



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY

AM2023/30 and Ors

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

Application by [REDACTED]
(AM2023/30)

Application by [REDACTED]
(AM2023/32)

Application by [REDACTED]
(AM2024/1)

Application by [REDACTED]
(AM2024/2)

Application by [REDACTED]
(AM2024/3)

Rail Industry Award 2020

Brisbane

11.00 AM, MONDAY, 15 JANUARY 2024

PN1

THE VICE PRESIDENT: Good morning everyone. Can I just start by confirming the appearances. So the applicant in AM/30 is Mr [REDACTED]; that's correct?

PN2

MR [REDACTED]: That is correct.

PN3

THE VICE PRESIDENT: We have got you there, Mr [REDACTED].

PN4

MR [REDACTED]: Yes, we have.

PN5

THE VICE PRESIDENT: And the applicant in matter AM32 Ms [REDACTED]?

PN6

MS [REDACTED]: Yes, that's correct.

PN7

THE VICE PRESIDENT: Thank you. And Mr [REDACTED] being the applicant in AM1 of 2024.

PN8

MR [REDACTED]: Yes, that's correct.

PN9

THE VICE PRESIDENT: Thank you. And we have also listed the AM/2 and 3 of 2024 which are respectively applications by [REDACTED] and [REDACTED]. Mr [REDACTED], we've got you there? Mr [REDACTED], I think you're on mute. Mr [REDACTED], could you just unmute your microphone, please, and just confirm your appearance. Sorry, we will just get Mr [REDACTED] back. We will just stand the matter down for a few minutes while we get Mr [REDACTED] back.

SHORT ADJOURNMENT

[11.04 AM]

RESUMED

[11.07 AM]

PN10

MR [REDACTED]: My apologies, (indistinct).

PN11

THE VICE PRESIDENT: Okay. So, Mr [REDACTED], we've got you there?

PN12

MR [REDACTED]: Yes.

PN13

THE VICE PRESIDENT: And you're the applicant in AM3 of 2024.

PN14

MR [REDACTED]: Yes.

PN15

THE VICE PRESIDENT: Thank you. Ms Bhatt, as I understand it you're an interested party in these proceedings?

PN16

MS R BHATT: Yes. We're appearing in today's proceedings for the purposes of identifying our potential interest in the matter. I think it might depend a little bit on how it all unfolds.

PN17

THE VICE PRESIDENT: Okay. So you don't hold instructions from any of the employers of these applicants?

PN18

MS BHATT: I don't think we know who the employers of these applicants are. Speaking for myself I don't, so, no, I don't have any instructions of that nature.

PN19

THE VICE PRESIDENT: Okay. Well, perhaps for the purposes of today as I understand it each of the applications is seeking a potential amendment to the Rail Industry Award, and I just want to be clear I understand what the basis of the applications are. Are you arguing that the Rail Industry Award doesn't cover protection officers, or are you arguing - what is it exactly that you're seeking to achieve here? Perhaps if I start with you, Mr [REDACTED].

PN20

MR [REDACTED]: Can [REDACTED] speak on my behalf?

PN21

THE VICE PRESIDENT: Sure.

PN22

MR [REDACTED]: He knows more about it than - - -

PN23

THE VICE PRESIDENT: Sure. Mr [REDACTED]?

PN24

MR [REDACTED]: Yes. So essentially if you go through the current 2020 Rail Industry Awards there's three pay tables in there which covers administration, clerical, operations for the second line, and then civil and infrastructure. When you go through all the list of duties that then relate to the pay tables in that matter none of them accurately clarify our duties in there, and we don't really have a basis for us to move forward in terms of our own employment and that aspect of it in terms of getting better pay rates and stuff like that because we're not accurately represented with our duties in the awards.

PN25

THE VICE PRESIDENT: Okay. Have your employers informed you what classification they say you are, or do they say you're covered by the award?

PN26

MR [REDACTED]: I've asked this question multiple times. I've asked - obviously first they'll be asked what award are you under. You get told the Rail Industry Act. I then asked what category we're under, and I get the answer, 'I don't know, I'll chase it up', and never hear anything back. I've asked this question multiple times and had the same answer from multiple different safe working companies.

PN27

THE VICE PRESIDENT: Okay. Are you in a position to identify who your employer is?

PN28

MR [REDACTED]: In the interest - one of the issues here is that we don't want targets on our back. So we're effectively safe working personnel in the area I'm in as 99 per cent casual employees, and we will suffer from in the retaliation of we've got no work for you will be the comment coming from the companies. We say that there's about 10 or so I think safe working companies in the area that I work in, and I've had the answer from multiple companies essentially.

PN29

THE VICE PRESIDENT: All right. Well, is it possible to identify who those companies are, because it's a little bit difficult to have a hearing and a process to vary an award that potentially affects employers without notifying them that they may be affected by the variation.

PN30

MR [REDACTED]: Yes. So in saying that we are very clearly identified in the 2012 Rail Act as a requirement to work in the rails as a safety worker. So we're clearly identified independently in the legal sense prior to what the current awards say. The current awards then don't have the definition for it. It's up to the companies then to go back and look at what the award has and make a decision based off that and - - -

PN31

THE VICE PRESIDENT: Mr [REDACTED] - - -

PN32

MR [REDACTED]: - - - covered.

PN33

THE VICE PRESIDENT: Mr [REDACTED], if you want the Fair Work Commission - let me put it this way. If you expect the Fair Work Commission to progress this matter then we need to know who the employers who will potentially be affected by this are. Now I understand if you don't want to identify who your employer is, but we need to know who we're dealing with here so that they can be notified that there is an application that could potentially affect them.

PN34

MR [REDACTED]: Yes. So that would be any of the safe working companies that provide to the rail operators. In New South Wales you have ARTC, Sydney Trains, Transport for NSW, Sydney Metro are the operators, and then the safe working companies there's Swetha, Multi Civil Rail which is known as MCR. You have Pure Rail, Programs - - -

PN35

THE VICE PRESIDENT: That's fine, Mr [REDACTED]. So you can identify the employers that you say - so these employers are contracting to the rail operators. Is that - - -

PN36

MR [REDACTED]: That's correct, and I can identify a number of them, but I don't have a complete comprehensive list, because they change name and spring up very quickly.

PN37

THE VICE PRESIDENT: Okay. So the issue for you is that the award doesn't currently clearly identify that protection officers as you term yourselves are covered in the classification definitions in the award and you want clarification as to where you sit in the classification structure.

PN38

MR [REDACTED]: Yes. Like our duties are - we have some absolutely unique duties, and then we have some duties that are covered in the awards. They're at different rates than what we get compensated for, which is a bit beyond the point. Some of the duties are covered, but our main roles and responsibilities aren't clearly identified, and I sought clarification with the ombudsman and Legal Aid first, and the one that comes closest to us in the awards they believe was more for train drivers and stuff like that. So it's not crystal clear, even through the people who are doing the (indistinct) that have the training, to how we should be classified.

PN39

THE VICE PRESIDENT: Okay. Would you be in a position to file some information or file a statement that said what the duties are that you perform? If I gave you a period of time to do that would you be in a position to do that? Do you have a job description or something like that that you could provide?

PN40

MR [REDACTED]: There is a couple of things that I did try to provide to the ombudsman. So one of them for myself, [REDACTED], [REDACTED] have a web page with the duties and roles of the protection officer on them. Also there is the Australian Government training page which has the rail protection officer Cert II and III, which is modules which the organisations then base their individual training on. So there's information in those as well if you can access them.

PN41

THE VICE PRESIDENT: No. Mr [REDACTED], you're the applicant, so I need you to provide them. I need you to provide - - -

PN42

MR [REDACTED]: Yes, I - - -

PN43

THE VICE PRESIDENT: - - - a statement that says this is the work I do. Here's some documents that describe the work that we do. Here is a list of the companies that we often work for. These are the companies we say are in this industry and employ persons that do the work that we do. So are you able to between all of you file materials that sets that out?

PN44

MR [REDACTED]: Yes, I don't think that will be an issue. We can put that together for you.

PN45

THE VICE PRESIDENT: Okay. How long would you need to do that?

PN46

MR [REDACTED]: I'm working tomorrow. I can get started on it on Wednesday and I'll try and flick it out to everyone else here and get them to review it and add to it. So hopefully we can - like it just depends on work - - -

PN47

THE VICE PRESIDENT: If I give you two weeks, Mr [REDACTED], is that enough time?

PN48

MR [REDACTED]: Yes, I think we can get something pretty solid together in that time, yes.

PN49

THE VICE PRESIDENT: Okay, great. Thank you. Are you all able to work together on that, or do you want to provide information separately?

PN50

MR [REDACTED]: No, we can work together on it.

PN51

SPEAKER: Yes, together.

PN52

THE VICE PRESIDENT: And we have some additional applicants that want to be part of these proceedings as well as I understand. So we will put those applications up. We will process them and put them up on the website, but the issue is that as I understand it some don't wish to be identified, and if you don't wish to be identified that's a matter that we're going to have to deal with as well, because we're supposed to have open justice here and people are entitled to know who the employer of an applicant is, and that employer is entitled to respond. So it's something that you're going to need to deal with, and I can assure you that it is - you are protected under the provisions of the Fair Work Act from having adverse

action taken against you because you've been an applicant or a party in proceedings before the Fair Work Commission.

PN53

MR [REDACTED]: Yes. This is - I touched on this on the email that I mentioned a bit before. As much as those laws are there, there are laws for the employer as well just to be able to turn around, because we're all casuals, and say, 'We've got no work for you.' And then if we want to change to legally, we fight a legal battle for however long to get back into work, and that's something that most common people such as myself - I can't really speak for everyone else here on this topic - can't afford to do. I'm happy - - -

PN54

THE VICE PRESIDENT: Well, Mr [REDACTED] - - -

PN55

MR [REDACTED]: Sorry.

PN56

THE VICE PRESIDENT: The difficulty, Mr [REDACTED], is I cannot vary an award without hearing from the people that are going to be affected by it, and that includes the employers. So there will have to be some way of informing those employers what this application is seeking and what information is being put before the Commission. Now, if you want to de-identify it I guess we can deal with that, but these employers need to know what they're dealing with, who they're dealing with and the case they're answering if this is going to proceed.

PN57

MR [REDACTED]: Yes, that's understandable, but there's no reason to individually identify a person if this affects the entire industry in terms of the people there. Like if it's affecting me as an individual PO, protection officer, it's affecting everyone else as an individual protection officer. So no one needs to be individually identified. We're happy to like I said provide you with all the information that we can about the companies and who they are.

PN58

THE VICE PRESIDENT: Mr [REDACTED], at the moment you have been individually identified because you have all filed applications with your names on them, and I haven't suppressed your names. So your applications have been filed and your names aren't suppressed. So if you now want that - you didn't indicate that when you filed your application. So if you want them suppressed you're going to have to make - - -

PN59

MR [REDACTED]: I've actually got the email from you saying that my request was approved to keep my information suppressed until this meeting.

PN60

THE VICE PRESIDENT: At this stage.

PN61

MR [REDACTED]: Yes.

PN62

THE VICE PRESIDENT: At this stage, and I don't know that any of the other applicants had asked for that. I think you were the only one who did. Two of you have. So the other one - - -

PN63

MR [REDACTED]: I asked for myself.

PN64

THE VICE PRESIDENT: Mr [REDACTED]. Yes, okay. Understood, but after this, after today we're going to need to deal with how we put this information out, because the employers are entitled to see what they're dealing with. So if we're going to suppress your names I don't know how that's going to be dealt with, because let's say you say, 'This is the work that I do', and the other side, an employer party doesn't agree with that, or, 'This is where I say I fit in the award', then that party is entitled to question you about what you said.

PN65

MR [REDACTED]: Yes. So one of the sources of information that has our rules and responsibilities is actually the legal precedent that if we don't follow we can be charged on. So that's why rail safe, and that's - they had the duties and the roles of the protection officer. That's our bible, that's what we work to, that's what we get prosecuted on. So just by providing those alone and not adding anything extra our employer has access to all that information. Every person in the world can look that up.

PN66

THE VICE PRESIDENT: But the issue is whether you're actually doing it, Mr [REDACTED], and they're entitled to explore that if they raise an issue about it. Okay?

PN67

MR [REDACTED]: Yes. All of our work is documented on paperwork and it can be looked at for up to 90 days. That's how long we have to keep it for. So we document that it's all done, and there's other forms of documentation with recorded phone calls when we use more advanced levels of protection - - -

PN68

THE VICE PRESIDENT: Mr [REDACTED], I am not going to get into a debate with you now. I am simply alerting you to the fact that I cannot guarantee that I can keep your name confidential, all of your names confidential, and allow this matter to proceed, and before I make a decision about that I need to see what you're basing your application on. So you will need to file a statement that says this is the work I do. Here's the duty statement of what I do. Here's whatever legislation governs it. Here's the training I had to do to undertake the work. That sort of information. So you're going to need to file that.

PN69

MR [REDACTED]: Yes. Yes, that's fine. Look, I'll put that together for you, that's no worries. You can put my name on it. I'll wear the brunt, I'll take the bullseye.

PN70

THE VICE PRESIDENT: I am not taking asking you to take the bullseye, Mr [REDACTED], I'm just asking you to put the statement together, and then I will consider how I deal with it. But you need to understand that we have to have an open system here where if you're going to apply to vary the award it will affect all employers who employ people to do this work, and those employers are entitled to be heard about their views on your application.

PN71

MR [REDACTED]: Yes, like I said that's fine. I'll put my name to it.

PN72

THE VICE PRESIDENT: Well, let's see what it is that you have to say first. Ms Bhatt, if you have that material filed it is basically an outline of the duties that these employees say that they're performing, and a list of the employers that they say operate in this industry, does that assist you to get some instructions in relation to whether those employers are members, whether they wish to be represented, et cetera?

PN73

MS BHATT: I think that would go a long way to helping us assess whether this application or these applications plural would affect our membership and therefore the extent of our interest and involvement in the matter, most certainly. Can I suggest, Vice President, that once that material has been filed perhaps the Commission might list the matter for another directions hearing approximately three weeks after the material has been filed, and we would hope to be in a position at that time to provide that indication to the Commission. We would have consulted with our members in the meantime.

PN74

THE VICE PRESIDENT: Okay. Mr [REDACTED], does that sound reasonable to you?

PN75

MR [REDACTED]: Yes, I'm happy with that. I've got no issue with that at all.

PN76

THE VICE PRESIDENT: Okay. Well, the Australian Industry Group is an employer organisation. So just as you have unions that represent employees you have registered organisations that represent employers. So if you file a list of the employers that operate in this industry and employ people in your classifications then Ms Bhatt will be able to seek some instructions from any of those employers that are members of the Australian Industry Group about their views in relation to the application, and at least we will have something we can lodge on the website so that those employers can consider it. And once I have looked at that information that you file I won't identify you until I have had a further directions hearing and looked at how we might proceed with this matter. Okay?

PN77

MR [REDACTED]: Yes, I'm happy with that.

PN78

THE VICE PRESIDENT: All right. So you will take two weeks to file your material, which is, just so we're clear, a statement that says this is my job, this is who I work for, and I will keep that de-identified, and, Ms Bhatt, I will simply confirm whether or not the entity that Mr [REDACTED] says he works for is one of the ones on the list that he provides.

PN79

MS BHATT: Sure.

PN80

THE VICE PRESIDENT: And it will then indicate the work that you do, the legislation that you do it under, the training modules that you trained in accordance with, so that we can identify the kinds of duties that you under, [REDACTED]. Does that make sense?

PN81

MR [REDACTED]: Yes, that sounds pretty reasonable, yes.

PN82

THE VICE PRESIDENT: Okay. Because at the moment I don't really have much information about exactly what it is that you do. So I need something that looks like a job description. These are the duties I perform. This is the context I perform them in. This is where I am when I'm doing them.

PN83

MR [REDACTED]: Yes. Our job is - it's not very well known in terms of in the public area. Even the Tax Office has a lot of trouble identifying us, but there is - at least I know of some online resources that do describe it, so we will put together a package.

PN84

THE VICE PRESIDENT: Great. That's fantastic. All right. So if you put that together and also a list of the names of companies that you say operate in this industry, and if you could provide the full name of the company, like is it a Pty Ltd company, not just - do you understand?

PN85

MR [REDACTED]: Yes, I'll try and go as detailed as I can on that list.

PN86

THE VICE PRESIDENT: All right. And then, Ms Bhatt, once that material is in we will de-identify who [REDACTED] works for and [REDACTED], and I am sure you will understand at the moment that you will keep that confidential.

PN87

MS BHATT: I will. Of course I undertake to treat that information confidentially.

PN88

THE VICE PRESIDENT: And with respect to the other applicants as well. And then we will see where we get to at that point.

PN89

MS BHATT: If it pleases. Thank you.

PN90

THE VICE PRESIDENT: All right. Do you have any questions about the process that we're going to go through before I adjourn this?

PN91

MR [REDACTED]: I guess there will be more information forthcoming once we get, you know, the next part rolling. So I guess we're going to be kept up point by point, and obviously there's going to be, you know, depending on what comes back to you is going to depend on the nature of the way (indistinct). I'm guessing that's how it's going to happen.

PN92

THE VICE PRESIDENT: Okay. Well, if you have any questions about the process now is your opportunity to ask them.

PN93

MR [REDACTED]: Yes, well I just - yes, like what are the possible end goals, you know, like in terms of the outcomes for us? You know, is it looking potentially like we could get a new award made or (indistinct) of the current award for us, like - - -

PN94

THE VICE PRESIDENT: Well, first of all we have to establish that the award doesn't clearly identify what you do. Before the award can be varied we need to establish that there's a need to vary it, and if it already covers what you do and there's just a misunderstanding about that that needs to be clarified or corrected, then that could be a possible outcome. Or if there is a gap in the award and it doesn't cover the work that you're doing or it doesn't accurately describe the work that you're doing, then a possible outcome is there will be a variation to the award to cover or make clear where your position or job sits in the classification definitions in the award.

PN95

MR [REDACTED]: Yes, fantastic, that's what we wanted.

PN96

THE VICE PRESIDENT: Okay. But unlikely there will be a new award, because we're trying to not have too many of those. We're trying to rationalise awards so that we have industry awards that describe work that's being done in the industry. So if this is an area that's not properly covered by an existing award that covers the rail industry then that's the probable outcome if there is a problem, that it will be varied to fix the problem.

PN97

MR [REDACTED]: That sounds fine, but you will be adding a fair bit to it because we're a pretty unique role. But, yes, that's not an issue at all.

PN98

THE VICE PRESIDENT: First of all as I said we have to identify that there is an issue. So if you outline the duties you perform then we can look at what that issue looks like and how it might be addressed.

PN99

MR [REDACTED]: Yes, yes, that's - yes, that's no worries.

PN100

THE VICE PRESIDENT: Okay.

PN101

MR [REDACTED]: Can I ask a quick question, please?

PN102

THE VICE PRESIDENT: Sure. Is that [REDACTED]? Yes.

PN103

MR [REDACTED]: Yes, it's [REDACTED]. My camera keeps turning on and off because my phone keeps overheating. My question for you is what you're saying is based on the award if it's not covered the duties that we do there can or can be a higher degree of a variation to our award; is that correct?

PN104

THE VICE PRESIDENT: Yes. If you can demonstrate that this is work that should be covered by the award that's not clearly covered by the award then, yes, we can vary the award to make clear that you are covered by the award and where you sit in it. But before we can do that we have to find that there is a problem that needs to be addressed, or there is a need to vary the award.

PN105

MR [REDACTED]: So the need to vary an award is a job description that is not covered by the existing award, and is that determined by the type of work that is to be performed but not covered by the award?

PN106

THE VICE PRESIDENT: Yes.

PN107

MR [REDACTED]: As in how important it is?

PN108

THE VICE PRESIDENT: We have to understand what it is that you do in order to decide whether the award currently covers you or not, or whether it accurately describes what you're doing in a way that makes it clear where you sit in the award, and if that is a gap in the award we can fix it, but if it's just a misunderstanding and the current award is clear about where you sit, then it's just a matter of clarifying that - - -

PN109

MR [REDACTED]: Okay. Yes, I understand. I understand what - - -

PN110

THE VICE PRESIDENT: - - - and indicating there's no need to vary the award. I am just not sure because I haven't got any information about what you do, where you do it, how you do it, all of that.

PN111

MR [REDACTED]: Okay. That's okay.

PN112

THE VICE PRESIDENT: Your applications don't tell me that, and so that's why I am trying to get the further information.

PN113

MR [REDACTED]: Yes. So (indistinct) all our details together.

PN114

THE VICE PRESIDENT: Sorry?

PN115

MR [REDACTED]: I can give a bit of feedback on that to you, [REDACTED]. So in terms of what's written in the award you have the pay tables - - -

PN116

THE VICE PRESIDENT: Mr [REDACTED], if you want to talk to [REDACTED] offline that's fine. At the moment I have got applications that don't give me any information about what you all do. That's what I am asking you to provide. Okay. I know you know what to do - - -

PN117

MR [REDACTED]: That's fine.

PN118

THE VICE PRESIDENT: - - - and you've already said not many people understand what we do. Well, I am among them. So you need to tell me what you do by putting in a job description, information about what exactly it is that you do, and that way Ms Bhatt can then go to her members and say, 'Where do you say these people sit in the award, if at all? What's your view about them being covered by the award? Where do you think they should fit if they don't fit there at the moment?' They're the kinds of things that the employers are entitled to be heard on, just as you are. So you're entitled to say, 'Under this award this is the most like what we do, and this is where we say we should fit', and the employers are entitled to say, 'No, it's not. This is where they should fit.' And that's where the Fair Work Commission comes in. We have to decide do you fit, should you fit, and if so where are we going to put you in the award.

PN119

MR [REDACTED]: Okay, yes.

PN120

THE VICE PRESIDENT: Okay?

PN121

MR [REDACTED]: Yes, that's good. I was just clarifying, that's all. Yes, I'm happy with that.

PN122

THE VICE PRESIDENT: All right. Okay, well thank you for that. Ms Bhatt, is there anything you wanted to add?

PN123

MS BHATT: Nothing from me, thank you.

PN124

THE VICE PRESIDENT: All right. Thank you for your understanding and participation in these proceedings today, and I will wait to receive the material. Thank you very much, and on that basis I will adjourn.

ADJOURNED TO A DATE TO BE FIXED

[11.34 AM]