



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT

AM2021/58

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

**Application by Restaurant & Catering Industrial
(AM2021/58)
Restaurant Industry Award 2020**

Melbourne

12.59 PM, WEDNESDAY, 28 APRIL 2021

PN1

JUSTICE ROSS: Good afternoon. I have Mr Redford from the UWU, Mr Ward with some others from Restaurant & Catering Industrial and there's someone from the organisation Wage Buddy. Is that right? No? They'd expressed an interest in joining but nevertheless - and similarly the - Mr Bayliss from the Attorney-General's Department had indicated that they would be observing. Are you there Mr Bayliss?

PN2

MR BAYLISS: Yes, sir, I'm here.

PN3

JUSTICE ROSS: All right. Thanks. Well, Restaurant & Catering Industrial have filed the application and it's really to ascertain where it's - how you wanted to proceed with it and also to see what the UWU's attitude was to the application, at least at this stage. Mr Ward.

PN4

MR WARD: Thank you, your Honour. Can I start at the outset. Obviously the application carries on from ongoing proceedings and ongoing discussions we've had with the UWU following the Attorney-General's correspondence with the Commission some months ago. I have to say on behalf of my client that the dialogue that we've had with UWU to date has been frankly more than constructive. It has possibly been some of the best dialogue my client's had with the UWU for quite some time. We've been constantly trying to juggle continuation of that dialogue against the pressing needs of the membership in the industry. We have not at this stage reached any position of agreement with the UWU and we appreciate that Mr Redford is exploring what might be the UWU's formal position in relation to our application.

PN5

We reached the position where we felt it was necessary now to file but in doing so we don't want the Commission to form the view that we have abandoned the ongoing process of dialogue. Rather we see that running in tandem in this fashion subject to the Commission's views and submissions from Mr Redford. One, we would seek that a timetable be set down now for dealing with our application but that timetable also include face to face private conferences involving the Commission, the UWU and my client. Because we are still optimistic that possibly in whole but certainly in part some of these matters might move forward by consent without the need for detailed arbitration.

PN6

So in that regard what we would propose would be this; that the applicant file their evidence and materials by 28 May, that the Commission convene a face to face private conference of the parties at its earliest reasonable convenience. Now I suspect that won't be next week. I suspect it will most likely be the week after and I always get where Mr Redford lives wrong but I think he's in Melbourne. I got that right, good. So I suspect that the conference will be in Melbourne and I suspect that it'll be myself and my client's representatives travelling to Melbourne. I'm assuming that Mr Redford then would be given similar time to

reply in relation to any evidentiary materials or submissions, which would lead us pretty much sometime at the end of this financial year should it have to be fully arbitrated to have the matter dealt with, with this proviso that if we can reach consent on some things along the way we'd seek to have those matters dealt with by consent on the run, subject to the requirements of the Commission.

PN7

So I appreciate that's a little piecemeal at the moment but that's because we're trying to get on and get the matter resolved but still maintaining the opportunity for some form of resolution in whole or in part, given the very constructive dialogue that's occurred to date with the UWU.

PN8

JUSTICE ROSS: All right. Thanks, Mr Ward. Mr Redford, so as I understand the proposition it would be the applicant to file submissions in evidence and materials in support by 28 May. Any party opposing or taking a contrary view in relation to the application would file their material by 25 June. We would probably then have a mention to deal with if there's any witness evidence, cross-examination et cetera, and then list the matter for hearing subsequently. The matter would be the subject of a private conference between Restaurant & Catering and the UWU.

PN9

In terms of that conference, can I provide a couple of options. 2.30 - either 2.30 on Tuesday, 11 May or in the morning of 12 May or in the afternoon of 14 May. So if you can give some thought to those as I'll - but that's the - can I get your reaction to the overall timelines, Mr Redford, indicated by Mr Ward as to filing and then your availability for a private conference at any of those times?

PN10

MR REDFORD: Yes, your Honour. Firstly, we're available to be involved in a private conference at those times and ready, willing and able to have those discussions. Dealing with the timetable, your Honour, and your Honour will appreciate that I'm dealing with the proposal to some extent on the fly not sort of having had a sense of what the timetable that would be proposed might have been until now. The concern from our perspective is just this, that we still don't completely understand the nature of the application that'll be advanced and in particular whether or not part of the application will involve a work value case, particularly in relation to the classification proposal but possibly also in relation to the exemption rates proposal.

PN11

So if it were the case that that would form part of the application, a period of only four weeks for the union to respond being by 25 June is a - I'd respectfully suggest a fairly tight timeframe for an application of that nature but I'm conscious of the fact, your Honour, that I don't - you know, I don't want to presuppose things about the application that I don't know yet. And I'm also very much conscious of the fact, your Honour, that the Commission's indicated an intention to deal with this matter expeditiously and I understand why that is the case and also the fact that the Commission's convened extensive discussions between the parties about these matters in the course of the last few months.

PN12

I'm conscious of all of those things but I suppose a turnaround time for a work value case might be more in the order of two or three months, your Honour, and taking that into account and also the matters I've just mentioned in terms of the nature of this proceeding, I would suggest that a period to reply in the order of eight weeks would be more appropriate than four. Otherwise, your Honour, I'm content with the gist of the program that's been advanced.

PN13

JUSTICE ROSS: Look, I think the safer course might be at this stage to have the applicant file its material by 28 May. Once that material's in you'll have a better appreciation of the nature of the argument that's advanced and the evidence in support of it, and I'd convene a telephone mention shortly after the material's filed, and then consider the time period. But if it's not involving a work value case then four weeks seems reasonable.

PN14

I'd rather not prescribe - I take your point about if it's a full evidentiary case you would need time to respond but I'd rather not put an eight week timeframe in at the moment. I think we'd be better off just waiting to see how it goes and as Mr Ward's alluded to, it may be that part of the application can progress unopposed in the interim and that might further narrow the issues, or the outcome of the conferences might narrow the issues. All of that will effect how much time is required to reply. So let's park the reply submission date for the moment, deal with the applicant's filing of the material by 28 May, we'll have a short mention after that.

PN15

Mr Ward, I have some questions for you about the application itself but before we do that, can we just tie down when we might have the conference. The dates were broadly Tuesday the 11th, Wednesday the 12th or the afternoon of Friday the 14th.

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MR WARD: I suspect given that I can't talk to my clients I get some liberty here. Can we take the 14th, your Honour?

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JUSTICE ROSS: Sure. We could do 1 pm on the 14th?

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MR WARD: Yes, your Honour.

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JUSTICE ROSS: Okay. Is that okay with you, Mr Redford?

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MR REDFORD: Yes, your Honour.

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JUSTICE ROSS: Okay. Can I just go to the application and it's the draft determination attached, Mr Ward. Now I might have missed - I had essentially skimmed through the grounds but in terms of the application's commentary at 2.2 as to the nature of the schedule, then when I go to the schedule under 'Exemption rates' I see option 1 and option 2, and I'm just not sure is that - is the difference between them both the classifications they can be subject to and the range of things you're buying for the exemption rate. Is that - - -

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MR WARD: Well it's a little more than that, your Honour. It's who they apply to, it's the level of guaranteed remuneration that operates and then it's the circumstances within which you receive additional overtime the trigger for that.

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JUSTICE ROSS: I see.

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MR WARD: So one is - to put it bluntly, one is a lower level exemption rate applying to certain people with a faster trigger for overtime. One is a higher level exemption rate with a less generous trigger for applying overtime. So it's basically one's a lower option and one's a higher option, if I can use that phrase.

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JUSTICE ROSS: All right. Look, it might - it would certainly assist me and no doubt Mr Redford though I appreciate that the two of you or the two organisations have had more detailed discussions about this but I'd be interested in the thinking behind the two options.

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MR WARD: Yes.

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JUSTICE ROSS: And how you've arrived at that particular mix of the three varying constituent parts. The quantum of the exemption rate, the classifications and level that it applies to and the overtime cut-in, and do you canvass - I mean I think we've been over the classification structure issues before but we can no doubt cover that at the conference as well. But in terms of the exemption rates, are they intended to operate in a way that essentially the employer gets the benefit of an easier payroll application and payment system, and is it the intent that the employee not be worse off under the exemption rate arrangement as opposed to the application of all of the award provisions?

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MR WARD: Well I'm always very sensitive about the phrase absolutely, your Honour, because - - -

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JUSTICE ROSS: Yes.

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MR WARD: - - - it's a challenging phrase but the intent is certainly not to put somebody in a situation where they are worse off.

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JUSTICE ROSS: Yes.

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MR WARD: It is by agreement. We think we've got the - we think we've got the balance of the level right and the trigger for overtime right and we certainly obviously in our material explain that in fine detail. And obviously we've added in the additional safeguards that the role of the Commission in assisting should there be a dispute. The package is not really in any sense, to in any fundamental sense undermine what people were earning, that's not our intent at all. Our intention is to provide a surety around the higher rate of remuneration, guaranteed rate of remuneration and as your Honour has said considerably more simplified arrangement. We think that that will create a far more supportive environment for increased employment in certain categories for the security of that employment.

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We also think it has flow on benefits in terms of what Mr Redford has discussed with us over many a long day, the question about compliance. We've been very careful as well about what we've constructed into what is offset. That's really benefitted from dialogue with the UWU, so for instance we've made it very clear that we're not offsetting things like late night penalty rates. That they still stand to the side. So we've been very cautious also about what we're offsetting.

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JUSTICE ROSS: Yes. Look, certainly the point about simplicity and compliance is well made. The compliance issues in the sector are well known and fairly widespread and they often - based on the ombudsman's regular reporting in this space, many of them flow from the payment of a flat hourly rate intending to compensate a range of things but with no explicit provisions. Can I put this that it might facilitate the conference, Mr Ward, if you're able to forward to myself and Mr Redford some explanation of the methodology, how you've gotten there.

PN35

The other thing that occurs to me and I note that you've got arbitration as a protection, the question that it gives rise to in my mind is well, what are we arbitrating? What would the nature of the dispute be and what would be the relevant test? For example, and it's only an example, there'd be a range of objectives that you might put in that then the arbitration becomes around either whether there was somehow no agreement or the agreement is not fair. Fairness might be addressed as an objective and it may be that you know the objective is that the employee will be better off over a cycle of however many weeks.

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Because I can readily understand that with any exemption rate there's always going to be a pinch-point at which there's a risk that at a particular point in time on that day that shift, had the employee been under the award they might be better off under the award. But what's more useful is to look at it over some sort of payroll cycle. So in that arbitration space it's really well what sort of dispute do

we envisage the Commission dealing with, and I'm assuming it's not a sort of free ranging the Commission can replace whatever arrangement the parties have come up with, with something that it thinks in an abstract sense is fair.

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So there has to be some sort of articulation of some test that the agreement, the practical application of the agreement has meant that it hasn't met that mutually understood outcome. But perhaps if you can - look, I mean - - -

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MR WARD: Your Honour, can I take that - - -

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JUSTICE ROSS: Yes, yes.

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MR WARD: - - - under advisement. I'll make these two observations. Your Honour's comments are very useful and very helpful. Two of the objectives in providing arbitration which we need to think about how they crystallise are these. We want it to be reasonable to ensure that had an employee entered into such an arrangement and later perhaps formed the view it wasn't advantageous to them or benign that they had recourse to the tribunal to, for want of a way of putting it, get out of that arrangement. We also secondly wanted to ensure that the union was confident that if one of its members was being offered such an arrangement and the union felt concerned about the efficacy of that arrangement or the method of it being offered on behalf of its member, it had recourse to the tribunal to have that matter dealt with.

PN41

So I think all of that falls comfortably within the ambit of what has fallen from the Commission. But yes, we'll take onboard the question of exactly how it might be exercised and what the test might be and we might talk more about that when we come to the conference.

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JUSTICE ROSS: Mr Ward, if the employer decides that the arrangement isn't one that they want to persist with, are they able to - well they can terminate by four weeks' notice. Is that the - - -

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MR WARD: Yes, there's provision for notice but certainly obviously one might think that an employee might feel that giving that period of notice might for them be too long a period. So we've also got - we've also got the ability to terminate on relatively reasonable notice as well.

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JUSTICE ROSS: Yes, okay. All right. Well, is there anything further that either of you wish to say, or anybody else?

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MR WARD: Not at this stage, your Honour.

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JUSTICE ROSS: All right.

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MR REDFORD: There's just one matter from me, your Honour.

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JUSTICE ROSS: Yes.

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MR REDFORD: And I hesitate to raise this because I think it's entirely uncontroversial and I worry I'm wasting your Honour's time, but I think I should put this on the table. It'd be my intention to be joined by a couple of our delegates in the private conference, and I say it - I'd prefer not to put a number of a cap on that at this point, your Honour, although I say a couple. It wouldn't be our intention to bring the whole footy team, your Honour. But it is important to the UWU that this process continues to be conducted transparently as it has been throughout its life, and that the workers who are the people who would be affected by these changes if they were made are participating actively in the process. Which is why I would like to do that, and just wanted to mention that, your Honour, in case there's any issues with that.

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JUSTICE ROSS: Well not from my perspective and Mr Ward, I wouldn't seek to confine the number of people that you want to bring as well.

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MR WARD: No, no, and can I just say we think that demonstrates how genuine the UWU are about the dialogue and we're encouraged by that.

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JUSTICE ROSS: Look, Mr Redford, as would be the usual course I'd be looking for one spokesperson from either side and at an appropriate point we would probably break into private caucus and that would provide an opportunity for your delegates to particular raise any issues or concerns. I think we're all interested in getting some constructive comment and feedback about what the practicalities of the proposal might be, so I think there's no issue with what you're proposing.

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All right. Well, I'll await for further information from you, Mr Ward.

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MR WARD: Yes.

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JUSTICE ROSS: By close of business next Friday and then I'll see both of you and your respective groups at 1 pm on Friday, 14 May in Melbourne for a private conference. All right.

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MR WARD: If it please.

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JUSTICE ROSS: Thank you both, see you then.

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MR REDFORD: Thank you, your Honour.

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JUSTICE ROSS: I'll adjourn.

ADJOURNED INDEFINITELY

[1.25 PM]