

TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

50199-1

COMMISSIONER MCKENNA

AM2011/26

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

**Application by Australian Business Industrial
(AM2011/26)**

Social, Community, Home Care and Disability Services Industry Award 2010

(ODN AM2008/79)

[MA000100 Print PR991066]

Sydney

2.07PM, TUESDAY, 24 MAY 2011

PN1

THE COMMISSIONER: Could I have the appearances, please?

PN2

MR B. BRIGGS: Briggs, initial B., for Australian Business Industrial.

PN3

THE COMMISSIONER: Thank you, Mr Briggs.

PN4

MR K. GODFREY: Godfrey, initial K, for Jobs Australia Ltd.

PN5

THE COMMISSIONER: Thank you, Mr Godfrey.

PN6

MS J. LAWRENCE: Lawrence, initial J., for the Australian Federation of Employers and Industries.

PN7

THE COMMISSIONER: Thank you, Ms Lawrence.

PN8

MR M. McLEAY: McLeay, initial M., for the Health Services Union.

PN9

THE COMMISSIONER: Thank you, Mr McLeay, and who do I have on the video link, please?

PN10

MR J. NUCIFORA: Yes, Commissioner. Nucifora, initial J., for the Australian Services Union.

PN11

THE COMMISSIONER: Thank you, Mr Nucifora. Yes, Mr Briggs.

PN12

MR BRIGGS: Thank you, Commissioner. This matter was lodged by ABI. It's largely a technical variation we're seeking to have made. It appears on its face to be largely a clerical error in the information provided in the award and contrary to some of the information that was made during the decision to make the award. It was never intended that this application to vary would be quite as contentious as it appears like it may become. That may have implications for the timetabling of the matter but I am willing to hear other parties' suggestions on that. ABI would rather have this matter heard as soon as possible, because it really is a matter just to clean up a technical issue in the award and to remove confusion.

PN13

THE COMMISSIONER: Yes, thank you. Mr Godfrey?

PN14

MR GODFREY: Jobs Australia support the application on behalf of ABI. We also believe that the matter is an anomaly, where two parts of the award don't match themselves and it is, we believe, a clerical error. We believe the matters relating to the broader span of hours were determined in great detail by the Full

Bench and don't need to be revisited. All that needs to be done is for one of the times to be amended to match the other.

PN15

THE COMMISSIONER: Thank you. Ms Lawrence?

PN16

MS LAWRENCE: Thank you. AFEI again is also broadly supportive of the application by ABI and views the amendment sought as an administrative or technical amendment. We would also be supportive of the application being dealt with sooner rather than later. However, if there are a number of areas of contention, which it is my understanding that there is, we would strongly wish to have the opportunity to file submissions in the matter.

PN17

THE COMMISSIONER: Thank you. Mr McLeay?

PN18

MR McLEAY: Thank you, Commissioner. Our union agrees that there is an error but we disagree about what the error is. We say the error was back in making the award and the original span of hours was wrong and that it should have been in line with what was made in stage 2 and stage 4, with the rest of the community involvement onwards. We have a very short submission to that effect, Commissioner, if I could provide that to you. In relation to timetabling, we understand that the ASU have some meetings with their branches later on next month and we would support the matter being listed after those meetings took place.

PN19

THE COMMISSIONER: Thank you. Mr Nucifora?

PN20

MR NUCIFORA: Yes. Thank you, Commissioner. Commissioner, the ASU opposes the application and we understand the ABI have lodged the application, supported by the other employer organisations and peak bodies before you. Sometimes, Commissioner, we have had, with modern awards, as we found last year with the number of applications that were lodged to vary the award, what appeared sometimes fairly straightforward actually raises more questions than they answer.

PN21

Commissioner, we were seeking to have further discussions around this whole application on 16 June. There are other issues that our branches and our, if you like, internal social community services coordinators were seeking to meet to discuss other issues that we believe will arise with the award review next year. But at this point my instructions are to oppose the application. Some of the issues raised by Mr McLeay are those that we need to discuss, such as the span of hours here being 8.00 to 6.00. I don't think it is there indicated on behalf of the employers; I think it was Mr Godfrey, that in fact the span of hours was detailed through the award modernisation process.

PN22

But, in fact, if you look at a number of comparable awards - aged care, for example and we have submissions from the aged care employers - there generally

is a spread of 6.00 to 6.00 or 7.00 to 7.00. There is the Health Professionals Award and the Children's Services Award for employment services, classifications - all of those have a 6.00 to 6.00 spread. So those questions arise and we made a decision some time ago, soon after the modern award was made, that we wouldn't seek to lodge applications to vary the award unless we really had to.

PN23

Now, of course, recently, with the equal pay case, we had to vary the transitional operative dates and that needed to happen, of course, for mechanical reasons, but other than that we have sought to not vary the award until the award review. We do ask in this situation and we ask of the applicant whether there were any pressing concerns raised by their members. We are not aware at this stage that, in fact, there has been a widespread concern raised by the employer. So what we propose, Commissioner, is that 16 June is a date when I am seeking certainly for there to be further discussions before we proceed.

PN24

At this point we oppose the application and we would seek, given that today is up for mention and programming, to make further written submissions in support of our opposition and, in fact, we may raise counter proposals, and then we would seek to have that after 16 June. I have already raised that with Mr Briggs and, of course, Mr McLeay has referred to it, but it is, from our point of view, an important date before we proceed any further with our position; particularly, as I say, our opposition and any counter proposal or, for that matter, any counter application we might seek to lodge at the same time.

PN25

THE COMMISSIONER: Thank you.

PN26

MR BRIGGS: If I may, Commissioner? Just a couple of points in response. The first is that this really is only intended as a technical variation, to remove the capacity for confusion in the award. It's expected that this doesn't change the status quo of how the award currently operates. It just makes that clear in the text of the award. The variations that seem to be flagged by the HSU are substantive in nature and go to much bigger issues and I would submit on that that there is nothing to stop the HSU, even if this matter is heard in our favour and decided in our favour, then lodging an application to go to those substantive issues and, being a technical matter, this wouldn't prejudice the outcome of those proceedings, in my opinion.

PN27

Finally, in relation to the ASU's proposal for timetabling, in the context of this is a technical matter it seems unnecessary to make it wait until after 16 June. I presume that once the 16 June meeting they proposed had happened they would then need to write the detailed submissions they seek to make and so that would be the earliest date on which a hearing could occur. It appears that waiting a month to deal with a technical issue like this is a little over the top, but I am willing to go with the bench's opinion on that matter, Commissioner.

PN28

THE COMMISSIONER: Well, it will always be better if the parties can reach a resolution, rather than proceeding to arbitration, if there is some prospect that there might be a consent position.

PN29

MR BRIGGS: At this point, Commissioner, that won't be the case.

PN30

THE COMMISSIONER: That should be explored.

PN31

MR BRIGGS: Yes, Commissioner.

PN32

THE COMMISSIONER: Perhaps it could be dealt with in this way, and I just flag this by way of possibility, that the parties confer about proposed directions and that Mr Briggs, as the applicant, you then file and serve those draft directions after you have discussed that matter as between the parties. It may be that those directions could be staggered to facilitate the discussions that have been flagged for 16 June. Obviously, if the parties cannot reach agreement as to the form of the directions, it would be a matter for me to determine. I just wonder, as everyone is either here or here by video link, whether it might be appropriate if I go off the bench and ask that recording equipment be turned off to allow the parties to explore that possibility.

PN33

Does any party have a course that they wish to propose different from that which I have suggested?

PN34

MR BRIGGS: No, Commissioner.

PN35

THE COMMISSIONER: No.

PN36

MR NUCIFORA: No, Commissioner.

PN37

THE COMMISSIONER: Well, unless there is anything else at this stage, I will go off the bench, ask the recording equipment be turned off, and allow the parties to open up those discussions. Thank you very much. Off record, please.

OFF THE RECORD

[2.18PM]

ON THE RECORD

[2.40PM]

PN38

THE COMMISSIONER: On record, please. Yes, Mr Briggs.

PN39

MR BRIGGS: Unfortunately, Commissioner, we haven't been able to agree to a process to deal with this matter. I propose that the employers set out how they believe it should be followed and appropriate dates and give the unions an opportunity to respond. We haven't been able to agree over, effectively, what this

application is trying to do and therefore the amount of resources that should be allocated to it. The employers are of the position that this should be dealt with quickly and that, as such, a date probable in the next two weeks should be set for a hearing of the matter, similar to the application to change the transitional arrangements and also the application to include the National Training Wage schedule to the award.

PN40

However, the response and the substantive variations - if I may call them that - that the unions are proposing would require a much longer timeframe. It would also likely attract a substantial amount of submissions from a whole range of parties and require a more substantive process to go along with it. ABI and the employers submit that a hearing date on 7 June would be appropriate to deal with the matter, we believe, and that this sort of variation doesn't require the sort of input the unions are seeking from their national councils and the state offices, but the unions may like to respond to that.

PN41

THE COMMISSIONER: Mr McLeay?

PN42

MR McLEAY: Thank you, Commissioner. As it was reported we couldn't reach an agreement about programming. We say that it should be done - at the very least, the unions should have a chance to respond after the 16th and that any hearing be listed after that and that the employers - sorry, that the unions respond some time after the 16th. Mr Nucifora has suggested probably a week after that, maybe more, but that suggests a timeframe, with the employers having time to respond to any submissions we put up then, and then the matter be listed for hearing.

PN43

We would also seek to discuss this issue further with the applicant. Not quite knowing at this point who is disadvantaged by the way the award is set out at the moment, we are unaware of anyone who has spoken to us, or any employee who has spoken to us about being disadvantaged or, to put it in another way, who is hurting and so we would seek to find out a bit more about that. I would also seek to undertake further instructions from my national executive and national secretary about how we proceed with this and have some discussions with the other applicant and with the other unions that have an interest and who aren't here today.

PN44

THE COMMISSIONER: Thank you. Mr Nucifora?

PN45

MR NUCIFORA: Yes. Thank you, Commissioner. We had discussions in the case of, Commissioner, your not being up with the submissions put by Mr Briggs in relation to a short timeframe - what alternate dates might have been possible, given that a key date for us is 16 June. We would be able to respond in our submissions by as early as 21 June and then we would propose a hearing soon after that. We believe that that is an appropriate timeframe, Commissioner. We do believe that it is not as straightforward as it seems in the application because

there is a concern and a perception that, in fact, it may prejudice the unions' position in relation to future discussions about the span of hours.

PN46

We don't believe that having that timeframe, and I have mentioned 21 June for the unions to respond, would in any way prejudice ABI or any of the employer peak bodies' members, given that there has been no practical evidence at this stage that employers are in any way disadvantaged because of what seems to be an anomaly in the award. If there was, then we would reply to that, but my understanding is, Commissioner, if the short timeframe isn't accepted by yourself, that in fact time isn't as big as an issue. We did talk about as early as 21 June that the unions would respond and we would be prepared to meet that date, given it's after 16 June, and a hearing date soon after at the Commission's convenience.

PN47

THE COMMISSIONER: Thank you.

PN48

MR BRIGGS: Just one thing to add, sorry, Commissioner. If you are of the mind to approach the matter in the way the unions suggest, then the employers would appreciate a chance to make written submissions in response to the unions' written submissions.

PN49

MR GODFREY: Commissioner, from what we have heard the union will be putting in their submissions, from what they have said, a substantial, different variation to the award than the one that's put up here. In fact, we think it will be a major change to what the Full Bench made. If that's the case, we would expect, in my view, three to four weeks' time after their submissions to thoroughly examine what they are putting forward, to put a response to those things, which will have little or nothing to do with the technical change of dates. So my view would be that we would seek three weeks after the 21st for our submissions and then a hearing date possibly a couple of weeks after that.

PN50

MR BRIGGS: I am sorry, Commissioner. One more thing, if I may have your indulgence. I would also point out at this point that the sort of variations that the unions are mooting, I believe there will be an issue making those variations under this application if they were successful in their argument. This application is brought under section 160, which is really an application to vary, arising from an ambiguity or an error. I understand that the HSU characterise in their submissions that this is an error but it goes to some substantive matters that I don't think fall within the definition of ambiguity and error.

PN51

The section 160, as I understand it, can really only deal with the sort of variations that ABI are seeking and therefore it would be the appropriate way to handle the matters that the HSU are raising under section 157 and a separate application to vary would really have to be made in this matter. Thank you, Commissioner.

PN52

MR NUCIFORA: Commissioner, we appreciate what Mr Briggs is putting in relation to the technical aspects of the application, but there are a number of

alternatives that we will be discussing on 16 June and one of them may simply be let's just simply deal with the ambiguity here, and it may be quite straightforward within the 160 application. As I mentioned before, this whole question of why we need a definition of a dayshift may arise, so there are different alternatives that we are prepared - if it is a new application, as Mr Briggs has indicated, that is not our inclination, but if it were, then Mr Godfrey, I believe it was, from Jobs Australia - we would support, of course, extra time for the employers to respond to any separate application we might lodge in response.

PN53

THE COMMISSIONER: Well, regrettably, Mr Briggs, it doesn't seem to be the confined issue that had been described initially. I am mindful of the submissions advanced by the unions that they should have an opportunity to respond to the application as they deem appropriate. They submit to me that it is not a small matter and that some additional time, rather than listing the matter on 7 June, would be required. I can indicate I am not, in any event, available on 7 June.

PN54

In those circumstances I would propose to essentially accede to the associations' submissions as to the potential timing of the filing and service of materials. Once again, you know what your own commitments are. It might be appropriate if, against that background, I once again go off the bench and, with the views that I have expressed, that you then develop as between yourselves some directions, taking into account matters such as those referred to by Mr Godfrey. Once again, how long might you need, another 10 minutes?

PN55

MR BRIGGS: I imagine in this situation it should only be five minutes, Commissioner.

PN56

THE COMMISSIONER: Thank you. Is there anything else that needs to be attended to?

PN57

MR NUCIFORA: No, Commissioner.

PN58

THE COMMISSIONER: Thank you. Off record, please.

OFF THE RECORD

[2.49PM]

ON THE RECORD

[2.59PM]

PN59

THE COMMISSIONER: Thank you. On record, thanks.

PN60

MR BRIGGS: Thank you, Commissioner. We have agreed on dates, Commissioner, if this suits the bench. The unions make their written submissions on 24 June, which is a Friday. The employers make written submissions in response on Friday, 8 July. That is giving the employers two weeks to respond. We are also proposing that the parties will hold a teleconference on Wednesday, 29 June to discuss the matter and the differences that may still exist.

PN61

THE COMMISSIONER: What date did you say?

PN62

MR BRIGGS: Wednesday, 29 June.

PN63

THE COMMISSIONER: That will be between yourselves, will it?

PN64

MR BRIGGS: That will be between ourselves. Yes. As a preliminary hearing date, Tuesday, 12 July, to hear the matter. However, depending on the circumstances, it may be possible to call the matter on earlier if the differences are likely to be resolved.

PN65

THE COMMISSIONER: Well, thank you for that. Mr Briggs, could I ask that you settle the terms of those draft directions and email them to me and I will arrange for them to be posted on the award modernisation website? To the extent that other parties have appeared in the proceedings today, would you attend to the filing of notices of appearances?

PN66

Mr McLeay, you mentioned that there may be some other unions that may have an interest in relation to the application but there has been no appearance by them today, although the information was on the website.

PN67

MR McLEAY: That's correct, Commissioner. The other unions who generally have an interest in this award are the five unions that have been party to the equal remuneration order, the ASU, the HSU, United Voice, the AWU and the LHMU - I will make sure to find out whether they want to pursue this matter and advise them that if they do they should talk to us very quickly.

PN68

THE COMMISSIONER: Thank you for that, Mr McLeay. If they are interested parties I assume that they would have received the usual notifications in that respect. Now, Mr McLeay, you had also said that you had a submission? Perhaps, rather than accepting the tender of documents at this stage, that, subject to what you might wish to say, it may be appropriate, if you have anything to be filed, that it be filed and then it would be posted on the website?

PN69

MR McLEAY: I was just going to say, Commissioner, that I might email it to the email address.

PN70

THE COMMISSIONER: I am informed that has been done already.

PN71

MR McLEAY: Thank you.

PN72

THE COMMISSIONER: Is there anything else that needs to be attended to?

PN73

MR BRIGGS: No, Commissioner.

PN74

THE COMMISSIONER: Could I inquire, Mr Nucifora, for the hearing on 12 July, would you be appearing by video link on that occasion? Should I request that the equipment be set up for you that day or will you be appearing in person?

PN75

MR NUCIFORA: At this stage, if we could, Commissioner, but I may be appearing in person. I am just not sure at this stage, but if at this stage it could be reserved and we would, closer to the date, might indicate whether we need that or not. If that's okay, Commissioner.

PN76

THE COMMISSIONER: All right. That's certainly all right. I will just list it simply then for hearing at 10 o'clock on Tuesday, 12 July 2011. I note that the directions are going to be settled and forwarded to me, or draft directions, in any event, and that if there is to be any request for video linking you will give us some notice of that before the hearing, Mr Nucifora. Is there anything else that needs to be attended to?

PN77

MR GODFREY: Commissioner, in regards to that video link, it is quite likely, if there is some agreement to have a video link, that we might be appearing in Melbourne, rather than in Sydney, of course.

PN78

THE COMMISSIONER: Good.

PN79

MR GODFREY: Sometimes circumstances don't always match and link in.

PN80

THE COMMISSIONER: Similarly, Mr Godfrey, if you could give us some notice if that is to be the case. Is there anything else that needs to be attended to?

PN81

MR McLEAY: Not from me, Commissioner.

PN82

THE COMMISSIONER: No.

PN83

MR NUCIFORA: No, Commissioner.

PN84

THE COMMISSIONER: Thank you very much. The proceedings are adjourned.

<ADJOURNED UNTIL TUESDAY, 7 JULY 2011

[3.05PM]