



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

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JUSTICE ROSS, PRESIDENT

AM2020/103

s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

**Award Flexibility – Hospitality and Retail Sectors
(AM2020/103)
Restaurant Industry Award 2020
Hospitality Industry (General) Award 2020**

Melbourne

9.47 AM, THURSDAY, 18 FEBRUARY 2021

PN1

JUSTICE ROSS: Good morning. I am sorry about the delay in getting underway. Can I go through the appearances. I have for the Restaurant and Catering Industry Association Mr Ward and Mr Song.

PN2

MR WARD: Yes, your Honour.

PN3

JUSTICE ROSS: Mr Redford for the UWU.

PN4

MR REDFORD: Yes, your Honour.

PN5

JUSTICE ROSS: Mr Kemppi for the ACTU. Mr Ryan for the AHA.

PN6

MR RYAN: Yes, Your Honour.

PN7

JUSTICE ROSS: Ms Durbin from the Attorney-General's Department. Have I missed anybody? No. All right. I might deal firstly with the hospitality matter. Mr Ryan and Mr Redford, I think the Commission's agreement area forwarded you earlier this week, it may have been yesterday, the lockdown in Melbourne has disrupted us a little bit, a BOOT analysis of the AHA's proposal, and as you know there were a number of other elements to the AHA's proposal. Can you make sure that you're on mute, I am getting a bit of feedback from somewhere. Thank you. Have you had an opportunity to have discussions about the various elements? I appreciate that the loaded rates matter may take a bit more time, but I wondered where you had gotten to with the other two matters. I should also generally note that the survey instrument in respect of the number of junior employees amongst AHA members was finalised last week, and I think the survey was open from Thursday of last week for a period of two weeks I think. Mr Ryan, would you like to go and give us an update on where you're up to.

PN8

MR RYAN: Yes, your Honour. Your Honour, we have had some discussions with the UWU. Those discussions have primarily focused on the loaded rates aspect of the AHA's proposals rather than the other aspects. Those discussions have briefly touched on the analysis provided by the Fair Work Commission, I think it was on Tuesday this week, Tuesday afternoon. The UWU and myself had a discussion yesterday afternoon about that. It was quite brief. At that particular time we hadn't had an opportunity to go right through that document. Well, at least from my perspective we hadn't had an opportunity to go through that document in full detail.

PN9

We have also floated between us, and I have put some broad machinery provisions to assist those discussions to Mr Redford on a without prejudice basis.

What I was hoping to, or what I was intending to put to your Honour this morning was that whether or not it would be possible to facilitate a meeting with the relevant staff members of the Commission who undertook the analysis to perhaps glean a little bit more of the insights into their rationale with a view to then possibly tweeting our proposal and coming back to the Commission.

PN10

I have also indicated that I will be putting that course to Mr Redford and indicated that we would have no objection to the UWU having Mr Redford or somebody else participate in that meeting if the Commission was minded to facilitate that.

PN11

JUSTICE ROSS: Well, I don't think there is any issue from our perspective. The one observation I would make about the analysis is that to some extent - this isn't an issue that necessarily lends itself to black and white judgments - and to some extent the level of detail about what you can and can't do is contingent on the other safeguards you have in the provision - you know, to illustrate if you have an obligation around BOOT or a reconciliation mechanism or an access to arbitration however one frames that. Then the extent of the prescription about what can and can't be done is probably mediated a bit by that. I am not suggesting that it becomes a free for all, but I am just making the observation that there are a number of different ways of approaching the problem. Either you can engineer the sort of rosters that can be worked and you can be very prescriptive about that, in which case you can effectively ensure that no one is going to be adversely affected by the loaded rate, or no one would be worse off, or you can provide an amount of flexibility around that, but there has to be a balance protection I think. That's really the message they're trying to say. And ultimately, Mr Ryan, to some extent this is driven by your organisation's perception of what sort of BROS does your members, in fact, want to work. That's why it's a bit difficult for us to get involved in that space, because that's something uniquely in your knowledge. But, look, the short answer is, that from our perspective, yes, we're happy to make people available to have a discussion.

PN12

What do you say about that, Mr Redford, are you happy to participate in that sort of on a without prejudice basis?

PN13

MR REDFORD: Yes, your Honour. Look, the analysis, which we're still digesting, probably reinforced the UWU's pretty significant concern about the proposal. But I'll keep my powder dry on that, your Honour. I thought Mr Ryan's idea of sort of interrogating the analysis with the people who did it was a sensible idea, we'd be happy to participate in that.

PN14

JUSTICE ROSS: Okay. Can I touch on - look, there are the four elements, and I understand your position, Mr Redford, on the junior rates matter, but the two other variations, there at least seems to be some prospect for if not a consent position then perhaps not opposed.

PN15

The hours change - on its face, my initial impression was that didn't seem to disadvantage any employee and the change that was put, I think it was in relation to the breaks provision, Mr Ryan, but the other one that was tracking the shift in the Clubs Award, which I think the UWU had consented to in that award, those two matters didn't seem to be as contentious and I wondered whether you'd had a chance to look at those, Mr Redford, whether you agreed with that observation, that they're not as contentious as the other two. And if that's right, there might be the option of proceeding with those whilst your discussions on the other matters continue?

PN16

MR REDFORD: Your Honour, we don't have a final position, in relation to those two matters. I agree, generally, with your observation. I think there's, and again we don't have a final position on either of these two matters, but I think there is some prospect of our being able to adopt a positive position in relation to what is described as the simplification of the late night/early morning penalties, which is the matter your Honour refers to in the Clubs Award.

PN17

I think the other proposal, in relation to hours at work, needs more analysis and analysis, in particular, on whether or not that proposal would, in fact, provide such an increase in flexibility, in relation to the way in which ordinary hours of work could be rostered, such that some workers might lose the opportunity to earn overtime that they are currently earning. So we need to get our head around that, your Honour, and I think that one's just a little bit more difficult than the other.

PN18

JUSTICE ROSS: All right. Well, I'd encourage you to continue to look at that and to continue to have a dialogue with Mr Ryan about that, rather than - if we can do it simultaneously, rather than focusing on the loaded rates, to the exclusion of the discussion about the other matters.

PN19

I think your position on junior rates is relatively clear and that's probably not going to shift a lot, Mr Ryan. It's probably you need to wait until the survey results become available, in a couple of weeks, and then the timing of that and when you want to bring it forward for a hearing is - I'll leave with you, but I'd encourage you to keep discussing the other matters.

PN20

Yes, we'll make the staff members available. Someone will be in touch with you at the conclusion of this conference to organise a time for that to take place. Do you have - are you both available tomorrow?

PN21

MR RYAN: I am, your Honour.

PN22

JUSTICE ROSS: Mr Redford, would you be available tomorrow morning?

PN23

MR REDFORD: Yes, your Honour.

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JUSTICE ROSS: All right.

PN25

MR RYAN: Your Honour, if we could make it perhaps late morning because if it was going ahead I would like to have a colleague, who's based in our Western Australian office, participate in that discussion as well.

PN26

JUSTICE ROSS: All right. Is 11 am?

PN27

MR RYAN: That would be fine.

PN28

JUSTICE ROSS: All right. Well, tentatively, if you can both mark that as for 11 am, and I'll organise it with the Commission members. Is there anything else at this stage, Mr Ryan?

PN29

MR RYAN: The only observation I make at this stage, your Honour, is with reconciliation aspect, we would not envisage these proposals having a reconciliation aspect to them. We're open to, potentially, other safeguards that might be incorporated in the schedule.

PN30

The reason for that is if the percentage of the loading and the premise can be struck in such a way that it can, in most cases, result in an employee not being worse off, then to incorporate a reconciliation sort of defeats the purpose because then you have the existing annualised salary arrangements, which has that and then you can construct it in a very customised way.

PN31

So it seems that if these were to be simplified in a way that someone can pick them up, put an employee on it, work them within that parameters and pay that rate, even if there are some other safeguards, and we have had some without prejudice discussions, including some of the matters - safeguards that you raised earlier, your Honour, we think that works. But incorporating a reconciliation would lead to us just saying, "Well, the existing annualised wage arrangement provision serves that purpose".

PN32

JUSTICE ROSS: No, no, I follow that, Mr Ryan, and I follow the administrative burden, et cetera. But I suppose that ultimately depends on what the loaded rate is and what it's compensating for and what sort of limitations you have around it.

PN33

That was really the point that I was making. If it's sort of open-ended it makes it, on that analysis, say, a more difficult proposition, that's all.

PN34

MR RYAN: We understand that.

PN35

JUSTICE ROSS: Well, look, as for the next conference around this issue, how do you want to proceed with that. I'm conscious that after the meeting with the Commission staff it may take you - there might be an iterative process where you come up with another proposal and you want it assessed and then provided to each of you. I don't want this issue to drift, but I'm also conscious that I don't want to drag you in for a further conference before you're ready to have one.

PN36

Given they're really the two principal parties, are you content, Mr Ryan, if I leave the timing of the next conference for you to initiate and - or do you want one scheduled at a particular time?

PN37

MR RYAN: Your Honour, we would think it would have to be a sufficient time, after 26 February, just for the ability to see the outcome of the junior rates and junior employees survey, which closes on, I think, the 26th. So if it could be towards the back end of the following week, that would then give us two weeks from today to continue working on the loaded rates stuff, but also a week to assess the - what the survey means and continue to have some discussion and considerations on that front. So, possibly, another fortnight from today, being 4 March.

PN38

JUSTICE ROSS: Okay. All right. I'm content to list it on 4 March at 9.30 am. All right, is there anything else from either of you?

PN39

MR REDFORD: No, your Honour.

PN40

JUSTICE ROSS: All right.

PN41

MR RYAN: No, your Honour.

PN42

JUSTICE ROSS: Okay. Well, you can also, before 4 March, contact my Chambers if there's anything we could do to assist. Whether it's facilitated discussions or any information, or access to Commission resources, and we'll accommodate that.

PN43

All right. Well, thank you both.

PN44

Can I now go to the restaurant matter. Mr Wood, where we left this, I think certainly you were giving some thought to what was described as your purpose

rate and the other proposal. On the face of it, it appeared that the broadbanding matter, I think you were seeking some instructions in response to my question about, would anyone be disadvantaged by this proposal, did it mean any change, because on the face of it, it didn't appear to, and at least that item amongst the three - I don't mean to verbal you about this, Mr Redford, but it was sort of regarded as less contentious of the three items, that was the broad banding exercise, and I was interested in seeing how quickly we could pursue that matter accepting that the other two may take a bit more time. Mr Ward?

PN45

MR WARD: Thank you, your Honour. Can I just respond to the specific question and then indicate to the Commission where we have got up to. So in relation to the question of the broad banding issue, of somebody being disadvantaged, the answer is nobody would be disadvantaged by that from payment perspective. It simply involves people either maintaining their current rate or being paid at the rate above on the basis that they're doing a broader basket of duties and holding a broader basket of skills.

PN46

Putting aside the observation I made last time about whether or not that is a requirement to be met as a matter of fact the proposal would not disadvantage anybody. So I just deal with that in that sense.

PN47

JUSTICE ROSS: Sorry, Mr Ward, can I just ask you, remember the last time there was a discussion around the mechanism - I think it was put that this was to be an opt in arrangement, so something that might be in a schedule and there was some discussion about whether it would be an individual opt in arrangement, that is in respect of an individual employer and employee, or whether it would apply at an enterprise level. Where did you land on that issue?

PN48

MR WARD: Can I answer that in a slightly circular way. Since we have been last before the Commission my client has met with the United Workers Union at various levels of the union. I don't wish to put words into Mr Redford's mouth in any sense, but from my client's perspective those discussions have been very constructive, and our position has been evolving to reflect the ongoing dialogue. Yesterday we filed an amended application to ensure that the Commission had a document that reflected where our thinking had evolved onto.

PN49

I will now answer your Honour's question and then deal with the other issues. In relation to the classification structure we have in the amended application identified it as an opt in. It would work on the following basis. It is actually by employer election and it would apply to the workforce as a whole. That is it's not by agreement, it's not I am going to do it for you but not for you. So a single employer would be able to say, "This is a good thing for my business", and on the basis that nobody is going to be financially disadvantaged in any way they simply elect to adopt these broad banded classifications for the appropriate people who may be in those classifications. So that's where we have evolved to, and that is in the amended application.

PN50

In relation to the exemption rate issue our position has changed considerably from the original application, and we have taken into consideration as I have said both the Commission's comments and discussions with the union, and I will just identify in very broad terms how that position has changed. Firstly, the exemption is now expressed as a percentage, that's 150 per cent of the relevant classification rather than being 150 per cent of a static Level 3 classification.

PN51

The second proposition is we have quite dramatically limited who that might apply to, and we have isolated the application of the exemption provision to people in one of five jobs in a restaurant. Those jobs are restaurant manager, sommelier, and then the three principal chef designations, Commis Chef, Demi Chef, and Chef de Partie, or their equivalent. So we have very much limited the scope of who this could apply to.

PN52

JUSTICE ROSS: And it also is restricted to full-time employees?

PN53

MR WARD: Yes, it is, your Honour. In light of the conversation we had the Bench on the last occasion we have made it very clear that it's limited to full-time employees. And in addition to that we have included an additional safeguard which is that the arrangement excludes obviously from paying overtime, but the exclusion for the payment of overtime only operates to the extent the person works up to 45 hours a week. Any person working in excess of 45 hours a week overtime applies to the 46th, 47th, 48th, 49th hour of the week.

PN54

So we changed the machinery of how 150 per cent applies to levels. We dramatically limited who it applies to, primarily focusing on those fine dining restaurants and the very senior people in them. We have also introduced a weekly hours cap to ensure that there is no shall we say broader abuse of dramatically long hours being worked. So that's changed quite a lot. I accept that Mr Redford doesn't have a final position on this at this stage, but as I said this is an evolving matter in light of us reflecting on the discussions with the union that we have had over the past week.

PN55

That leaves us then to the industry allowance, and I again indicate that it might not ultimately be the right vein for it. It's effectively an allowance to substitute - a single allowance to substitute for a number of allowances. We are less advanced on that, but we have amended the opting in arrangements with that; that is we still have individual agreement, but we also have a fall of majority or substantial majority agreement for it to apply across a particular workplace. That's not a simple majority, but it's at 75 per cent. So we have the opportunity for employer and employee agreement or employer majority, substantial majority agreement to apply at large in the workplace.

PN56

So again, your Honour, there's more work to be done on that element more than the others, but we are moving in our view closer to the possibility that we might reach some form of agreement with the union. My client is continuing that dialogue. We have every expectation that we will have a much stronger picture of where we are with the union by close of business at the end of next week. So that I think is February 26. I am just guessing, that might not be completely right, but the 26th, and at this stage my client would seek to have the matter relisted shortly after that, and without wishing to offend Mr Ryan in any sense it might be more efficient for my client if our matter could be listed after or before Mr Ryan's matter rather than necessarily holding them together.

PN57

JUSTICE ROSS: Would 11 am on 4 March fit with that, Mr Ward?

PN58

MR WARD: If you give me a moment, your Honour. Yes, your Honour, that would be fine.

PN59

JUSTICE ROSS: Mr Redford, is there anything that you wanted to say, and are you content for the matter to be - that was the first thing. The second was whether you're content for the matter to be relisted for 11 am on 4 March.

PN60

MR REDFORD: Your Honour, yes, we are content with that. The general thrust of what Mr Ward says we agree with. We have had some discussions. The discussions have been reasonably positive. We are still - the broad banding proposal has altered I would say significantly in the last day or so in that it's now proposed to be applicable by the employer imposing that arrangement on employees unilaterally, or electing to do so. So whilst we accept the proposition that the concept is not intended to disadvantage any employee or, indeed, is intended to advantage some employees. We need to wrap our head around that idea, that idea that the arrangement could be imposed unilaterally and isn't one that would be subject to the agreement of the employee and the employer.

PN61

In relation to the exemption rates proposal, we remain concerned about the possibility that that proposal could see some employees worse off. We're happy to continue discussions about that proposal but we are still concerned about that and, in particular, note that whilst the class of employees that it could be applied to has been confined, it is still proposed that an exemption rate would apply in this award to chefs, to grade qualified chefs, in general. That's a significant proposal, your Honour, and one that we are concerned about.

PN62

In relation to the allowance, well, I think, as I said last time, your Honour, the key thing there is the value of the allowance, and we still don't understand what that proposal is. Again, comfortable to continue discussions around that.

PN63

JUSTICE ROSS: All right, thank you. Can I make two observations about what you've just put, Mr Redford? One, in relation to the broadbanding exercise, perhaps something for you to consider, Mr Ward, would be a consultation provision, that it's introduced following consultation with the affected employees. I'm not advancing that in any sort of merit judgment sense, but that would seem to be an intermediate position between requiring the employees' agreement, versus the unilateral imposition.

PN64

As for Mr Redford's propositions or his observations around the exemption rate, and the concern that it may result in some employees being worse off, and I'm not suggesting this is going to cure your concern, necessarily, Mr Redford, but something that might be directed at that may be a statement of purpose. That is, what's the intention here? It's intended to provide a simplified administrative arrangement for remunerating specified classifications of employees and the rates have been struck at a level where it's intended that the employees would be better off overall, as a result, or, you know, something. There's nothing magic about those words, but I think, to some extent it may benefit from a context, and that may go to assuaging some of the union's concerns.

PN65

As to the observation that it's at the trade qualified chef, can I just explore that for a moment with you, Mr Redford? Which of the particular, the five classifications is at that level? All of them?

PN66

MR REDFORD: It's in relation to the current award, your Honour, 4, 5 and 6.

PN67

JUSTICE ROSS: I'm sorry, just take me through that, Mr Redford? I see, you mean the demi chef or the chef de partie?

PN68

MR REDFORD: Yes, your Honour. So level 4 where, in the current award, the classification is described as, "Cook tradesperson grade 3", and that's the commis chef. Level 5, where in the current award it's described as, "Cook tradesperson grade 4", that's the demi chef. And level 6, "Cook tradesperson grade 5", that's chef de partie.

PN69

JUSTICE ROSS: I see.

PN70

Can I go to you, for a moment, Ms Durbin. Look, my recollection is slightly hazy about this, but I wasn't sure if I'd asked you the question on the last occasion or, indeed, if you've provided the information about any data you have on the remuneration of trade qualified chefs?

PN71

MS DURBIN: Not specifically about chefs, your Honour, no. We were looking at some junior aide starter, but nothing particular about chef.

PN72

JUSTICE ROSS: Look, I wonder if you could look at that and see what's available and that might inform the discussion as well. Only because - look, Mr Redford, anecdotally you certainly hear of chefs being paid well above the highest level in the award minimum rate, how widespread that is, I've no idea, but it might assist to see if there is any data on the particular classifications that the employer proposal is directed at. I don't know if there's any wage data on sommeliers or restaurant managers, or the various levels of chef, but perhaps, Ms Durbin, if you wouldn't mind seeing what there is available. It may not be at that sort of level of granularity, but I think, at this stage, any information we could get would assist the discussions.

PN73

MS DURBIN: That's fine, your Honour. We did have the discussion last time around looking at skill shortages and those kind of things so, yes, we'll continue to look at that.

PN74

JUSTICE ROSS: All right. Is there anything further? Anything that I can do to assist just contact my Chambers. If you want facilitated direct discussions let me know. If there's any information that the Commission can get for either of you, then let us know about that as well.

PN75

Okay? I think, Ms Durbin, you were also looking at the historical purpose, arbitral decisions on exemption rates as well?

PN76

MS DURBIN: That's right, your Honour. That's in progress, as you'd appreciate. Just going through the records is quite time consuming, particularly pre the Fair Work Act. Yes, that's in progress.

PN77

JUSTICE ROSS: All right. We'll publish that material when we receive it.

PN78

Is there anything further anyone wishes to raise?

PN79

MR RYAN: No, your Honour.

PN80

MR REDFORD: No, your Honour.

PN81

JUSTICE ROSS: All right, thank you.

PN82

Mr Kempii, we haven't heard from you, is there anything you wanted to say?

PN83

MR KEMPPII: No, thank you, your Honour. For this matter I'm happy to leave it to Mr Redford.

PN84

JUSTICE ROSS: Okay. Well, lucky you, Mr Redford.

PN85

All right. Thanks very much for your attendance and I certainly encourage you to continue to have the discussions and at least, from what you've put, there is a prospect of a significant measure of agreement on some of the items and you've made progress to narrow the issues in dispute, in respect of the other matters. I think we're making progress. Thank you very much.

PN86

All right. I'll see you all, all be it at different times, on 4 March. I'll adjourn. Thank you.

ADJOURNED UNTIL THURSDAY, 04 MARCH 2021

[10.21 AM]