



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/2

AM2023/5

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

Application by Mental Health Australia
(AM2023/2)

Application by Plan International Australia
(AM2023/5)

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

Sydney

2.00 PM, TUESDAY, 21 MARCH 2023

Continued from 13/02/2023

PN1

THE ASSOCIATE: The Fair Work Commission is now in session. This is matter numbers AM2 and 5 of 2023 for conference before Hatcher J.

PN2

PRESIDENT HATCHER: I'll take the appearances. Mr Ash, you appear for Mental Health Australia, the applicant in AM2023/2, is that correct? You'll need to turn on your microphone in due course, Mr Ash.

PN3

MR S ASH: Sorry, that's correct.

PN4

PRESIDENT HATCHER: Ms Boyd and Ms Liu, you appear for Plan International Australia, the applicant in AM2023/5, correct?

PN5

MS L BOYD: Correct.

PN6

MS M LIU: Correct.

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PRESIDENT HATCHER: Ms Bhatt, you appear for the Australian Industry Group?

PN8

MS R BHATT: Yes, your Honour.

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PRESIDENT HATCHER: Mr Robson, you appear for the Australian Services Union?

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MR M ROBSON: Yes, your Honour.

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PRESIDENT HATCHER: Ms Barry, you appear for United Workers Union?

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MS C BARRY: Yes, thank you, your Honour.

PN13

PRESIDENT HATCHER: Ms de Plater, you appear for the Health Services Union?

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MS L DE PLATER: Yes, thank you, your Honour.

PN15

PRESIDENT HATCHER: All right. So there's just two preliminary matters. First of all, as you would have seen from the listing, I've joined the two applications. It appears to me they seek the identical variation to the relevant award.

PN16

Secondly, as the parties may have seen, in a statement I issued on 14 March 2023, in accordance with the Act, Mental Health Australia's application will be referred to a care and community sector expert panel at the appropriate time and I'll indicate, in due course, that I think the same conclusion necessarily applies to Plan International Australia's application.

PN17

So dealing with matters first, Mental Health Australia's application had been adjourned to allow the parties to have some discussions. Who'd like to report on the outcome of those discussions? I'll call on you, Mr Ash, where's the matter up to? Your microphone is off, Mr Ash.

PN18

MR ASH: Sorry, your Honour. Our application stands as it was, which is just seeking a variation to the award, to enable the substitution for public holidays.

PN19

PRESIDENT HATCHER: Have you had any discussion with the other parties about the application, since the last time we were here?

PN20

MR ASH: None of the other parties have contacted me, no.

PN21

PRESIDENT HATCHER: All right. Is there any update to any party's position then? What's the position of the union parties in the application?

PN22

MR ROBSON: If I may speak, your Honour?

PN23

PRESIDENT HATCHER: Yes.

PN24

MR ROBSON: Robson for the Australian Services Union. We maintain the position that we put in the conference earlier this year. We're open to exploring a variation to the award, dealing with the substitution of the Australia Day public holiday. We understand that is the motivating factor behind Mental Health Australia's application. But we do see serious consequences for shift workers, particularly in the disability sector if the application - if the variation proposed by Mental Health Australia and Plan International Australia is made. We maintain that position. We wonder if there's some benefit, since we're here today, taking this discussion offline, not offline but off the record, if there's any value in conciliation from the Commission along those lines.

PN25

PRESIDENT HATCHER: Mr Robson, I was of the impression, from the last occasion, that the parties were going to have some communications with each other, but that doesn't appear to have happened.

PN26

MR ROBSON: No, I apologise, your Honour.

PN27

PRESIDENT HATCHER: Mr Ash, you've heard what Mr Robson has said, do you think there's any purpose in entertaining a discussion about some narrower scope for your application, or do you simply wish to proceed with it in the original form?

PN28

MR ASH: Mental Health Australia would be happy with constraining it to Australia Day only.

PN29

PRESIDENT HATCHER: All right. Well, if the application was confined in that way - I'll come back to Plan International in a second. If the application was confined in that way, would any party have any difficulty with the application?

PN30

MS BHATT: Your Honour, it would be our position that any variation made, in relation to the substitution of public holidays, should relate to all public holidays, consistent with the approach that's taken in the majority of other modern awards, if not the vast majority of other modern awards. I'm not aware of any other modern award that allows for the substitution of only particular public holidays. I understand that the genesis of this application is or relates to an employee or multiple employees who sought to substitute the Australia Day public holiday but the issues that this application gives rise to are similarly relevant to any number of other public holidays, not in an identical vein, but similar sorts of issues might arise, and it's simply a sensible flexibility that should be extended to other public holidays too.

PN31

Mr Robson's made reference to some concerns about how the provision might apply to shift workers and without having heard more from the union about it, I'm not entirely sure what those concerns are, but I would just say that my recollection is that there are some awards that contemplate shift work that perhaps deal with circumstances in which a public holiday straddles two - or a shift straddles two days, one of which is a public holiday, it makes special provision for how those circumstances should be dealt with. It might be that similar mechanisms can be put in place, in this award, in relation to substituted public holidays, if that's the issue but, as I say, it's not entirely clear what the concern is, at the moment.

PN32

PRESIDENT HATCHER: I know what you're saying, Ms Bhatt but, at the end of the day, it's Mr Ash's application, so if he's (indistinct) on the base identified then

so be it. Of course, Australian Industry Group is competent to make any application it wants, in relation to these matters.

PN33

All right, I'll turn to you, Ms Boyd. You've heard that discussion, what's your organisation's position about all this?

PN34

MS BOYD: Our organisation would seek it for all public holidays, given that we're a culturally diverse nation and also a culturally diverse workforce. It's not just related to 26 January, there's other public holidays with significance that don't relate to culturally diverse workforce, that they would like the opportunity to be able to exchange those for other days that are more culturally significant to them.

PN35

PRESIDENT HATCHER: All right. So it seems to me that, on any view, there's going to be a disagreement about this application. So, Ms Boyd, are you happy to take your matter forward to hearing?

PN36

MS BOYD: Yes, thank you.

PN37

PRESIDENT HATCHER: Well, in the circumstances I think that I should simply constitute the requisite expert panel and list the matter for hearing. Ms Boyd, what, if any, submissions or evidence might you want to file, in support of your application?

PN38

MS BOYD: To be honest, I don't know. What would be possible to submit?

PN39

PRESIDENT HATCHER: Well, Ms Boyd, there's various criteria in the Fair Work Act that you need to address, in order to make out a case for a variation of an award. It's not appropriate for me to give you legal advice, but they're there and you need to look at those. You need to advance such evidence and submissions as are necessary to satisfy the Commission that the variation should be made. Again, without giving legal advice, the evidence might go to some of the matters you've just raised, about the culture and diversity of your workforce and whether employees have an interest in alternative days of cultural significance, but that's all a matter for you.

PN40

MS BOYD: Thank you.

PN41

PRESIDENT HATCHER: How long might you need to file that material?

PN42

MS BOYD: It would be a number of weeks required.

PN43

PRESIDENT HATCHER: If I give you three weeks, is that sufficient?

PN44

MS BOYD: Thank you.

PN45

PRESIDENT HATCHER: All right. So would it be appropriate that I allow a period of three weeks for both applicants and any parties supporting the applications to file their evidence and submissions and allow parties opposing the applications to file evidence and submissions in reply?

PN46

I'll take assent from that.

PN47

Now, we can deal with this matter at a formal hearing, or we can simply determine it on the matters that have been filed, that is, on the papers, does any party wish to express a view about that?

PN48

MS BHATT: Your Honour, to some extent it might be difficult to make that assessment now, without having seen the material in writing. Perhaps if the Commission would be minded to not list the matter for hearing at this stage but grant the parties liberty to request a hearing within a certain timeframe, once the material in reply has been filed?

PN49

PRESIDENT HATCHER: That's one course. I think what I'll do is take the opposite course though, Ms Bhatt. I'll list the matter for hearing but if, after the material is filed, parties consider that a hearing is not necessary they can notify me and if it's by consent we'll do it on the papers.

PN50

Mr Ash, in relation to your application, I've heard what you've said and you've heard what the other applicant has said, so I'll allow you, in three weeks, to either proceed with your application and submission form, in which case you can file evidence or submissions, or you can seek leave to amend your application to narrow it to Australia Day, in which case I don't think that, by itself, would attract opposition, but that's a matter I think I can leave in your hands. Is that an appropriate course?

PN51

MR ASH: Yes, thank you, your Honour, I'll discuss that with my board and we'll have a position available.

PN52

PRESIDENT HATCHER: Okay. I'll issue formal written directions confirming what I've just said and I'll also issue a listing for hearing, which can be cancelled, as I've indicated, if the parties agree that a hearing is not necessary.

PN53

Is there any other matter than any party wishes to raise?

PN54

Thank you for your attendance, we'll now adjourn, which means you can simply disconnect from the conference.

ADJOURNED INDEFINITELY

[2.21 PM]