



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER LEE

C2023/7152

s.526 - Application to deal with a dispute involving stand down

Mr Samir Patel

and

**Hospitality Performance Leaders T/A Nu Force Security Group
(C2023/7152)**

Melbourne

2.00 PM, THURSDAY, 7 DECEMBER 2023

PN1

THE COMMISSIONER: Good afternoon. Mr Patel, you're representing yourself today.

PN2

MR PATEL: Yes.

PN3

THE COMMISSIONER: Mr Cohen, you're representing the company.

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MR COHEN: That is correct.

PN5

THE COMMISSIONER: Okay. All right. Mr Patel, I've got your application. What else do you want to tell me about it?

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MR PATEL: Yes. Because the new boss is not providing the - what they want the commitment in the contract, like, four hours minimum. They're not providing, and they stand down me from 6 November 2023 and - - -

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THE COMMISSIONER: Sorry. I'll just stop you there for a sec. So the minimum hours in the contract you say are four hours; is that right?

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MR PATEL: Yes. Four hours per week.

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THE COMMISSIONER: Four hours per week.

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MR PATEL: Yes.

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THE COMMISSIONER: Where - okay. Can you tell me where it says that in the contract?

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MR PATEL: Yes. It's in the open letters and has the - in the - it's on the offer letter. It's saying, like - I just sent you just like a few - maybe 15 minutes before. There is a contract of offer, and there is - in the middle is saying, like, a minimum four hours is - will be provided per week.

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THE COMMISSIONER: All right. And you've been - you saw the note that the employer put in.

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MR PATEL: Yes.

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THE COMMISSIONER: Yes. So - and they say that you've been stood down. In the end, they say after - well, I'm going to ask some questions about that. It's rather confusing, but, 'Because of our efforts to try to place Mr Patel somewhere with his AM weekend limited ability, I'm not finding a happy middle ground. We felt the option available to us at the time was stand down'. I'll have a few things to say about that, but we'll come to that in a minute. You are employed - but perhaps you tell me what you understand the terms of your engagement are, that is - sorry. That was not very clear. I'll try and express that in plainer terms. Are you engaged as a part-time employee or a casual employee?

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MR PATEL: Part time.

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THE COMMISSIONER: Part time. Okay.

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MR PATEL: Part time (indistinct).

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THE COMMISSIONER: And what do you understand your hours of work to be as a part-time employee?

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MR PATEL: So hours like (indistinct) they saying in the contract it's four hours. So it should be as (indistinct) on that offer - letter of offer and contract, and it seems like we can - or, like, Nu Force can provide a four hours minimum and up to 36 hours. So if they're not provide, that means they have to pay for the four hours, but they're not paying.

PN21

THE COMMISSIONER: Yes. All right. Now, you've brought this as a stand down dispute. So as I understand the position from you, you believe that you can't be stood down under the terms of the - under the terms of s524. Is that your
- - -

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MR PATEL: That's right.

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THE COMMISSIONER: All right. And why do you say that?

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MR PATEL: Yes because there has (indistinct) like, we had hired for the COVID jobs, but it's not clearly in the - mentioned in the contracts and has a letter of offer. It is the mention only for part-time jobs. It's not mention anything about the COVID-related job. Only (indistinct) provide. And if they have, like, a COVID-related job, and they hire me, they should have to mention (indistinct) before they signed these jobs. Like, and it's not particularly, like, part-time jobs. They should have to do contractor jobs. They know it's like a new

(indistinct) have to mention in the contract and say, like, this is the - like a particular timeframes like a two years or three years or whatever.

PN25

THE COMMISSIONER: All right.

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MR PATEL: And in the contract, it's saying, like, we can providing multiple location jobs. It's not only for COVID-related jobs.

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THE COMMISSIONER: Yes. Okay. I understand that. So you say that the - there's opportunities for you to work in other locations.

PN28

MR PATEL: Yes. I already mentioned them to - I can happy to work, but there's certain travel times because last few - couple of weeks on - maybe on October, they're providing all, like, 80 kilometre or 100 kilometre part jobs. And that's only for four hours jobs.

PN29

THE COMMISSIONER: Yes.

PN30

MR PATEL: I'm happy to work anywhere, but it's certain travel times and certain, like - certain distance, you know.

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THE COMMISSIONER: Okay. Well, where is it that you are prepared to work?

PN32

MR PATEL: Yes. I can work any jobs, like, I mean, I can - Nu Force provide anywhere. I'm happy to work any kind of works.

PN33

THE COMMISSIONER: All right. All right. Well, we'll come back to where you'll be starting work, but before we get any further, Mr Cohen, what are your perspectives on this?

PN34

MR COHEN: Good afternoon. I've tried to assist Mr Patel many times since the COVID funding positions ended at Peninsula Health. I've offered - - -

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THE COMMISSIONER: So just tell me a bit about the COVID funding positions. So these were - this was a contract that your firm entered into with Peninsula Health, as I understand it, to provide security services that were associated with the pandemic and, no doubt, the heightened security issues that they had during that time. Is that a fair statement?

PN36

MR COHEN: That is a fair statement. So we (indistinct) contract with Peninsula Health to help them out with other areas of the hospital. A lot of these areas occur overnights, and we do ad hoc shifts for them as well which come up sporadically, and no main shifts ongoing. The only main shift I have ongoing are 74 hours a week, and they actually all occur overnights which won't suit Mr Patel's availabilities.

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THE COMMISSIONER: So in terms of this contract with Peninsula Health, you knew that it would come to an end.

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MR COHEN: It's - we don't know when. Like, no one was told when. It's just ongoing until the government ceased the COVID funding, and then the hospital make the decision, and we have no way of determining our clients' needs for the future. They just let us know when they need the - as a subcontractor, we just get told when they have the position for us and when they don't.

PN39

THE COMMISSIONER: All right. Well, I'll put it to you this way. It was a contract that was related to the operation of the pandemic, and the pandemic's officially over.

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MR COHEN: Yes.

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THE COMMISSIONER: Yes. So you were expecting that these contracts would come to an end at some stage.

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MR COHEN: Correct. So they kept them going for a little while, but then once the funding got pulled, we did our best to provide hours and shifts for all of our guys that were on those positions that were cut across the hospital and other sites given the availability. Now, of course, there were staff members that could not, you know, work those other sites due to other terms of what they were doing in their life. So they seek other employment, other - we've got some that stayed on at the hospital and upskilled themselves to work overnights in mainline roles for the hospital, but given the availabilities of Mr Patel, we found it difficult to find ongoing ad hoc work that was coming through that would suit him.

PN43

THE COMMISSIONER: All right. So under the terms of his contract of employment, you've got a right at clause 7 to - for the employer - to direct the employer to work in line with his licence and to the level of their skill and competence and training, yes?

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MR COHEN: Yes.

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THE COMMISSIONER: Yes. So you can direct him to work. You've got work in other locations. That's probably the first question.

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MR COHEN: Yes.

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THE COMMISSIONER: Yes.

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MR COHEN: So we have other sites. Yes.

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THE COMMISSIONER: Yes. You'll have other sites where there's work. So the applicant could be directed to work at those other sites.

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MR COHEN: Which he has been offered work at the other sites. Some of them are outside the timeframes of his availability. Some are a little bit further away, as he stated, that he's not willing to drive, and then not all of them are a 12-hour shift, as he would refer. Some are only four hours. Some are only six hours. It's just what the clients' needs for that particular site. However, when something does come across on the weekends of his availability that we can offer, I was offering.

PN51

THE COMMISSIONER: All right. Well, look, let's just go to the stand down provisions. Now, this is not going to be straightforward, but I'll take it as slowly as I can. If you have any questions, ask me about it. It's not a straightforward area of the law, but I'll do my best to take you through what I think the position is in respect of what you're doing, and I'll probably start just to help with your understanding that I don't think you can stand down this employee, and I'll tell you why.

PN52

So the first point is - and this is an issue for the applicant as well, of course, that the application's brought under s524 of the Act. Now, I doubt that either of you have a copy of the Fair Work Act in front of you. No. So I'll - - -

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MR COHEN: Negative.

PN54

THE COMMISSIONER: I'll tell you what that says, and, relevantly, I won't read out the whole thing, but the first part of it provides a right for an employer to stand down an employee in certain circumstances. Probably the closest one to what you're, you know, I think, arguing here is the stoppage of work for any cause for which the employer cannot be reasonably held responsible. Now, we don't need to sort of get into that because - and, look, I should just check, but somewhere in your material that you provided in this matter, I think, today - no,

on another occasion, you're relying on section 524 to stand him down. Is that right, Ms Hafner?

PN55

MR COHEN: That's the reason we have stood down, yes. And that way, he would have accessibility to his annual leave as well during this time until we have another contract (indistinct).

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THE COMMISSIONER: Yes. Well, you're relying on section 524 of the Act for this right to stand him down without pay, correct?

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MR COHEN: Correct.

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THE COMMISSIONER: Yes, yes. Now, have you read section 524? No.

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MR COHEN: (Indistinct).

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THE COMMISSIONER: Right. Well, I'll tell you what it says, and I'll just give you a tip as an employer - how many people do you employ, Mr Cohen?

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MR COHEN: Currently we have between (indistinct) that come through every now and then, and permanent employees anywhere between, I'd say, 60 to 80.

PN62

THE COMMISSIONER: All right. Well, as an employer of 60 to 80 people, we need to purport to rely on a piece of legislation to do something which has involved not paying an employee of yours. I'll just make the suggestion that you read the provision of the Act that you're actually going to rely on. Okay. Now, rather than just putting, as you have in this note here, that you felt the option available was the stand down.

PN63

Now, subsection (2) of section 524 - sorry. I'm having trouble with this microphone. There we go - says that, as I say, subsection (1) sets out the circumstances about - upon which a stand down can occur. Subsection (2) says, 'However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if (a) an enterprise agreement or a contract of employment applies to the employer and the employee', and that's what we've got here. We have a contract of employment, 'And the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance'.

PN64

Now, it's not, you know, a simply written provision, but I think the appropriate reading of it is that you can - you can't rely on section 524 if you have a right under a contract of employment or an enterprise agreement to use stand down. Hang on. We've lost the applicant.

PN65

THE ASSOCIATE: I'll just give him a call.

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THE COMMISSIONER: Okay.

PN67

THE ASSOCIATE: Or I might just phone him into this call, actually, to avoid any issues.

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THE COMMISSIONER: All right.

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THE ASSOCIATE: Just bear with me. He's just rejoined.

PN70

THE COMMISSIONER: Are you there, Mr Patel? Mr Patel, are you there? You're on mute.

PN71

MR PATEL: Yes. Sorry.

PN72

THE COMMISSIONER: Thank you. You can hear me okay? Can you hear me, Mr Patel?

PN73

MR PATEL: Yes. I can hear you. Sorry for that.

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THE COMMISSIONER: Right. Okay. Now, subsection (2) provides - you can put yourself on mute now, Mr Patel, and just remember to turn it off when you're speaking. Thanks. Subsection (2), as I say, provides that - as I say, if the contract of employment provides a right, then you can't rely on section 524 if there's a - I guess if there's a parallel in terms of the circumstance. Now, you've got a stand down provision in the contract of employment with this employee at clause 26. Yes.

PN75

MR COHEN: Yes.

PN76

THE COMMISSIONER: So it would seem that that is the - that that is a contract that provides a right to stand down the employee during that period if the employee cannot be usefully employed during that period because of that circumstance. Now, just going to you, Mr Patel, are you understanding this? It

was actually you that sent me the copy of your contract with the stand down provision. So do you understand what I'm saying, is that I think that to the extent that there is a right to stand you down, it's in accordance with clause 26 and not clause - of your contract and not clause - section - sorry, and not section 524 of the Act. Do you understand that?

PN77

MR PATEL: Yes.

PN78

THE COMMISSIONER: Yes. All right. Well, look, just assuming that's right - and that is subject to anyone suggesting to me that that's not correct - and I think it is correct because the provisions for stand down in the contract of employment provide - it's not in parallel terms with the circumstances or one of the circumstances in 524C, the closest of which is a stoppage of work for any clause for which the employer cannot be reasonably held responsible, but, indeed, arguably, it's broader than that because it covers 'cannot usefully be employed because of reasons beyond the employer's control'.

PN79

So I think it's - it is a circumstance that's contemplated in 524C. Therefore, it's only clause 26 that could be relevant to this. Now, that's got some implications as to my powers to deal with this because if that's right, the straightforward point is that that - there's no jurisdiction for me to deal with this dispute to the extent that it's been brought under section 524 because section 526 says that I can deal with a dispute about an operation of this part.

PN80

Now, the extent to which I can deal with a dispute is to make a ruling on this provisional view I've just expressed that I think there's no right to stand down under section 524 because there's a contract of employment which provides a right to stand down and, therefore, pursuant to 524 subsection (2), the employer can't rely on section 524.

PN81

All right. Now, having said that, what I'm going to say from here are really observations to assist you because, clearly, I think that you are navigating in uncharted waters, that is, you're not really sure what you're doing in this area. So I'll just make these observations. Firstly, a stand down provision in the contract provides the employee may be stood down during a period. So we'll just stop there. Now, that's the first point.

PN82

Stand down provisions, whether they're under section 524 or otherwise, contemplate a period and, indeed, if your clause didn't contemplate a period, then, arguably, it wouldn't displace section 524 because it's dealing with something else, but the relevant point is there needs to be some sort of period. Now, you have not stood him down for a period. At best, you've said, 'We're standing you down until probably 1 March' or something like that, 'But it might be longer'.

PN83

Now, that's not what these provisions are for. These provisions are for dealing with situations where, again, say, in terms of the stoppage of work, you know, 'The power workers are on strike, and there's no power, and no one can operate the machines, and so we just - there's no point in having people at work. I can't give them anything to do', and one reasonably expects that that is for some sort of defined period. It's not some ongoing thing because you've lost a contract, or a contract's come to an end.

PN84

So that's the first problem you've got in terms of relying on this being a stand down. The second problem you've got, we come to the words, 'In which the employer cannot usefully be employed'. Now, this loops back to the rather bizarre employment arrangements you've got, and I'll come back to that in a moment, but at least in terms of his contract of employment, it seems to be that he can be directed to work at a particular place, and you've got work. So on any view, it doesn't meet the test of 'cannot usefully be employed'. He can be employed. So you can't stand down someone who can be usefully employed.

PN85

And then you fail on the third point which is the last set of words 'because of reasons beyond the employer's control' because the - while this COVID contract came to an end, this is standard fair in your sector, you know. You enter into contracts. They come to an end. You might lose contracts because of the end of a particular funding arrangement, but you might lose them because you're not competitive. You might lose them because you're not running a very effective business. Whatever. These are not circumstances that are beyond your control. That's not what's contemplated, I wouldn't have thought, and, again, these are just my opinions, but that's not what's contemplated in terms of control.

PN86

I mean, that - when those words were tested in respect of the analogous section 524 in a case where an airline sought to stand down its employees because it had heavy maintenance on its aircraft that was scheduled - and, anyway, they knew they were going to have to do this sometime, a bit like you knew you've got - your contracts were going to come to an end sometime - and they said, 'Well, we have to stand them down'. The Commission held, well, that's not right. That's not something that was beyond your control, hence you can't rely on those provisions.

PN87

So for those reasons, in summary, I don't think you can rely on section 524 because of the existence of clause 26 in the contract of employment which, by virtue of the operation of 524 subsection (2) means that you can't rely on section 524 subsection (1) and - but having said that, my opinion is that the - you can't stand the employee down in accordance with those - that provision for the reasons that I've gone through. So I'll just give you a chance to make any comment you want to make about that, Mr Cohen.

PN88

MR COHEN: No. They're all fair points. I just ask if the employee can't be stood down and we still have other contracts and the employee doesn't want to

attend those contracts of the availability of what we have for his limited availability, what then?

PN89

THE COMMISSIONER: Well, I'm not here to advise you generally, but you'll have to sort your way through that. Now, so, look, let me conclude on the stand down point. So, Mr Patel - and, obviously, I want to hear from you, but my view is that unless you want to say anything else to me, the - this application ultimately - well, it's within jurisdiction to the extent that I can determine that - whether or not I've got a capacity to deal with it, and that turns on my interpretation of section 524 subsection (2), but my decision on that - my provisional view is - sorry, withdraw that.

PN90

My provisional view is that the enterprise agreement - sorry, the contract of employment which provides for the right of stand down means that that's the provision - to the extent you could be stood down under the - under any provision, that that's the relevant provision. Do you agree with that, or are you not sure, or disagree?

PN91

MR PATEL: So as you're saying, like, any agreements, any (indistinct) they can stand down. Perhaps I can understand what it's not like a - has been in, like, about temporarily - they can stood down.

PN92

THE COMMISSIONER: I beg your pardon?

PN93

MR PATEL: As you mentioned, like, they can - employers can stood down any - because it sounds like they're using 526. But as they're stood down for the temporary, it's like a not temporary, but they get stood down on permanent places, you know.

PN94

THE COMMISSIONER: No. As I say, whether or not we were dealing with section 524, or whether we're dealing with your contract of employment, that position is the same. You can't stand people down indefinitely because that's not a period. I mean, the ordinary meaning of a period is that it's got some - it's contained within a beginning and an end date. There's some sense of it. One might now know what period is, but it is something more than, well, you're stood down until March, maybe longer. We don't know. That's not - you couldn't reasonably be conceived of being a period. And, look, there's been prosecutions run by the Fair Work Ombudsman of employers who have purported to stand down their employees for long periods of time due to lack of work because, ultimately, it would have the effect of avoiding - if there is actually a lack of work, that's not a circumstance which appears to apply here, there is work for you to do - we'll come back to that. But in terms of if there was a lack of work - let's just say you'd lost half of your contracts - we can't just stand people down because you've lost a lot of your contracts, (a) that's not something that's beyond your control. You could win some more contracts. You know, there's an

argument that you haven't been a successful business manager. It's all those sorts of things.

PN95

Beyond your control is things that have happened that you can't – or what are the words in your contract? Yes: 'Reasons beyond the employer's control', are things, you know, obviously typically done by third parties that, for example, as I said, cutting off the power or something like that where you've got – there's nothing you can do to ameliorate that situation. But you can't use a stand-down provision for dealing with a slow-down in work. That's the short point. So for that reason, we'll come back to this in the end, Mr Patel, but I'm going to put to you, you should reasonably – I think you should discontinue this application because I don't think there is any power beyond me determining that it's a contract of employment that applies in terms of its stand-down rights.

PN96

But as I say, I've made the observations that I don't think the employer can stand you down under the terms of that contract but that's not a matter I have the power to deal with in terms of section 534 and section 526 of the Act. Having said that, just in terms of trying to resolve the dispute in a sensible way, I'm just trying to understand the basis of employment. So perhaps you can take me though that, Mr Cohen. I'm a bit confused about how Mr Patel is part-time but he seems to get offered shifts like he's a casual. It's not quite stacking up for me. Can you explain to me how all this works?

PN97

MR COHEN: So all of our employees are hired under permanent part-time. The hours can fluctuate roughly – sorry – 32 hours over an eight-week period, meaning that depending on the ad hoc working coming through and the permanent shifts we have, and the availability of staff, we could have them have ongoing work or it could be sporadic work.

PN98

THE COMMISSIONER: So your minimum – and presumably this applies to Mr Patel as well – the minimum amount of engagement for him is 32 hours over eight weeks?

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MR COHEN: That's correct.

PN100

THE COMMISSIONER: Right, okay – where does it say that in his contract, please?

PN101

MR COHEN: I believe that was in the IFA. Is that correct, Tim?

PN102

THE COMMISSIONER: It's in the IFA, is it?

PN103

MS HAFNER: I believe it has stated the minimum four hours per week and then in the IFA schedule 2 has the breakdown of the (indistinct) as the average over the rostered period.

PN104

THE COMMISSIONER: What clause numbers are we looking at?

PN105

MS HAFNER: I'm just trying to find the numbers for you.

PN106

THE COMMISSIONER: Yes.

PN107

MS HAFNER: So it is in the ongoing offer of part-time employment. So it's not in the clauses, it's in the offer of employment on those last:

PN108

Subject to the terms of the attached contract of employment your minimum hours of work shall be four hours per week in accordance with the roster. Your normal starting and finish times will be in accordance with your allotted roster or as otherwise agreed.

PN109

THE COMMISSIONER: Okay. Jess, can you just send me that? I haven't got this letter of offer. Sorry, I withdraw that. I've got it. Thanks, Jess. Okay, so the part-time basis is four hours a week minimum hours. Yes.

PN110

MR COHEN: That's correct.

PN111

MS HAFNER: Yes.

PN112

THE COMMISSIONER: All right. Now, he's covered by the security award?

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MS HAFNER: Yes, he is.

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THE COMMISSIONER: Security Services Industry Award 2020.

PN115

MS HAFNER: Yes.

PN116

THE COMMISSIONER: All right. And that says for part-time employees, among other things:

PN117

An employee who is engaged in work for fewer than 38 ordinary hours per week or fewer than an average of 38 ordinary hours per week over a roster cycle between two and eight weeks and whose hours of work are reasonably predictable is a part-time employee. At the time of engaging a part-time employee the employer and employee must agree in writing on a regular pattern of work. If the agreement under clause 10.3 is that the employee will work on a roster the agreement must specify at least the following: the starting and finishing times for each shift and the days or part days on which the employee will not be rostered.

PN118

So you've got him on a roster, so 10.5 is not relevant. So in terms of 10.4, where is the agreement about the starting and finishing times for his shifts and the days or part days on which he will not be rostered? Is that in here?

PN119

MS HAFNER: No, I don't believe there is an agreement with those specific words in the contract.

PN120

THE COMMISSIONER: All right, well, then to the extent you are purporting to engage him as a part-timer, you're in breach of clause 10.4. Now, we've got then – let's go to the contract and I see the contract is titled: 'Contract of employment and individual flexibility agreement part-time'. Yes?

PN121

MS HAFNER: Yes.

PN122

MR COHEN: Yes.

PN123

THE COMMISSIONER: So when I look at the – there's a demonstration going on outside so it's getting a bit noisy. So the contract refers to the IFA. The IFA at schedule 2 sets out the conditions relating to hours of work. Yes?

PN124

MR COHEN: Yes.

PN125

MS HAFNER: The hours of work?

PN126

THE COMMISSIONER: Yes. So the hours of work that you've got in the contract – to find that, I go to the IFA, which is in schedule 2. Yes?

PN127

MS HAFNER: Yes.

PN128

THE COMMISSIONER: And I can't see in there where his hours of work are. It says a part-time employee's nominal hours of work shall be as set out in the schedule. Well, I'm in the schedule. So where's his hours of work?

PN129

MS HAFNER: There are no written (indistinct) work.

PN130

THE COMMISSIONER: You don't know, all right. And then the purported roster provides for the employer to place the employee on a roster and provide the start and finish time of each shift on a weekly basis via SMS and/or email one week in advance. Then: 'The period of the roster shall be determined by the employer, e.g. one, two, hour, eight weeks or longer', et cetera, et cetera. So there's no limitation on those things. And then additional hours to the roster will be compensated in accordance with the additional hours provision. I'm not even sure how that works.

PN131

But, look, let's go back to some fundamentals. The IFA seems to have been entered into when Mr Patel started his employment. Agreed?

PN132

MR COHEN: Agreed.

PN133

THE COMMISSIONER: Indeed, he signed it on 2 September 2021 and he signed the IFA on the same day. Now, there is a reference in your IFA to somewhere – you refer to section 144 of the Act and you've referred to clause 7 of the award. Clause 7 of the award is facilitative provisions, I take it that what you meant to do is refer to clause 5, individual flexibility arrangements that's what this purports to be. Is that right?

PN134

MS HAFNER: Yes.

PN135

THE COMMISSIONER: Yes. Okay. Now clause 5, as I understand it, was in force at the time you made this agreement because this is the 2020 award. It sets out that an employer and: an individual employer may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer. And it allows for arrangements of that for when work is performed overtime rate, penalty rates, allowances, annual leave loading.

PN136

Now there's a few issues with your IFA because you can only make these arrangements if they are consistent with the provisions in the relevant modern award. And the relevant modern award provides, firstly, the agreement must be one that is genuinely made by the employer, and the individual employee without coercion or duress. And importantly, and agreement may only be made after the individual employee has commenced employment with the employer. You've put

him on this arrangement when he commenced employment, in breach of that provision, haven't you? Yes?

PN137

MS HAFNER: It seems so.

PN138

THE COMMISSIONER: It seems so. And the rest of that – the provision only makes sense if you are applying the IFA provision as it is intended, that is while the employment is underway, one side or the other may initiate a proposal to enter into an individual flexibility agreement.

PN139

Now looking at the way this is put together, I would be safe in assuming, would I, that this is the standard arrangement upon which you employ all of your employees, that you engage the on a contract and an IFA?

PN140

MS HAFNER: Yes.

PN141

THE COMMISSIONER: Yes. Well, that presents significant difficulties for you. Now the other provisions are, aside from the fact that it can only be made after the individual employee has commenced employment, which hasn't been the case, so it is made in breach of that provision, the agreement may also result in the employee being better off over all the time the agreement is made, than if the agreement had not been made. Now we won't go into great detail on that, but frankly – well, the employee is paid consistently with the minimum rate and the award, is he, level 2 security award?

PN142

MR COHEN: That's correct.

PN143

MS HAFNER: Yes.

PN144

THE COMMISSIONER: Yes. So there is no additional remuneration, beyond that to which he is statutorily entitled?

PN145

MS HAFNER: No. In agreement with the award, yes.

PN146

THE COMMISSIONER: Yes. So to the extent that this purported IFA has reduced his terms and conditions that he would be entitled to under the award, prima facie he's not going to be better off overall.

PN147

Then at 5.6, the agreement must identify – must state the names of the employer and the employee. Well, you have complied with that. Must identify the award term or award terms the application of which is to be varied. You haven't done

that. Set out how the application, or the award term or each award term is varied. You haven't done that. Sets out how the agreement results in the employee being better off over all the time the agreement is made, than if the agreement had not been made. You haven't done that. State the agreement is to start. You've done that, and you've started it. I mean, really you've put him and your other employees on IFAs as a term of their employment, haven't you? Term of their engagement.

PN148

MS HAFNER: Yes.

PN149

THE COMMISSIONER: Yes. So this is a serious matter, I don't think these IFAs are worth the paper they're written on because they are made in breach, almost certainly, is my opinion. I am not a court, I can't determine these matters, but my opinion is, based on what you told me, that prima facie they have been made in breach of the terms of clause 5 of the Security Industry Award.

PN150

But the reason I delved into all of this in the context of a standdown dispute, and it goes back to those issues I raised earlier, Mr Cohen. That ordinarily in a dispute like this, I'd be saying to the employer, like I said to you earlier, well, if this person's a part-time employee, an actual part-time employee, as opposed to this bizarre arrangement that you have entered into with him, and arguably illegal arrangement, you would say, well, I've got work for you, you are going to go and do it, that's what would happen.

PN151

The problematic situation is, as it stands at the moment, you are not inclined to do that, and I do understand why because you've been proceeding on the basis that you have a contractual arrangement through this purported IFA to effectively offer shifts on a weekly basis through an SMS system.

PN152

And look, I haven't even looked at the roster provisions in the Security Industry Award, but chances are everyone failed that as well, but let's leave that aside for the moment, in terms of notice periods and so on. I don't know about that, I haven't looked at it.

PN153

But, yes, I am not quite sure how to go about resolving this. I'm going to refer this matter, I'll just put you on notice now, I'm going to refer this matter to the Fair Work ombudsman to come and have a look at it because I think it needs to be sorted out. And I don't have the power to do it beyond telling you what I think my views are. But they do, so you can expect a call from them.

PN154

But the issue is what to do with Mr Patel for now. So leaving everything that I've said to one side, that will take its own course. But the question is for this interim period for Mr Patel, where he's still, at this stage, purportedly operating under the terms of his IFA, and so on, what arrangements can be put in place to number one,

backpay him for at least what he should've been paid. And I'll say this, and listen carefully when I say it, in accordance with his contract of employment as you understand it, notwithstanding that chances are it'll be found to be – to have issues with its enforceability.

PN155

But leaving that aside for the moment. He's entitled to be paid at least four hours a week from the time that you allegedly stood him down as a minimum. Secondly, he needs to be re-engaged on some basis, so what can be done in that regard?

PN156

MR COHEN: I'm happy to talk to Mr Patel if he's happy to chat with me, whether it be this afternoon or at his earliest convenience and we can make an appointment.

PN157

THE COMMISSIONER: Let's do it right now. I've got another hour. So what is on offer? Happy to take a break for 10 minutes while you find some places he can go. What do you want to do?

PN158

MR COHEN: Sorry, can you say that again, sorry?

PN159

THE COMMISSIONER: I'm happy to take a break for 10 minutes, if you need to look at some, you know, spreadsheets and, you know, put some proposals to Mr Patel, to at least resolve this immediate matter, which is he's not being paid anything, which is, to say the least, a very unsatisfactory state of affairs. But let's just get that fixed up, what shifts can he be offered?

PN160

So first thing – well, let's just go with the first thing, can we get an understanding that he'll be paid retrospectively for the hours that he should have been paid for, notwithstanding he didn't work, but the hours he should have been paid for when he was purportedly stood down?

PN161

MS HAFNER: Yes.

PN162

THE COMMISSIONER: Yes. All right. Thank you. And what will that total to, Ms Hafner?

PN163

MS HAFNER: I am just going to pull up the information so I can get that for you.

PN164

THE COMMISSIONER: Yes. No worries. Just while you are doing that, what – I look to you, Mr Cohen, do I, in terms of shifts that he could do? Do you need

ten minutes to have a look at what's around? Or do I ask Mr Patel what he wants or what's the best way to skin this cat?

PN165

MR COHEN: This issue – the reason why he was put on – he was stood down originally is because we had no work available for his availability without taking hours off other permanent employees that were doing their job long before this situation occurred. Which if I take – it is like robbing Peter to pay Paul, if I take some hours off someone else to give Mr Patel hours, then they are going to be without as well, that's the issue. So that's the reason we didn't have anything extra at this time.

PN166

THE COMMISSIONER: Well - - -

PN167

MR COHEN: I'll have to talk to some employees and possibly see if I can reschedule some things with their permanent rosters to allow Mr Patel some hours in his availability.

PN168

THE COMMISSIONER: Well, what I need from you now is, to resolve the dispute, is an understanding, it's a matter for you how you do it, and hopefully you'll do it within the limits of the law. But I'm looking for an understanding that you will reengage him. So you're going to backpay him from the time that he was purportedly stood down for his minimum hours, that's what you're after, Mr Patel?

PN169

MR PATEL: Yes. Please.

PN170

THE COMMISSIONER: Yes. And then you'll engage him on a roster somewhere somehow. Happy to make that commitment?

PN171

MR COHEN: I am.

PN172

THE COMMISSIONER: All right. So we might leave it on that basis, Mr Patel, that Mr Cohen's going to one, backpay you for the period that you were stood down because you shouldn't have been and secondly, that he will engage you in some work ongoing.

PN173

And I think the position is, look, arguably that the, as I say, I don't think the IFA has any consequence, you really are employed in accordance with the award and arguably the IFA has no effect. But that also operates consistent with the terms of your contract of employment as aside from the IFA and that contract of employment, not unreasonably, allows for them to direct you to work in particular locations.

PN174

Now you understand what I'm saying? It's not a – you can't walk both sides of the street at the same time, so I'll need some sense from you that you are prepared to accept the work that they have available. Is there particular work that you can't do? Particular days you can't do?

PN175

MR PATEL: Yes. So like, as I provided my (indistinct) and like, I'm available on weekends because I'm doing my trainings and those on weekdays.

PN176

THE COMMISSIONER: You're available on weekends?

PN177

MR PATEL: Yes. Please.

PN178

THE COMMISSIONER: Okay. All right. So if you can get some weekend work, Mr Cohen. Now you might have to travel, Mr Patel, you understand that?

PN179

MR PATEL: Yes, yes. I am happy to travel and I (indistinct) when I did work, and I am happy to travel on this one as well.

PN180

THE COMMISSIONER: Yes. So that is a term of your contract of your employment, that's not an unreasonable term or an illegal term. It's a standard term that one has in a contract of employment, that the – well, just rather than making it up, just checking what yours exactly says:

PN181

Due to the nature of the industry, the employee will work where directed in line with the employee's license, and to the level of your skill, competence, and training.

PN182

And you:

PN183

don't get any compensation for a change in your place of work and such, a transfer doesn't constitute termination of the employee's employment.

PN184

So, you know, within limits, you know, they can't – presumably, they're not going to send you to Darwin or Warrnambool, but you've got to, within limits, go to where you're directed to work. You understand that? Yes.

PN185

MR PATEL: Yes, yes. I understood.

PN186

THE COMMISSIONER: This is just to be clear for all of you, I'm not saying that the whole contract is null and void, in my opinion. I'm just saying the IFA is. And then to the extent that the IFA has no effect, as night follows day, the award is what drives – is what covers and applies to the employee and must be complied with. That's the simple point.

PN187

Now again, I'll just clarify, since we're on the record, I am not a court, I am just a tribunal. I obviously have a very good understanding of the law, but I'm not judicial, so I'm not in a position to express these – and do anything other than express opinions about these matters, but that's my opinion.

PN188

So I think I'll leave it at that, are you happy to – on the basis you're going to be back paid, Mr Patel, and you're going to be re-engaged and that's all on record, it's agreed that that's what the employer's going to be doing, they're going to reemploy you. So you won't have lost any money as a result of the standdown dispute you brought before me, you understand that? Yes. Mr Patel?

PN189

MR PATEL: Yes, I understand, and I agree.

PN190

THE COMMISSIONER: Okay.

PN191

MR PATEL: Yes.

PN192

THE COMMISSIONER: So you're happy to discontinue this application?

PN193

MR PATEL: Yes, happy, yes.

PN194

THE COMMISSIONER: Well, the application is discontinued, and I will close the file. I expect that, Mr Cohen, you will honour the agreement that was reached and abide by that. If there is any issues, Mr Patel, you can always lodge a dispute under the terms of the award that covers you because it still covers you, notwithstanding your contract of employment, if there's a dispute about an award provision. But assuming that that doesn't occur, I wish you all the best.

PN195

And, as I indicated, I have serious concerns about the nature of the employment arrangements here and the legality, and I'm going to refer that matter off to the Fair Work ombudsman. The Fair Work ombudsman is the Commonwealth authority that has responsibility for enforcement and so it'll be a matter for them what action they take, if any, but I'll leave that up to them. All right. That concludes the matter, thanks for your attendance today.

PN196

MR COHEN: Thank you.

PN197

MS HAFNER: Thank you.

PN198

THE COMMISSIONER: Thank you. Thanks, Mr Patel. Bye.

PN199

MR PATEL: Thank you. Thanks, bye.

ADJOURNED INDEFINITELY

[3.05 PM]