



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/16

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

**Application by Australian Industry Group, The (163V)
(AM2023/16)**

Vehicle Repair, Services and Retail Award 2020

Sydney

2.00 PM, MONDAY, 7 AUGUST 2023

Continued from 13/07/2023

PN29

JUSTICE HATCHER: Good afternoon, everyone. Ms Bhatt, you appear for the applicant?

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MS R BHATT: Yes, your Honour.

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JUSTICE HATCHER: Mr Hodges, you appear for the Victorian Automotive Chamber of Commerce?

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MR D HODGES: Yes, your Honour.

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JUSTICE HATCHER: And, Ms Burnley, you appear for the SDA?

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MS S BURNLEY: Yes, your Honour.

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JUSTICE HATCHER: All right. I am not sure that I require this, but have the parties had any discussions about this application?

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MS BHATT: Not since the last time we appeared before your Honour.

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JUSTICE HATCHER: All right. I think it might be useful to start off, Ms Bhatt, if you just can take us to the elements of the application and then perhaps explain why it's thought to be necessary.

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MS BHATT: Yes, your Honour. Can I identify that as we conceive of it the variations proposed fall into three categories, and can I identify those categories by reference to the draft determination that we filed.

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JUSTICE HATCHER: Yes.

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MS BHATT: We'd say that the first category of variations are found at paragraphs 1, 2, 3, 4, and the first variation proposed at paragraph 5. So it's the insertion of the word 'ordinary' in clause 10.4. And in broad terms we say that all of those variations are proposed to make abundantly clear that those provisions don't require a consideration of overtime and they relate only to part-time employees' ordinary hours of work, and I can deal with that in more detail as we go if it's of use.

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JUSTICE HATCHER: Yes.

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MS BHATT: The second category of variation appears in paragraph 5, and it's the second variation that's proposed there, the insertion of the words '(including by electronic means)', and this is directed towards making clear that the requirement to record an agreement to vary ordinary hours in writing can be satisfied if that agreement is recorded through electronic means. So this might be an exchange of emails. It might be communication through a software that is used for time and attendance purposes, rostering purposes, or indeed an application or an app that's used on a mobile phone for similar purposes.

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And the third category of variation is in paragraph 5 of the draft determination. It's the addition of the last sentence to clause 10.4, which reads, 'Any such agreement may be on an ongoing or for a specified period of time.' And again this is for the purposes of making very clear that a variation to an employee's hours of work might be one that's temporary, or it's one that's ongoing. I should say - - -

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JUSTICE HATCHER: That would include the agreement being for a single shift with that.

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MS BHATT: Yes, it could, your Honour.

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JUSTICE HATCHER: Yes, all right.

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MS BHATT: Can I just say that in relation to both the second and third categories of variations we've looked to other modern awards for guidance and instruction, and I think that analysis is review of it. Neither of these concepts are foreign to the award system. For example this notion of calling out the ability to record an agreement via electronic means appears in various other modern awards.

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Given that the SDA is participating in these proceedings, at least for the purposes of today's proceedings we narrowed our search to other awards in which it has an interest, and we've identified that similar provisions appear in the Fast Food Award, the Hair and Beauty Award and the General Retail Industry Award. And in each case the concept seems to be the same. There's a requirement to reach agreement and the award goes on to say that that can be via electronic means.

PN49

The same can be said of the third category of variation. Your Honour might recall that during the four yearly review of modern awards substantive variations were sought to the Social Community Home Care and Disability Services Industry Award in the context of the casual and part-time (indistinct) proceedings. And, your Honour, this wording that we've adopted is from that award. It's found for the benefit of the other parties at clause 10.3(e).

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My understanding is that it was introduced as a product of those proceedings, and again I will just give the other parties the citation for that decision. It's [2017] FWCFB 3541. And of course I'm paraphrasing the decision here, but, 'Parties in this proceeding sought variations to the part-time provisions seeking greater flexibility.' And the Commission observed in its decision that on one view a very similarly worded clause in the SCHADS award already provided for that flexibility, which is that you could already reach agreement on an ongoing basis or temporarily to agree to vary a part-time employee's hours. But nonetheless Commission found that there was a merit in making that clear, and we rely, respectfully, on a similar logic in this matter.

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I will also just flag that similar words also appear in the General Retail Industry Award, which too might be as a result of some relatively recent proceedings that I think were initiated in the context of the pandemic perhaps at the request of the then minister. So I hope that assists your Honour in eliminating the underlying intent.

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JUSTICE HATCHER: In relation to the second and third categories is there any particular issue would need this requirement that's come up in this industry that requires a variation?

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MS BHATT: Your Honour, we're not aware of any dispute as such that has arisen as to whether or not these provisions can be operated in this way. But this application has been brought on the basis of feedback that has been provided to us by members, and that feedback seems to be this, that on one view the award can already be read in this way, but it's not as clear as it could be or should be. I think there's some reluctance to adopt that interpretation in circumstances where it's not abundantly clear. I think there's just some concern about the risk that might flow if that happens to be incorrect.

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JUSTICE HATCHER: All right. Can I just take you back to the first one. I think I noted on the last occasion that this award doesn't appear to have a span of ordinary hours.

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MS BHATT: Yes, your Honour, I took that on notice at the time, and since then having worked through the ordinary hours of work provisions of this award that does appear to be correct. And of course ordinary hours are dealt with in various parts of this award. There are special provisions that relate to certain categories of employees. Despite that, your Honour, we would say that the award does in other ways define the parameters of what ordinary hours of work constitute, and in relation to a part-time employee in particular it's the hours of work that are agreed between the employer and employee at commencement, and then any agreed variations that are made subsequently.

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JUSTICE HATCHER: Well, the 10.2(a) already says that a part-time employee is someone less than 38 ordinary hours per week.

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MS BHATT: Yes.

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JUSTICE HATCHER: And 10.5 already says that anything over the agreed hours of overtime. There's no span of hours. So I'm just wondering why this (audio malfunction).

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MS BHATT: I'm sorry, your Honour, I just lost the last part of your - - -

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JUSTICE HATCHER: Sorry. So 10.2(a) says a part-time employee is by definition engaged in work less than 38 ordinary hours. 10.5 says that anything in excess of agreed hours is overtime.

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MS BHATT: Yes, your Honour.

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JUSTICE HATCHER: There's no span of hours. I'm just struggling to understand the purpose of this.

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MS BHATT: I think the concern is, your Honour, for example if we look to 10.2(b), which is the first clause we propose to vary. It identifies that one of the characteristics of a part-time employee is one who has reasonably predictable hours of work. Now, we'd say that that consideration of whether an employee's hours of work are predictable relates only to their ordinary hours, not their overtime.

PN64

Although the award doesn't have a span of hours part-time employees do of course have ordinary hours of work and overtime hours of work. That delineation remains. And we simply say that the provision should be amended to clarify that for the purposes of defining who is a part-time employee and considering whether their hours of work are predictable it's only the ordinary hours of work to which you need to turn your mind.

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JUSTICE HATCHER: I mean the difficulty of this is that I've looked at a few part-time clauses, most of them do not have this reference to ordinary hours, (indistinct) reasonably predictable clause to the extent they exist or the agreement clause. I'm wondering what distinguishes this award that would require this variation in circumstances where it might then raise a whole series of issues about other awards and why they don't have that as the same word in there.

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MS BHATT: And, your Honour, I suspect that these provisions are drafted the way they are for various historical reasons. This issue was not one that was dealt with through the recent plain language redrafting process. I think I have to accept that there might not be any reason that distinguishes this award from others, apart from the fact that in the course of looking at the part-time provisions in detail this issue is one that's come to our attention and it's come to mind. I think I can sort of cut to the chase in saying that it's the second and third categories of variations that are sort of our primary concern, and they're the more significant or substantive ones.

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JUSTICE HATCHER: The problem, I speak for myself, is that if we vary it here I immediately then look at 10.1 of the General Retail Award which says, 'Engaged to work for fewer than 38 ordinary hours per week and whose hours of work are reasonably predictable.' All right, I understand all that. Mr Hodges, what do you want to say about the application?

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MR HODGES: Thank you, your Honour. I think as we said at the directions hearing whilst we're not currently convinced that the relevant provisions are ambiguous or uncertain we do view the proposed amendments as clear and simple to understand certainly consistent with the ACC's understanding of the intent and application of the current provisions.

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JUSTICE HATCHER: All right. Ms Burnley?

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MS BURNLEY: Thank you, your Honour. From what I have just heard from Ms Bhatt the question that the SDA has is that, (indistinct) the 10.4, the variations to 10.4 is not the concerns of the SDA. That does exist in other awards. It was done through part of the review process, which is just to put into the award the clear understanding which is in the Act that electronic means can mean in writing, or in writing can mean - - -

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JUSTICE HATCHER: I think you said 10.4, you mean 10.5? I'm sorry, no, you do mean - - -

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MS BURNLEY: Yes, it's number 5 which is variation to 10.4.

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JUSTICE HATCHER: Yes, you're right, sorry. Yes, go ahead.

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MS BURNLEY: Yes. So the SDA does not have a concern with that. That does reflect what was discussed in some of the reviews and reflects what's in the Act about electronic means being equivalent to in writing so long as it's recorded somewhere, and neither do we have an issue regarding to it can be for an ongoing or for a specified period of time.

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The issue that we do have is all the other variations of inserting the word 'ordinary' before the word 'hours', which as your Honour has just reflected on pointing at GRIA the SDA did have a look to find out whether this word 'ordinary' did go into the part-time hours clauses in other awards, and we didn't find one which had been similarly drafted as per the GRIA or the RS&R Award which had the word.

PN76

So we do have concerns that it could change and open up a whole lot of other either more variations, queries or questions that would come, and we do note that the part-time clause in the GRIA was reviewed in the 2014 review. Part of the plain language, the (indistinct) proceedings, it was done, and there was also a particular case just looking at the part-time clause and it was varied in particular ways. So that clause was heavily and extensively reviewed during the 2014 review. So we would think it would be unnecessary for this award to have the word 'ordinary' inserted such as the Ai Group is seeking to do at this time. If it pleases the Commission.

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JUSTICE HATCHER: All right. So what's your position in response to all that, Ms Bhatt?

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MS BHATT: Your Honour, in light of the views that your Honour has expressed and those of the SDA we can give some further thought to whether the first category of variation need to be pressed, and it appears that if not there may be scope for the balance of the variations to proceed, at least the Commission to consider any absence of any opposition from any party, at least amongst those that are appearing today.

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Can I make an enquiry of the SDA directly, just in response to that feedback from Ms Burnley. I understand the concern about similar provisions not appearing in other awards, or the retail award for example not making express reference to ordinary hours in a way that we have proposed here. But is there any disagreement about the substance, which is that those provisions only relate to ordinary hours of work? I should flag in fairness to Ms Burnley that my understanding is that we are on the record. Is that right, your Honour?

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JUSTICE HATCHER: Yes, we are. It's up to you whether you want to answer that, Ms Burnley. We're in a conference so I think Ms Bhatt is entitled to ask a question, but it's up to you whether you answer it or not. I mean you might want to think it through or you might want to give a response, it's up to you.

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MS BURNLEY: I think we'd probably have a little bit of time. I mean these clauses we haven't had a problem with from the SDA's view as for anybody putting in a different interpretation, or having some issue about it. We do note that at times though there are predictable hours which are overtime. So I guess it

depends how it words with the overtime clause, but there hasn't been a problem that the SDA is aware of in any other award or agreements that have come before the Commission based on these words which appear in the RS&R Award.

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JUSTICE HATCHER: I mean speaking for myself, Ms Bhatt, the slight concern I have is that if you're asking the Commission to consider this variation because of its logical implications for a range of other awards we have to open the whole thing up to comment from a range of other parties. Whereas perhaps if you, and accept Ms Burnley's indication, you might just seem to be pushing at an open door to get this thing wrapped up.

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MS BHATT: I understand, your Honour. In light of what's been put today would your Honour be minded to stand the matter over for perhaps three weeks or four to allow us to reassess that relevant part of the application. We might engage in some further discussions directly with Ms Burnley and Mr Hodges if that's relevant, and then report back to the Commission either in writing or in proceedings before your Honour, whatever is convenient.

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JUSTICE HATCHER: That's fine, Ms Bhatt. I think if the parties were able to reach an agreement in respect of the categories 2 and 3 then the Commission would be in a position to probably make a statement stating provisional view that the variation should be made, and if there's no further opposition simply make the variations. So that's a straightforward course of action, so I encourage you to think about that.

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MS BHATT: I am grateful for that indication, thank you.

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JUSTICE HATCHER: Are the other parties content with the course proposed?

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MS BURNLEY: Yes, your Honour.

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MR HODGES: Yes, your Honour.

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JUSTICE HATCHER: Ms Bhatt, I think I will simply stand the matter over until we receive further advice from the organisation.

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MS BHATT: If it pleases, thank you.

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JUSTICE HATCHER: Okay. Thank you everyone for their attendance. We will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[2.21 PM]