I'm announcing my appearance, McDermott for the respondent, in recent times this week with Microsoft Teams I found that if you topple the camera that can fix it pretty quickly. So Mr Lew might like to try that, respectfully.

PN6

THE COMMISSIONER: Thank you for the IT assistance, Mr McDermott.

PN7

MR LEW: I'll have a go.

PN8

MR MCDERMOTT: Thank you.

PN9

MR LEW: I'll turn the camera off - - -

PN10

MR MCDERMOTT: And back on.

PN11

MR LEW: Back on. Can you see me now?

PN12

MR MCDERMOTT: We can. Thank you, Mr Lew.

PN13

THE COMMISSIONER: Thank you, Mr McDermott, for your very helpful suggestion. All right. Thank you, Mr Lew, Mr McDermott. This hearing today is just to deal with the Form F52 dispute. First can I congratulate the parties on narrowing the issues that are in dispute, or the categories of documents which are in dispute. I know that the parties were content for me to deal with the matter on the papers, but I just have a few questions that I thought just might be easier if we call the matter on this morning and deal with those.

PN14

My concern is that in relation to this reclassification issue it seems to be coming more complex than it might need to be. As I understand it in terms of the reclassification I am to have regard to the table 29.2 legal grade and value range descriptors for senior solicitor and principal solicitor, and then I am to look at principal solicitor, which is VPS Grade 6 BR1 and BR2. There are some general attributes. We then go down to look at streams in relation to litigation advice and legislative drafting. As I understand it in relation to this dispute I am concerned only with the litigation stream. Is that right, Mr Lew?

PN15

MR LEW: That's my position. I'm not sure that that's the respondent's - - -

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THE COMMISSIONER: I am only asking for yours.

PN17

MR LEW: That's my position, yes.

PN18

THE COMMISSIONER: All right. Now that I come to Mr McDermott and ask him whether I'm confined to the general descriptors plus the litigation descriptor?

PN19

MR MCDERMOTT: Commissioner, the OPP's position is that it's the litigation stream. Having said that, Commissioner, there might very well be tasks that overlap that an adviser might do in the litigation stream, if that makes sense.

PN20

THE COMMISSIONER: Yes, of course, and likewise someone in the litigation stream might do some advice work and might do some drafting, but the principal work they do is in relation to the litigation stream. Okay. So we're agreed upon that. Excellent.

PN21

Then in terms of the task before me if you turn to page 24 of the digital tribunal book. Do you all have that?

PN22

MR LEW: Yes.

PN23

MR MCDERMOTT: Yes, Commissioner.

PN24

THE COMMISSIONER: If you go to page 24, these are the applicant's submissions.

PN25

MR LEW: Yes.

PN26

THE COMMISSIONER: Thank you.

PN27

MR MCDERMOTT: Yes, thank you, Commissioner.

PN28

THE COMMISSIONER: It just seems to me, and I'm happy to be corrected, Mr McDermott, but it just seems to me that the applicant in paragraph 39 has quite succinctly summarised sort of the task before me in terms of deciding how someone might be categorised as a 6.1 versus a 6.2. Do you accept that as an appropriate summary of the task?

PN29

MR MCDERMOTT: Not necessarily, your Honour, but I do recognise the value in what Mr Lew has done as a matter of the structure. In terms of distinguishing between 6.1 and 6.2 it's certainly of moment, but one of the major elements across all of the different categories (indistinct) adviser, legislative drafting or litigation is the framework of leadership and guidance. So essentially it's what enables the position to be classified in that leadership and guidance high level.

PN30

But whether or not the provision of high level advice, which I think Mr Lew is addressing the advice role in this paragraph specifically as opposed to litigation role, then enables leadership and guidance, i.e. does one task equal leadership and guidance, if that makes sense. I don't accept that proposition, but I do accept the value in comparing the essential elements of what the tasks are involved for a principal solicitor to then enable the evaluation of whether or not leadership and guidance areas of specialisation and engagement with senior stakeholders does or does not happen, if that makes sense.

PN31

THE COMMISSIONER: Sorry, maybe I have got it wrong now, because if I look at the litigation stream - - -

PN32

MR MCDERMOTT: Sorry, Commissioner, if you've just got a page reference.

PN33

THE COMMISSIONER: Sorry, I'm looking at page 24 of the digital tribunal book. Mr Lew, if I go back to the litigation stream, which is page 16 of the digital tribunal book, the difference between a 6.1 and a 6.2 works independently in highly complex cases may act as solicitor advocate - so I'm a bit confused now about why I'm dealing with this advice bit.

PN34

MR LEW: Because if you move over to page 17, the litigation goes over the page - I'm just going to turn my page around so it's easy - - -

PN35

THE COMMISSIONER: No, no. Okay, sorry. No, I have got it now, you're quite right. It's probably why I highlighted it and thought it was useful. Yes, okay. It seems to me that that's primarily a good summary of the distinction

between 6.1 and 6.2, and useful to me in determining the matter before me. Mr McDermott, you don't really have an issue with that, do you?

PN36

MR MCDERMOTT: Broadly, no. My point really, Commissioner, was about, if you have a look at digital court book page 446 and 447 where you've got a table extracted, my point was just making sure from the respondent's perspective that everything that's picked up - if you go back to 39(a) - whether or not the emboldened words 'high level advice therefore equals provides leadership and guidance' is fully encapsulated from the respondent's perspective having regard to the difference.

PN37

THE COMMISSIONER: I understand.

PN38

MR MCDERMOTT: That's all I was really pointing to, Commissioner.

PN39

THE COMMISSIONER: All right.

PN40

MR MCDERMOTT: The value of comparing the trust in the way that Mr Lew identifies is certainly obvious.

PN41

THE COMMISSIONER: All right. Very good, thank you. I want to then go to page 373 of the digital tribunal book which deals with Mr Fowler's principal reasons for declining the request when it was before him.

PN42

MR MCDERMOTT: Pardon me just a moment, Commissioner. This digital court book is beautifully prepared, but I'm a bit slow at getting down to the page numbers.

PN43

THE COMMISSIONER: We thank my associate for that.

PN44

MR MCDERMOTT: 397 did you say, Commissioner?

PN45

THE COMMISSIONER: 373.

PN46

MR MCDERMOTT: 373, my apologies. So these are the submissions that I had made on the primary task, as opposed to the F52. That's correct.

PN47

THE COMMISSIONER: That's right, yes. It says:

PN48

Mr Fowler's principal reasons for declining the request were his view that - - -

PN49

MR MCDERMOTT: Yes.

PN50

THE COMMISSIONER: Is it put to me that I should be thinking about the same things here that Mr Fowler did?

PN51

MR MCDERMOTT: Does your Honour mean as though a merits review?

PN52

THE COMMISSIONER: Yes.

PN53

MR MCDERMOTT: No. So part of the reason, your Honour, that - - -

PN54

THE COMMISSIONER: Sorry, Mr McDermott, I would be delighted if I was deserving of being call your Honour, but I'm not - - -

PN55

MR MCDERMOTT: I'm so sorry.

PN56

THE COMMISSIONER: No.

PN57

MR MCDERMOTT: I do apologise. I didn't intend - - -

PN58

THE COMMISSIONER: No, not at all.

PN59

MR MCDERMOTT: - - - no disrespect.

PN60

THE COMMISSIONER: Not at all. It's flattering.

PN61

MR MCDERMOTT: Thank you. Sorry, your question, Commissioner, pertained to whether or not I was inviting you to engage in a merits review of Mr Fowler's decision making.

PN62

THE COMMISSIONER: No, no. I mean I understand. I'm dealing with this essentially de novo. Okay. You accept that, don't you?

PN63

MR MCDERMOTT: I do. And the other thing I was just going to say, your Honour, is, and I intend no criticism of Mr Lew, there's a bit of a factual history

how this all came about, part of which is dealt with in the affidavit material. So in part this is a summary by reference to the narrative - - -

PN64

THE COMMISSIONER: That's all right.

PN65

MR MCDERMOTT: - - - I was responding to the affidavit.

PN66

THE COMMISSIONER: But one of the things that both parties seem to have referred to is, and it's in Mr Fowler's decision, there are limited opportunities for a resize of grade 6 roles, and then (e):

PN67

There was no operational need or immediate plan to increase the number of roles at grade 6.2 within the trial division, or the number of ongoing legal practice specialists either.

PN68

It seems to me that whether or not there are opportunities for a resize or whether there's an operational need for a grade 6.2 has nothing to do with the task before me. There's nothing as I see it in the enterprise agreement which says that's a relevant consideration for me. Do you accept that, Mr McDermott?

PN69

MR MCDERMOTT: I do, Commissioner. It's really more the context of that decision overall. So whether or not the resizing application was determined correctly or not having regard to whatever the principles are, the task for you is exactly what the Commissioner has just identified in relation to those - - -

PN70

THE COMMISSIONER: Mr Lew, do you accept too, also, that whether or not there's operational need is an irrelevant consideration to me?

PN71

MR LEW: It comes in at the enterprise agreement if you - and I will just find 27.5 - I'm just trying to find - it might be in the Form 10.

PN72

MR MCDERMOTT: If it assists Mr Lew through you, Commissioner, at page 446 Ms Christopoulos extracts clause 27.5(a) and (b) on page 446 of the digital court book.

PN73

MR LEW: Yes, that does assist me, thank you. It comes down to - - -

PN74

THE COMMISSIONER: Okay. So the review process includes an assessment for work the employer requires to be undertaken.

PN75

MR LEW: Yes, and it comes down to - I understood Mr Fowler to be suggesting that the requirement to undertake refers to operational need. In my submission, and I go back to what was said in Tucker and Hufton, that if the work must be done there's a need for it to be done. But Mr Fowler seems to be interpreting that clause 27.5 as requiring there to be an operational need as determined by management to allow a resize to take place. If the respondent is prepared to withdraw that submission and says they no longer rely on that submission I won't press that there is an operational need, and that that's something that you need to consider, Commissioner.

PN76

THE COMMISSIONER: Mr McDermott?

PN77

MR MCDERMOTT: I am not withdrawing a submission that I haven't necessarily made. This is evidence of the decision making process of Mr Fowler at a point in time. So I'm responding - - -

PN78

THE COMMISSIONER: I understand - the thing is I am trying to determine whether like Mr Fowler, even though I'm doing it de novo, like Mr Fowler I need to look at operational need.

PN79

MR MCDERMOTT: On the face - - -

PN80

THE COMMISSIONER: Speaking for myself just reviewing the materials I am not presently convinced that I do, but I'm open to be persuaded about that.

PN81

MR MCDERMOTT: Commissioner, that may ultimately be correct as a matter of the primary or the holistic or the overarching task. Having said that there's nothing in 27.5 and the document in between, which is the movement policy, which has to be taken into account as a matter of industrial context once it's imposed by the Victorian Public Service, that would preclude that matter being taken into account. So as a matter of context it is relevant. Whether or not it's dispositive I think that's a different proposition.

PN82

THE COMMISSIONER: All right. Okay, I understand that.

PN83

MR MCDERMOTT: Thank you.

PN84

THE COMMISSIONER: It's still an issue hanging around, I might put it that way. All right. So then I want to go to - the issue that's really exercising my mind in relation to the Form F52, in relation to the category of documents which are the disputed documents, or disputed categories, is this question of the apparent relevance of them. I accept what the principles are for apparent relevance.

PN85

If we then go to say category 3 which are the performance reviews.

PN86

The performance reviews redacted to remove names of staff members, accused persons and privileged information of all VPS 6.2 non-management principal solicitors over the last six years.

PN87

Mr Lew, I just can't - and I've read your submissions in relation to the matter - I can't understand the apparent relevance of this to me assessing whether you should be reclassified as 6.2. I am struggling to understand how a comparator with performance reviews of people already in this role assists me. I'm just struggling with it.

PN88

MR LEW: Well, there's a number of points that get there. The first thing is that in terms of - you have my performance reviews, and my performance reviews provide a snapshot of the work that I do over quite a long period of time. They provide an annual snapshot over a period of five years. So for you to interpret the position descriptors in the industrial context and to understand the industrial context you need to understand what non-management principal solicitors do, and there's no better documents that will help you understand what non-management principal solicitors do than a document where non-management principal solicitors have summarised their work in a particular year and put that work there.

PN89

So in that regard that will give you the overall industrial context, and I'm talking about ones that are at 6.2, because really this dispute is about whether my work is at 6.1 level and 6.2 level.

PN90

THE COMMISSIONER: Why can't I just decide that by looking at your performance reviews and looking at 29.2; why can't I just do that?

PN91

MR LEW: Well, that's ultimately your task, but then if we're going to get down into the nitty gritty of what does leadership and guidance mean versus high level advice, and we're going to get into the nitty gritty of what are senior stakeholders and what are key stakeholders, then you're going to require some context as to the work that 6.2 solicitors do to properly define those concepts.

PN92

Because as I understand the applicant's(sic) ultimate submissions they're saying that there's two roles. There's principal solicitors who are managers called managing principal solicitors, and they mainly manage - they do a little bit of file work, but they mainly supervise. And then there's principal solicitors who are mainly file operators who do more file operating and less supervision, and they're asking you, Commissioner, to do a comparison between my role and that of the role of managing principal solicitor.

PN93

And I'm suggesting to you that if you are to do a comparison between my role and another role it's not fair to compare me against that as a managing principal solicitor. It's fair to compare me against principal solicitors who are employed at a 6.2 level in non-management roles. And that will give you a snapshot of the work that principal solicitors in non-management roles do. There's only 13 of them, so it's not a huge volume of documents. Each of the performance reviews are probably only about five pages or six pages long, and it's simply about giving you the opportunity to really understand the day to day work of 6.2 non-management principal solicitors, and so you can say, okay, that's what non-management principal solicitors at the OPP do, and that's an independent source - -

PN94

THE COMMISSIONER: That presumes that all of these people who you seek to be compared to have been properly classified at 6.2.

PN95

MR LEW: Well, it does presume that, that's correct, but that has to be the industrial context, because each of those principal solicitors at 6.2 represents at very least an agreement between the employer and the employees that they are correctly classified at 6.2, and the precedent of that has to be relevant to the industrial context as to how table 29.2 in the enterprise agreement needs to be interpreted.

PN96

THE COMMISSIONER: I mean I was leaning towards the view that I can't see the utility in comparing you to other 6.2s. I was leaning towards the view that what I do is look at what you do and look at the descriptors and see if they fall within the descriptors. But, Mr McDermott, it does seem as though the OPP has put into issue this issue of comparator, that I should compare the applicant say to the MPSs or whatever. And if the OPP is saying that I have to do that comparison then I'm struggling to understand why there isn't apparent relevance of these matters. It's the OPP has put the comparator into play, not the applicant. I mean in your submissions at 679 of the court book you say:

PN97

It is the performance of the work of the applicant in the position, not the performance of the work by other employees in their positions, which is of the moment for purposes - - -

PN98

Now, I tell you what, I'm pretty much persuaded by that, but then the OPP says, 'Well, no, go and have a look at these other people. He doesn't do the work like those other people.' You can't have it both ways.

PN99

MR MCDERMOTT: I accept that insofar as if it was made out that there was a valuation based on the individuals in question in relation - compared to Mr Lew - but the context is not limited, Commissioner, to the OPP putting this into issue. The OPP is in part responding to elements of the way in which Mr Lew

distinguishes aspects of his role compared to management of post principal solicitors as he understands it, and we have contested aspects of his understanding by reference to Mr Fowler's evidence, which is partly what the OPP's evidentiary response is. The other contextual element - - -

PN100

THE COMMISSIONER: Well, I'm going to call you out there. I understand you might have done it and put this into evidence to be responsive to the applicant. The alternative would be to say we're not going to respond to that material by the applicant because we say it's not relevant, and the submission at 679, that is:

PN101

The performance of the work of the applicant in the position, not the performance of work by other employees in their positions, which is of the moment for the purposes of 27.5 - - -

PN102

If you hold strong to that then there will be aspects of the applicant's evidence which you will want struck out for relevance, and likewise a lot of the evidence of the respondent witnesses in this matter would be struck out on the same basis. So I think you both need to figure out whether or not I'm doing this comparator or not. If I do do the comparator, and as I say I think the apparent relevance goes against you, Mr McDermott, because it's well and truly in play.

PN103

MR MCDERMOTT: Commissioner, the only other point on apparent relevance I do want to be heard on the issue of, if I can put it, case management or oppressional burden at a separate point juncture if I may as a backstop. Commissioner, if you look at the extract of Mr Fowler's statement at 22 at page 380 there is a reference to the Victorian Government's movement policy, which is a shorthand. The task there is also part of the industrial context. This is at 3.2. Commissioner, you will see there:

PN104

No single element of the descriptors of itself would determine whether a position - - -

PN105

THE COMMISSIONER: Sorry, I'm on page 380.

PN106

MR MCDERMOTT: Yes, at 22 there's an extract of what is 3.2 of the - - -

PN107

THE COMMISSIONER: Yes, I have got that.

PN108

MR MCDERMOTT: And if the Commissioner sees - this is the whole of position resizing assessment approach, and this is not an OPP document, Commissioner,

this is a Victorian Government policy framework which is issued I think by an Industrial Relations Victoria entity. You can see there halfway down:

PN109

No single element of the descriptors of itself would determine whether a position is appropriately classified. It is not necessary to demonstrate that work is being performed for all or a majority of the work descriptors for this position to be appropriately classified at the higher value range.

PN110

And then some additional things that you've got at 3.3, and 3.3.1 specifically:

PN111

Organisations (indistinct) would form into the higher value range, including the duties more appropriate lie.

PN112

Now, Commissioner, I accept the point that potentially as a result of responding to the applicant that may have slightly enlarged the issue, but the task was not performed by reference to specific individuals. There's no evidence that the OPP did that by reference to those 13 individuals specifically, and the context also includes what I have just taken the Commissioner to at 3.2, but there's nothing further I can be heard about on those particular matters.

PN113

THE COMMISSIONER: I don't know how much the movement policy is relevant to the exercise before me. I'm not bound by it.

PN114

MR MCDERMOTT: Of course you're not bound by it per se, Commissioner, but it is part of the industrial context in relation to how - this enterprise agreement obviously does not apply specifically to the OPP or a limited form of public servants. This is dealing with legal officers across a broad array of government departments and agencies, statutory agencies, and the movement policy informs the approach to how you deal with these things as a matter of Victorian Government industrial policy overall.

PN115

THE COMMISSIONER: All right. Mr McDermott, we are going to take a 10 minute adjournment so that you can get some instructions from your client. I want to know very, very directly whether the OPP holds to the view that it is the performance of the work of the applicant in the position, not the performance of work of other employees in their positions, which is of the moment. Because if that's the case and you hold to that then there will be swathes of the applicant's evidence which you will object to, and there will be a lot of the evidence of the respondent's witnesses which will not be pressed. I want to know very, very clearly whether the OPP says this is a comparator issue or not, because if it is it really does seem to me that the disputed categories have some apparent relevance, and then we can deal with the other objections after that.

PN116

MR MCDERMOTT: Thank you, Commissioner.

PN117

THE COMMISSIONER: We will adjourn for 10 minutes.

SHORT ADJOURNMENT

[10.58 AM]

RESUMED

[11.12 AM]

PN118

THE COMMISSIONER: Mr Lew, we need you to switch your camera off and on again. Very good, we can see you. Mr McDermott, what instructions do you have?

PN119

MR MCDERMOTT: Commissioner, in the spirit of being helpful, which is the grant of leave, I adopt the issue that you identified, but can I just say a couple of matters about the context in which that arose. Commissioner, I don't want to go through this chapter and verse, and I don't think it's specifically controversial. As part of the review process for the resizing, some of the matters that Mr Lew has raised now in the Commission by way that these were also raised as part of that merits review, if you like, of the resize application, and were also raised as part of the process of freedom of information and the like, which were also raised in this Commission by way of those matters.

PN120

Now, accepting exactly what that issue is, as has been identified, those matters are irrelevant to your task at the Commission, but I don't want it to be thought that we did so with a view to being unhelpful. It was really a matter of the context in which those issues has arisen. And, Commissioner, it's probably worth noting that the tasks that were done at the OPP level differ from the tasks that ought to have been done at the Fair Work Commission level, because at the OPP level there would have been administrative law principles at play about not considering various submissions Mr Lew made.

PN121

We might have got into trouble from an admin law perspective about not taking into account Mr Lew's submissions and those decisions might then have been the subject of judicial review and the like. So they are potentially relevant insofar as that principle, but not for the purposes of the Commission, if that makes sense.

PN122

THE COMMISSIONER: Yes, I understand.

PN123

MR MCDERMOTT: As its height, Commissioner, just in relation to adopting the issue, I'm not in a position now to suddenly get a red pen out and do swathes of dropping evidence for the OPP. But can I indicate, Commissioner, and again this is in the spirit of attempting to be helpful, I anticipate, and I reserve my position, I anticipate that at its height the main evidence about the distinction between managing principal solicitor and principal solicitor, if it is to be before the

Commission at all from the OPP level, as a matter of Mr Fowler's own evidence and opinion, is what appears at 385, paragraphs 55 to 57. If the Commissioner could just briefly turn that up.

PN124

THE COMMISSIONER: Yes, I have that in front of me.

PN125

MR MCDERMOTT: You can see there that what - leaving aside the acronyms which all public servants seem to be addicted to, but I find difficult to remember - MPS is just a reference to managing principal solicitor, Commissioner - basically what Mr Fowler does at a very high level overview, and you can see that at 57, he's really drawing out that point that Mr Lew was making before about the main difference between the two roles being one does management and a leadership. The other does - - -

PN126

THE COMMISSIONER: I don't know why I am looking at MPS's at all.

PN127

MR MCDERMOTT: The only difference there, Commissioner, is I suspect at its height that would be the extent of the evidence as a matter of how it's dealt with in the organisation I'd be relying on. The balance, Commissioner, which deals with all of this stuff at 58 right through to 76, and also some of the other points that Mr Lew has raised in his own evidence about his previous work as an acting managing principal solicitor, changes in position advertising distinction between positions, all of that would effectively fall away on the adoption of the major issue that I have identified to the Commission. So really all I'm trying to say, Commissioner, is that 55 to 57 would be most likely at its height, but even then it may be that we don't deal with that evidence other than those matters, if that makes sense.

PN128

THE COMMISSIONER: Yes.

PN129

MR MCDERMOTT: The principal issue is as you identified it.

PN130

THE COMMISSIONER: Yes. I sort of look at what MPS's do, and I say, well that's all very interesting, but I don't know that it helps me decide whether or not the applicant should be a 6.2, to be frank.

PN131

MR MCDERMOTT: Commissioner, I understand that. In part the other reason why it was raised, and again I am attempting to be helpful, not critical of Mr Lew or my client in relation to the adoption of the issue, but one of the issues I think in the applicant's submissions was one that pursuant to clause 27.5, 'Should I be properly moved from principal solicitor 6.1 to 6.2', and then the remedy sought, Commissioner - this is at pages 18 to 19, 2(a) and 2(b), 'The value of my work has

crossed the threshold from 6.1 to 6.2.' And then, 'The OPP must increase my salary by' - this figure.

PN132

I did debate bringing along enough dollars in the term of Mr Lew's natural life to try and resolve the matter, but I'm not sure that that's necessarily going to resolve the matter.

PN133

THE COMMISSIONER: I must say for the sake of one dollar, having regard to the time, energy and resources that have been spent on this, Mr Lew would have to live to 2000 or something in order to make some sense of why the OPP is from an issue of the proper administration of public funds fighting this so hard, to be frank. The fact that there's a dollar difference between the two does suggest in terms of the industrial context that there is a marginal difference between 6.1 and 6.2.

PN134

MR MCDERMOTT: Commissioner, without fully embracing those observations, and in context they did come from me being somewhat flippant, and I apologise if you're responding to that, Commissioner. At 2(b) Mr Lew does point out what the difference between those two is. One is the top of the range, and then one is the bottom of the range. But once you're in the range the differences depend on what it is that you're doing within those. So that's really the context in which a lot of this evidence has arisen. But going back to the primary issue at its height, and I don't think that I necessarily will do this, but at its height the only evidence that is likely before the Commission from the OPP's perspective is what I have taken you to in relation to those three paragraphs.

PN135

THE COMMISSIONER: Sorry, Mr Lew, did you want to say something?

PN136

MR LEW: I just wanted to clarify. I'm looking at page 375, paragraph 20, of the respondent's submissions. 'A specific issue for the Commission will be the valuation of the applicant's performance of his role by comparison to his identification of the main tasks - - -'

PN137

THE COMMISSIONER: Sorry, what paragraph number?

PN138

MR LEW: 375, paragraph 20. So my understanding of the dispute up until this point has been that that's been the entirety of the dispute. If the respondent is now withdrawing from that, then there may be some benefit in these proceedings being adjourned to see if the parties can resolve the matter, having heard your comments, Commissioner.

PN139

THE COMMISSIONER: Yes.

PN140

MR LEW: Because as I understand the decision of Mr Fowler, and then the decision of the reviewer, the task that was undertaken by both Mr Fowler and the reviewer was comparing my role to the role of managing principal solicitor and coming to the conclusion that managing principal solicitors are worth 6.2. Solicitors who do mainly file work are not worth 6.2s, and that that's the distinction.

PN141

THE COMMISSIONER: I guess what I am suggesting to the parties is having looked at the materials which are before me I don't know that my task is to compare Mr Lew to MPS. I think my task is to compare Mr Lew from what he does to the descriptors in the enterprise agreement.

PN142

MR LEW: And that's been my primary submission. In terms of the industrial context being a Public Service agency and the agreement being made in the context of particular provisions of the Public Administration Act and the Charter of Human Rights, there's a necessity for the employer to provide equal opportunity employment, which ultimately means that people doing the same work are remunerated at the same rate.

PN143

So when you're looking at table 29.2 it can't result in a conclusion that has some people classified at 6.2 and some people classified at 6.1 who are doing the exact same or very similar work, because to do so would indicate that the employer has entered into an agreement which is contrary to their obligations under the Public Administration Act. So if the employer has created a situation where there's a whole class of people who are improperly classified then - - -

PN144

THE COMMISSIONER: Mr Lew, I am not going there. I am not going to decide whether MPS's are properly classified at 6.2.

PN145

MR LEW: Sorry to cut across you, Commissioner. I'm not suggesting that you should, I'm referring just to non-management principal solicitors who are classified at 6.2. So if the performance reviews will show, as I believe they will, that my work is indistinguishable from 25 per cent of the workforce, of the OPP principal solicitor cohort who are classified at 6.2, then that's highly relevant to the industrial context of table 29.2.

PN146

THE COMMISSIONER: All right. Why don't we do this; why don't we just go through the disputed categories, and I am going to make some suggestions about how I'm presently thinking about it, but you must accept that I'm open to be persuaded otherwise. Then what we might do is adjourn and allow the parties to reflect upon my observations and see whether or not we can't resolve the disputed categories. How does that sound?

PN147

MR LEW: It sounds good.

PN148

THE COMMISSIONER: All right. So in relation to category 3 I understand that this refers to 13 people. Is that right, Mr McDermott?

PN149

MR MCDERMOTT: I'm sure that that is, Commissioner, as you've observed it. Just give me one second, sorry, I'm just trying to jump back down to that point. So sorry, Commissioner, I'm just trying to switch between - - -

PN150

THE COMMISSIONER: No, that's all right, please take your time.

PN151

MR MCDERMOTT: If those instructing me have access to WhatsApp could identify for me Ms Christopoulos's second statement I'd be most grateful. Sorry, I'm instructed it's actually 13 people in relation to category 15, which is the - just pardon me a moment, Commissioner, I will just get that up - records which demonstrate the unique circumstances for remuneration of 13 - - -

PN152

THE COMMISSIONER: Yes.

PN153

MR MCDERMOTT: - - - solicitors. This relates to people that are not actually doing the job of - - -

PN154

THE COMMISSIONER: So how many people fall into this category of VPS 6.2 non-management principal solicitors?

PN155

MR MCDERMOTT: That should be 13 for that category 15, which is - - -

PN156

THE COMMISSIONER: No, I'm on category 3.

PN157

MR MCDERMOTT: Sorry, Commissioner, I apologise.

PN158

THE COMMISSIONER: How many people in category 3? So VPS 6.2 non-management - - -

PN159

MR MCDERMOTT: That would be quite significant, Commissioner. So that would be six years at that level.

PN160

THE COMMISSIONER: Okay. First of all why don't I tell you this; I can't imagine why I need six years of performance reviews. If I was inclined to make

an order in respect of category 3 I can't see why I would need anything more than two years.

PN161

MR MCDERMOTT: Yes. I'm not sure I have the exact numbers in the evidence, Commissioner, on that discrete category. The only thing I could point to, Commissioner, which might shed light on it is what I raised before about the category 15, which might overlap substantially, Commissioner, with what you just said.

PN162

THE COMMISSIONER: So let me just say this; in relation to category 3 my preliminary view is that it has some apparent relevance because it's non-management principal solicitors. I don't know why I would need six years. I think I could form a pretty good view about what non-management principal solicitors are performing and the work they're performing if I had a look at the last two years. If it was narrowed to that, Mr Lew, what do you say?

PN163

MR LEW: I'd be content with that.

PN164

THE COMMISSIONER: Yes. So that might deal with the question of oppression and I think it deals with the question of relevance, but I will leave it to the parties to consider that further.

PN165

MR MCDERMOTT: Thank you, Commissioner. Before - - -

PN166

THE COMMISSIONER: Category - sorry, yes.

PN167

MR MCDERMOTT: Sorry, Commissioner, my apologies. Before your Honour indicated that two year versus six year distinction my instructions were that category 3 was the most problematic, because it's in that very significant document, but it may be that I can during the break work out what that would look like if we were to press it.

PN168

THE COMMISSIONER: Yes, all right.

PN169

MR MCDERMOTT: Thank you.

PN170

THE COMMISSIONER: In relation to category 5 I have already raised my concern, I guess, that I don't know that operational need is what I need to determine. I can understand why Mr Fowler needed to turn his mind to that, but I am presently not satisfied that there's some apparent relevance in category 5, but we can come back and talk about that later if you want to press it, Mr Lew.

PN171

We then get to category 7, 'The CVs and responses to key selection criteria submitted by successful managing principal solicitors.' I'm not presently persuaded that there's an apparent relevance in that. I don't know why I should compare you to managing principal solicitors. And also the fact that someone produced a CV that matched a selection criteria that got them an interview or were successful in their recruitment, again I don't know that that really assists me in the task that's before me.

PN172

We then get to category 15. I'm struggling to understand the apparent relevance of that. So you might want to think about that. When we get to category 17 I can see some apparent relevance in that, because their present decisions in relation to refusal or reclassification, and I think it would assist me to understand why someone who is a VPS 6.1 has not been promoted to 6.2, and I understand that there's only five people who fall within that classification. So it seems to me that it's not oppressive as I presently understand the matter.

PN173

What we might do is adjourn for a week so that I can allow the parties to have some discussions to see whether or not you can come to some agreement about the disputed categories. So just to recap: category 3, I'm inclined to order that, but only in respect of two years. Category 5, I'm presently not inclined. Category 7, I'm presently not inclined. Category 15, I'm presently not inclined. And category 17, I am presently inclined.

PN174

So you can go away with those general observations and see whether or not you can resolve the outstanding disputed categories as successful as you have just resolved the other issues. The Commission will be greatly assisted in that regard. If those discussions can be completed within the week and the parties could jointly write to me to indicate what categories are still in dispute, and I will come back and hear you very shortly in relation to just those matters before deciding them. Is that a sensible way forward, Mr Lew?

PN175

MR LEW: It is a way forward. The only issue is I'm going overseas after Easter, so I'd require maybe two weeks.

PN176

THE COMMISSIONER: All right.

PN177

MR LEW: Or maybe even three weeks, but to allow some time to consider it. However, it might be that we can consider it even more quickly as in today if we have a chance to put our heads together now. If the parties agree that the comparison between MPS and principal solicitor is not a task that the Commission needs to undertake, and the parties agree that operational need is not something that the Commission needs to consider, then many of the categories go away.

PN178

THE COMMISSIONER: Yes, I agree.

PN179

MR MCDERMOTT: Commissioner, I wonder if I could - - -

PN180

THE COMMISSIONER: So I'm going to - sorry, Mr McDermott.

PN181

MR MCDERMOTT: I'm so sorry, Commissioner, I know you would like us to go and speak and deal with this matter. I anticipate that there will be very substantial agreement and you won't have anything to resolve a week from now. Mr Lew has demonstrated a significant amount of good faith in terms of being able to deal with us in relation to getting our heads together and trying to reduce matters, and I'm almost certain that we can do something similar.

PN182

THE COMMISSIONER: All right.

PN183

MR MCDERMOTT: Sorry, if I can just complete my observation, Commissioner, to the extent it's appropriate to do so. If there is no dispute and if there is a substantial reduction in potential evidence that might be before the Commission, that may - this matter was presently listed for a two day matter I think back in March or thereabouts. It may be that we can identify, reduce the scope of the hearing possibly to a day, but maybe with a day or half a day in reserve, and also use the facility which has not yet been used because we need Mr Lew's reply evidence to complete it, which is the statement of agreed facts procedure, such that your job then becomes, with great respect, a lot simpler.

PN184

And then it's just a matter for when the matter might be reasonably heard, and I would like to be heard if I could, Commissioner, at a later point or at some point about some of the difficulties I have to the extent that's a relevant consideration, and I accept counsel's availability is not dispositive of anything, about when that matter might be heard. I just have some difficult periods coming up, but I'm sure if we were to reduce the hearing time - - -

PN185

THE COMMISSIONER: For my own purpose, Mr McDermott, I have been greatly assisted by your participation in this matter and your determination to efficiently deal with it, and I think it would not serve the Commission or the respondent for there to be a change of jockey at this stage.

PN186

MR MCDERMOTT: Thank you. I'm a bit taller than a jockey, Commissioner, but I'm grateful for that observation.

PN187

THE COMMISSIONER: All right. I am going to give the parties until 4 pm on 19 April to have discussions about the disputed categories of documents. I would

then like you to jointly indicate to me what has been resolved and so forth. I would like you to also have some discussions about the timetable for the finalisation of the matter and come to some agreement about when the applicant's response materials are filed and when the hearing might be.

PN188

In terms of the hearing if you could come up with sort of three dates so that I might be able to then align it with my calendar. That would be of great assistance.

PN189

MR MCDERMOTT: Commissioner, just before you adjourn I wonder on indulgence we use the Commission's fabulous facilities to maintain a direct line to Mr Lew now, because that might be more convenient than trying to arrange a different line. I don't know if that's possible or not, or if that's going to cause the Commission or more importantly your associate any difficulty once you leave the Bench.

PN190

THE COMMISSIONER: We can do it, but the problem is only that the line remains open in the sense that my associate still has access to it.

PN191

MR MCDERMOTT: I see. If that's the case, Commissioner, we wouldn't trouble you.

PN192

THE COMMISSIONER: Yes. I'm sure that Lander & Rogers could quickly set up a Teams link between everyone and you could have those continued discussions.

PN193

MR MCDERMOTT: If Mr Lew is content with that through you, Commissioner, that would be enormously helpful. So my instructor will send a link to Mr Lew immediately.

PN194

MR LEW: Yes.

PN195

MR MCDERMOTT: Thank you, Commissioner.

PN196

MR LEW: Thank you, Commissioner.

PN197

THE COMMISSIONER: All right. Mr Lew, anything further this morning?

PN198

MR LEW: No, Commissioner.

PN199

THE COMMISSIONER: Mr McDermott, anything further this morning?

PN200

MR MCDERMOTT: No, Commissioner. It's been enormously helpful to have this conference. Thank you.

PN201

THE COMMISSIONER: Thank you. Very good, we're adjourned.

ADJOURNED TO A DATE TO BE FIXED

[11.35 AM]