



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/6

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

**Application by Kaptich
(AM2023/6)**

Corrections and Detention (Private Sector) Award 2020

Sydney

9.30 AM, TUESDAY, 28 MARCH 2023

PN1

PRESIDENT HATCHER: I will take appearances. Mr Kaptich, you're the applicant, you appear on your own behalf?

PN2

MR F KAPTICH: Yes, Honourable President. Yes, I appear on my own behalf and I'm the applicant.

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PRESIDENT HATCHER: All right. Mr Perica, you appear for the CPSU?

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MR M PERICA: That is correct, your Honour.

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PRESIDENT HATCHER: Mr Brown, you appear for Serco?

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MR P BROWN: Yes, we seek the permission of the Commission to appear today, and only in relation to today's direction on behalf of Serco Australia Pty Ltd.

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PRESIDENT HATCHER: Ms Bhatt, you appear for the Australian Industry Group?

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MS R BHATT: Yes, your Honour.

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PRESIDENT HATCHER: Mr Brown, to the extent it's necessary you are granted permission. I will start with you, Mr Kaptich. So this is your application. Can I ask you to clarify, I know that you've said that you want to amend your application, but in the form it's filed it's made under section 160 and you say that there's an error or an ambiguity in the award as you understand it. I'm just having trouble understanding what is said to be the error or ambiguity. Can you explain that?

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MR KAPTICH: Yes, Mr President, thank you very much. (Audio malfunction). Can you hear me?

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PRESIDENT HATCHER: Yes, but the sound is very bad, so I'm having trouble understanding you.

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MR KAPTICH: Is that better?

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PRESIDENT HATCHER: Yes, that's a lot better, thank you.

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MR KAPTICH: Yes. Yes, so obviously I've had some legal advice just to clarify this matter. So section 160 was probably not the best way to address this matter. So that's why I made sort of amendment, application to amend to rely on the broad powers of section 157(1), only because - it is not so much about the ambiguity and uncertainty. I think the proper way to characterise this it's the section 15.1 of the award is probably silent and devoid of - so it needs to be expanded, not so much about ambiguity and uncertainty, just silent on key fundamental details.

PN15

PRESIDENT HATCHER: All right. If you wish to amend your application, it's no longer under section 160 and is now under section 157, you will need to amend the application to demonstrate in respect of section 157(2) why you say the variation is justified by work value reasons, and why making the determination outside the annual wage agreement is necessary to achieve the modern awards objective, because as it stands now it seems to me that the application is not framed by reference to those matters.

PN16

MR KAPTICH: Just to clarify I was not trying to rely on section 157(2A), it's more of the section 157(1).

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PRESIDENT HATCHER: I understand that, but under that section if you're trying to vary modern award minimum wages, which I understand you are by adding a whole range of new pay rates, you will have to satisfy the Commission that the variation is justified by work value reasons, and that it's necessary to achieve the modern award objectives to make the variation outside the annual wage review. Again if you need to seek further advice about those matters that may be necessary.

PN18

So what I was going to propose in the first instance is that the matter be stood over for a number of weeks so that you can get the advice you may need to get and then file an amended application which addresses those matters, so that other parties know the basis upon which you're advancing the application.

PN19

MR KAPTICH: Yes, your Honour, I think that's - I'm okay with that. I think my understanding is obviously being section 160 was not appropriate (indistinct), so I believe the section 157(2A) obviously is a different hurdle to go through, but I will seek legal advice on this and then I'm happy to make amendments and advise the Commission.

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PRESIDENT HATCHER: How long might you need to do that; say four weeks, is that enough?

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MR KAPTICH: Yes, three to four weeks should be sufficient.

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PRESIDENT HATCHER: All right. The only other matter I was going to raise with you, and obviously you (indistinct) amending your application, but as it stands a large number of the matters raised in your application seem to relate not so much to the award, as to issues you have with the Serco Enterprise Agreement. Is that right?

PN23

MR KAPTICH: Yes, your Honour. I think just to give a brief - so the issue we have is that the Serco Enterprise Agreement relies on the award, so they are sort of related. That's why I think us employees we are disadvantaged because, yes, it is about enterprise agreement, but the enterprise agreement relies on the award itself. So either way we have to address the award in order to cure the issue.

PN24

PRESIDENT HATCHER: Just to be clear I am not sure that varying the award will have any effect upon the terms of the Serco Enterprise Agreement, unless you want to tell me otherwise. That is I don't want you to be misled into thinking that variation of the award will necessarily have any immediate effect upon the terms of the Serco Enterprise Agreement.

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MR KAPTICH: Okay. Yes. So I want to seek advice on this, but I think in comparison to other awards, for example the Public State Award Corrections and Detentions, that's why I wanted to - my original intention was to obviously get a hearing date and submit evidence, but obviously I have to go back to square one to be able to get a proper reliance. There is honestly a challenge with that. But, yes, I'm not sure whether I've explained it properly. The award itself hasn't been amended outside of the national minimum wage and the four yearly review. It hasn't really been varied to satisfactory level for employees. I'm not sure whether that makes sense.

PN26

PRESIDENT HATCHER: All right. Thank you. I will turn to the other parties. I will start with you, Mr Perica. The proposal is that the matter be stood over for about four weeks to allow the applicant to seek further advice and file an amended application. Do you take any different view as to how we should approach the matter?

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MR PERICA: I don't, but I commend Mr Kaptich on his initiative in making this application. It's tough when you're representing him. So good on him I say. Yes, we're content with that, your Honour.

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PRESIDENT HATCHER: All right. Thank you. Mr Brown?

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MR BROWN: Nothing further to add, President.

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PRESIDENT HATCHER: All right. Ms Bhatt?

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MS BHATT: We don't oppose the course of action proposed, your Honour, thank you.

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PRESIDENT HATCHER: All right. As I have indicated I will stand the matter over for a period of about four weeks. I will advise the parties of the date of a further report back in about four weeks later today, and in that period, Mr Kaptich, you will seek further advice and then prior to the specified date file an amended application. Is that understood?

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MR KAPTICH: Yes. Yes, that is, your Honour, it is understood. Thanks a lot.

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PRESIDENT HATCHER: All right. I thank everyone for their attendance. We will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[9.45 AM]