



# SIGNAL SEVEN

8 March 2022

## COVID Stand Down Dispute

Members would be aware that a dispute arose last year in relation to COVID 19 Secondary contacts stand downs: Three members were subject to preliminary assessment (a step taken where misconduct or inappropriate conduct is alleged or said to have occurred) under the Enterprise Agreement in relation to directions to not attend work pending COVID test result. (Signal 7, 3 September 2021)

### Fair Work Commission Directions

The matter was listed before the Fair Work Commission (FWC) for conference on Tuesday 7 December.

On 3 December 2021, the Associate to Deputy President Easton of FWC wrote to the parties, and required the ACT Government if it proposed to provide a response to the application to do so by 4 pm on 6 December 2021.

At 4pm on 6 December 2021, the ACT Government Solicitor replied to the FWC that it would “provide a response as soon as we can”.

At 9.33 am on the 7 December, (the day of the Conference), the ACT Government wrote to the FWC stating:

“I advise that the Respondent will not lodge a formal Response today. It reserves the right to do so if the dispute is not resolved today.”

The conference proceeded as scheduled but did not resolve the issue, and directions were issued by FWC for the filing of evidence and submissions. These directions required:

1. UFU to file and serve any evidence and an outline of submissions, as well as any other documentary materials by no later than 4:00pm on 17 January 2022.
2. ACTF&R to file and serve any evidence and an outline of submissions, as well as any other documentary materials in reply by no later than 4.00pm on 7 February 2022.
3. UFU to file and serve any evidence and an outline of submissions, as well as any other documentary materials in reply by no later than 4.00pm on 14 February 2022.
4. The Parties are to prepare and file a Statement of Agreed Facts by no later than 4.00pm on 17 February 2022.
5. The Parties are to jointly prepare and file a Digital Court Book by no later than 4.00pm on 18 February 2022. The Digital Court Book is to be a single PDF document, in a text-searchable format, and paginated consecutively starting from the very first page of the index.
6. The matter is listed for Hearing (By Video using Microsoft Teams) at 9.00am on 22 February 2022.

In accordance with the Directions, the UFU filed 8 witness statements and an outline of submissions on 17 January 2022.

In a mediation on an unrelated matter on 27 January 2022, the ACTF&R Chief Officer stated that he would be on leave from 14 – 25 February: a period which included the scheduled FWC hearing date. This was noted by the UFU representatives at the mediation and called into question whether the ACT Government intended that the matter proceed as listed.

### **ACT Government seeks extension**

As the February 7 deadline drew near, the ACT Government Solicitor asked the UFU to agree to an extension of time to 5 pm on 9 February to file their evidence. The UFU agreed to allow an extension until only midday on 9 February, as we believe that the ACT Government has sufficient resources to comply with court and tribunal-imposed deadlines. The FWC issued new directions on 7 February, allowing the extension of time to 9 February.

### **UFU Offers Settlement**

Also on 7 February, in the interest of avoiding time consuming litigation, solicitors for the UFU made an open offer to settle the matter. The solicitor's letter stated:

“The Respondent has now had the opportunity to consider the Applicant's evidence and submissions which we note were served on your office on 17 January 2022.

...

Your client's response to these proceedings has no reasonable prospects of success.”

The solicitor's letter of 7 February offered to settle the dispute on the basis that:

“(The three firefighters) be deemed to have been on paid “Leave where leave cannot be granted under any other provision” (Annex D item 21 of the Agreement) for the entire nightshift which commenced on 31 August 2021.”

And

“That no disciplinary action or adverse findings, including those available under Section L Workplace Values and Behaviours of the Agreement, be taken or noted in relation to Senior Firefighters Gruber and Janssen and Firefighter Trevillian and any such action that has been taken be revoked and removed from their personnel record.”

### **ACT Government “accepts” Settlement**

On 9 February 2022 the ACT Government Solicitor wrote to the UFU solicitors and stated:

“My client has instructed me that they have considered your letter and while they do not agree with everything that you have written, I am instructed that **my client accepts your offer** to bring these proceedings to a conclusion and in order to minimise further disruption to all parties.” (our emphasis added)

and

“Importantly, for clarity, other than a preliminary assessment there has not been any disciplinary action and therefore your clients (sic) employment history remains unblemished as a consequence of the events of 31 August 2022.”

(Leaving aside the fact that the “client” is the UFU, and the fact that the UFU is not employed by the ACT Government, we get what they mean).

Job done? Not quite.

### **Deed of Settlement Drafted and Served**

In matters of this kind, it is good practice to make sure that a settlement “sticks”, and the safest way to do this is through a “Deed of Settlement”. Accordingly on 14 February, solicitors for the UFU sent a draft Deed to the ACT Government solicitor.

As a matter of courtesy and appropriate professional practice, we notified the FWC that an in-principle settlement was reached. On 10 February, the Associate to FWC Deputy President Easton asked us to file a “notice of discontinuance” by 25 February. On 23 February, UFU solicitors wrote to the Deputy President’s Associate stating:

“I can advise that the Applicant forwarded a deed to the Respondent for consideration on 14 February. We are currently awaiting a response from the Respondent and as such do not anticipate we will be in a position to file a Notice of Discontinuance by Friday.”

### **45 Changes to Terms of Settlement sought by ACT Government**

On 6 March, the ACT Government Solicitor finally responded to the UFU draft Deed and sent a tracked changes version which sought 45 changes to the UFU draft, including the complete deletion of 8 paragraphs.

The UFU solicitors responded seeking an explanation of the changes sought, and stated:

“Our client requires you set out, in relation to each proposed change, the reason for such change and how it accords with the settlement offer accepted by your client. Further, we are not prepared to wait 3 weeks for a response. As your client has already turned its mind to these changes, please advise no later than 5pm Wednesday 9 March why each and every change is required. Please explain how it accords with the settlement reached as set out in the 7 January letter.

In our view the deed as drafted by this office accurately set out the settlement reached and should remain as drafted.

We require your urgent response and subject to your client’s comments reserve all rights to have this matter immediately relisted for conference without further notice to you.”

We are yet to receive a response.

### **Unusual Circumstances**

It is unusual to lay before the membership of the UFU the fine detail of a matter such as this, but this is unusual conduct. ACT Fire and Rescue in fact insisted that the UFU escalate this dispute: the uncontested evidence of the ACT Branch Secretary includes an email from the Chief Officer (15 November 2021) which stated:

“...this situation can not persevere and we will require the matter to be referred to the Fair Work Commission in accordance with clause P3.7 if the UFU do not wish to retract the dispute.

Given the time that has passed since the breach and the review and the dispute, it is my position that action on this matter is a priority.”

Having insisted that the UFU refer the matter to the FWC, the ACT Government:

- did not comply with the initial FWC directions;
- sought (and obtained) an extension of time;

- stated that the matter was settled;
- waited three weeks to respond to papers which were aimed at giving effect to the settlement;
- sought wholesale changes to the terms of settlement.

### **Potential unfairness**

The effect of this is that if the settlement “falls over” and proceeds to hearing, the ACT Government has now had the UFU’s evidence for 50 days, whereas the initial FWC Directions allowed them to have the evidence for 20 days before their reply was due. The FWC Directions were intended to provide procedural fairness to the parties, but if the matter now proceeds a serious question will arise as to whether the FWC has been placed in a position where the process might be perceived as unfair.

### **ACT Government Model Litigant Guidelines**

The ACT Government is bound by the “ACT Government Model Litigant Guidelines”. Those guidelines require that:

“the Territory and its agencies must behave as a model litigant in the conduct of litigation” (item 1.1).”

“The administrative unit or agency involved in the litigation has the primary responsibility for compliance with the obligation. In addition, legal practitioners performing Territory legal work, must act in accordance with the obligation and assist their client to do so.” (Item 2.2)

“The obligation requires that the Territory and its agencies act honestly and fairly in handling claims and litigation brought by or against the Territory or an agency by:

- (1) dealing with claims promptly and not causing unnecessary delays in the handling of claims and litigation;” (Item 3.1)”

There are many other provisions in the guidelines that are relevant to this matter. The whole of the Model Litigant Guidelines can be found at:

<https://www.legislation.act.gov.au/View/ni/2010-88/current/html/2010-88.html>

Members would understand that the UFU has expended significant time and legal costs in this matter. We stand by the decision to pursue this matter on behalf of our members. We remain hopeful that we can provide the membership with certainty, by way of a clear and unambiguous Deed of Settlement.

### **Strength in Unity**

**Authorised by Greg McConville, Secretary, UFU, A.C.T. Branch.**

**This is an official Union document to be shared between members only  
Read out at muster and pin on notice boards.**