



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

1058479

**JUSTICE ROSS, PRESIDENT**

**AM2020/103**

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

**Application by  
(AM2020/103)  
Hospitality and Retail Sectors**

**Hospitality Industry (General) Award 2020**

**Melbourne**

**9.30 AM, THURSDAY, 4 MARCH 2021**

PN1

JUSTICE ROSS: Good morning. I see we've got Mr Ryan from the AHA and Mr Redford from the UWU. We've also had requests from a number of journalists to attend the conference. Is there any objection to that course from either you, Mr Ryan or you, Mr Redford?

PN2

MR P RYAN: No objection from the AHA, your Honour.

PN3

MR B REDFORD: No, your Honour, no objection.

PN4

JUSTICE ROSS: Thank you. Can I cover off on some information that's been posted on the website relating to the hospitality matter. The first is correspondence received from the Attorney-General's Department on 25 February which deals with an arbitral history of exemption rates, and where those rates operate presently in awards, and there is also correspondence from the department of 26 February dealing with the earnings of chefs relative to the award minimum rates, and some information on juniors in the hospitality sector.

PN5

The second or the other matter posted on the website is a report prepared by Commission staff setting out an analysis of the survey for the Hospitality Award Junior Employees. Can I touch on that matter first? I know it's only recently been published, so you may not have had an opportunity to read it closely, but in the event that either of you seek more analysis of the results, or some more information based on the results, if you can contact my Chambers and we'll make sure that that's done.

PN6

Can I go - well, either of you, to just provide an update as to where your discussions have arrived at, and where you see the future course of this matter. Mr Ryan?

PN7

MR RYAN: Thank you, your Honour. By way of an update, and dealing with the four aspects to our proposals that were filed in the Commission back in January, firstly, the survey analysis document for the junior employees survey confirmed what we understood would be the level of employment for junior office employees in the industry.

PN8

I note that there is about 146 responses, but looking at the size of at least the largest employer there having 16,200 employees it does, in my view, and using our experience, cover probably a large number of venues in the industry which would be, we would think, getting into the vicinity of around about 10 per cent of venues that are members of the AHA or hotels across Australia.

PN9

Having said that, and going back to the earlier conferences where there has been some questions of work value, despite there being a low number of junior office employees we would not be seeking to push the junior rates aspect unless there was a consent position. We don't want to get into a work value issue, and we certainly don't want a position to have consequential impact on other awards from a work value perspective, so unless that were consent for this arrangement, we'd be seeking to withdraw that at the appropriate time.

PN10

JUSTICE ROSS: Thank you.

PN11

MR RYAN: I'll leave the hours of work arrangements and the late night penalties to Mr Redford to comment on. But moving to the loaded rate scenarios, following the last conference before the Commission, Mr Redford and myself had a very productive meeting with the Fair Work Commission staff who prepared the BOOT analysis document of the loaded rate scenarios. That was important because it gave us some further insights in relation to some of the concerns which were raised in that document.

PN12

Since that time I have been working on tweaking our loaded rate scenarios and the parameters and the machinery provisions. We haven't been able to get that to an advanced stage to share with Mr Redford at the moment, so what we would be seeking today is that whether we could have a period of seven to 14 days at which case we would then file a draft determination on what we would be advancing in our right, or a draft determination that was by consent. But we think if we can have that seven to 14 days that would give us an opportunity to finesse the parameters, finesse what's in and what's out, and have further discussions with Mr Redford of UWU.

PN13

JUSTICE ROSS: Thank you, Mr Ryan. Mr Redford?

PN14

MR REDFORD: Yes, your Honour. Look, firstly, in relation to the junior rates proposal, I unfortunately didn't have an opportunity to see the survey results until just a moment ago. Mr Ryan was good enough to send me the report, and I thank him for that.

PN15

On a quick reading though, your Honour, what the report appears to confirm is that junior employees working in hospitality venues in a clerical position do indeed exist. They represent a small proportion of the workforce but they exist.

PN16

The proposal that's been put would, subject to transitional provisions, provide that those junior employees would in an overall sense be paid less for the work they do than they are now. The UWU has adopted a threshold position in relation to this proceeding that no worker be worse off as a result of any proposed change, so we're not prepared to consent to this proposal.

PN17

In relation to the proposal that's been made about the ordinary hours of work, we're comfortable to continue to have discussions with the AHA about this proposal. And I must say, your Honour, that the discussions that we have had on all of these matters have, over the past few weeks, been good discussions and productive discussions, so we're happy to continue those in relation to this proposal.

PN18

But we are concerned about the implications of this proposal in that it also may have some potential for workers covered by the award to suffer detriment. And what we're particularly concerned about is the loss of daily hourly limits. So, you know, for example, the award envisages a situation in which a worker could work four days at 9.4 hours a day. Now, if that worker is currently occasionally staying back and working beyond 9.5 hours a day they are earning overtime as a result, and the removal of these daily hourly limits from the clause would potentially cause that hypothetical worker some detriment. We're concerned about that, but, as I said, happy to continue the discussion.

PN19

The other proposal that's been put is in relation to what the award says about penalty rates, and whether or not, in effect, the dollar amount provided for in the award in relation to a penalty rate is payable on a pro rata basis for part hours worked, or on an entire basis for a part hour worked.

PN20

Your Honour, in relation to that the concern we have about the proposal is that on our reading of the award the provision seems fairly clear, and that is that a worker covered by this award who works a part hour that would attract a penalty is entitled to the entire dollar amount penalty for that hour, and so we are not prepared to consent to this proposal because again the result would be that workers who are currently entitled to full penalty for that hour worked would lose that entitlement.

PN21

JUSTICE ROSS: I suppose, Mr Redford, an issue will arise about if that's the correct interpretation then what's the merit basis for that proposition? In circumstances where it's a, in essence, a disutility type of penalty why would someone who is exposed to the disutility for half an hour receive the same amount as someone who's exposed to the disutility for a full hour? I understand it's an existing award provision, and I understand that it's been in the award for a considerable period of time. It's really that it does seem curious that it would operate in that way.

PN22

MR REDFORD: Yes, your Honour, I accept that. And that undoubtedly in addition to our sort of exploring the history of the creation of the award and its predecessor would no doubt be central to the argument if this proposal is advanced. But in terms of sort of the fundamental proposition I think which is being put to the union, which is whether or not the union would consent to this change, where on its face it appears to remove an entitlement, if I can put it that

way, to the detriment of employees who are currently receiving it, which I'm instructed exist, that is, employees who are currently receiving under this award the whole penalty for a part hour worked, you know, the union's position is not to consent to such a change.

PN23

JUSTICE ROSS: All right.

PN24

MR REDFORD: The final matter, your Honour, was in relation to loaded rates, and we are comfortable with the position put by the AHA, that is, that some more time would be beneficial to continue to work on the proposal and now continue to discuss, and we're comfortable to continue with those discussions. We had the benefit of the analysis that the Commission prepared and also meeting with the analysts, which was a good meeting.

PN25

An observation, your Honour, from the union's perspective, based on that analysis it seems clear that on the current proposal, your Honour, the percentage loadings are too low, and would need to be increased. But possibly even in addition to that that the parameters surrounding the application of the model or models would also need further work, such that the model can't be applied unless certain parameters are met. And then even then, your Honour, it's possible, based on the report prepared by the Commission's analysts, it might even still be necessary for there to be some sort of a reconciliation mechanism in the model, which I understand the AHA is not supportive of and I understand why.

PN26

I also, your Honour, still don't entirely understand how a worker and an employer would determine whether that hypothetical worker would be on model 1 or model 2 or model 3 or 4, 5 or 6, whether this would be by agreement, whether the applicable model could be adjusted to take into account change in circumstances, et cetera.

PN27

So I just make the general observation, your Honour, that if the exercise was to look at what is said to be complexity in the award we are concerned that we'll inadvertently arrive at a position where we've not improved complexity, and maybe the award would be even user friendly but in fact made it even more complex to apply.

PN28

So, as I said, we're happy to continue to be part of the discussion, but I suppose we express that concern, your Honour, about where the proposal seems to be heading.

PN29

JUSTICE ROSS: Was there anything you wanted to say in reply, Mr Ryan?

PN30

MR RYAN: Your Honour, look, we appreciate that the scenarios do need some finessing. We don't necessarily agree with the observation that the percentages need to go up. It would be dependent upon the inclusions which the loaded rate compensates for, and the parameters which that work can be worked within.

PN31

In relation to the reconciliation issue, as previously - we put this previously at an earlier conference, we don't see this working with a reconciliation because of the existing annualised wage arrangement provision in the award whereby that permits the employer and the employee to come to a custom or bespoke arrangement in relation to that employee's work, and that has all the protections and safeguards.

PN32

We note the existing provision in the Hospitality Award is still subject to final determination by the Commission as part of the four-yearly review of modern awards, so that is the intention with these arrangements is to strike a balance were the parameters were for small to medium enterprises easy to implement cover the majority or the main penalty rates and allowances that would apply.

PN33

We have kicked this off with a focus on chefs, but we think they can be applied. But the more adjustments that might be needed to cover a broader range of allowances or penalties then removes any buffer needed, so it's about - there is sort of a working up and down in trying to strike this, and we've also been looking at how an employer's payroll cycle might affect it from when overtime might apply.

PN34

So that is the, I suppose, the prism that we're looking at this through. It may be that to reduce complexity we have only four proposals, a Monday to Friday proposal, and a Monday to Sunday proposal, 40 and 45. However, we would see the employer and the employee getting on and off these arrangements similar to - if I can say, similar to an IFA, but perhaps different with the timeframes and things, that might come with moving on and off. But this would be an alternative arrangement to paying the wages and allowances that otherwise apply in the award if that work falls within those parameters.

PN35

I suspect, and from discussions I've had, they aren't going to be used by large employers that have sophisticated time attendance systems. They will stick with the annualised wage arrangements to bespoke. This is more so targeted at those small to medium enterprises where the owner/operator is usually doing the payroll as well, and to make it easy for them and easy for the employee to understand.

PN36

JUSTICE ROSS: If I could just make the observation that I think it's correct that the various elements are inter-related, that is, the extent of the loading is really dependent on two factors: what you're seeking to have it compensate for; and, secondly, the parameters or constraints that are being applied to it. And I also

understand that it is a complicated exercise to try and get an appropriate balance that you think will be of assistance to your members.

PN37

If we were to look at a further conference on Friday, 19 March, at 9.30 that would give you sufficient time to have your further discussions and hopefully, Mr Ryan and Mr Redford, where in relation to the loaded rates matter, for example, you would have a landing, Mr Ryan, and we could get some - even if in outline form, Mr Redford, as to what, if any, remaining concerns the union had about that proposal so that we understand the parameters of any proceeding in relation to it.

PN38

On the hours of work and late night penalty, I'll have some Commission staff do some work on the award history of the late night penalty provision. That'll save each of you from doing that. I'd encourage you to still have discussions about that issue.

PN39

In relation to the hours of work matter, we'll also have another look at that clause generally to see if there can be any reworking of the clause to better express it in plain language. That would be without - well, the intention would not be to remove entitlements, but to make it easier to understand, and we'd provide both of those to you during the course of the next two weeks, and they may assist you in your ongoing discussions about those matters.

PN40

And please let my Chambers know or me directly if there's anything that you require. If you want a further meeting with the BOOT team then by all means just get in touch and we'll facilitate that. And if there's any further information that might assist in your discussions then let me know.

PN41

Was there anything further that either of you wish to raise? Is the 19th suitable? Did you want it earlier, later, or is that about right?

PN42

MR RYAN: Suitable for the AHA, your Honour.

PN43

MR REDFORD: Your Honour, I'll obviously make myself available if a conference is listed. In a perfect world it would be preferable for early the following week, so even on 22 March, which is the Monday, but I'm in your hands, your Honour.

PN44

JUSTICE ROSS: What's your availability on the following Monday, Mr Ryan?

PN45

MR RYAN: Your Honour, Monday the 22nd is suitable to me.

PN46

JUSTICE ROSS: All right. Just bear with me for a moment. Yes, that's fine. So we'll do it Monday the 22nd at 9.30, and if there's nothing further I wish you both well in your discussions, and, as I indicated, if there's anything further that the Commission can provide you with don't hesitate to get in touch.

PN47

Thank you both, and we'll adjourn, and I'll see you on Monday the 22nd.

PN48

MR RYAN: May it please. Thank you.

PN49

MR REDFORD: Thanks, your Honour.

**ADJOURNED UNTIL MONDAY, 22 MARCH 2021**

**[9.55 AM]**