



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/11

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

**Application by Secker
(AM2023/11)**

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

Sydney

2.00 PM, THURSDAY, 10 AUGUST 2023

Continued from 15/06/2023

PN57

JUSTICE HATCHER: Good afternoon, I will take the appearances. Mr Secker, you appear on your behalf?

PN58

MR S SECKER: That is correct.

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JUSTICE HATCHER: Ms Barry, you appear for the UWU and the ASU?

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MS C BARRY: Yes, thank you, your Honour.

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

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MS R BHATT: Yes, your Honour.

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JUSTICE HATCHER: Mr Scott and Mr Roper, you appear on behalf of Australian Business Industrial?

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MR K SCOTT: Yes, we do, thank you, your Honour.

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MR L ROPER: Yes, your Honour.

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JUSTICE HATCHER: And, Ms Nally, you appear for the Aged and Community Care Providers Association?

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MS A NALLY: Yes, thank you, your Honour.

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JUSTICE HATCHER: All right. Have the parties had the chance to have any discussions or communications about Mr Secker's application? Mr Secker?

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MR SECKER: I had some discussion with Ms Bhatt, and I've had email communication with a couple of others, but that's as far as we've been able to go.

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JUSTICE HATCHER: And what, if any, has been the upshot of those discussions or communications?

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MR SECKER: Well, Ms Bhatt raised two issues. One was that it was assumed, or it was considered that the driving to the first client and from the last wasn't in

the normal course of the employee's work, and also that I needed to present some mechanism for working out how much the employees needed to be paid if this was to go ahead.

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JUSTICE HATCHER: All right. I was going to ask you the same question, Mr Secker. What is it in the award which says that you aren't entitled to payment to travel to a client?

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MR SECKER: There is nothing in the award that says we aren't entitled to be paid. The issue was in the normal course of the work. So far as I'm concerned I have an arrangement with my employer. I do not have an arrangement with my employer's clients. I go to my employer's clients because that's my job.

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JUSTICE HATCHER: So I take it that your personal experience is that you haven't been paid to the first client and from the last client. Is that the position?

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MR SECKER: That is correct, yes.

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JUSTICE HATCHER: And is that just with one employer or across more than one employer?

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MR SECKER: Well, I've only been in this situation with one employer.

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JUSTICE HATCHER: Yes, all right.

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MR SECKER: But I understand it is common.

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JUSTICE HATCHER: Yes, all right. I might turn to you next, Ms Barry. What's the union's position about this application, and perhaps the underlying question of whether there is or is not currently an entitlement for payment (indistinct) travelling to the first client and from the last client?

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MS BARRY: Yes, the ASU and the UWU don't object to the application made. We note that some parts of the application are not typical in a modern award, and no significant departure from, I guess, the current norms relating to performance of work and travelling to and from home and to the workplace. We're interested parties in this application and would be interested in hearing the employer parties views as well and observing today, and it's likely that the union would file some joint submissions in this matter at the appropriate time.

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JUSTICE HATCHER: What's the unions' positions as to whether under the award there is currently an entitlement to pay - - -

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MS BARRY: I would need to take instructions, your Honour, and confirm.

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JUSTICE HATCHER: Ms Bhatt, what do you say about the application?

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MS BHATT: Yes, your Honour. If I can start with the question that your Honour has just posed. Ai Group's position is that typically where an employee travels to the first client or home from the last client, but doesn't constitute work or using the words that are used in the relevant provision of the award, that travel is not undertaken in the course of their duties and therefore an entitlement to that particular allowance which is a reimbursement per kilometre, does not arise. Issues of this nature were - - -

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JUSTICE HATCHER: Sorry, before you go on, Ms Bhatt, I think we're probably at cross purposes, because I think there's two elements. The first is the existing travel cost reimbursement.

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MS BHATT: Yes.

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JUSTICE HATCHER: Whether there's entitlement to that under clause 20.7(a). But then there's the separate question of whether this constitutes working time. So you say not even 20.7(a) applies?

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MS BHATT: That's correct, your Honour. And in relation to the issue of time spent travelling this issue was ventilated in quite some detail as some of my colleagues will recall during the four yearly review of this award, and in fact there was a union claim as I recall it for precisely these issues. So the payment of the allowance that I have just referred to for travel to and from, and then payment for time spent working. And the submissions we made then and the submissions we would make again is that whether or not an employee is entitled to be paid for time spent travelling will ultimately depend on the nature of their own arrangement.

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In some cases time spent travelling might form part of their work because of the way in which their hours of work have been structured and rostered. But in other cases it might not, and in those circumstances there's no entitlement we would say that arises under the award to be paid for that time.

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JUSTICE HATCHER: I understand that part of it, but in relation to 20.7(a) why would not that apply?

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MS BHATT: Your Honour, we would say that the question will turn on whether that travel forms part of the employee's duty, whether it's undertaken in the course of their duties. Can I give your Honour just a brief example. In some circumstances employees are rostered to work three continuous hours, and that might be because there's a three hour minimum payment provision that applies to that employee under the award, and the employee is required during those three hours to assist client A, to travel and to assist client B.

PN93

In those circumstances the travel that's undertaken in between might form part of their duties. It's expressly what the employee is required to do by the employer during those hours of work. But an employee's working day might not always be structured that way. Sometimes there are long breaks in between assisting two clients for instance. There might be some such situations in which 20.7(a) does not apply, and we would say that it does not apply where an employee travels to the first client or home from the last client, again unless that's the way in which their hours have been arranged.

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JUSTICE HATCHER: All right. And, sorry, you've mentioned the four yearly review. So what was the upshot of the claims you referred to?

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MS BHATT: The Commission decided not to vary the award to deal with the issue of travel expressly in any way. The Full Bench made the observation that in light of (indistinct) variations made to the award the incidents of what I will just call unpaid travel time for now might reduce significantly, and those other award variations related to minimum payment periods, which were significantly increased, and new limitations were placed on the performance of broken shifts. Perhaps I can just read the citation for the record because I have it to hand. It's [2021] FWCFB 5244, and the relevant part of the decision is paragraphs 219 to 230.

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JUSTICE HATCHER: Thank you. Anything further, Ms Bhatt?

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MS BHATT: No, your Honour.

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JUSTICE HATCHER: Is the appropriate course that we simply program the matter for hearing?

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MS BHATT: It would appear to be the case, your Honour. It's of course a matter for Mr Secker whether he wishes to file any more material in relation to his application. I would simply say that in respect of the period of time that is afforded to respondent parties to file we would seek a period of at least six to eight weeks, and part of the reason for that is we would seek an opportunity to

engage with our members. We know that this is an issue that is of serious concern to them.

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JUSTICE HATCHER: Is this a matter that would need to be heard by a care and community expert panel?

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MS BHATT: I think it would appear to be, your Honour.

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JUSTICE HATCHER: All right, thank you. Mr Scott and Mr Roper?

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MR SCOTT: Yes, thank you, your Honour. My client's position is very similar to what has just been put by Ms Bhatt, so indebted to her for those submissions. If I can just add to the contextual background of this application. So as Ms Bhatt indicated there was an extensive review during the four yearly review.

PN104

One of the variations that was made in 2022 I believe was the implementation or introduction of a broken shift allowance, and I have got a slightly different decision reference, because there were a series of decisions, and so I think this will assist the parties. There was a Full Bench decision [2021] FWCFB 5641. So it was October 2021, and the paragraph references 231 through to 236.

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In introducing or deciding to introduce a broken shift allowance the Full Bench indicated the purpose of that allowance and what it's intended to compensate, and there's some observations there or some findings that certainly at least part of the rationale for that additional allowance was the travel associated with the work.

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And so what we would say is in response to Mr Secker's application if the application was to proceed and the variation was to be sought at least one point that we would put is, well we say there's another entitlement in the award that is designed, at least in part, to compensate for that disutility if you like. And so if there's going to be an expanded scope of the travel allowance or a new entitlement we would say the natural consequence of that is to revisit the current entitlement to a broken shift allowance. So I'm happy to correspond directly with Mr Secker and provide him with that information if that assists, your Honour.

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JUSTICE HATCHER: Obviously I will have a look at that decision you have cited as well, Mr Scott, but at first blush I would have thought that a broken shift allowance will be addressed at gaps between jobs and not necessarily the issue that Mr Secker raised.

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MR SCOTT: Yes. I accept that, your Honour. My understanding of what Mr Secker was seeking was, yes, a travel allowance entitlement in respect of from

home to first place of work and from last place of work home. And I apologise if I have misunderstood it, but I thought it was broader than that and wanted some additional travel time compensation.

PN109

We would say, as Ms Bhatt indicated, that there's no current entitlement under the award for the kilometre allowance or the reimbursement from home to your starting place of work or from your finishing place home. We say that's certainly a fairly common industrial term across the modern award system, and that's certainly the way that the award has been applied since 2010. I accept your point, your Honour.

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JUSTICE HATCHER: All right, thank you. Ms Nally?

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MS NALLY: Thank you, your Honour. We are essentially participating today primarily to gain further understanding of Mr Secker's application and the proposed variation and the potential next steps in terms of this application.

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JUSTICE HATCHER: Thank you. Back to you, Mr Secker. So obviously there's at least two employer groups opposed to your application. So the normal course where somebody applies to vary an award and it is opposed is that I would make directions within a given timeframe for first the applicant and then the parties opposing the application to lodge evidence of any witnesses they would want to call and written submissions, and then have the matter subject to a formal hearing before the Fair Work Commission. Is that a path you are ready to undertake, or do you propose any alternative course?

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MR SECKER: I consider - sorry, sir - I consider that there are two issues that haven't been addressed in terms of what's been said today. One is that the employer's contract is with - sorry, the employee's contract is with the employer, not with the employer's client. So it is part of work to go to the first client. Whereas the argument is being put, no, it's not. If the client was my client I would agree with you wholeheartedly, but - - -

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JUSTICE HATCHER: Mr Secker, I am not hearing the case today.

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MR SECKER: Yes, that's fine.

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JUSTICE HATCHER: Can you have a go at the question I asked you, and if you want me to repeat it I can.

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MR SECKER: Yes, repeat what you said, please.

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JUSTICE HATCHER: All right. So the normal course is that where an application to vary an award is made and it is opposed that the matter would be programmed for hearing. That would normally involve a timetable where first the applicant and then other parties, mainly parties that oppose the application, would file documents consisting of their evidence about the matter, which might be statements of witnesses or other relevant documents, and submissions explaining why the application should or should not be granted. The matter would be set down for formal hearing before the Commission which would involve attendance at one of the Commission's courtrooms. Having regard to the fact that your application it appears is opposed are you ready for me to undertake that course, or do you propose some alternative course of action? Would you like to have further discussions with the other parties?

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MR SECKER: I'm happy to go down the line you just proposed.

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JUSTICE HATCHER: All right. How long might you need, and this is not to assume this needs to be done tomorrow or it's a quick or easy task, but how long would you need to file any submissions and evidence you want to file in support of your application?

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MR SECKER: Given that you want me to get some extra information to put to the Commission I would say six weeks.

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JUSTICE HATCHER: Six weeks is fine, but I just want to make clear that it's not a matter of what I want, it's a matter of what you need to do to satisfy the Commission that the variation you seek should be made.

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MR SECKER: Yes. I have to do this work within my work time as well.

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JUSTICE HATCHER: So six weeks is fine. So having regard to the previous indication if I then allow - if I allow six weeks for the applicant and any parties supporting the application to file their material, and then six weeks for any party opposing the application to file their materials. Is that generally appropriate?

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MS BHATT: Your Honour, can I just request that liberty to apply is granted. Subject to the nature of the material that's filed known by Mr Secker, but potentially by the unions, I am just mindful that we might end up needing more time, for example if there's a volume of evidence that's filed.

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JUSTICE HATCHER: All right. I will grant liberty to apply. What I think what I will do is I will have a timetable of six weeks a piece, liberty to apply is granted,

and I will call the matter back on for directions once the material has been filed so we can work out what to do next.

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MS BHATT: If it please.

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JUSTICE HATCHER: Is that suitable for everybody?

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MR SECKER: It's suitable for me.

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JUSTICE HATCHER: Yes, all right. Is there anything further I need to deal with today?

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MR SECKER: I don't think so.

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JUSTICE HATCHER: I thank everyone for their attendance. We will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[2.27 PM]