



TRANSCRIPT OF PROCEEDINGS

*Fair Work Act 2009*

**DEPUTY PRESIDENT GOSTENCNIK**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards**

**(AM2014/261)**

**Car Parking Award 2010**

**Sydney**

**9.31 AM, WEDNESDAY, 29 MARCH 2017**

PN1

THE DEPUTY PRESIDENT: Good morning. For the information of both parties represented, the proceedings this morning are being recorded, albeit that we're in a conference, for the purposes of maintaining a record of progress of the technical and drafting matters. So I might, to begin with, just ask each advocate to announce his appearance. Mr Robson?

PN2

MR M ROBSON: Robson, initial M, for United Voice.

PN3

THE DEPUTY PRESIDENT: Mr Jones-Valledor?

PN4

MR A JONES-VALLEDOR: Jones-Valledor, initial A, for the Australian Federation of Employers and Industries; AFEI.

PN5

THE DEPUTY PRESIDENT: Yes. Thank you. As I indicated, the purpose of the conference this morning is to go through the summary issues relating to technical and drafting matters concerning the Car Parking Award. This matter, along with a number of others, has been assigned to a Full Bench of which I'm a member and the President has asked that I conducted conferences in respect of some of the awards in order to narrow the issues between the parties.

PN6

Judging by the range of matters that are set out in the table, I would anticipate that we're able to reach an accommodation in respect of each of them during the course of this morning's conference. I intend thereafter to prepare a report to the President for the Full Bench's consideration. I assume each of you has a copy of the technical and drafting note which was published on 8 March 2017.

PN7

MR ROBSON: Yes.

PN8

MR JONES-VALLEDOR: Yes, Deputy President.

PN9

THE DEPUTY PRESIDENT: All right. What I propose to simply do is to go through the items on that list in the order in which they appear. The first matter identified is a numbering issue which should be corrected. There is no dispute about this. I assume that the clause currently numbered 2.5 and clause 7 should be numbered 7.2. I think in relation to item 2, there is a numbering mis-description in what will now be clause 7.2. The item identified in the first column of the table, the fourth row down, as 15.2, should be a reference to 15.3. None of that is disputed, is it?

PN10

MR ROBSON: No.

PN11

MR JONES-VALLEDOR: No.

PN12

THE DEPUTY PRESIDENT: Item 3. There seems to be a difference of opinion about that issue.

PN13

MR JONES-VALLEDOR: Yes, Deputy President. There just seems to be different interpretations, I suppose, on who you talk to in relation to that particular clause. United Voice say the minimum engagement applies for each shift or each engagement and my organisation, AFEI, says that it applies per day based on the wording; but I don't believe anyone is proposing a change to the wording at this stage.

PN14

MR ROBSON: Yes, I agree with my friend. It's a dispute over interpretation. United Voice isn't proposing to change the wording either.

PN15

MR JONES-VALLEDOR: You might find, Deputy President, that a lot of these issues relate to that issue of interpretation and no proposals related to changes of wording. I don't know whether, you know, there would be much utility here talking about interpretation. We could probably sit here all day, but - - -

PN16

THE DEPUTY PRESIDENT: There are two options then. One is that the wording proposed remain and nothing be done about it. The other is that the issue of the proper construction of clause 11.6 be referred to the Full Bench, or to a Full Bench, pursuant to the - and added to the list of substantive items, in which case the parties would be required to run a substantive case in relation to that issue, the outcome of which might result in an amendment to the clause to bring about clarity.

PN17

MR ROBSON: Look, I think United Voice would be content for the wording to remain as it is, but I suppose we're in the Commission's hands if it feels it needs to review this clause and refer it to a Full Bench. We're not sure the level of confusion is that great.

PN18

THE DEPUTY PRESIDENT: Well, you've got the union saying one thing and the employer organisation saying another. Presumably if issues arise in the future about the proper construction, one option is to utilise the dispute settlement procedure under the award. The other will be for one party to mount a prosecution for a breach of the award in the Federal Court. I'm not pressing for this matter to be dealt with by a Full Bench. In the scheme of things it's a low order item, I would think.

PN19

MR ROBSON: We're content to leave it as it is.

PN20

THE DEPUTY PRESIDENT: All right. Wording to remain and no further action is required.

PN21

MR JONES-VALLEDOR: Yes, AFEI would be content with that also.

PN22

THE DEPUTY PRESIDENT: All right. Thank you. Item 4, Mr Robson?

PN23

MR ROBSON: This just concerns the changes to how the accommodation allowance clause is structured. Again, we would just like to return to the original wording of the clause.

PN24

THE DEPUTY PRESIDENT: What is the original clause number? Is it 15.5(a)? Is that the one?

PN25

MR JONES-VALLEDOR: Yes, correct.

PN26

MR ROBSON: Yes. The key issue for us here is the words - the exposure draft uses the words "if an employee is living away from home" instead of being "absent from home".

PN27

THE DEPUTY PRESIDENT: Yes, I see. I think the drafting has changed the meaning of the clause.

PN28

MR JONES-VALLEDOR: If we are just going to retain the current award provision, we would have no issues with that.

PN29

MR ROBSON: Yes, that's all we're asking for; back to the old award provision.

PN30

THE DEPUTY PRESIDENT: Yes. All right. The agreement of the parties is to retain the words in existing 15.5 of the award. Yes?

PN31

MR JONES-VALLEDOR: Yes.

PN32

THE DEPUTY PRESIDENT: Thank you. Item 5, Mr Robson?

PN33

MR ROBSON: This is in answer to a question from the AMOD team.

PN34

THE DEPUTY PRESIDENT: Yes.

PN35

MR ROBSON: Look, we agree with the Commission that this clause applies to part-time employees who are absent outside of their ordinary hours or day workers outside of their span of hours. I think if we're reverting this clause to the text of the current award, there is no action that I think needs to be taken on this. It's much like the solution to item 3. We don't think it's, you know, a very pressing issue if the current - - -

PN36

THE DEPUTY PRESIDENT: Sorry, Mr Robson, which question?

PN37

MR ROBSON: It is at 18.3(d) of the exposure draft:

PN38

*Parties are asked to clarify the operation of the minimum payments under clause 18.3(d). Is it not the case that if an employee is required to live away from home because of their employment, they will necessarily be away from home outside of their ordinary hours of work? Does the eight hours' payment arise on their rostered working day while the 12 hours' payment is made on a non-rostered working day?*

PN39

Our understanding is that the Commission's proposition that the eight hours' minimum engagement applies to a rostered working day is correct and the 12 hours' minimum engagement applied to a non-rostered working day is also correct, in that if people are working away from home, this is necessarily outside of their normal pattern of work. I'm instructed that is a compository minimum engagement and that this does apply where a part-timer is absent and working outside of their ordinary hours of work as agreed under the part-time employment clause or a day worker is working outside of the span of hours.

PN40

THE DEPUTY PRESIDENT: I don't understand why the question is being asked, to be perfectly honest. It seems to me the operation of the existing clause 15.5 is pretty clear.

PN41

MR ROBSON: I think it has just generated more confusion for us than anything else.

PN42

THE DEPUTY PRESIDENT: Yes.

PN43

MR JONES-VALLEDOR: We're happy if the award remains untouched, Deputy President.

PN44

MR ROBSON: Yes, same.

PN45

THE DEPUTY PRESIDENT: All right. I will just put a note that we're reverting to clause 15.5 of the current award. Item 6?

PN46

MR ROBSON: This is in response to a question from the Commission at clause 21.

PN47

THE DEPUTY PRESIDENT: Yes, I see that. Again, I'm not sure why the question was asked, to be perfectly honest.

PN48

MR ROBSON: Yes, this one is pretty clear, as well.

PN49

THE DEPUTY PRESIDENT: I would have thought so.

PN50

MR ROBSON: From our point of view, anyway.

PN51

MR JONES-VALLEDOR: Yes.

PN52

THE DEPUTY PRESIDENT: The clause is clear. No clarification required. Again, I'm not sure why the second question was asked, to be perfectly honest. This is the one just above clause 21.2 in the exposure draft. No change?

PN53

MR ROBSON: No change.

PN54

MR JONES-VALLEDOR: No change.

PN55

THE DEPUTY PRESIDENT: Okay. Item 8?

PN56

MR JONES-VALLEDOR: Have we done item 7?

PN57

MR ROBSON: No, item 7 was about - - -

PN58

MR JONES-VALLEDOR: That was the - - -

PN59

MR ROBSON: The second question.

PN60

THE DEPUTY PRESIDENT: It was the second question.

PN61

MR JONES-VALLEDOR: Yes, I agree. My apologies.

PN62

THE DEPUTY PRESIDENT: Item 8, Mr Robson?

PN63

MR ROBSON: Yes, this is about the calculation of annual leave loading with the first aid allowance.

PN64

THE DEPUTY PRESIDENT: Yes.

PN65

MR ROBSON: We say it's 17.5 per cent of the wage, plus the first aid allowance, for the simple reason that's how other - I'm instructed that's how shift entitlements are calculated under the award. It's not an amount that sits - I understand it's an allowance that is paid for all purposes and so it should be paid for all purposes on a calculation of the annual leave loading.

PN66

THE DEPUTY PRESIDENT: But isn't that aspect covered by paragraph (a):

PN67

*The amount the employee would have earned for working their ordinary hours had they not been on leave.*

PN68

Doesn't that pick up shift loading?

PN69

MR ROBSON: Yes, but this is about the first aid allowance.

PN70

THE DEPUTY PRESIDENT: I understand that, but the first aid allowance is a - it's a percentage of what?

PN71

MR ROBSON: The first aid allowance is a percentage of the standard rate per week, so it's 2.54 per cent.

PN72

THE DEPUTY PRESIDENT: I think the question, with respect to whoever drafted it, misunderstands the operation of the clause. Under (a), one gets whatever that employee would have earned had they been working ordinary hours during the period of leave. Under (b), the employee would get an addition 17 and a half per cent loading at that employee's minimum rate plus the first aid allowance, however that's calculated. That's how I read the clause. So this

question of whether it's minimum rate plus first aid allowance or wage plus first aid allowance is a bit of a furphy.

PN73

MR ROBSON: Yes.

PN74

THE DEPUTY PRESIDENT: The net effect is the same. That is, the first aid allowance is calculated in accordance with whatever formula is set out in the award. You work that out. That's what it is. Under (a) you'll get whatever you would have earned and under (b) you'll get an additional 17 and a half per cent loading on the minimum rate plus the allowance, however it's calculated.

PN75

MR ROBSON: Yes. Again, we're not proposing any change to the - - -

PN76

THE DEPUTY PRESIDENT: Yes. I think the question misunderstands the operation of the clause. The clause seems to me to be clear. All right. No change?

PN77

MR JONES-VALLEDOR: No change.

PN78

THE DEPUTY PRESIDENT: Excellent. Again, I think the second question misunderstands the operation of paragraph (a).

PN79

MR ROBSON: Yes, 8 and 9 are both similar issues.

PN80

THE DEPUTY PRESIDENT: If an employee's ordinary hours that would have been worked included shift penalties, then those seem to be payable under (a).

PN81

MR JONES-VALLEDOR: Yes.

PN82

THE DEPUTY PRESIDENT: All right. No change. Item 10 arises out of a Fair Work Ombudsman query, Mr Robson.

PN83

MR ROBSON: Our understanding is that whether you pay the shift allowances or you pay the leave loading - is a comparison over the entire period of leave rather than on a day by day basis. The only reason we say that is just the instructions of officers who were around at the time when people were still employed in carparks. Unfortunately, you know, one of our problems is that most carparks have been automated and that's our area of coverage. There are very few people who actually work in the industry and it's difficult getting instructions about how these things apply on the ground.



PN84

THE DEPUTY PRESIDENT: That note about the Fair Work Ombudsman's query, there's a reference to clause 23.8(b) and it should be 25.8(b), so I was struggling to find it. I have to say that the last part of the sentence of (b) "or if they were a shift worker prior to entering leave, their shift penalty, whichever is greater", on a usual ordinary reading of (a), the amount the employee would have earned for working ordinary hours had they not been on leave would incorporate a shift penalty because that's an amount they would have earned.

PN85

In many respects a better drafting would be to have paragraph (a) as is, to insert the word "or" after that instead of "and" and then put a comma after "where appropriate", and then have sort of another - moving "whichever is the greater" to below that so it separates the two. Under (a), one would get whatever they would have earned - because we're not talking about minimum wages here. We're talking about what they would have earned had they worked ordinary hours. So if a shift worker goes on leave, what they would have earned for working ordinary hours would include the loading.

PN86

MR ROBSON: Yes.

PN87

THE DEPUTY PRESIDENT: So that's covered by (a). (b) is the alternative. That is, they get the 17 and a half per cent loading and it's whichever is the greater.

PN88

MR JONES-VALLEDOR: Yes, it should be (a) or (b).

PN89

THE DEPUTY PRESIDENT: Yes, (a) or (b), deleting the reference to "or if they were a shift worker prior to entering leave, their shift penalty" and so just insert a comma after "appropriate" and then have a sort of sub-sentence underneath that which lines up with the word "before" and the number (a) and the number (b) which provides whichever is the greater, so it makes it clear that you get the greater of the two, but not both.

PN90

MR ROBSON: Yes, that's - - -

PN91

MR JONES-VALLEDOR: Yes. I'm happy to have a look at - - -

PN92

THE DEPUTY PRESIDENT: All right. On that basis, we would amend the proposed clause 23.3 by deleting after the word "leave" colon in paragraph (a), the word "and" and inserting instead the word "or". In paragraph (b), inserting a comma after the word "appropriate" appearing in the second line and deleting the words "or if they were a shift worker prior to entering leave" comma "their shift penalty" full stop and then moving the words "whichever is the greater" to

commence in another line lined up with the formatting beginning with "before" and paragraph number (a) and paragraph number (b).

PN93

That, gentlemen, appears to be it for the technical and drafting matters. I note that neither party has - and there are some matters that the Fair Work Ombudsman has raised. The second matter, I think we have dealt with. I would have thought the answer is self-evident given that the requirement to make the payment under clause - well, in the exposure draft it's 123.3 - that the requirement to make the payment by the start of the employee's annual leave, the assessment has to be for the totality of the leave and not each day. I would have thought that that is self-evident.

PN94

MR ROBSON: That's our submissions.

PN95

MR JONES-VALLEDOR: I would think so, yes.

PN96

THE DEPUTY PRESIDENT: What I propose in those circumstances is to remove item 2 from the summary of substantive variations proposed, because I think it's unnecessary and we have re-drafted the clause. That simply leaves one item. I note that neither party has proposed any substantive variation. That remains the case?

PN97

MR ROBSON: Yes.

PN98

MR JONES-VALLEDOR: Yes, Deputy President.

PN99

THE DEPUTY PRESIDENT: All right. In those circumstances, I will bring the conference to an end. There will be an updated table published reflecting our discussions this morning. I will prepare a note for the Full Bench to deal with the technical and drafting matters which, when ready, will also be published on the award mod pages of the web site. Otherwise, I thank both of you for your contributions this morning and we will adjourn. Thank you.

PN100

MR JONES-VALLEDOR: Thank you, Deputy President.

**ADJOURNED INDEFINITELY**

**[10.01 AM]**