

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT

AM2020/103

s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

**Application by
(AM2020/103)**

Hospitality Industry (General) Award 2020

Melbourne

9.35 AM, THURSDAY, 25 MARCH 2021

PN1

JUSTICE ROSS: Good morning. I see I've got Mr Ryan and Mr Redford. We have had a request from, I think, a journalist with the Financial Review to attend the conference. They have been told that I would put that to the parties to see whether you had any objection or whether you wished the matter to be a private conference, or whether you were content for the journalist to attend. What do you want to say about that?

PN2

MR P RYAN: We have no objection for the AHA, your Honour.

PN3

JUSTICE ROSS: Thanks, Mr Ryan.

PN4

MR B REDFORD: No objection from the union, your Honour.

PN5

JUSTICE ROSS: Thanks, Mr Redford. Mr Ryan, can I go to you. Is someone - now, there is somebody who does not have their microphone on mute. Who is that?

PN6

MR B REEVES: Apologies, your Honour. Ben Reeves from the Department. I was just getting sort of (audio malfunction).

PN7

JUSTICE ROSS: Yes, all right. If I can go back to you, Mr Ryan. We had a draft determination that came in on Wednesday. That was published on the web site. We have recently received another - I think this morning - revised draft determination. I'm not sure what the difference is between the two because I had some questions for you in relation to the earlier one. Perhaps if you can take me through where you're up to with that.

PN8

MR RYAN: Yes, your Honour, and I do apologise for the lateness in getting the revised or amended draft determination filed with the Commission. The amendments largely relate to - or following some discussions we had with United Workers Union late yesterday afternoon and evening, then I was only able to get some final instructions at my end this morning.

PN9

JUSTICE ROSS: Mr Ryan, there is no difficulty from my end. There is no need to apologise. I understand this is a fluid situation. It was just that I wasn't quite sure what the changes were, so I didn't want to sort of start asking questions that you had already dealt with. That's all.

PN10

MR RYAN: If I take you through the changes then, firstly, at the top of the draft determination the reference to section 157, we just replicated the heading of that section as is in the Act. It was incorrect on the earlier one. The other changes - there are no changes to the proposal to insert schedule K and schedule L. The changes between Wednesday's draft determination and today's is item 2 on the revised one, which is deleting clause 15.1(b) and inserting a new 15.1(b), and deleting 29.2(b) and inserting a new provision there.

PN11

In relation to those two changes, the amendment to 15.1(b) replicates what was in our submissions and proposal filed in late January. 29.2(b) does also replicate what was filed in January, in effect, but we have changed the wording in table 14 in relation to the late night penalties between 7 pm to midnight and midnight to 7 am. We have put in this draft determination \$2.31 and \$3.46 per hour and then we have kept the additional note at the bottom, note 2, that the additional amount is being paid on a pro rata basis for a part hour.

PN12

We think that more accurately and clearly sets out what we're attempting to do there. Other than that, I would be happy to take any questions that your Honour has. Sorry, for completeness, your Honour, there is one further change which was just item 6 on the revised one which is updating cross-references accordingly (audio malfunction).

PN13

JUSTICE ROSS: Thanks, Mr Ryan. If I can go to the loaded rates part of the draft determination and to the table in K6 where you have got the loaded rate and the range of days. The last one on that list is the Monday to Sunday rate. It appears that the parameters around the working for that loaded rate have not changed since the last proposal, but the loaded rate has decreased in the proposal from 135 to 129.45. Is that right?

PN14

MR RYAN: Your Honour, yes, it is right that the percentage has been reduced. The percentages in that table have varied, so the first relevant column, 10.2, has gone up. I think the 16.95 has reduced for that category, the 23.4 - there has been some change there. That is because we have narrowed the scope and breadth of the parameters following discussions both with United Voice as well as the Fair Work Commission's enterprise agreement team.

PN15

JUSTICE ROSS: Yes.

PN16

MR RYAN: The parameters - - -

PN17

JUSTICE ROSS: Sorry, Mr Ryan, I have provided - I have only just received the team's quick review of the determination you filed yesterday. They raised a question about the tool allowance and whether that is paid to someone on the loaded rate or not. That seems to make a difference to the Monday to Saturday 45 hours and it may make a difference to the Monday to Sunday 45 hours. Can you clarify what the position is with that?

PN18

MR RYAN: Yes. We have removed the tool allowance from being within the parameters of the loaded rate. We have also shrunk or restricted the split shift allowance only to include those split shifts which are three hours or less. We have also restricted work on Saturday and Sunday to a maximum of 10 hours of either the 40 or 45 respectively. They are matters or parameters that we have taken into consideration following consultation with members and our relevant stakeholders within the association's branches. That is why there is that reduction in the percentage.

PN19

JUSTICE ROSS: I follow. Perhaps if I go to Mr Redford at this stage, Mr Ryan, and just see what the union's attitude is to the revised draft variation filed this morning.

PN20

MR REDFORD: Well, your Honour, if you will indulge me just very quickly, I feel like I should provide a little bit of context to the union's position on the matter.

PN21

JUSTICE ROSS: Sure.

PN22

MR REDFORD: Which I should say after the discussions that we have been able to have with Mr Ryan and the AHA, we understand the proposals that are being put. Obviously this matter arises after a request that was made to the Commission by the Attorney-General to conduct a review in relation to the Hospitality and the Retail Awards.

PN23

The request made to the Commission was based on a proposition that the retail and the hospitality industries were suffering such acute economic distress as a result of the pandemic that quite significant - what I would describe, your Honour, as quite significant industrial changes might be warranted.

PN24

I suppose what has happened, if I could put it this way, your Honour, is that the Commission has chaired a process to bring the relevant industrial parties together to have a dialogue about those matters and the United Workers Union has participated in that process we think in good faith during January, February and March. The culmination of that process, your Honour, in relation to the retail matter, was, as you know, that an application, pursuant to section 158 was filed seeking a determination to vary that retail award. That application was filed as a consent position by both the employer, the relevant employer groups, and also the relevant unions.

PN25

Now, United Workers Union has concluded that that course of action is not one that we are prepared to adopt in this matter. So a scenario in which there is an application made to vary this award, that application is not going to be one that's going to be co-sponsored by UWU.

PN26

We do think, your Honour, and I make this submission to you, that an application is appropriate though, that there should be, if a variation is to be pursued, an application filed under section 158, in relation to that proposed variation, because these changes that are being mooted are significant and such an application would afford UWU the procedural fairness, your Honour, to understand the grounds upon which such a variation would be sought and give us a glimpse of what the evidentiary case would look like, upon which such a variation would be based. But that's obviously a matter for you, your Honour, and, indeed, for the AHA because it won't be something that the UWU will be doing.

PN27

If there was such an application made, your Honour, we would deal with it in the normal way and that is we would consult with our members about it. We may oppose it, we may consent to part of it or all of it, but I mention that, your Honour, that piece about consultation because what I also wanted to say to you, and you may appreciate this, is that consultation with our members has not been easy in this matter and we have sought to consult with our members throughout the process. Indeed, some of these kinds of changes were the subject of the Attorney-General's working

group process in 2020 and during that process we sought to consult with our members about these concepts. But it's really not been until the most recent iteration of the loaded rates proposal that we're really been able to have a proper consultation with our members about precisely what the proposal might mean for them.

PN28

We had the benefit of receiving a draft version of what was filed yesterday with the Commission, we received that from AHA last week, so I've been able to commence some discussions around the specifics of that proposal but, as I say, your Honour, a proper consultation with our members for us has not been easy, but we have commenced that process. There are significant initial concerns from our members, in relation to the loaded rates proposal in particular, but we intend to continue that consultation process in anticipation of any application that may be made in relation to the proposal.

PN29

The last thing I would say, your Honour, is that we will submit that if an application was made we will submit to you that it should be the subject of a proper evidentiary case. It is an extremely significant proposal, we would want to understand, in detail, the evidentiary basis upon which the proposal is said to be consistent with the modern awards objective and we would want the opportunity to respond with our own evidentiary case in the event that our members wish to oppose it, which is likely to be substantive, your Honour.

PN30

So that's where we sit right now.

PN31

JUSTICE ROSS: I think the first step is in relation to the loaded rate part of the proposal. I'll organise for the agreement team to contact you, initially, Mr Ryan, so they can fully understand and they can clarify any of the parameters or anything like that, any questions they have, then they will do an analysis of that, a BOOT analysis, and then have a conference. They'll have a discussion, a joint discussion with both you and Mr Redford.

PN32

I think, Mr Redford, if you're going to - look, once that's done we'd publish - well we'll talk about how we publish the BOOT analysis, that might depend on the application being filed, but, Mr Redford, I think if you're consulting with your members it would assist you if you were able to show them the BOOT analysis and that may address some of their concerns and might facilitate the process.

PN33

As for where we go from here, it's not quite accurate the characterisation in retail. There was an agreement between the predominant union, the SDA, and the Manufacturing Grocers employer organisation, supported by COSBOA and the ACTU. They did file a section 158 application.

PN34

That was opposed by a range of other employer organisations. We handed down a decision dealing with that matter yesterday and setting out some further steps, namely, that the uncertainty around the working of additional hours by part-time employees in the Retail Award is a matter that we're now seized of and we're going to act on our own initiative to address that issue. Then we'll return to the various competing proposals.

PN35

In respect of this matter, yes, bearing in mind that modern awards are not residency based, it is the appropriate course for a moving party to file an application.

PN36

As for your observations about the evidentiary case required, I think all of that is contingent on the assessment one makes of the extent of changes and their impact. Ultimately, I'm not going to make any observations about whether evidence is or is not required in this case, that's really a matter for each party to consider their position and, obviously, would be influenced by the extent of opposition I imagine as well, Mr Redford. It would appear that we don't quite know where that's up to at this stage.

PN37

I propose, and this could be done very quickly. Mr Ryan, I'll get the agreements team to communicate with you later this morning, to go through any questions they have that you can clarify and if anything needs to be made more explicit, it's intended to be a parameter but it may not have been captured in those terms in the document you've filed. It gives you an opportunity to consider that.

PN38

Once that's happened, they can do the analysis and it can be provided to each of you. They can convene a conference with each of you to discuss that. That can happen very early next week.

PN39

From that, I think the appropriate course would be you don't need to file a full submission or anything like that at this stage, Mr Ryan, but an application, setting out the grounds in support. I would, in the meantime, encourage both of you to confer about what directions might be issued.

PN40

I wouldn't propose - I think it's premature, well, certainly at the moment, because there's no application, but even once it's filed I wouldn't propose to rush to issuing directions because I think Mr Redford, until you engage in that consultation process, in the meantime the AHA can get it's case ready, but until you engage in that, if I can put it - you're not going to know whether the position of your organisation is to not oppose, to consent to all or part or to run a substantive case in relation to any element of it.

PN41

I don't want to issue elaborate directions that deal with the filing of material in response and all the rest of it if it turns out the area of dispute between the two organisations - the two principal organisations - is relatively narrow. I don't want to make the case bigger than it needs to be. What I would propose is we get the BOOT issue sorted. I think, Mr Redford, if on analysis the loaded rates pass the BOOT assessment, I'm not sure I would understand the basis for an objection to it. That might assuage any concerns your members have.

PN42

As to the other elements of the proposed variation, well, I'm not sure what their impact is. I have not had a chance to look at them and I don't

know what reservations you may have about them. It seems to me that the BOOT assessment is critical to the loaded rates view. It's not, Mr Ryan, that if for whatever reason that team formed a view that it didn't pass the BOOT - that of course is not binding on the Commission and you would be entitled to run your case as you see fit.

PN43

My only observation is if they and Mr Redford are persuaded that there is not a BOOT issue, whilst no doubt Mr Redford would like a higher loaded rate - if in fact you're satisfied with the factual basis that it would pass a BOOT, then I think that would make the consultation process and the subsequent proceedings go much more smoothly. The two steps are we'll tidy up the BOOT issue in relation to the latest variation. Once that's done, the AHA would file its application.

PN44

There would be, I would expect either prior to or at that time, discussion between the AHA and the United Workers Union about what the next steps in this process are. If that means a period - and you've already started the process, Mr Redford, so it might be, you know, a relatively confined period to enable you to complete your consultations. You can discuss that between you and reach a view about when a mention and directions hearing would be appropriate in relation to the application. I propose to leave that in your hands at the moment.

PN45

If you're not able to reach a landing on when that would be appropriate, well, let me know and I will just call it on and we'll see how we go, but I think the process so far has been characterised by cooperation and engagement in good faith between the two principal parties, and I don't expect that will change. I'm comfortable to leave the matter on that basis. If there is anything at all you need from me or the Commission, you just need to let us know, but I think the next steps are fairly clear: there will be the BOOT engagement, as I discussed, there will be the application filed.

PN46

When the application is filed, we will also make public the BOOT analysis so that everyone is informed of what you have, then I'll wait to hear from either of you - or probably you, Mr Ryan, as the moving party. You can let me know following your discussions with Mr Redford when you think an appropriate time is for a mention in relation to the application, about how we then go about discussing how we're going to deal with it, bearing in mind, Mr Redford, the only other thing I'd add is that the Commission has got a general obligation to deal with matters as quickly as practicable.

PN47

I understand the need to accord procedural fairness to you in that process, but we need to deal with these things with a degree of expedition, as well, balancing that requirement as we go through. Mr Ryan?

PN48

MR RYAN: Yes, your Honour, if I can just address two matters. Firstly, in relation to the BOOT assessment, I'm happy to provide to the enterprise agreements team the supporting calculations for our percentages and the parameters, if that assists them.

PN49

JUSTICE ROSS: That would be of assistance. That would be great. Thank you.

PN50

MR RYAN: When they contact me, I will arrange for them to be provided. In relation to an application being made, the AHA's understanding was that this matter was being dealt with by the Commission on its own motion and we were responding to that. We understand in relation to our proposals and submissions that - sorry, our proposals and that we will need to put out some submissions and grounds for it, but I just wanted to raise it I suppose to make sure that we understand the process correctly. Are we making an application pursuant to 158 or are we responding to the Commission acting on its own motion under 157?

PN51

JUSTICE ROSS: Look, the short answer is it's an application under 158, but in the grounds you can indicate that the application has arisen out of this process.

PN52

MR RYAN: May it please.

PN53

JUSTICE ROSS: Thanks, Mr Ryan. Was there anything you wanted to add, Mr Redford? Are you happy to participate in the BOOT discussion with the team and Mr Ryan once we have got that data?

PN54

MR REDFORD: Nothing to add, your Honour. No problems with that course of action.

PN55

JUSTICE ROSS: All right. Well, as I say, if something arises or you want the matter brought back on or if there is any assistance you need or any points of clarification, please let me know. We want to facilitate this process as much as possible. Thank you for your assistance to date. Mr Ryan, the team will be in touch with you later this morning. I'll indicate to them your offer to provide the calculations and parameters. I'm sure that will be of assistance and they can sort out any questions they have with you.

PN56

They will then prepare an analysis, provide it to both you and Mr Redford, then organise a telephone conference with each of you to explain their analysis and to deal with any questions either of you may have. If there's nothing further, thank you very much and I'll await your further advice as to the next step in the proceeding. Thank you. I'll adjourn.

ADJOURNED INDEFINITELY

[10.04 AM]