

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

25645-1

SENIOR DEPUTY PRESIDENT WATSON

AM2010/22

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

**Application by Simpson Personnel Pty Ltd
(AM2010/22)
Building and Construction General On-site Award 2010**

**(ODN AM2008/15)
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Melbourne

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Reserved for Decision

**THE FOLLOWING PROCEEDINGS WERE CONDUCTED VIA
VIDEO CONFERENCE AND RECORDED IN MELBOURNE**

PN1

THE SENIOR DEPUTY PRESIDENT: Yes, I'll take appearances, please. Those located in Sydney and Canberra can remain seated. Would it help if Mr Simpson is seated in terms of - no. So I'll commence with you in Melbourne.

PN2

MR B. SIMPSON: Thank you, your Honour. My name is Bryce Simpson, I am the managing director of Simpson Personnel, I am the applicant in this matter. Simpson Personnel employs eight permanent staff over three offices in Western Victoria. The company's general - - -

PN3

THE SENIOR DEPUTY PRESIDENT: I'm sorry, you're proceeding to give some submission at this stage? Were you proceeding to make submission?

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MR SIMPSON: Sorry, I'm - - -

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THE SENIOR DEPUTY PRESIDENT: I'll just get appearances from the others and - - -

PN6

MR SIMPSON: I see, I'm sorry. I'm with you now.

PN7

THE SENIOR DEPUTY PRESIDENT: Yes, okay.

PN8

MR SIMPSON: Beg your pardon.

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THE SENIOR DEPUTY PRESIDENT: In Canberra?

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MR R. CALVER: Yes, if the tribunal pleases, it's Richard Calver from Master Builders Australia.

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THE SENIOR DEPUTY PRESIDENT: Thank you for that, and in Sydney?

PN12

MR S. MAXWELL: If the tribunal pleases, my name is Maxwell, initial S, I appear on behalf of the Construction, Forestry, Mining and Energy Union.

PN13

THE SENIOR DEPUTY PRESIDENT: Thank you.

PN14

MS C. BLADES: If it pleases, Blades, initial C, on behalf of the Australian Federation of Employers and Industries.

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THE SENIOR DEPUTY PRESIDENT: Thank you, Ms Blades.

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MS A. MATHESON: If the tribunal pleases, my name is Matheson, initial A, on behalf of the Housing Industry Association.

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THE SENIOR DEPUTY PRESIDENT: Thank you, Ms Matheson. Now, I'll hear from you now, Mr Simpson.

PN18

MR SIMPSON: Thank you, your Honour. Yes, my name is Bryce Simpson, my company, Simpson Personnel, employs approximately - employs eight permanent staff over three offices in Western Victoria. We're a generalist labour hire company and have been in operation since 1996. We're generally a small family business. We hire, on the average, 200 people at any one time. It normally takes approximately three days to fully complete a payroll for these staff. Simpson Personnel is respondent to the Building and Construction General On-site Award 2010 under clause 4.1, in that it employs staff on site, mainly in the civil construction industry.

PN19

I'm seeking a variation to the award to allow payment of wages on a fortnightly basis. Simpson Personnel have generally paid its staff on a fortnightly basis since it commenced operation. This hasn't been an impost on any of our employees, we haven't had any complaints about that matter. On average, we would pay the order of 60 staff under the Building Construction On-site Award. I estimate that by having to pay these staff weekly - having to pay these staff weekly incurs the following costs: a payroll person for eight hours, about \$450, two hours for an administration person of \$100, the opportunity cost of that lost time is \$550, so it's approximately \$1100 per week extra costs.

PN20

To me, this is a large impost on any small business without any particular benefits. I don't pretend to be under (indistinct) technical legal aspects of this, I just see it as a commonsense variation to keep awards flexible, which I understand to unobjective to the modern award system. The CFMEU and the AMWU, in their objections to this variation, have not given any reasons why the application should fail, other than along some technical grounds. They have not shown that, in any way, it would disadvantage workers, they have not shown any detriment to workers by having them paid fortnightly. Thank you, your Honour.

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THE SENIOR DEPUTY PRESIDENT: Yes, thank you, Mr Simpson. Mr Calver?

PN22

MR CALVER: I think Ms Matheson was going to go first, your Honour, if that's okay with you.

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THE SENIOR DEPUTY PRESIDENT: Yes, that's fine. Ms Matheson?

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MS MATHESON: Yes, your Honour, we do also acknowledge the fact that the parties in opposition to this application do appear to be basing, I guess, their

opposition on the basis that either the applicant doesn't have standing, which I think we potentially have established there, he does seem to be an employer who is covered by the Building and Construction General On-site Award. The other aspect, I guess, of the opposition relates to the fact that there is some conception that this matter has been dealt with through the award modernisation process.

PN25

I think that it would be a little bit, I guess, naïve, if you like, to suggest that every aspect of the award would affect the terms of (indistinct) instrument, would have been considered in detail and complex debate through that process. I don't want to undermine the enormity of that process, but there are a vast range of matters that needed to be considered as a part of that award modernisation process and I suggest (indistinct) submission, they state that there - well, to the effect that there was no current opposition, or limited opposition to an inflexible provision of this nature.

PN26

I think if we were to read through all of the submissions from the employer parties during that process, we can see that there is an underlying opposition to inflexible prescriptive provisions that do have an effect upon issues such as, you know, productivity and efficiency, as well as the regulatory (indistinct) for employers, so on that basis, I am - HIA is of the belief that the application should be proceed to be heard. We do have, I guess, a technical matter that we raised initially in our submission, and that is in relation to the legislative framework which the Fair Work Act currently is operating.

PN27

You will see that section 323 of the Fair Work Act does cover provisions dealing with frequency and method of payment. Under subsection (3) of that clause, there is some ability, if you like, for a modern award to override, I guess, the methods of payment that are prescribed within the act itself. That is an express right, and while there is that ability with respect to the method of payment, we note that the act is silent on the issue of frequency of payment, and in our mind, that may be attributed to the fact that, potentially, there is no ability to override that provision of the act. We would ask your Honour to consider that initial point. If - - -

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THE SENIOR DEPUTY PRESIDENT: Ms Matheson, there is a specific provision dealing with frequency, that is 323(1)(c), "At least monthly" and almost every modern award has prescribed, having regard to the pre-modern instruments, a frequency shorter than monthly. So if your submission is correct in respect of this award, it would be correct in respect of every award, would it not?

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MS MATHESON: Yes, that's correct, your Honour.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MS MATHESON: So that is our first threshold argument. If your Honour doesn't accept that the intention of the award is to - I guess, for less flexibility to the frequency of payment provisions when compared, for example, to the method

of payment provisions, we would also ask that modern award objectives be considered, and we feel that this application really does go to the heart of those modern award objectives. In particular, the objectives that we would be looking at is the need to promote flexible modern work practices as well as the likely impact of any exercise of modern award powers of business, including on productivity, employment costs and the regulatory burden.

PN32

As the applicant stated in his submissions, he is, I guess, evidence that this inflexible provision does result in an unnecessary cost impost upon business. There is little evidence - there's no evidence brought to show how - you know, (indistinct) flexibility within this provision would result in a detriment to employees, and it would seem that the detriment is largely all one-way, and that's in respect to the cost impost upon business and the regulatory burden associated with the process and payroll administration. As the applicant did note in their submission, it is, effectively, doubling the workload with little productivity gain, and so in that respect, we would ask that your Honour do consider, in particular, subsection (f), the modern award objective, in determining this application.

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THE SENIOR DEPUTY PRESIDENT: Is there no detriment to an employee, for example, placed by Mr Simpson's organisation for three days in some week, but not the following week, to wait for the next fortnightly pay cycle in order to receive payment?

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MS MATHESON: Is it a question for myself, your Honour?

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MS MATHESON: In our opinion, we feel that the regulatory burden - you know, it's failure to proportion it from the employer's perspective, so while, I guess, that the employee may have to wait a little bit longer for the payment of wages, when we're considering figures for - like, for example, Mr Simpson, we're looking at \$1100 extra per week incurred by his business alone. If we add that up across the construction industry, that is a massive cost impost. I would have a look, your Honour, at some of the other awards, the instrument, that the other parties will identify as well, do contain these flexible provisions regarding payment of wages.

PN37

It would seem, to us, to be quite inappropriate to not, I guess, afford those same flexibilities to an industry such as the construction industry which is so highly contingent upon, you know, maintaining high productivity levels and has such a far-reaching impact not only on construction businesses within the industry, but other industries as well. If anything, I guess, trying to increase the efficiency and productivity would be more relevant to this industry than some other industries. The other - - -

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THE SENIOR DEPUTY PRESIDENT: Is there any relevance in the daily hire basis of employment?

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MS MATHESON: In that context, I think we also need to consider one of the other public party's submissions where, under the new modern awards daily hire is not the only method of engagement or basis for engagement.

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THE SENIOR DEPUTY PRESIDENT: No I'm not - - -

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MS MATHESON: (indistinct)

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THE SENIOR DEPUTY PRESIDENT: Yes. Sorry, did you say daily hire? I - - -

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MS MATHESON: Yes.

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THE SENIOR DEPUTY PRESIDENT: Yes, okay. Go ahead.

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MS MATHESON: Sorry. We also have a weekly hire option of engagement and I think that does recognise the fact now that there are, you know - there is some ongoing employment in the - anticipated in our industry, so to that end, I think, you know, there has been a change in the award and that should be considered as well, so potentially historical provisions that have been in there through, you know, agreements resulting from industrial disputation made which should be revisited in the context of these newly created, or newly available options for engagement under the modern award.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR SIMPSON: Your Honour, can I speak to the - - -

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THE SENIOR DEPUTY PRESIDENT: Well you hold on and we'll hear from everyone else and then I'll hear from you again. Can I ask you, Ms Matheson, what's - this is an industry in which award reliance, and therefore the application of the award, is relatively limited and that arises from material within minimum wage fixing cases over a long period of time. What, on your understanding of the arrangements for payment of wages under enterprise agreement?

PN49

MS MATHESON: Enterprise agreements in our industry - I can, I guess, comment first-hand on any agreements that we have been involved in the drafting of, from HIA's perspective. With flexibility, in terms of payment of wages, is one of the areas where our members are seeking flexibility, if you like. One of the reasons for that, as well, is because they are not only engaging under the Building and Construction - or (indistinct) the Building and Construction General Industry

State Award equivalent pre-reform or pre-modernised instruments, but they were engaging under, I guess, a vast range of instruments, including clerical instruments that did have more flexible provisions regarding payment of wages.

PN50

So to that extent, they were looking to streamline - or have been looking to streamline the method for payment of wages so that it is consistent across their entire workforce, and obviously from an efficiency perspective, the preferred way to pay wages was on a fortnightly basis in most cases.

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THE SENIOR DEPUTY PRESIDENT: Do you have any - - -

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MS MATHESON: I'm not saying - - -

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THE SENIOR DEPUTY PRESIDENT: Do you have any understanding of what provisions are actually within agreements approved?

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MS MATHESON: Yes, well - many of the pre-modernised Australian workplace agreements and individual agreements did contain provisions allowing for fortnightly payment. That was one of our considerations in our modern award submission, was that we were trying to encompass some of those flexibilities in our drafting of an award that were existent in negotiated workplace - or collective agreements. So we've flowed on, I guess, that provision into our draft modern award so that payment - or requesting that payment of wages be allowed on a fortnightly basis, as you will see in that model clause of our draft modern award.

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THE SENIOR DEPUTY PRESIDENT: Yes, but you don't have any information on the general provisions which appear in agreements approved?

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MS MATHESON: No. I can give you specific statistics, but I can comment with, you know, quite a bit of certainty that this was one of the provisions that was usually removed from the agreements, where they weren't union negotiated agreements.

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THE SENIOR DEPUTY PRESIDENT: Yes, thank you. Yes?

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MS MATHESON: That's probably all I have to say for the time being, your Honour.

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THE SENIOR DEPUTY PRESIDENT: Very well, thank you. Whoever is next on the order - the running sheet that seems to have been discussed, should proceed. Who's that? Is that you, Mr Calver, now?

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MR CALVER: That's right. I just had a discussion with HIA - - -

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR CALVER: - - - your Honour.

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THE SENIOR DEPUTY PRESIDENT: I'm not being political and if - - -

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MR CALVER: No.

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THE SENIOR DEPUTY PRESIDENT: - - - there's been some discussion and - - -

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MR CALVER: It's because of the distance.

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THE SENIOR DEPUTY PRESIDENT: - - - I'm happy to accommodate it.

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MR CALVER: Yes. Thank you, it's because of the distance we were apart that we decided to do it that way. If it pleases the tribunal, you've received two submissions from Master Builders on this application and, obviously, you rely upon those submissions.

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THE SENIOR DEPUTY PRESIDENT: Yes.

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MR CALVER: The essential issue is that, in Master Builders' submission, the building and construction industry, as epitomised in clause 31 of the Building and Construction General On-site Award 2010, has an inflexible (indistinct) prescriptive provision concerning the payment of wages. That point is made stark when provisions are compared with the mining and manufacturing industry provisions, and that's an issue set out, paragraphs 2.3 to 2.5 of the Master Builders' supplementary submission in this matter. I also have something more to say about that in analysing another building industry award in a few moments.

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THE SENIOR DEPUTY PRESIDENT: Yes.

PN72

MR CALVER: Master Builders has always maintained that the payment of wages provision is inflexible and overly prescriptive. We renew and re-emphasise that proposition today. Clause 31, in fact, contains a punishment, in clause 31.5, which is associated with the payment of wages, otherwise in accordance with its scriptures, a penalty provision operates. We do not believe that that is an appropriate provision in respect of a safety net in an employment contract and, as articulated in our written submissions to the commission, we believe that it would be excluded, as a penalty, from the normal contract.

PN73

We believe that that penalty provision offends the notion of equity and good conscience that underlines the work of this tribunal, in accordance with section 578(b) of the act and under the predecessor provisions of its prior emanations. We urge the tribunal to amend clause 31 and to replace it with provisions which are, in accordance with the modern award objective, concerned to promote flexible modern award practices. We have heard today from a courageous applicant. The applicant is courageous because its managing director comes to the tribunal with the knowledge that a very large contingent liability is potentially accruing because of the simple fact that it has, and wants to maintain, payment of wages fortnightly.

PN74

As expressed by the applicant, that is not detrimental to employees. If the cycle of wages has been fortnightly, it should be able to be maintained. As of 1 January 2010, nothing happened to businesses like the applicant's, which suddenly meant that prescription should descend from the sky. Other sectors have the flexibility sought. There is nothing about the building and construction industry sector in today's environment that warrants the inflexibility that, through the tentacles of history, so tie up clause 31. If we look at the manner in which we approach this issue in the modern award process, Master Builders put to the then commission, a provision which was clause 16 of our draft award which went to the full bench, which was two paragraphs very much aligned to the Mining Industry Award.

PN75

Now the CFMEU, in its submission, has taken us through some of the detail of the making of the award. I reiterate that Master Builders has consistently maintained that clause 31 is overly prescriptive, and the matter today should be considered on its merits having regard to that proposition. The full bench quotation that appears in clause 3.10, your Honour, of the CFMEU's submission, says that very thing: "Applications to vary the substantive terms of modern awards will be considered on their merits". That's the opening proposition with a full bench. Accordingly, everything about process that the CFMEU has said, is merely a precursor to the consideration of this matter on its merits.

PN76

Apropos that proposition, your Honour, in any event, the only reference to the full bench considering payment of wages provisions, in its critical decision of 3 April 2009 - that is 2009 ARC FB 345, and if I was there, your Honour, I would hand up the case, and I'm sorry that the distance is one of tyranny - is where, at paragraph 126, the full bench said:

PN77

We have included a payment of wages provision in respect of the Mobile Crane Hiring Award 2010. We have included a payment of wages provision which simplifies the current, overly prescriptive provision, although not to the full extent suggested by the AI group, CICA.

PN78

And then, when you go to the Mobile Crane Hiring Award 2010, the full bench determined that wages could be paid either weekly or fortnightly. So the only time, the only evidence that we have that the full bench turned its mind to this matter, is in labelling a similar provision, in the same manner that Master Builders

labels it, as, "Overly prescriptive", and there was a change. Now, there is nothing elsewhere, in any of the evidence that surrounds this matter, that the full bench turned its mind to a payment of wages provision other than in respect of the Mobile Crane Hiring Award 2010.

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THE SENIOR DEPUTY PRESIDENT: Did you recall what was in the Mobile - the pre-modern Mobile Crane Hiring Award?

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MR CALVER: I don't have it with me, your Honour, I only discovered that this morning, but if your Honour wishes, I can undertake to provide that to you.

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THE SENIOR DEPUTY PRESIDENT: Yes, thank you.

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MR CALVER: Thank you. So we say that the provision in the Mobile Crane Hiring Award 2010 reinforces that the full bench did not turn its mind to the similar representations about payment of wages in the order sectoral awards. It seems difficult to believe that the full bench would label one clause, from one sectoral award, as, "Overly prescriptive", permit it to be changed and then have provisions that are anti-diluvian, and provide a penalty which would be against common law principles in the other sectoral awards. We do not believe that that is a matter which should be approached in that way, because it offends against equity and good conscience.

PN83

Change to at least emulate the Mobile Crane Award is sought and, your Honour, I would have reinforce the fact that the industry is speaking through a courageous applicant and we fully endorse his application. To the extent that we are prepared to stand in his shoes on the issue of standing proves to be a consideration that would exclude the application, if it please the tribunal.

PN84

THE SENIOR DEPUTY PRESIDENT: Yes. Mr Calver, the variations can be only made if necessary to achieve the modern award's objective. What element of that are you relying on in the - - -

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MR CALVER: Your Honour, we articulated this quite - in detail, in the supplementary submission - - -

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THE SENIOR DEPUTY PRESIDENT: Yes.

PN87

MR CALVER: - - - that was lodged to assist parties today, because with the tyranny of distance, it is quite difficult to follow oral submissions. You will see that in that submission, we outline a number of points of the modern award objective set out in section 134. One of the points that we take the tribunal to, in section 134, is that it not only needs to be a fair safety net, but a relevant safety net, and we think that the historical burden of providing a penalty to payment of

wages, to the extent expressed in the award, is not relevant for modern circumstance.

PN88

That is particularly the case, having regard to all of the legal cases that relate to the exclusion of penalties from otherwise that - employment contracts where the safety net would have been adopted, and that we say that that offends against the principles identified by the High Court in the case in which I cite in the first written submission we put. So they weren't relevant in section 134(1). We say also that section 134(1)(d) is absolutely critical in the current context.

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THE SENIOR DEPUTY PRESIDENT: How so?

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MR CALVER: It says that there is a need to promote flexible modern work practices, and the efficient and productive performance of work.

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THE SENIOR DEPUTY PRESIDENT: Well the payment of wages - - -

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MR CALVER: (indistinct)

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THE SENIOR DEPUTY PRESIDENT: The payment of wages doesn't affect work practices or the performance of work, does it?

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MR CALVER: We would say that it is necessary to have flexible modern work practices, including - as they relate to the administration of that work, your Honour, and that seems, to us, to be the reason that the provisions of the mining award and the manufacturing award are in our supplementary submission, and which are a world away from that which is contained in the Building and Construction General On-site Award should be emulated in our award. The opportunity costs that the applicant spoke to you about is absolutely essential to small businesses. Yes, the higher the administrative burden, your Honour, the less likely is there to be efficient and productive performance of work, and that is one of the issues that we underline in the submissions that have been made to you today, your Honour - - -

PN95

THE SENIOR DEPUTY PRESIDENT: I'm sorry, I don't understand it. I don't see how payment of wages affects work practices or efficient and productive performance of work at all. I can understand the cost issue and regulatory issue raised by Mr Simpson would raise issues in terms of section 134(1)(f), but I can't see the relevance to (d) at all.

PN96

MR CALVER: Well, if you're a small business person, the higher the administrative burden and the greater time that you spent on the administration of work practices, that is, the payment of your workers and the ordering of their work, the less time you have to spend on the work that is central to the tasks that are being undertaken, your Honour. That's the point we make, that if I am having

to spend an extra number of hours a week, for example: those articulated by the applicant, I don't have the opportunity to apply myself to other aspects of my work.

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THE SENIOR DEPUTY PRESIDENT: Well that - - -

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MR CALVER: In that sense - - -

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THE SENIOR DEPUTY PRESIDENT: That goes to employment costs and regulatory burden, rather than work practices and the performance of work, does it not?

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MR CALVER: Well we would say that it is more flexible, in a modern work environment, to enable fortnightly payment of wages with the ability to provide resources to work, so we would say, with respect, your Honour, that it is a provision upon which we could rely, and we do take the point that you've made in relation to costs and in relation to the regulatory burden on business, which is mentioned in section 135 - 134(1)(f), "The likely impact of the exercise of modern award powers on a business, including on productivity and employment costs and the regulatory burden".

PN101

If we're talking about regulatory burden, that is right in the eye of this particular storm, and the obvious issue in 134(1)(h) is that, if - as is outlined by the applicant, if it impacts upon his competitiveness at the micro level, you magnify those particular effects to the national economy by the number of small businesses and this industry has (indistinct) small businesses, so that, also section 134(1)(h) can be invoked, if it pleases the tribunal.

PN102

THE SENIOR DEPUTY PRESIDENT: Yes, thank you, Mr Calver. Ms Blades?

PN103

MS BLADES: Thank you, your Honour, I'll be very brief. AFEI apologises for the late submission made on this particular matter. We are here today to support the application made by Simspsons Personnel. We rely upon our submission in this matter. Concerning what has been said today and certainly in the written submissions as my colleagues from the HIA and MBA, AFEI supports their position. Just briefly, further to our submission, in pointing towards the particular clauses in those two NAPSAs that we have identified that have greater flexibility in their payment arrangements. If I could point the tribunal in Plant, &C., Operators on Construction (State) Award to clause 28, and in terms of the General Construction and Maintenance, Civil and Mechanical Engineering, &C. (State) Award to clause 30.

PN104

We only get a cursory look at the awards but greater flexibility existing that - we are certainly able to identify those two and the awards covering landscape gardening in South Australia and Western Australia which are now covered by this particular modern award, if the tribunal pleases.

PN105

THE SENIOR DEPUTY PRESIDENT: Yes, thank you, Ms Blades. Mr Maxwell?

PN106

MR MAXWELL: Thank you, your Honour. Your Honour, I forgot to - but I shall also make an appearance on behalf of the AMWU who asked me to appear on their behalf. Your Honour, the CFMEU and AMWU have made written submissions in response to this application and we rely on those written submissions. In regard to some of the additional matters that have been raised, perhaps if I can deal with this issue about fairness and about (indistinct) I've heard a lot today about the increase in costs to the employer of going from weekly pay to fortnightly pay. While I point out that (indistinct) costs on, say, for employers if they had to pay weekly rather than fortnightly.

PN107

There is also a cost (indistinct) for employees that are currently paid by weekly pay, if they are then paid fortnightly pay. That is a loss of interest on earnings, that they are - the cost on re-arrangement of their billing arrangements and so forth. But more important, in terms of the construction industry, is that, as you will be aware from your long involvement in dealing with matters in the construction industry, unfortunately, the industry has a significant problem with companies going into administration and receivership. You only have to look in the papers daily to see the large number of companies that go bust that owe workers' entitlements.

PN108

There have been two recent cases in New South Wales in terms of (indistinct) and another company, where those companies have gone into receivership, and not only are contractors and suppliers owed money, but a significant number of employees in the industry are owed money, and if we move the situation of weekly pays to one fortnightly pay, that situation is likely to be exacerbated. We point out in regard to the consideration of the various awards, there's a significant difference between the construction award and mining award and manufacturing award, and that is, that if, under the construction award, by and large, employment is daily hire.

PN109

We know that there is some weekly hire employment but, by and large, the employees are engaged daily hire and casuals are engaged by the day, and we say (indistinct) employee who works for two days as a casual, to then wait another 10 to 12 days for the payment of their wages, and we would oppose this on those grounds. Your Honour, the HIA, in their submission, has referred the tribunal to section 323 of the Fair Work Act which has a provision that wages must be paid at least monthly. We know that the provisions of the legislation are silent in regard to the other issue - or, the specific issue of frequency of payment.

PN110

Your Honour, we would point the tribunal to the explanatory memorandum for the Fair Work Bill 2008, and in particular, paragraphs 1279 and paragraphs 1280, and on page 205 of the explanatory memorandum, there is a provision on that page - sorry there is - the explanatory memorandum on that page deals with the issue of payment of wages and in paragraph 1279, they deal with subclause 32.31

and set out what the requirements are of that paragraph. However, in paragraph 1280, the explanatory memorandum states as follows: "A modern award, enterprise agreement or contract of employment may provide for more frequent payment."

PN111

So I'll reiterate, in regard to the submissions of the HIA, in regard to the provision of clause 323 of the Fair Work Act, it is quite clear from the explanatory memorandum that the intent of the legislators was that the modern award could override that provision in regard to the frequency of the payment of wages. Your Honour, if I can then briefly deal with the submissions of the AFEI, we note that they have referred the tribunal to two NAPSAs from New South Wales, at which they state that the frequency of payment provisions are, I suppose, more liberal, for want of a better term.

PN112

We note that neither - sorry, the provisions in neither of those awards actually state that payment may be made fortnightly or monthly or by any other provision. Employer says that the wages must be paid on the pay day. Your Honour, if I can then deal with the submissions of Master Builders Association, and I must point out that I'm somewhat disappointed that the approach that appears to be taken by the MBA in this matter, because we would suggest that it's nothing more than an attempt to hijack the application by the Master Builders Association to deal with a matter that is not sought to be dealt with by the application itself.

PN113

My understanding of the application made by Simpson Personnel was that they sought a provision that allowed for fortnightly pay. When you look at the submissions of the Master Builders Association, the overwhelming majority of their submission do not deal with the issue of fortnightly pay, it deals with the penalty that is paid for when wages are not paid, in particular paragraph - sorry, clause 31(5) of the modern award. We say, to the extent that their submissions deal with that matter, that those submissions should be disregarded in regard to this application.

PN114

The other point we would make in regard to the submissions of Master Builders Association, who seek to rely on the proposal that we should somehow adopt the payment of wages clause in the mining award. We would point out in their supplementary submission, made on the - we received notice of it yesterday by way of the email service from Fair Work Australia, but in paragraph 2.2 of that supplementary submission, the MBA referred to paragraph 5.8 of their explanatory memorandum, which deals with the (indistinct) safety nets of terms and conditions for awards, and it states that:

PN115

In ensuring that the minimum safety net of terms and conditions is relevant, it is anticipated that Fair Work Australia will take account of changes in community standards and expectations, and that the terms and conditions will be tailored as appropriate to the specific industry or occupation covered by the award.

PN116

So it points out that it is quite clear from the explanatory memorandum that the modern award terms were to be tailored specifically for the industry that they were dealing with. In this case, we are dealing with the building and construction industry, we are dealing with an industry that's predominantly daily hire, we are dealing with an industry where there is a high percentage of failures of businesses in the industry, and, therefore, it would be quite justified for having a separate payment of wage provision, as compared to that contained in the mining award or the manufacturing award.

PN117

Your Honour, it's not to say that we do not have any sympathy for the position of Mr Simpson and his company, although we note that, whilst he states that he only has eight permanent employees, we would say that any company that is hiring 60 employees just for the construction industry when a generalist labour hire company would not necessarily fit into the category of small business, that has now been adopted, generally, in terms of the entitlements of employees. So we say that there are options for the company to deal with their situation, that they - sorry, there is availability of entering into a collective agreement with their employees, and we believe that that would be the appropriate way of dealing with this situation.

PN118

But we would note that, at least there is then a general requirement under the provisions of a collective agreement, but while the employees must generally agree to the provision, and secondly, that the employees are not disadvantaged, so we say that (indistinct) would offer the protection for the employees that, we say, would not be allowed by altering the provisions of the award. Unless there are any questions, your Honour, they are the submissions we wish to make today.

PN119

THE SENIOR DEPUTY PRESIDENT: I do have a question, could you bear with me one moment. The question goes to the issue of spanning of the applicant - Simpson, to bring the application. In my understanding, and, Mr Simpson, you'll correct me if I'm wrong, your eight permanent employees are not labour hire employees working out in the field, they're the - - -

PN120

MR SIMPSON: They're my - - -

PN121

THE SENIOR DEPUTY PRESIDENT: Arrange the - - -

PN122

MR SIMPSON: They're my consultants and admin staff.

PN123

THE SENIOR DEPUTY PRESIDENT: They're the consultants, and they're not covered by the Building and Construction General - - -

PN124

MR SIMPSON: No, that's correct.

PN125

THE SENIOR DEPUTY PRESIDENT: - - - On-site Award? Okay, and the question, therefore, Mr Maxwell, goes to coverage. Does that not arise by way of the labour hire provision that was placed in awards?

PN126

MR MAXWELL: Your Honour, it does, and - to the extent that Mr Simpson can provide some evidence to the commission that they actually have employees covered by this award on that, so to speak - that they - we (indistinct) that they (indistinct) by the tribunal. We do not press that submission.

PN127

THE SENIOR DEPUTY PRESIDENT: Yes. Very well, thank you. Okay, Mr Simpson, did you want to say something?

PN128

MR SIMPSON: Thank you, your Honour. Just on the couple of questions - regarding no detriment to employees: although, certainly in my business, my staff are predominantly not daily hire. We have two contracts, one was (indistinct) company Sprayline and these people are employed on a seasonal basis, on a weekly - well, an ongoing basis, if you like. They're certainly labour hire staff, but they're not employed on a daily basis. These people - - -

PN129

THE SENIOR DEPUTY PRESIDENT: Are they employed as casuals? Or - - -

PN130

MR SIMPSON: They're paid at the casual rate, certainly.

PN131

THE SENIOR DEPUTY PRESIDENT: So they're employed daily, in fact?

PN132

MR SIMPSON: Yes. No, I guess they are, but with the expectation that there's ongoing work.

PN133

THE SENIOR DEPUTY PRESIDENT: Yes.

PN134

MR SIMPSON: Up until recently, we have employed - sorry, we have paid all our staff on a fortnightly basis. We have not had any employees put to us that they would love to get paid on a weekly basis because it's causing them some financial difficulty or causing them some harm. Of the odd occasion, we had people starting work who are short because Centrelink removes their benefits or whatever, and in that case we're happy to advance them and that sorts itself out. I think - companies going into receivership, I think that's not peculiar to the construction industry, that's something that happens in businesses all over, and I think weekly or fortnightly wages is not going to make a great deal of difference to that scenario.

PN135

Sorry, one other thing on the fortnightly/weekly - our daily hire arrangements - our hire arrangements: if the award was varied to allow that flexibility, then certainly inside agreements for construction sites, it can be agreed to pay the daily

hire people on a weekly basis and the more permanent staff on a fortnightly basis, it allows flexibility. This current clause doesn't allow that flexibility at all, and it is a large impost on a small business and we're still defined as a small business. Our labour hire staff are our stock in trade, they're not our employees, for that matter.

PN136

Collective agreements don't generally work for a generalist labour hire company. We're obliged to pay what our clients wish to pay the staff that work for them, provided they've met the minimum award requirements, we can't go in to our clients and say, "Sorry, we have a collective agreement with this staff, we're going to pay them that". They'll say, "Well sorry, that doesn't suit our work practices, go away". So collective agreements don't generally work for generalist labour hire companies. I think Mr Calver's point on modern work practice - I think what he was trying to say was that paying fortnightly is our modern work practice, it's a practice that allows some economies of scale where weekly payments double the costs for no extra benefit - well, I think monthly - paying people monthly tends to stretch it out, makes it very difficult - - -

PN137

THE SENIOR DEPUTY PRESIDENT: Well that's work practices of your consultants and administrative staff, it doesn't - - -

PN138

MR SIMPSON: Yes, (indistinct)

PN139

THE SENIOR DEPUTY PRESIDENT: - - - the work of the - - -

PN140

MR SIMPSON: Yes, I think that's what he was telling - (indistinct)

PN141

THE SENIOR DEPUTY PRESIDENT: Yes.

PN142

MR SIMPSON: I'll take that point. Yes, so I - as I say, I don't - I haven't had anybody say to me, "I would love to get paid weekly because I'm finding this to my detriment", and there's certainly ways to - where you've been paying weekly and then bringing in fortnightly, there's certainly ways to overcome any financial difficulties there and that's been done in previous occasions where businesses have gone from weekly to fortnightly, that's not a major issue. Thank you, your Honour.

PN143

THE SENIOR DEPUTY PRESIDENT: What award were you paying in?

PN144

MR SIMPSON: Most of those would be under the AWU Construction and Maintenance Award.

PN145

THE SENIOR DEPUTY PRESIDENT: What does that provide for, in terms of - - -

PN146

MR SIMPSON: That provides for an alternative arrangement. I actually think, and I've got the - - -

PN147

THE SENIOR DEPUTY PRESIDENT: It's in the - - -

PN148

MR SIMPSON: Yes (indistinct) nothing should prevent an alternate mutual arrangement between employer and employee. That's clause 22 out of that award.

PN149

THE SENIOR DEPUTY PRESIDENT: 22.25?

PN150

MR SIMPSON: 22.25, that's the one.

PN151

THE SENIOR DEPUTY PRESIDENT: Mr Maxwell characterises that as not being at large relating to clause 22.2.4 and the (indistinct) that a holiday clause - - -

PN152

MR SIMPSON: I don't think - it would be 22.2.4.1 then, I would think? 22.2.5. To me that's the subset of the whole 22, so - 22.2, so it's a subset of 22.2 which is titled payment. "Nothing shall prevent an alternative mutual arrangement between an employer and employee", and that does encompass his labour - his daily hire people, if that's the arrangement, it wants to be for a particular work situation and that could be the arrangement. But fortnightly (indistinct) flexibility for ongoing more permanent employees. We have eight people who work for a particular employer and they are, effectively, permanent employees, they work 52 weeks a year right through, so they're not - and (indistinct) people, they generally work full-year, Sprayline guys work October to May, because once you get past - into cold weather, they can't work, but they work full-time right through that period as well. So they're not, certainly - - -

PN153

THE SENIOR DEPUTY PRESIDENT: If 22.2.5 was read at large, that would allow agreement between the employer and employee to do anything in respect of the payment of wages, but - - -

PN154

MR SIMPSON: I agree.

PN155

THE SENIOR DEPUTY PRESIDENT: - - - there would be no restriction, whatever.

PN156

MR SIMPSON: I think that that's probably not unfair in that it has to be mutually agreed, certainly, but very few places, other than a senior-executive type role is paid within past fortnightly - it's usually weekly/fortnightly, occasionally monthly for the more executive roles - - -

PN157

THE SENIOR DEPUTY PRESIDENT: Yes.

PN158

MR SIMPSON: - - - but not very often.

PN159

THE SENIOR DEPUTY PRESIDENT: Well it could purport to allow payment in breach of section 323 of the act, that is more than a fortnight - more than monthly.

PN160

MR SIMPSON: More than monthly.

PN161

THE SENIOR DEPUTY PRESIDENT: Yes.

PN162

MR SIMPSON: But then - but there's the act, which prevents that happening, wouldn't it?

PN163

THE SENIOR DEPUTY PRESIDENT: Mr Calver, do you have any submission on that interpretation of the existing instruments point?

PN164

MR CALVER: We have referred to that clause in our written submission to your Honour, we believe that it is able to be interpreted that the arrangements of the (indistinct) can be made other than in respect of the limit that Mr Maxwell puts on it.

PN165

THE SENIOR DEPUTY PRESIDENT: That is relating to holidays falling on the Thursday or Friday.

PN166

MR CALVER: Yes, we believe that it has a broader application (indistinct)

PN167

THE SENIOR DEPUTY PRESIDENT: It would be - - -

PN168

MR CALVER: (indistinct) - - -

PN169

THE SENIOR DEPUTY PRESIDENT: - - - entirely (indistinct) if that were the case, would it not, Mr Calver? An agreement could be made for any arrangement for time of payment. An agreement could be made that payment will be made six months after the work is done.

PN170

MR CALVER: Well, your Honour, I don't believe that such arrangement has been made in respect of that award, but I don't think that it was used other than to alter the period of wage payments, in our experience. I must also, if your Honour doesn't mind, correct the record - - -

PN171

THE SENIOR DEPUTY PRESIDENT: No.

PN172

MR CALVER: In respect of Mr Maxwell's statement that casual employees are normally paid by the day. In fact, casual employment is engaged on an hour-by-hour with the minimum is four hours at clause 14.4 of the award. At the time of engagement, clause 14.3, requires an employer to inform the employee in writing the status of employment for casual, by whom the employees would be employed, the job to be performed in what classification level and the actual likely number of hours to be worked and the relevant rate of pay. So in practice, now with the modern award and, in particular, reinforcing that, we're having casuals engaged for a likely period of work with a minimum of four hours' engagement.

PN173

So with respect to my colleague, that is what the award says, not an engagement by the day which would make them similar to daily hire employees. We also say that the matter that Mr Maxwell alluded to as the daily hiring casuals, might have a period shorter than a fortnight, could be quite easily dealt with if there is requirements to pay on this engagement or termination, incorporated into clause 31, and that would be a much simpler way to deal with it than have an overly prescriptive payment as the full bench labelled it in the pre-current Mobile Crane Hiring Award, if the tribunal pleases.

PN174

THE SENIOR DEPUTY PRESIDENT: Anything further from anyone? Very well. I'll reserve my decision in this matter and now adjourn.

<ADJOURNED INDEFINITELY

[3.00PM]