



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT**

**AM2024/15**

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

**Application by Hay  
(AM2024/15)**

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

**Sydney**

**9.30 AM, FRIDAY, 12 APRIL 2024**

PN1

JUSTICE HATCHER: You appear on your own behalf as the applicant?

PN2

MR D HAY: Yes.

PN3

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: Ms McKeown, you appear for the Australian Services Union?

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MS M McKEOWN: Yes, your Honour.

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JUSTICE HATCHER: And, Mr Roper, you appear for Australian Business Industrial?

PN8

MR L ROPER: Yes, your Honour.

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JUSTICE HATCHER: All right. Mr Hay, so you've made an application to vary an award. The purpose of today is to make arrangements for the determination of your application. So I just want to explain that in the usual course that would require an applicant to vary an award to file evidence which might be by way of witness statements giving actual information as to why the award should be varied, and also submissions addressing the legal requirements of the Fair Work Act pertaining to award variations.

PN10

I understand that that might sound a bit complex to you, but as a general concept applications to vary awards are very major matters because they involve the interests of thousands of people, employers and employees, and we need some degree of material to form a conclusion there's a proper basis to vary an award.

PN11

So, Mr Hay, the usual approach I would take is that I would give an applicant to vary an award an amount of time to file any material that they wish to file in support of their application, and then consider what the next step would be in the matter. Having heard that what course do you want to take - - -

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MR HAY: Can you say it again, sorry.

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JUSTICE HATCHER: So having explained that to you what course do you - - -

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MR HAY: Before that, just before that where you said - I'm not quite sure I understood right at the start where you said - - -

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JUSTICE HATCHER: Okay, I will explain it again.

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MR HAY: Yes.

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JUSTICE HATCHER: Varying an award is a major matter, because this award as an example covers not you, but thousands of people, both employers and employees, and when a person applies to vary an award they need to present sufficient material to the Commission to satisfy the Commission there's a proper basis to vary the award.

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MR HAY: Yes.

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JUSTICE HATCHER: And that usually involves an applicant filing evidence which might be documents or statements from witnesses - - -

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MR HAY: I did submit something afterwards.

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JUSTICE HATCHER: Yes. Just let me finish. Which sets out the factual information they rely upon, and also written submissions that address the legal requirements of the Fair Work Act which apply to variations to awards. So do you understand all that part?

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MR HAY: Yes.

PN23

JUSTICE HATCHER: Okay. So the usual course I would take is for an applicant who seeks to vary an award a period of time in which to provide that material to the Commission.

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MR HAY: Okay.

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JUSTICE HATCHER: So having heard that how do you wish to proceed with your application?

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MR HAY: I still would like to go ahead.

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JUSTICE HATCHER: All right. So how long would you need to file the type of material that I have described?

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MR HAY: Okay. I'm a bit on iffy that going on what I do know is that 25.5(f) says - it should say that employees, but it stipulates only full-time and part-time.

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JUSTICE HATCHER: I understand that, Mr Hay. I understand - - -

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MR HAY: Yes.

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JUSTICE HATCHER: Let me finish. I understand what you're asking for. The question I'm asking you is how long do you need to file the evidentiary material and submissions in support of your application, and if you don't file anything just tell me.

PN32

MR HAY: Well, I thought I did that on my second email I sent in stating a bit more stuff, because the NDIS says employees must get paid, but the Fair Work Commission says, no, not all employees. It's that. So I'm not quite sure that I've already submitted stuff after I put the application in first. So I'm not too sure what else do I need to do to ask for time.

PN33

JUSTICE HATCHER: All right. Look, Mr Hay, it's not up to me to tell you what material you want to file in support of your case. If you're content to rely upon the material you've already sent us then we will determine it on that basis.

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MR HAY: Okay. Yes. Because I'm not too sure what else I need to submit.

PN35

JUSTICE HATCHER: You're the one applying to vary the award, so that's a matter for your judgment. But just bear in mind that you bear the burden of persuading the Commission that something has to be changed.

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MR HAY: Yes, I'll take that on.

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JUSTICE HATCHER: So do you want to file anything in addition or are you happy to rely upon the material you've already filed?

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MR HAY: I'm not too sure if I need to submit anything else, but I'll go by what I've submitted on my second email.

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JUSTICE HATCHER: All right. Okay, thank you. I will turn to the ASU. Ms McKeown, do you want to say anything about this?

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MS McKEOWN: Thank you, your Honour, McKeown, M, for the Australian Services Union. May it please the Commission we have got an interest in this matter and how it proceeds due to the nature of our coverage. At this stage we're trying to work out the substance of the application, so we would be seeking a period of time to consider our position, and particularly with regard to any evidence and witness statements we might provide.

PN41

JUSTICE HATCHER: Ms McKeown, I would have thought the application is pretty clear what's being sought.

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MS McKEOWN: Yes.

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JUSTICE HATCHER: It's seeking an extension of a clause which currently does not apply to casual employees to casual employees. So how long do you need to form a view about that?

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MS McKEOWN: Well, we do have a view. I mean we would support the application. I need to get instructions as to - you know, this is, I guess, the first hearing, so I would need to get some further instructions as to the nature of what we're going to submit. I mean I would think a period of six weeks would be adequate.

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JUSTICE HATCHER: Six weeks to get instructions?

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MS McKEOWN: No, no, not six weeks to get instructions, six weeks to file any material.

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JUSTICE HATCHER: I am happy to give you six weeks, but I don't want to give you six weeks and then find out you filed nothing. All I really want to know from the ASU is are you going to get involved in this case to the extent of filing evidence and submissions, or not. If you are tell me and I will give you the time, but if you're not I don't want to waste people's time.

PN48

MS McKEOWN: No, no. I mean based on the information that we have been able to view already about the application there's not a substantial amount of information in the application already. Perhaps a period of two weeks to consider our position and then take it from there.

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JUSTICE HATCHER: All right. I don't think you're going to find out anything more about the application than you do already, but anyway. All right. Ms Bhatt and Mr Roper, do I take it the application is opposed?

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MS BHATT: It is by Ai Group, your Honour, and we will seek an opportunity to file material in response. How long we need will depend in part on whether the ASU intends to file material. Can I also just note that Mr Hay has made reference to - I think he referred to it as a second email that he has filed, which has material that's in addition to the application. As far as I can see that has not been uploaded to the Commission's website. I just request that that's made available to us somehow if it's being relied upon.

PN51

JUSTICE HATCHER: Yes, I just want to check that we have the email. Just hold on a second.

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MS BHATT: Yes, your Honour.

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JUSTICE HATCHER: Mr Hay, when did you send this email?

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MR HAY: I'm going to have to try and find out.

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JUSTICE HATCHER: I am not sure that we have got it, Mr Hay.

PN56

MR HAY: It's just stating some extra stuff about what I found out afterwards. Like the NDIS says all employees are to be paid, and basically an employer cannot discriminate against being casual, but then I've seen in this 25.5(f) that casuals are getting discriminated against. So it was just pointing out a few things like that.

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JUSTICE HATCHER: Okay. Mr Hay - - -

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MR HAY: I'm looking now when it was sent.

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JUSTICE HATCHER: Can I just ask you to send the email again.

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MR HAY: Yes, I will.

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JUSTICE HATCHER: And then it will be loaded onto the web page.

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MR HAY: Okay.

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JUSTICE HATCHER: Mr Roper, do you want to say anything?

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MR ROPER: Thank you, your Honour. Just very briefly our position is that we will likely oppose the application. In terms of timing and the scheduling of the matter subject obviously to any materials that the ASU wishes to file in support of the matter we probably would be seeking a period of around four to six weeks to respond to that with submissions.

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JUSTICE HATCHER: All right. Having heard the parties what I think I will do is this; I will simply make directions noting that Mr Hay says he doesn't want to file anything further, but I think I will allow that opportunity as an abundance of caution. So what I think I will simply do at this stage is to make a direction that the applicant and any party supporting the application is to file their evidence and submissions within a period of six weeks, and then I will call the matter on for report back after that time to see what material we have to deal with. All right. Is there anything else any party wishes to raise at this time? No. All right. Mr Hay, when we finish if you could just send that email through again.

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MR HAY: Yes, I found it. I sent it on the 20th of the 3rd, but I'll send another one.

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JUSTICE HATCHER: Yes.

PN68

MR HAY: Okay.

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JUSTICE HATCHER: All right, thank you. Thank you for your attendance, we will now adjourn.

**ADJOURNED TO A DATE TO BE FIXED**

**[9.42 AM]**