



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/282)
Racing Clubs Events Award 2010**

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Sydney

9.33 AM, TUESDAY, 28 MARCH 2017

PN1

THE DEPUTY PRESIDENT: Good morning. This conference is being recorded and also amplified, for some reason, but in any event - so I might just ask the parties for the record to announce their appearance, Mr Duncalfe. You can remain seated.

PN2

MR Z DUNCALFE: May it please the Commission, Duncalfe, initial Z, for the Australian Workers' Union.

PN3

THE DEPUTY PRESIDENT: Yes, thank you, Mr Duncalfe. Ms Whish.

PN4

MS S WHISH: May it please the Commission, Whish, initial S, on behalf of Australian Business Industrial and the New South Wales Business Chamber.

PN5

THE DEPUTY PRESIDENT: Yes, thank you, Ms Whish. Ms Shaw.

PN6

MS N SHAW: May it please the Commission, Shaw, initial N, on behalf of AFEI.

PN7

THE DEPUTY PRESIDENT: Yes, thank you. I've been asked by the President to convene a conference in relation to a number of modern award exposure draft issues and this is one of the awards that has been assigned to me. The purpose of the conference today is to try and narrow and if not finalise the issues between the parties so far as they concern technical and drafting matters. I trust that the parties have got a copy of the summary of submissions on technical and drafting matters, which was published by the Commission on 8 March, so what I propose to do is work through that document.

PN8

On my review of that document, there doesn't appear to be too many issues between the parties but we'll record those and if we're able to finalise all matters today I propose to prepare a report for the President. I also note that separately there is a list of proposed substantial variations and no party present today proposes any substantive matter to be dealt with separately by a full bench. That appears to be the case, save for the note - I note there is one substantial matter and I'll come to that but so far as the list is presently - in its present state no party is proposing - we'll come back to that separate issue.

PN9

All right, well, we might then begin with item 1. Mr Duncalfe, the AWU propose a definition of shop day?

PN10

MR DUNCALFE: Yes, your Honour.

PN11

THE DEPUTY PRESIDENT: Yes.

PN12

MR DUNCALFE: It's no big deal because shop day is only used in that one clause, 12.6.

PN13

THE DEPUTY PRESIDENT: Yes - what does it mean?

PN14

MR DUNCALFE: It's explained in 12.6, the preparation for an event.

PN15

THE DEPUTY PRESIDENT: Yes.

PN16

MR DUNCALFE: So if it was used elsewhere in the award without the definition included in the same clause it would be something we'd be really wanting to push but considering that's the only place in the exposure draft where it's used, it's no big deal to us whether it's inserted in clause 2 definitions. I don't want to withdraw it but in the same breath it's not something that I really want to cling to, either, so I'm open to why anyone would oppose its entry into clause 2 definitions.

PN17

THE DEPUTY PRESIDENT: Yes, Ms Shaw.

PN18

MS SHAW: I mean, it's not something we strongly oppose either. We just kind of didn't see the need for the duplication in the award when it is only referred to once in that section and has the definition in that section. It kind of reads better in the body anyway.

PN19

MR DUNCALFE: I tend to agree. We can withdraw that one, your Honour.

PN20

THE DEPUTY PRESIDENT: All right, thank you, Mr Duncalfe. Item 2 appears to be agreed, so that the reference to, "and their employees when first appearing", would be deleted? Yes?

PN21

MR DUNCALFE: Yes.

PN22

MS SHAW: Yes.

PN23

THE DEPUTY PRESIDENT: Sorry, the transcript won't record nodding. All right, likewise item 3 is agreed?

PN24

MS SHAW: Yes.

PN25

MS WHISH: Yes.

PN26

MR DUNCALFE: Yes, your Honour.

PN27

THE DEPUTY PRESIDENT: Thank you. Item 4 is yours, Ms Shaw.

PN28

MS SHAW: Yes - again, something we're not very strong about but it's just reflective of the current award, where it does say percentage of the minimum wage and we were just looking for the exposure draft to reflect the current award.

PN29

THE DEPUTY PRESIDENT: What is the introductory level rate?

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MS SHAW: It's for juniors. It's - - -

PN31

THE DEPUTY PRESIDENT: I understand that.

PN32

MS SHAW: Yes, it would - - -

PN33

THE DEPUTY PRESIDENT: But what it says is it's a percentage of the - - -

PN34

MS SHAW: Introductory level rate. Our thoughts was just to make it clearer as to all the other references to rates do say, "minimum weekly rates", and it did say - - -

PN35

THE DEPUTY PRESIDENT: Well, presumably it's the - the reference to introductory level rate is a reference to introductory level employees, is that right?

PN36

MS SHAW: Yes.

PN37

THE DEPUTY PRESIDENT: Because if you insert a - the words of, "percentage of the minimum weekly rate", for example, that then begs the issue of which of those rates is applicable.

PN38

MS SHAW: Yes, we were looking to insert this to reflect the current award where it says, "percentage of minimum wage introductory level."

PN39

THE DEPUTY PRESIDENT: I see - so what you're actually proposing would be percentage of the minimum weekly - - -

PN40

MS SHAW: Minimum wage, yes.

PN41

THE DEPUTY PRESIDENT: Well, in using the same - - -

PN42

MS SHAW: Yes, just using the same - - -

PN43

THE DEPUTY PRESIDENT: Minimum weekly rate for introductory level employee - is that - - -

PN44

MS SHAW: That's correct, yes.

PN45

THE DEPUTY PRESIDENT: Any difficulty with that?

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MR DUNCALFE: Well, basically - - -

PN47

THE DEPUTY PRESIDENT: It makes the table wider, but - - -

PN48

MR DUNCALFE: Well, basically what your Honour has mentioned is the reason why we are against adding any more words into it. The junior employees' clause says percentage of introductory level rate, clause 17.1 has the rates as introductory level employee.

PN49

THE DEPUTY PRESIDENT: How about this as a compromise, so it would read: "A percentage of the minimum level employee rate?"

PN50

MR DUNCALFE: Minimum level employee is the - - -

PN51

THE DEPUTY PRESIDENT: No, no - not minimum: percentage of the introductory level employee rate, so using the description in the classification introductory - - -

PN52

MR DUNCALFE: So just adding, "employee", after, "introductory level in 17.2."

PN53

THE DEPUTY PRESIDENT: Yes, between the words, "level", and, "rate".

PN54

MR DUNCALFE: That's fine, we can take that.

PN55

THE DEPUTY PRESIDENT: Ms Shaw, is that - - -

PN56

MS SHAW: Yes, that's fine.

PN57

THE DEPUTY PRESIDENT: All right. Well, I record that there's a - I'm sorry, Ms Whish, you comfortable with that?

PN58

MS WHISH: Yes.

PN59

THE DEPUTY PRESIDENT: All right, thank you. All right, we'll record that clause - the table in clause 17.2 be amended so that the word, "employee", is inserted between the words, "level", and, "rate", where appearing twice, firstly in the paragraph preceding the table in the second line and secondly in the table itself. Item 5 there appears to be agreement that both the clause 17.4 be deleted and consequently, schedule B.

PN60

MR DUNCALFE: Yes, your Honour.

PN61

MS SHAW: Yes.

PN62

MS WHISH: Yes.

PN63

THE DEPUTY PRESIDENT: As a consequence of that there will need to be a renumbering, so clause 17.5 would become - which deals with national training wage - 17.4 and presumably also schedule E, national training wage, would become schedule D. Mr Duncalfe, item 6?

PN64

MR DUNCALFE: Yes, your Honour: we agree with ABI that is a substantive claim and I believe it would be dealt with by the payment of wages full bench, so we will withdraw that.

PN65

THE DEPUTY PRESIDENT: All right. Well, withdraw it from the list of technical and further drafting - - -

PN66

MR DUNCALFE: Yes, your honour.

PN67

THE DEPUTY PRESIDENT: Yes, thank you. Item 7, Mr Duncalfe?

PN68

MR DUNCALFE: Yes, your Honour, no strong push on this one. Basically it was just - it would be nice if it did explicitly provide for allowances being payable to all types of employee but the word, "Employee", is sufficiently wide enough, really, to cover them all so I'm not too strongly concerned with that one. It would be nice so I'd still like to keep it there, I won't withdraw it.

PN69

THE DEPUTY PRESIDENT: Perhaps for my benefit, Mr Duncalfe, you might just explain what it is that you're proposing.

PN70

MR DUNCALFE: I'm proposing that under clause 20, "Allowances", that it's explicit that all allowances payable to full-time, part-time and casual employees and not just, "an employee", but I will admit the language of the section doesn't exclude any type of employee.

PN71

THE DEPUTY PRESIDENT: No.

PN72

MR DUNCALFE: So as I said, I'm not clinging to it very strongly, your Honour.

PN73

THE DEPUTY PRESIDENT: It's not suggested by anybody that casual employees, for example, aren't entitled to an allowance in an appropriate circumstance, or part-time employees for that matter. No? The difficulty with fiddling with that in this section - it then raises the issue in others where there's a different nomenclature. So if you, for example, were to say, "An employee must pay an employee regardless of the mode or type of employment the following allowances", then you don't use that term elsewhere, I think there being an argument down the track that, "employee", used elsewhere must be more narrowly construed.

PN74

MR DUNCALFE: I agree, so I can withdraw that.

PN75

THE DEPUTY PRESIDENT: Thank you. Item 8, Mr Duncalfe, is that a reference to the paragraph (c) of 20.1?

PN76

MR DUNCALFE: I'm actually unsure.

PN77

THE DEPUTY PRESIDENT: 20.1(c), for example, has a i and no ii.

PN78

MR DUNCALFE: I didn't prepare this original submission, your Honour, so I - -

-

PN79

THE DEPUTY PRESIDENT: Certainly on my reading of at least paragraph (c) i should be deleted. It's a substantive paragraph.

PN80

MS WHISH: Your Honour, it might also be 20.2 - it goes from 20, then it goes 20.2 and it really should start at 20.1.

PN81

THE DEPUTY PRESIDENT: Well, 20.1 is on the previous page.

PN82

MR DUNCALFE: I actually do remember - - -

PN83

MS WHISH: No, sorry - if you jump right back to the very beginning, to 20, "allowances", the next numerical paragraph after that is 20.2.

PN84

THE DEPUTY PRESIDENT: Not in my version, it's not.

PN85

MS WHISH: Okay.

PN86

MR DUNCALFE: I do understand what the industrial officer meant. He was looking at the comparison, just as you are.

PN87

THE DEPUTY PRESIDENT: I see. I'm actually - - -

PN88

MR DUNCALFE: 20.1 in the actual exposure draft document itself is - does sit after 20. So that's neither here nor there so that's - - -

PN89

THE DEPUTY PRESIDENT: But in any event, it does seem to me that there is an errant i under paragraph (c), there being no ii.

PN90

MR DUNCALFE: I don't oppose that being changed.

PN91

THE DEPUTY PRESIDENT: Yes, all right. So we'll amend clause 20 by deleting a i, not the paragraph attached to it but simply the number under paragraph (c) so that it will simply be a substantive paragraph, as is the case in respect of subparagraphs (a) through (d) of 20.2. There appears to be agreement in relation to item 9, so the loss of clothing paragraph would be a subparagraph of 20.2, is that right?

PN92

MR DUNCALFE: Yes, your Honour.

PN93

THE DEPUTY PRESIDENT: In which case, there would also need to be a consequential amendment to paragraph (c), which would become paragraph (b) of 20.1. There is also agreement in respect of item 10, so there's a meal allowance figure in 20.2(d) will be updated to read, "\$10.98."

PN94

MR DUNCALFE: Yes, your Honour.

PN95

THE DEPUTY PRESIDENT: That's correct? Thank you. Item 11, Mr Duncalfe?

PN96

MR DUNCALFE: Yes, your Honour: basically our submission revolves around the fact that in clauses 12.4 and 12.5 there is no time period attached to the minimum payment and we believe that without - this is the only instance in the entire award where a payment is expressed without a time period. It's our fear that someone could possibly read this and believe that this is the minimum payment for a day's work, especially considering 12.4 and 12.5 read, "Must be paid the rate for work performed on any one day as follows", and so the minimum payment is obviously a reflection of the minimum engagement multiplied by the minimum hourly rate but the minimum engagement is only expressed in clause 11.5 and not in clause 12 anywhere so we would really like that minimum payment to express in the exposure draft, in these clauses and in these tables, that that minimum payment is for the minimum engagement of four hours and not for a day's work or any other time period.

PN97

THE DEPUTY PRESIDENT: All right, well, Ms Whish?

PN98

MS WHISH: Our submission was that by calculating - by multiplying the minimum hourly rate by four you're getting to the minimum payment and that it's already covered by clause 11.5.

PN99

THE DEPUTY PRESIDENT: Yes.

PN100

MS WHISH: But I do respect the reference, having re-read that clause, that it does mention, "on any one day."

PN101

THE DEPUTY PRESIDENT: Yes. Ms Shaw?

PN102

MS WHISH: We don't really have much further to add. We were just responding to the Commission's question.

PN103

THE DEPUTY PRESIDENT: I understand.

PN104

MS WHISH: We just didn't think it was necessary.

PN105

THE DEPUTY PRESIDENT: I don't for my own part favour the suggestion in the Commission question but noting Mr Duncalfe's concern, it seems to me it could be accommodated in this way; firstly, we could add, for example, in clause 11 after the word, "relevant classification", add a comma and insert something to the effect as follows - which is expressed in the tables in clause 12 as the minimum payment. Out of an abundance of caution under, "minimum payment", the heading in each of the tables in 12.4 and 12.5 we could have under the words, "minimum table", "see clause 11.5." Mr Duncalfe, would something like that work?

PN106

MR DUNCALFE: Yes, your Honour: I think that would clarify it for anyone reading it, especially if you were reading these tables in isolation without having read clause 11 first. I think it's just better off that there is some kind of recognition of how that payment was constructed, even though it is a simple multiplication of the hourly rate, so yes, your Honour.

PN107

THE DEPUTY PRESIDENT: Ms Whish, you troubled by that?

PN108

MS WHISH: We don't oppose that.

PN109

THE DEPUTY PRESIDENT: Ms Shaw?

PN110

MS WHISH: We don't oppose.

PN111

THE DEPUTY PRESIDENT: All right. Thank you. All right, the parties agree that clause 11.5 would be amended by deleting the full stop after the word, "classification", and setting the following comma which is expressed in the tables in clause 12 as the minimum payment and the - underneath the heading, "minimum payment", in each of clause 12.4 and 12.5, there would be inserted the following; "See clause 11.5." All right, well, that appears to be all of the technical and drafting issues and on that basis, there appears to be no outstanding issue. Is there any other matter that the parties wish to raise?

PN112

MR DUNCALFE: No, your Honour.

PN113

MS WHISH: No, thank you.

PN114

MS WHISH: No.

PN115

THE DEPUTY PRESIDENT: All right, well, I'm happy to say that this conference sets a record for the shortest conference I've had by streets in award matters. I thank the parties for their participation and efforts. As I indicated earlier I will prepare a report for the President. When the report is given to him it will also be published on the website. Thank you for your attendance. We're adjourned.

ADJOURNED INDEFINITELY

[9.58 AM]