



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**ACTING PRESIDENT HATCHER**

**AM2023/1**

**s.158 - Application to vary or revoke a modern award**

**Application by Bongiorno  
(AM2023/1)**

***Manufacturing and Associated Industries and Occupations Award***

**Sydney**

**10.00 AM, FRIDAY, 20 JANUARY 2023**

PN1

THE ACTING PRESIDENT: Mr Goodwin, you appear on behalf of Mr Bongiorno by telephone; is that correct?

PN2

MR K GOODWIN: That's correct.

PN3

THE ACTING PRESIDENT: Ms Devasia, you appear for the AMWU?

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MS A DEVASIA: Yes, that's correct, Acting President. I also have Mr Amarisana with us from the AMWU.

PN5

THE ACTING PRESIDENT: And, Mr Maxwell, you appear for the CFMMEU?

PN6

MR S MAXWELL: That's correct, your Honour.

PN7

THE ACTING PRESIDENT: Mr Goodwin, I have read your application. What do you want the Commission to do about this?

PN8

MR GOODWIN: Well, it all started where Paul was working for this person - he's still working for him - and we found out that he was sort of, according to the award, meant to get leave loading, but the trouble is the employer went to Fair Work and the Fair Work Commissioner come back and said the employer doesn't have to pay leave loading if he's paying above the award rate, and it never said anything about having to be a written agreement or anything like that, so I thought that was very strange.

PN9

Now, I had a bit of a look in the award and I found about the annualising of wage arrangements, but only certain people can do that and Paul wasn't one of the actual supervisor, trainer or coordinator, so he didn't come to that area. So, I thought it was extremely strange that they didn't have something in the award that sort of said there had to be a written agreement that if you're being paid above the award, you won't be paid leave loading.

PN10

THE ACTING PRESIDENT: Mr Bongiorno, there's well-established legal principles about how you go about doing this. I mean it's not for me to provide legal advice, but that's the way to do it. In any event, do you have an actual variation to the award that (indistinct)?

PN11

MR GOODWIN: Well, (indistinct) I was sort of hoping that it would have in the award, that it would actually have somewhere there that, if you are paid above the award wage, you have to have a written agreement to say what you aren't going to

be given as a part of the award, like, 'We will pay you above the award wage, but you won't get any leave loading, you won't get any tool allowance.'

PN12

THE ACTING PRESIDENT: All right. So how do you want to proceed with this matter, Mr Goodwin? What you appear to be applying for or your brother-in-law appears to be applying for is to vary the award. Usually, to do that, you would need to advance evidence and submissions in support of the variation. Is that something you want to - - -

PN13

MR GOODWIN: I thought I'd put the paperwork in when I did the application.

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THE ACTING PRESIDENT: Sorry, can you say that again?

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MR GOODWIN: I thought when I did the application online, I thought I had that information there.

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THE ACTING PRESIDENT: Well, it's a matter for you how much information you want to support the variation, but normally to vary an award which applies to thousands of people, you would need to advance a more substantive case to justify the variation because obviously this doesn't just apply to your brother-in-law and his employers, it applies to everybody covered by the award, so it's not a minor matter.

PN17

MS DEVASIA: Vice President, if I may assist? I did attempt to get in touch with the applicant but, unfortunately, was not able to do so because all of the information has been redacted on his application. I think it might be useful for us to have a conversation with the applicant just to point out what the variation application might need to look like and also about pointing out clause 5 of the award, which allows for those variations to working arrangements that can be made, and talking him through it, and it might be that the better avenue is - I understand from the application, a major gripe is that it's not appearing on the Fair Work Ombudsman's website, so it might give him some guidance around what he might need to do that and then see if he still wants to press ahead with the variation application.

PN18

MR GOODWIN: Yes, well, I can deal on his behalf. I don't think he does. I have finally found out that the actual section 5 does have that information, but the trouble is the Fair Work Ombudsman, if you ever talk to them, they always come back with, 'The employer may.' They don't say, 'The employer may, as long as they abide by the individual flexible arrangements.' So that's what sort of got me in the first place. I thought the Fair Work Ombudsman would have told me that because I've actually asked them if there's any ruling elsewhere that says they don't have to abide by the individual flexible arrangements and they still haven't got any ruling there. They just say they may do it and it should be agreed with the

employer but it doesn't have to be, so I thought that was very strange that it's actually in the award, yet Fair Work is not saying exactly how the award works.

PN19

But this is - I found this after I put the information in. I found out about the individual flexible arrangements, the actual annualising, but he didn't come under that section, so I thought there would be something like that in the award, but the Fair Work Ombudsman still keeps saying that the employer may do it and doesn't necessarily have to tell the employee why he's doing it, or have it in writing. So, I thought there was something in there - I don't know - it seems that it's in there, but it's not being looked at, but I thought there might have been something better in there, or change it so it really does shine out that if you're going to pay above the award, make sure you have it in writing.

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THE ACTING PRESIDENT: These arrangements, whether it's under clause 5 or clause 28, are by agreement.

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MR GOODWIN: Yes.

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THE ACTING PRESIDENT: So, if there's no agreement, those clauses don't apply, but, otherwise, employees and employers can enter into private agreements about these things, but if, as you say, it's not done in the correct form, it may not work.

PN23

MR GOODWIN: Well, it sort of hasn't. As I said, I think this is sort of - probably ought to be - not go any further with after I've sort of been speaking to a few people and found this information out, but, as I said, it all started that Fair Work sort of said it didn't have to be a written agreement, and then, all of a sudden, I thought, 'Well, that's strange, I thought there'd be something in there.' I didn't actually see section 5. I managed to get to the section - what was it - 28, but that said it had to be written and had to spell out exactly what was going on. So, I thought, 'Well, it's strange that the award has it; why isn't there something in the award?' And it was my fault that I sort of didn't read deep enough into it to find out this thing before I actually put it to - put it in, as such.

PN24

THE ACTING PRESIDENT: Yes. There's decisions, of course, in this Commission about it. Employers face the risk that if they don't put these arrangements in writing and specify that an above award payment is paid in lieu of annual leave loading or something else in the award, the risk is that arrangement is not enforceable and they will be liable to pay what they thought they weren't liable to pay, but that's a matter for employees to get advice about.

PN25

MR GOODWIN: Yes, well, I think that's what sort of Fair Work said, sort of they said, 'Well, you'd better get legal advice' and gave some phone numbers over it, but I thought that sort of they would say, 'Well, hey, according to the award,

according to clause 5 of the award, it should be this.' But, as I said, when I first put this in, I didn't - I read most of the award, but I didn't actually - or the only part that I came about was this annualising. I didn't actually see the actual individual flexible arrangements, but the individual flexible arrangements are saying exactly what I virtually wanted the award to say, so it's actually in there, so I'm sort of wasting your time, but the reason it happened was because the Ombudsman sort of didn't put me on to section 5, he actually - every other time I've asked him things, he's given me the exact point in the award to look at, but he never mentioned in accordance with section 5, it's got to be a written agreement, which I thought would have been the thing that the Ombudsman would have said.

PN26

THE ACTING PRESIDENT: Okay. Well, if we have straightened that out to your satisfaction, Mr Goodwin, there's no need for you to press your application if you don't want to.

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MR GOODWIN: No, I think, no, don't worry about it. I believe everything is in there as long as the sort of people deal - well, deal with the award correctly sort of thing.

PN28

THE ACTING PRESIDENT: All right. So, do I take it then you want to discontinue your application and proceed no further with it?

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MR GOODWIN: Yes. Thank you.

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THE PRESIDENT: Thank you. In that case, I will dispense with the formalities of the discontinuance and I'll treat the application as discontinued.

PN31

MR GOODWIN: Yes, right, thanks very much. When I went on the website, it sort of - it doesn't really give you a great deal of information exactly how it goes sort of thing and, yes, I'm sorry about putting it in, but thanks very much for that anyway.

PN32

THE PRESIDENT: That's all right. If we have provided assistance, that's not a waste of time.

PN33

I thank everyone for their attendance and we will now adjourn the matter as discontinued.

**ADJOURNED INDEFINITELY**

**[10.18 AM]**