

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

26694-1

VICE PRESIDENT WATSON

AM2010/73

s.158 - Application to make a modern award

**Application by Newcastle Market Co-operative Ltd
(AM2010/73)
Storage Services and Wholesale Award 2010**

**(ODN AM2008/55)
[MA000084 Print PR988944]**

Sydney

10.33AM, FRIDAY, 25 JUNE 2010

PN1

THE VICE PRESIDENT: Can I have the appearances, please.

PN2

MR T. BROWN: Thank you, your Honour. Brown, T. I seek leave to appear on behalf of Newcastle Regional Markets Co-op Ltd and I have with me MR P. HOLMES, who is the CEO to that organisation.

PN3

THE VICE PRESIDENT: Mr Brown.

PN4

MR D. MAKINS: If it pleases, my name's Makins, initial D, from the Australian Federation of Employers and Industries.

PN5

THE VICE PRESIDENT: Thank you, Mr Makins. Permission is granted, Mr Brown.

PN6

MR BROWN: Thank you, your Honour.

PN7

THE VICE PRESIDENT: Yes, Mr Brown.

PN8

MR BROWN: Your Honour, this is an application by the markets to seek a variation to the Storage and Distribution modern award in accordance with section 158(1) of the act. We would be seeking, with respect, Fair Work Australia to exercise its powers in respect of section 157(1)(a) to vary the modern award. In doing so, we would be relying upon, in section 134 of the act, the objectives of the modern award provisions in the act. It is our respectful view that the application is consistent with those objectives and also falls within the category of exceptional circumstances.

PN9

Your Honour, we've only unfortunately this morning in writing been notified of an application by the SDA which we've only had a limited opportunity to peruse. My friend on my friend also has appeared, which we weren't aware of until obviously he's arrived and had some very brief discussions. So we're in the hands of your Honour how we wish to proceed. I have a number of documents we seek to rely upon, including the application we've lodged with Fair Work Australia and some other background information which may assist the tribunal.

PN10

THE VICE PRESIDENT: Applications of this type have been dealt with by putting submissions received and documentation on the web site. I notice the SDA is not appearing here today but they have filed a written submission in the matter. Do you have any objection to that submission being considered in this matter?

PN11

MR BROWN: Theoretically, yes, your Honour. I checked the web site last night at approximately 8.30 in preparation for attending today and there was no

submissions lodged. It does give us late notice, but in terms of the practicalities of the situation, we've had a very brief opportunity to peruse it and would like to respond to it and have a number of areas we don't think are correct in their submissions. We note also that the union has made no previous communications with the applicants in this matter and we'd leave that in the hands of your Honour in terms of what weight you give that to the submission from the union.

PN12

THE VICE PRESIDENT: You would like an opportunity to respond to it. How much time do you - - -

PN13

MR BROWN: We think that we could provide that this morning but our formal submission would be that due to the late notice and the fact that the union has not made any communications with the applicant or been here today, that the tribunal should disregard that submission.

PN14

THE VICE PRESIDENT: Mr Makins, do you have a view about this question?

PN15

MR MAKINS: Thank you, your Honour. Firstly, I must apologise, our organisation only became aware of this application this morning, hence as to why we haven't put in a submission. In principle, your Honour, we do support the application, albeit we do note the basis of the variation pertaining to the Newcastle region only. We submit that this is a very important variation for this particular industry, being the wholesale fruit and veg market, not only from Newcastle but also particularly in New South Wales but across Australia. We note a number of pre-modern award instruments which had provided a greater span of hours. We think it's very important that your Honour be aware of these instruments and the impact that the modern award has had on these employers in terms of cost increases.

PN16

Accordingly, we would respectfully request additional time to consider not only the application in its current terms but also the SDA's opposition and whether the application needs further amendment to overcome the tribunal's historical reluctance to preserve regional state based differentials. We would submit that additional time would be necessary.

PN17

THE VICE PRESIDENT: How much additional time would you require?

PN18

MR MAKINS: Your Honour, I may need to confer with my friend but in order to properly prepare and consider the pre-reform instruments and consult our members who are similarly affected to Mr Brown's client, we would submit two weeks but we certainly would be in your hands with that.

PN19

THE VICE PRESIDENT: Mr Brown, I see the strength of what's been put in terms of the importance of this matter and the question's difficulty as to questions that are raised and the test that has to be met under question 157. I think in those circumstances and having regard to what Mr Makins has said, that providing an

opportunity for the AFEI to put more detailed material has something to be said for it. The option would be to adjourn the matter to another date or to do so with directions as to the filing of material in advance of the hearing so that all parties have an opportunity of knowing the evidence and submissions of each other in advance to the hearing. Do you have a view as to those options?

PN20

MR BROWN: Your Honour, first of all, I must say we appreciate AFEI's in principle support for our application. It's just unfortunate for the Market's perspective in terms of cost and time in travelling down from Newcastle for this matter in good faith, when it had no previous indication that these important issue would arise. Your Honour, what you obviously said makes a lot of sense. In terms of exploring getting value for money for the markets today, we would just seek to explore whether there's any value in if we presented and went through some of the material with you this morning in terms of your familiarity with the issues and the argument which may make our visit to Sydney more productive, if you like.

PN21

THE VICE PRESIDENT: Certainly.

PN22

MR BROWN: But obviously the issues which Mr Makins raise are vary important. We wouldn't want to extinguish that broader opportunity.

PN23

THE VICE PRESIDENT: That's a course that's certainly available. If you wish to take some time to put material that you were proposing to put in any event, that's open to you, but I do indicate that I would be inclined to provide Mr Makins with the opportunity of consulting with his members and producing material at a later time. If there's a further hearing, then others may also wish to participate and put submissions such as that submitted on the web site by the SDA. But if you wish to take the time to put the case this morning, then I'm certainly happy to hear from you.

PN24

MR BROWN: Thank you, your Honour. We would not want to frustrate the broader issue for Mr Makins; I wish to make that point clear and also seek the opportunity to make further, more substantive submissions based on what they may come up with in what response they give.

PN25

THE VICE PRESIDENT: Yes, by all means. Yes, indeed.

PN26

MR BROWN: My point this morning was just more the familiarity, in terms of pointing you to the instruments we're relying upon and the basics supporting some of the application points in reference to those instruments, just to familiarise yourself with where the Newcastle Regional Markets are coming from.

PN27

THE VICE PRESIDENT: Yes, by all means please continue.

PN28

MR BROWN: Unfortunately I must apologise to my colleague on my right also that we only brought one copy along this morning in anticipation we'd be the only one here. So I'm happy to try and pass a copy across, your Honour.

PN29

THE VICE PRESIDENT: I'm sure we can cope.

PN30

MR BROWN: If I may hand up a folder.

PN31

THE VICE PRESIDENT: It appears to be a folder of different documents.

PN32

MR BROWN: If I may help assist the tribunal by just identifying those documents as we run through.

PN33

THE VICE PRESIDENT: Yes.

PN34

MR BROWN: Your Honour, this may provide the opportunity in terms of following hearings to make respectful suggestions to my client in respect of, "You may need to bring on further evidence on this point to facilitate the process of the hearing." The first document is a decision of Busselton Hockey Stadium Club (Inc) re variation to the award, which was before yourself. That's a loose document. The second document is a table prepared this week which just in a dollar sense compares the situation in relation to rates of pay under the Current Storage Services and Wholesale Award, the impact of the 12.5 per cent early morning shift - which I must emphasise our client is fully aware of, in contradiction to the SDA's assertions - the total costs in terms of those grades of employees with the base award rate plus the 12.5 per cent early morning shift allowance.

PN35

The second-last column on the right-hand side is the applicable rates under the Wholesale Fruit and Vegetable Market Employees (Newcastle, & C.) Award or the equivalent NAPSA it became, which we emphasise has a spread of hours from 3 am to 3 pm. Newcastle Regional Markets, I'm instructed, is the oldest markets in Australia and as long as anybody can remember, the fruit and veg market in Newcastle has had that same spread of hours.

PN36

On the right-hand side is the applicable minimum rates contained in the Newcastle Regional Markets Multi-Enterprise Agreement 2009 that was ratified by his Honour Sams DP on 11 February 2010 and has an expiry date of 10 February 2014. Your Honour will notice that in terms of the right-hand column versus the left hand column, that is a comparison between the current multi-enterprise agreement which covers 11 of the 13 employees of the markets and the modern award, that in all cases there's a significant difference of higher rate of pay under the multi-enterprise agreement than the award. These rates were struck before the modern award came into effect. So it's not a case of the employers at the regional markets, if you like - in a colloquial expression - trying to rip off their employees.

PN37

The second document in my folder, and hopefully yours, is a list of the 13 employer currently at the Newcastle Regional Markets. I'm instructed that there are 77 permanent-type employees. Although the application referred to 120, I understand that includes seasonal casual employees. The folder also contains the application. The other important documents contained within the folder are various industrial instruments. The first being - I'm not quite sure what order you may have them in, your Honour - is the Newcastle Regional Markets Multi-Enterprise Agreement 2009. Your Honour will notice in clause 12.1 appearing on page 9 that that multi-enterprise agreement's spread of hours provides for a 2 am to a 2 pm spread of hours at ordinary time, with no penalties for 11 of those 13 employers on that list. That is one hour less than prescribed in the underpinning award and the employers thought that that would in fact advantage employees not having to get up one hour later.

PN38

Your Honour, I also take you to the underpinning state award which is also in the folder, the Wholesale Fruit and Vegetable Market Employees (Newcastle, & C.) Award. In particular I take you to clause 3, which again provides for the ordinary hours between 3 am and 3 pm. As long as anybody at the market now can remember, that has always been the case at the markets.

PN39

Finally, in terms of the industrial instruments, the Storage Service and Wholesale Award, the applicable clause there of course is clause 25, Shift Work; 25.1(a), early morning shift between 2 am and 7 am, which attracts that loading at 25.4 of 12.5 per cent.

PN40

THE VICE PRESIDENT: Yes.

PN41

MR BROWN: Your Honour, I've attempted just to navigate at this stage just through those instruments, bringing your attention to the applicable clauses within those industrial instruments and also providing you with some background about the markets and its structure and the employees.

PN42

THE VICE PRESIDENT: What was the allowance you just referred to in the last one?

PN43

MR BROWN: Your Honour, clause 25, Shift Work; 25.1(a):

PN44

Early morning shift means a shift commencing between 2 am and 7 am.

PN45

That's on page 21 of 49 of the document in front of your Honour.

PN46

THE VICE PRESIDENT: Yes.

PN47

MR BROWN: If your Honour turns the page over - - -

PN48

THE VICE PRESIDENT: Do you say that working between 2 am and 2 pm is an early morning shift under this award, qualifying for the allowance?

PN49

MR BROWN: Your Honour, I'm basing that in terms of the union's submission. Again, I would qualify that by saying we haven't had time to go back and research that in detail.

PN50

THE VICE PRESIDENT: Yes.

PN51

MR BROWN: On page 7 of the second page:

PN52

Under clause 25 of the Storage Award there are provisions for shift work.

PN53

They then go on to say:

PN54

Clause 25 allows the working of ordinary hours from 2 am with an early morning shift penalty of 12.5 per cent.

PN55

The next paragraph, your Honour can see they're saying that, "This fully caters for the market situation" - I'm paraphrasing this - and they say:

PN56

It does not mean that the employers are not required to pay overtime to cover this span of market hours.

PN57

We need to consider that claim from the union in a bit more detail, your Honour.

PN58

THE VICE PRESIDENT: Yes, and the SDA would be familiar with proceedings before me concerning the general retail award and the position of bakers, where early morning shift provisions were sought and ultimately inserted into that award covering early starts. There was also a consideration of the Food Manufacturing Award in that connection as well. So that baking in a factory takes place under the Food Manufacturing Award and baking in shops takes place under the General Retail Award but there are considerations of early morning shifts in both of those awards in proceedings that you may care to look at.

PN59

MR BROWN: Hopefully I can do that when we receive a copy of the transcript and I will go straight to those references. Thank you, your Honour. Sorry, you asked a question.

PN60

THE VICE PRESIDENT: No, I was just locating the reference to the shift allowance in the modern award and you require some time to look at the significance of that in the context of your application.

PN61

MR BROWN: Your Honour, prior to coming here, the Market was of the initial belief, having not received any other submissions, that in fact it may be subject to the 12.5 per cent early morning loading. In fact that's reflected in the table that I handed up to you earlier in terms of assessing the cost impact if it was to be covered by that modern award. Also, in terms of looking at the union's submission, that in paragraph 10 they conclude their paragraph 10 by saying:

PN62

Any new employer starting operations at the market will also enjoy the transitional arrangements until 2015.

PN63

It's our understanding that from 1 July onwards - which isn't very far away - any new employer coming in who is a new employer not previously covered by the previous industrial instrument is not subject to those transitional arrangements.

PN64

THE VICE PRESIDENT: Are you asking me a question?

PN65

MR BROWN: I'm just posing our understanding. The relevance and the significance of that point is, though - and this is detailed in our submissions - that for the 11 employers who are respondent to the current multi-enterprise agreement, that they're obviously not covered by those transitional arrangements. They're protected from those, but they're only protected from those until the expiry of their existing multi-enterprise agreement. In our application, we raise that as an issue in terms of the objectives of the act and the administrative instructions and directions. The second thing, in terms of the Market's application is the significant problems that would cause new employers entering into the markets when we have this existing multi-enterprise agreement with a spread of hours which has a history, an antecedence, back for many years, basing that the early starts are normal times.

PN66

If I could just briefly refer to that earlier Busselton Hockey Stadium Club matter before you. We respectfully submit there are some important distinctions between the case of the oldest regional markets in Australia who have had a pre-existing industrial instrument that's always prescribed for this ordinary hours being in the middle of the night so that the mums and dads of the Newcastle region - their kids can get fresh fruit and vegetables.

PN67

If I may take your Honour to the second page, paragraph 6, where you say:

PN68

The approach of the Australian Industrial Relations Commission in award modernisation was to give effect to the award modernisation objectives in the Workplace Relations Act 1996 -

PN69

and I emphasise the following words -

PN70

by paying particular regard to the content of pre-existing instruments.

PN71

Our cursory search of the history of the formation of this particular modern award seems to appear that the Wholesale Newcastle Markets Award may have escaped that attention of consideration. My friend may have a view in terms of the other awards and instruments affecting his clients but from our perusal of the substantial amount of documentation on the very good web site is that there appears to be of no consideration to the oldest continuous regional markets in Australia their industrial instruments.

PN72

We were going to make submissions today relating to section 134, the modern award objectives but I'm just cautious in terms of how much you would seek us to get into that area on the basis that you are likely to adjourn this matter and call for further submissions. So that's getting more into the area of advocacy. To this stage if just tried to give you, with respect, some familiarisation and direction of where this employers' application is coming from, but I pause at this stage and seek direction from you on how far you wish us to proceed with those further submissions.

PN73

THE VICE PRESIDENT: Mr Brown, why were these matters not raised during the award modernisation process?

PN74

MR BROWN: Sorry, your Honour?

PN75

THE VICE PRESIDENT: Why were these matters not raised during the award modernisation process?

PN76

MR BROWN: Your Honour, partly that may be the employers' responsibility in Newcastle Regional Markets, the 13 small employers being unaware of the process.

PN77

THE VICE PRESIDENT: But they're not the only markets in Australia.

PN78

MR BROWN: I obviously can't make submissions on behalf of the other markets. They also weren't members or are not members of any larger employer association.

PN79

THE VICE PRESIDENT: Yes. I think there is a prospect that this matter will be contested, based on the submission of the SDA. I think there's not a lot to be served by going beyond the familiarisation that you have undertaken today. I would propose to load these documents onto the web site so that everyone affected by the award is aware of the proceedings and their status. The transcript will also be loaded. I propose to adjourn the matter to another date and I don't propose at this stage to make any further directions as to filing of any material. Obviously I would encourage any discussions between interested parties so that the areas of disagreement can be minimised or possibly eliminated. It's been suggested - - -

PN80

MR BROWN: Your Honour - - -

PN81

THE VICE PRESIDENT: Yes, Mr Brown.

PN82

MR BROWN: If I may assist, in terms of your associate, we could provide links to most of those documents or provide an electronic version to assist you with them.

PN83

THE VICE PRESIDENT: That would certainly assist, yes. Thank you. It was suggested that at least two weeks should be provided before the matter returns.

PN84

MR BROWN: Your Honour, this has got the potential to become bigger than Ben-Hur in terms of the regional markets around Australia, all starting off from a small number of small employers in Newcastle trying to remedy a situation. I was just thinking - - -

PN85

MR HOLMES: We're the only market. We're the only regional market in Australia - Newcastle. All the other markets are capital city based.

PN86

MR BROWN: It may take some time in terms - I'm just thinking of the geographic spread of this potentiality of this application - - -

PN87

THE VICE PRESIDENT: Yes.

PN88

MR BROWN: - - - as much as we'd like the matter dealt with today, your Honour.

PN89

THE VICE PRESIDENT: Do you wish me to set another date for the matter at this stage or simply adjourn the matter on the basis it can be relisted?

PN90

MR BROWN: The employer is keen to push on with the matter, and I think it would be productive, with respect, your Honour, to set a date and that will provide some discipline to the process in terms of those other people who seek to join it or seek to oppose it, that then they can't come in after that date for a second hit.

PN91

THE VICE PRESIDENT: Yes.

PN92

MR MAKINS: Your Honour, if I may, if it assists the commission, it may be useful to set this matter down for at least a further mention or conference before your Honour in order to assess whether there is any disagreement not only between the unions and employers but possibly between the scope of the application between the employers. A further mention may be suitable in two weeks time.

PN93

THE VICE PRESIDENT: Given the applicant is from Newcastle, that could be done via telephone mention or report back so there's no need to travel. Then we can see what further hearing might be required.

PN94

MR BROWN: That would be very appreciated, your Honour.

PN95

THE VICE PRESIDENT: I would propose to list this matter for a report back by telephone at 11 am on 8 July, unless that particular times creates a difficulty with the anyone. There's some flexibility on that day to accommodate other commitments but perhaps before confirming that date, the parties might mention any difficulties with my associate on adjourning. That's approximately two weeks away. It would be for report back with a view to ascertaining the level of interest and the nature of any further proceedings and setting down a time for those further proceedings and any other preliminary steps that may be required.

PN96

MR BROWN: Thank you.

PN97

THE VICE PRESIDENT: We will adjourn on that basis.

<ADJOURNED UNTIL THURSDAY, 8 JULY 2010

[11.06AM]