



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT ASBURY

AM2022/32

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

**Application by Pararahewa
(AM2022/32)**

Real Estate Industry Award 2020

Brisbane

11.00 AM, TUESDAY, 28 FEBRUARY 2023

Continued from 16/01/2023

PN94

THE DEPUTY PRESIDENT: Good morning. Could I start by taking the appearances, please. The applicant, you're there?

PN95

MR N PARANAHEWA: I am, your Honour.

PN96

THE DEPUTY PRESIDENT: Just correct me if I'm not pronouncing your name correctly. It's Paraneva?

PN97

MR PARANAHEWA: Paraneva.

PN98

THE DEPUTY PRESIDENT: Paraneva, I'm very sorry. Thank you. You are the applicant in this matter?

PN99

MR PARANAHEWA: That is correct, Deputy President.

PN100

THE DEPUTY PRESIDENT: All right, thank you, and perhaps if I could just take the appearances in terms of the aligned parties. I understand, Mr Clark, you are an aligned party with the applicant in relation to this matter?

PN101

MR CLARK: Yes, your Honour, we believe that the award needs clarification.

PN102

THE DEPUTY PRESIDENT: Yes.

PN103

MR R CLARK: We believe the award actually deals with the issue, but, to the untrained eye, probably many people wouldn't know that it's covered.

PN104

THE DEPUTY PRESIDENT: So you're not opposing the application?

PN105

MR CLARK: Correct.

PN106

THE DEPUTY PRESIDENT: All right, thank you for that. Thanks, Mr Clark. Then we have?

PN107

MR T McDONALD: Tim McDonald, solicitor, and with me is Mr Bryan Wilcox, the Chief Executive of the Real Estate Employers' Federation.

PN108

THE DEPUTY PRESIDENT: Thank you. Was there to be an appearance from - are you representing all of the real estate employer entities?

PN109

MR McDONALD: Yes, I am, Deputy President.

PN110

THE DEPUTY PRESIDENT: All right, thank you for that. Does any party require to cross-examine the applicant? Mr Clark, you wouldn't generally because you're an aligned interest, but do you have any questions you want to ask?

PN111

MR CLARK: Just a couple of basic questions really of the applicant. I just wanted to know whether you recorded your hours of work - - -

PN112

THE DEPUTY PRESIDENT: Hang on, Mr Clark, I haven't sworn him in or done anything yet.

PN113

MR CLARK: I see, sorry.

PN114

THE DEPUTY PRESIDENT: I'm just trying to work out whether I am required to - - -

PN115

MR CLARK: Just a couple of minor questions.

PN116

THE DEPUTY PRESIDENT: All right, thanks. And from the Real Estate Employers' Federation, do you require to cross-examine the applicant?

PN117

MR McDONALD: No, Deputy President. However, there is an objection to some parts of the statement of the applicant.

PN118

THE DEPUTY PRESIDENT: All right. The reality is this matter really turns on a construction of the award and whether, if it means something, it needs to be clarified. or whether it doesn't mean what the applicant is seeking, doesn't it?

PN119

MR McDONALD: Deputy President - - -

PN120

THE DEPUTY PRESIDENT: As I understand it, the applicant is seeking that the award be amended or varied so that it covers any excess travelling time that he is required to undertake between his place of residence and where he commences his first, I guess, engagement for the day - that's the case, Mr Paranaheva - and returning home?

PN121

MR PARANAHEWA: That is correct, Deputy President.

PN122

THE DEPUTY PRESIDENT: Okay. And, Mr Clark, your view is the award already provides for that and just needs to be clarified?

PN123

MR CLARK: (Audio malfunction.)

PN124

THE DEPUTY PRESIDENT: Sorry, Mr Clark, you're breaking up, I can't hear you.

PN125

MR CLARK: I'm sorry. Yes, I think it should be clarified.

PN126

THE DEPUTY PRESIDENT: Yes, and you say it applies to the excess travel from the employee's - the excess distance between the employee's place of employment, their office, wherever they are located, and the first location where the employee commences for the day. It's the excess travelling that the clause covers?

PN127

MR CLARK: Yes.

PN128

THE DEPUTY PRESIDENT: Okay. And the position of the employers is that the clause doesn't apply to travel from home to the first location where the employee commences work for the day?

PN129

MR McDONALD: Yes, Deputy President, we say that in respect of casual employees, of which the applicant is one. We say that the award is the usual provision that a casual employee doesn't get paid for the costs of travel to and from work and nor do they get reimbursed for the costs of that travel. So, we say it's a new claim and it's a reasonably significant claim not only in the context of the Real Estate Award but awards generally if such a claim was to be allowed. So, to some extent, it's something of a - we're coming at it from two different - - -

PN130

THE DEPUTY PRESIDENT: So you say that notwithstanding clause 17.2(c), which seems to say that part-time and casual employees are paid the standing charge or lump sum rate for each day worked, they are not entitled to the allowance per kilometre?

PN131

MR McDONALD: Yes. We say that the way that the award operates is that it operates during the course of employment. So, if a casual employee is required to

use their car in the course of an engagement, then they would be reimbursed in relation to that. However, we say the position in relation to casual employees generally is that they get paid on a per engagement basis and they get offered work at a particular location and they can accept or reject that.

PN132

I suppose, before turning to that, there is also the issue of standing in this matter and that is something that we would seek to have addressed up front, if that was convenient.

PN133

THE DEPUTY PRESIDENT: Well, you are not planning to cross-examine the applicant, are you?

PN134

MR McDONALD: The problem with - we take objection - the applicant has given no evidence. He's mentioned a few - he's mentioned some companies. As we have said in our outline of submissions, that's not enough to establish standing. He would have to put on some records in relation to being employed. We just don't know anything of the applicant really, other than sort of a couple of assertions. We've had a look to try and find him on the employer who he mentioned being his current one, but he's not mentioned on the website. It's very unusual for real estate agents not to be mentioned or to promote themselves in any way.

PN135

We think more needs to be done for him to clarify standing, as he was directed to do under the directions. It's not sufficient just for him to mention a couple of places. In our submission, Deputy President, we made reference to that at paragraphs 2 and 3 and 4. We say that the sort of things that he would need to do would be to establish with payslips, employment agreement, contracts, time wage records, tax returns, something that gives us a bit more.

PN136

We know his name, we don't know where he lives, we don't know really much about him at all. I'm not being critical of that, but I'm just saying in terms of establishing standing, this is a very significant award, it applies to a lot of people and we need to be clear that he does have some standing to make the application that he's currently employed and if he's employed as a casual, so be it, and then we could understand the application is being made in that capacity, but we wouldn't want to proceed on the basis that the arrangement is something different, that he's a contractor, or something like that. We just don't have any idea about the applicant and we submit that something needs to be done from his point of view to establish the standing. It is not sufficient to just do that by mere assertion in a case such as this.

PN137

If it was just a case that involved him, if it was an unfair dismissal something, it might be sort of slightly different, but it's a substantial award and we would say that he needs to do more. We have no reason to know anything about whether

what he says is right or not, whether he's still currently employed (audio malfunction).

PN138

THE DEPUTY PRESIDENT: An employee can be a person who is usually an employee.

PN139

MR McDONALD: yes.

PN140

THE DEPUTY PRESIDENT: And it's arguable that if the person was employed at the time the application was made, that's all that's necessary, the standing is then taken to exist.

PN141

MR McDONALD: Yes, Deputy President, under section 15 of the Act, it can be someone who is usually employed, but we need to be sort of clear about that, and ordinarily one would expect that there would be some evidence of the employment. We don't know anything about the employer, the employer is not present here, or there doesn't seem to be anything about the employer in the material on the website - sorry, in terms of the Fair Work Commission application website. So, we think that some explanation is required for him to establish standing rather than mere assertion, given the breadth of the proceedings and so forth.

PN142

THE DEPUTY PRESIDENT: Mr McDonald, essentially your position would be that you're not required to cross-examine the applicant because he hasn't established sufficiently that he has standing to even put the matter in issue?

PN143

MR McDONALD: That's right, Deputy President.

PN144

THE DEPUTY PRESIDENT: Mr Paranahewa, it is the case, isn't it, that you haven't filed anything to indicate that you were ever employed, much less that you are currently employed as a real estate agent covered by this award?

PN145

MR PARANAHEWA: Deputy President, if I may, I didn't feel the need to upload any payslips or employment contracts because Consumer Affairs maintain a current public register of all registered real estate agents. Anyone can search my legal name against the public register and it will specify my current licensee status and my current employers. Because this is - - -

PN146

THE DEPUTY PRESIDENT: Mr Paranahewa, this is not a matter of - it's not a general inquiry, it's an application and you're the applicant, and before you can even make this application, you have to establish, where it's challenged, that you have standing to make it and, in order to make the application, to legally be

entitled to make it, you have to be an employee covered by the award and, at the moment, there's an issue as to whether that's the case because there's no evidence to establish whether it is or not.

PN147

We're not going looking, Mr Paranahewa, you have to establish you have standing to make this application and, as I understand it, you haven't filed any additional material other than you've made various assertions about who you are employed by.

PN148

MR PARANAHEWA: Okay, Deputy President, am I able to make a submission with an employment contract or a recent payslip in order to support the application now?

PN149

THE DEPUTY PRESIDENT: Well, yes, you can, but the respondents may then say they want an opportunity to verify it by having an adjournment to check whether that's the case. Have you got something you can file? Really you needed to put a witness statement with it - that was what you were directed to do - and file it. I mean I don't want to make the matter overly technical, but there is an important requirement because you're not just moving on your own behalf, the effect of your application will be to amend an award or vary an award that covers the entire real estate industry and every single employee in that industry covered by the award.

PN150

MR PARANAHEWA: Okay, your Honour. So if I submit the evidence that's required by Mr McDonald in the next few minutes, how much time would Mr McDonald and his legal firm require to review that new evidence?

PN151

THE DEPUTY PRESIDENT: Well, I guess that's a matter for Mr McDonald once he sees it. He might ask for an adjournment today or he might be prepared to proceed on the basis of what you send, but you need to submit it first. Mr McDonald, I would give the applicant an opportunity to do this, notwithstanding that he hasn't done it in accordance with the directions, so - - -

PN152

MR McDONALD: We have no difficulty with that, Deputy President, yes.

PN153

THE DEPUTY PRESIDENT: Okay. So, Mr Paranahewa, if you can submit the documents, by email, to the parties, then we can consider them and then the respondents can decide whether they are in a position to proceed today or whether they want an opportunity to consider that material, have an adjournment, and put on some further submissions in relation to it.

PN154

MR PARANAHEWA: Understood, Your Honour. Deputy President, if I may respond to the last email from Mr McDonald with the summaries of the case law studies, would that be sufficient?

PN155

THE DEPUTY PRESIDENT: Would that get through to you, Mr McDonald?

PN156

MR McDONALD: Yes, certainly. Yes, it would.

PN157

THE DEPUTY PRESIDENT: Great, thanks. And also, if he could send it to Mr Clark, given he represents the employee parties to this award, or employees covered by this award generally. And, Mr McDonald, can I also just understand, is it the respondent's position that every time a casual employee reports to a particular location, to commence work, that's a separate engagement?

PN158

MR McDONALD: Yes, Deputy President.

PN159

THE DEPUTY PRESIDENT: So an engagement's not even per day; it's on each occasion they present at a property to show it or have an open house, or whatever have we.

PN160

MR McDONALD: As a general proposition, yes, I think that would stem from the definition in 15A of the Fair Work Act. But - yes.

PN161

THE DEPUTY PRESIDENT: So that would mean they'd never get paid any mileage allowance, wouldn't it? Because they'd leave one property and go to the next property, even the second one, third one, fourth one for the day, and they'd never be entitled to the per-kilometre allowance under your position, would they?

PN162

MR McDONALD: No, Deputy President.

PN163

THE DEPUTY PRESIDENT: And I'm sure that's a matter of great significance to Mr Clark, if that's going to be the position that they employers take in this matter.

PN164

MR McDONALD: That's not what we're putting, Deputy President. In terms of the way that the award operates, so when you're - during the course of an engagement, if you're required to use the - your vehicle, then it'd be the capacity for reimbursement and so forth. But I'm not even - we don't really know what the circumstances are of the applicant as to when he works or how he works, whether he - - -

PN165

THE DEPUTY PRESIDENT: Yes, but do we need to? Because we know - I mean, as a general proposition, we know that real estate agents travel in their own vehicle to locations; property sales persons, for example, travel to locations in their own vehicles, do whatever they do at the location, and then they may go to another location. Now if, in the course of this argument, you're going to say that every time they present at a particular location, it's a new engagement, that's - I understand the proposition that they start work at the first location, but if they're engaged for a day, and if they can be entitled to the entirety of the motor vehicle allowance for a day that they work, then I'm struggling with the proposition that after the first point at which they report to work, they don't get a mileage allowance if they have to travel to another point, and another point, in the course of the day.

PN166

MR McDONALD: Yes. That's not what we're putting, Deputy President. So if someone's required to use their car for travel when they're engaged as a casual employee, then they could get a vehicle allowance. It's more this point about - that we wouldn't want this to be some general inquiry into the way the vehicle allowance works in the real estate industry, because that wouldn't be fair to the (indistinct) employees who are in this industry, who are - - -

PN167

THE DEPUTY PRESIDENT: I understand, but if you're going to mount an argument that's got general implications for casual employees in the real estate industry, then it might have to turn into a broader-ranging inquiry.

PN168

MR McDONALD: Yes, Deputy President. We're saying that the application that's being made seeks to change the status quo to deal with - so that casual employees would be paid to travel to work. Now, I don't know of any industry where that's something that's provided-for in an award.

PN169

THE DEPUTY PRESIDENT: Well, I'm not entirely sure about that, because a lot of awards have excess travel provisions where people get paid to travel excess distances between where they were required to start work and - or the employer's depot, base, whatever you may call it, and where their first job for the day is.

PN170

MR McDONALD: Yes.

PN171

THE DEPUTY PRESIDENT: In any event - - -

PN172

MR McDONALD: Yes, I think there is quite a distinction between casual employees and permanent employees in relation to these matters. But perhaps if we could get this standing issue sorted out, that would be - - -

PN173

THE DEPUTY PRESIDENT: All right. So Paranahewa, if you could send that document through, I'll stand the matter down for, say, 15 minutes, and then I'll come back and see where the parties are.

PN174

MR PARANAHEWA: Already have, Your Honour.

PN175

THE DEPUTY PRESIDENT: All right, you've sent the documents through, so let's have a look at those, and so we will resume - - -

PN176

MR CLARK: Your Honour.

PN177

THE DEPUTY PRESIDENT: Sorry, Mr Clark?

PN178

MR CLARK: Thank you. Not being a tech - particularly technology-focused, if you leave and I then - how do we get back to you?

PN179

THE DEPUTY PRESIDENT: My associate will join you all back in again the same way.

PN180

MR CLARK: I see. So we'll get another invitation, is that right?

PN181

THE DEPUTY PRESIDENT: No, you use - I think you use the same one, Mr Clark.

PN182

MR CLARK: Can we?

PN183

THE DEPUTY PRESIDENT: So just - it should be in your calendar, and if you just click on it again in - so I make the time now, let's say it's 25 past 10 in Queensland, and I know you're not all in Queensland, so if we make it 15 minutes from now, it will be 20 to 11 here, probably - just click on the link in the notice of listing again.

PN184

MR CLARK: Okay, right.

PN185

THE DEPUTY PRESIDENT: In 15 minutes.

PN186

MR CLARK: Excellent. Thank you.

PN187

THE DEPUTY PRESIDENT: Okay, thank you.

SHORT ADJOURNMENT

[11.23 AM]

RESUMED

[11.51 AM]

PN188

THE DEPUTY PRESIDENT: Thank you. We have all received the document as I understand it, all the documentation sent through by Mr Paranahewa. Perhaps if I could get the respondent's position in relation to it.

PN189

MR McDONALD: Yes. Thank you, Deputy President, that's helpful. We don't take any issue as to the standing in light of that being produced. We will seek to make submissions at an appropriate time in relation to what interest the applicant can represent, but in terms of having standing under the Act to bring the application we don't take any issue with that.

PN190

THE DEPUTY PRESIDENT: Okay. Mr Paranahewa, having looked at that documentation my provisional view is that if your objective is to obtain payment of the travel allowance in your current employment - is that what you're seeking?

PN191

MR PARANAHEWA: Not entirely, your Honour. Through my application my objective is to make it clear for myself and the other casual and part-time employees in the real estate industry who are in a similar scenario, and also to make the award a bit more clearer for the Fair Work Ombudsman to enforce the entitlement.

PN192

THE DEPUTY PRESIDENT: For the sake of the discussion let's assume that your application succeeds. My reading of your contract, and again this is my provisional view, is that you're paid a comfortable margin in excess of the minimum award rate for a casual employee, and that you've signed a contract that says any payment of any other allowance, meal allowance, anything, including this travel allowance, is offset against the over award payment. So it's not going to make any difference in your immediate circumstances.

PN193

MR PARANAHEWA: Yes, it would, your Honour, because right now my time is accumulating, or starting to accumulate from the time I attend my first open for inspection. The time I travel from home to the first inspection, or travel back from the last open for inspection back home is unaccounted for.

PN194

THE DEPUTY PRESIDENT: Okay. So it's really the hours for which you say you should be paid the rate rather than the - this is really about whether you're working when you're travelling rather than the allowance itself, isn't it?

PN195

MR PARANAHEWA: Well, at the end of the day, your Honour, if my work commences when I arrive at the first site then the allowance - the number of kilometres I travel from home to the first site is also unaccounted for. So it's a combination of the rate itself and also the allowance, whether the allowance is paid for from when I travel from home to the first place of employment.

PN196

THE DEPUTY PRESIDENT: But the issue is going to be in your circumstance whether your rate covers it in any event, Mr Paranahewa, because you're paid in excess of the award.

PN197

MR PARANAHEWA: I would (indistinct) to disagree with that, your Honour, but again that minimum wage award conditions are enforceable by the Fair Work Ombudsman. I am supposed to be paid a minimum rate with my experience, with the number of years that I have worked in the industry, and if I'm underpaid according to the award that's something that the Fair Work Ombudsman should deal with, with the current award definitions. What my application seeks is the unclear nature of when I start work and when I finish work is where I'm seeking clarification, because I put it through to the Fair Work Ombudsman. The Fair Work Ombudsman has come back and said - I have that as a part of my submissions - the award is silent on that scenario.

PN198

THE DEPUTY PRESIDENT: Okay. But it's really when the hourly rates are going to be paid under the award - when the rates, hourly rates for casual and part-time employees commence to be paid, isn't it, that your issue is about, Mr Paranahewa?

PN199

MR PARANAHEWA: When the shift starts and when the shift finish is the focus of the application, your Honour.

PN200

THE DEPUTY PRESIDENT: Thanks for that. Does - - -

PN201

MR McDONALD: Deputy President - - -

PN202

THE DEPUTY PRESIDENT: Yes, sorry.

PN203

MR McDONALD: Sorry. Just in relation to the applicant's submission that he's bringing the application for other casual and part-time employees to assist the Fair Work Ombudsman, in our submission that's not the (indistinct) control. The applicant can bring an application in relation to his personal circumstance, but he can't really bring an application on behalf of casual employees and part-time employees across the industry, and I'm sure the Fair Work Ombudsman if they wanted to make an application to do anything if they were concerned about it they could do so themselves. But just because the Fair Work Ombudsman says

something is silent, that it doesn't provide the entitlement that he would like, it doesn't necessarily mean that there's anything wrong with the award, it just doesn't give the applicant the entitlement that he would like.

PN204

THE DEPUTY PRESIDENT: Yes, I understand that, but if the applicant has got standing to make the application, then he's got standing to make the application. Do his motives need to be taken into account? Does he have to be representing anybody?

PN205

MR McDONALD: Yes, for all practical purposes he does, because while he might have standing in terms of how the Commission might treat that standing it would have regard to his circumstances. Mr Clark is in quite a different category obviously; he's a registered union. He can speak on behalf of his members, no issue with that. But as a single individual you can't necessarily say, well I'm here and I'm going to change the award on behalf of all employees. To give him that role, in our submission, that he seems to be seeking wouldn't be correct, because he's an individual who is able to raise things about his circumstances.

PN206

I think that's where, in our submission, the focus should be, on looking at his particular circumstances. Do we need to be looking at some of the variations of the award? Is there something with the arrangements that he's got that could be sorted out with his employers to his benefit? It seems as though we might be sort of looking to do some big thing when perhaps maybe there needs - I am sure we will hear in due course - but maybe there just needs to be discussion with the employer about this.

PN207

It seems as though an arrangement has been struck, which on its face doesn't look too bad, \$50 an hour, it's well in excess of the award and he's got a couple of jobs going, and good luck to the applicant, but maybe that's where the issue needs to be better directed to try to sort those arrangements out so that they work for him and work for his employer, rather than trying to look at everyone in the real estate industry and try to make some change in respect of that.

PN208

In due course I suppose the applicant will have to try and establish about why this is necessary for his circumstances and what steps have been taken to try and resolve things with the employer. The award is supposed to be a safety net, in our submission. You're not going to cover every single circumstance. It's quite appropriate for people to come to their arrangements over and above the award, as the applicant has quite successfully done, but whether that means that we should sort of address any particular issues across the award, when we have done that we would have some concerns about that approach.

PN209

THE DEPUTY PRESIDENT: The difficulty is that an employee can make an application to vary a modern award, and I don't think there's any restriction on the capacity of an individual employee to make the application. But, Mr Paranehewa,

the difficulty I guess is that the award rate is, my calculation, roughly \$24.76 an hour for a real estate employee Level 2. The casual rate is about \$30.95 an hour.

PN210

MR PARANAHEWA: Correct.

PN211

THE DEPUTY PRESIDENT: Assuming you succeed with this application or the award is interpreted on the basis that you should have been paid from the point you get to the first location at which you start work, or the point you leave home, or whatever it is you're seeking, the employer is entitled to say, 'I'm paying you roughly \$20 above the award and that offsets it under your contract of employment', because that's what it says. So I can deduct - all you're entitled to if you're entitled to anything is the casual rate for your time that you worked under the award.

PN212

MR PARANAHEWA: Yes. However if you - - -

PN213

THE DEPUTY PRESIDENT: Not to be paid at your rate.

PN214

MR PARANAHEWA: Deputy President, if you refer to payslip from Fletchers, there's two payslips that I submitted, that pay rate is \$31.40, which would not cover the specific scenario that you just mentioned.

PN215

THE DEPUTY PRESIDENT: So that's another employer that you're working for at the same time?

PN216

MR PARANAHEWA: That is correct, your Honour.

PN217

THE DEPUTY PRESIDENT: Right, okay. It's an interesting argument. Whether the fact that an applicant has got his own interests in mind to vary a modern award is a matter that prevents the application from being made it doesn't, but the weight that should be put on it is another thing entirely as versus significant change to the award. I don't know, Mr Clark - sorry, go on.

PN218

MR PARANAHEWA: If I may further elaborate, your Honour. So if you refer to the payslips that I submitted from Fletchers you may see the unit, the number of hours is seven. In reality if you add the time that I travel to the first site and the time that I get back from the last site that could in reality be eight and a half hours, where an hour and a half of my time is not paid for, the number of kilometres that I have travelled during that 90 minutes is not paid for, which is the clarification that I'm seeking through my application.

PN219

THE DEPUTY PRESIDENT: And if you started work at their office - do they have an office?

PN220

MR PARANAHEWA: They do, and - - -

PN221

THE DEPUTY PRESIDENT: How far would the travel be?

PN222

MR PARANAHEWA: That would be about 10 minutes from where I live.

PN223

THE DEPUTY PRESIDENT: And if they moved office it could be any distance, couldn't it?

PN224

MR PARANAHEWA: That would be a different matter, your Honour, because then if the distance to travel gets too further from me then I would seek different employment. The current definitions in the award it doesn't stop the employer from making the employee travel for example two hours to the first open, and the last open for inspection would be two hours on the other end, which was the case with my very first employer Proper Pty Ltd. They had me travelling - as the business grew on their portfolio grew, and then I was requested to travel 90 minutes to start my first open where my time to travel plus the kilometres wasn't paid for, which is when I approached the Fair Work Ombudsman and - - -

PN225

MR McDONALD: I object to that material being led. As I said we have objections to the statement which included the material that the applicant refers to in relation to Proper. There's no evidence about his arrangements.

PN226

THE DEPUTY PRESIDENT: There's no evidence at all at the moment. I am just trying to understand the issue between the parties at the present point. That's all I am trying to do. So I think the best thing I can do I guess is swear the applicant in and let him tender his statement, and then you can object to whatever you want to object to.

PN227

MR McDONALD: Thank you, Deputy President.

PN228

THE DEPUTY PRESIDENT: All right. Mr Paranahewa, will you take an oath or an affirmation?

PN229

MR PARANAHEWA: Yes, I would, your Honour.

PN230

THE DEPUTY PRESIDENT: An oath or an affirmation; an oath on the Bible or an affirmation?

PN231

MR PARANAHEWA: Oath on the Bible.

PN232

THE DEPUTY PRESIDENT: Do you have a Bible with you?

PN233

MR PARANAHEWA: No, your Honour.

PN234

THE DEPUTY PRESIDENT: Then I guess you will be taking an affirmation. I will get my associate to administer it. Thank you.

PN235

THE ASSOCIATE: Could you please state your full name and address.

PN236

MR PARANAHEWA: Narangoda Amayuru Paranahewa, (address supplied).

<NARANGODA AMAYURU PARANAHEWA, AFFIRMED [12.05 PM]

EXAMINATION-IN-CHIEF BY THE DEPUTY PRESIDENT [12.05 PM]

PN237

THE DEPUTY PRESIDENT: So, Mr Paranahewa, if you could, now you're under affirmation, state your full name and address for the record. You can provide a business address, if you wish?---Full name, Narangoda Amayuru Paranahewa. Address, (address supplied).

PN238

And you're the applicant in this matter?---That is correct, Deputy President.

PN239

Okay. And you have – perhaps if we start with the material you tendered this morning, you've tendered a number of documents being a letter of offer of employment from Fletchers dated 29 August 2022?---That is correct, Your Honour.

PN240

Just bear with me. An employment contract with Lewis Realty dated 20 June 2022?---That is correct, Your Honour.

PN241

A payslip from Lewis Realty Pty Ltd for the pay period 6 February 2023 to 19 February 2023?---That is correct, Your Honour.

PN242

And a payslip from Fletchers for the period 25th of the 1st 2023 to the 7th of the 2nd 2023?---That is correct, Deputy President.

PN243

Okay. And, also, so, those documents, you're seeking to tender them?---That is correct, Your Honour.

*** NARANGODA AMAYURU PARANAHEWA

XN THE DEPUTY PRESIDENT

PN244

All right. I'll mark those respectively as exhibits A1 to A4 in the order that I dealt with them, and then you've also provided a statement of evidence dated 30 January 2023?---That is correct, Deputy President.

PN245

Twenty-two paragraphs long?---That is correct, Your Honour.

PN246

Okay. Now, I understand there are some objections to that statement. So, perhaps if we deal with those objections first.

PN247

MR CLARK: Thank you, Deputy President. The objections are in two categories. The first is in relation to the evidence in relation to Proper Pty Ltd, and the second is in relation to evidence about casual employment generally in the real estate industry. The first objection concerns paragraphs 2 to 16, although there are – could only be parts of 15 and 16.

PN248

So, it would be all paragraphs 2 to 14 and in relation to the paragraph 15, the words, 'I have resigned from Proper' and in paragraph 16 were exactly the same as Proper, and then – and we say that because there's no evidence that's been put forward despite the opportunity having been provided about Proper.

PN249

As well as that, there's a question of relevance given that it related to a period before the application was made which, I understand, was in November, and it concluded there on his evidence in June, and then at paragraph 19 where the applicant talks about the use of casual real estate agents about how they're used and refers us to be able to look at seek.com about the – there being more casual real estate agents.

PN250

We say that he's not in a position to give that evidence, and in terms of what's being sought to be established, there's nothing probative put forward. It's really just an opinion that he's in no position to express about casual employment generally in the industry.

PN251

THE DEPUTY PRESIDENT: Okay. Well, for the purposes of the exercise, though, is it not sufficient that the applicant says under his current employment arrangements when he gets to his first property or open for inspection for the days payment commences and when he ceases his last one for the day, payment ceases.

PN252

MR CLARK: Yes. We have no objection to that, Deputy President. I think that's his simple point, that he would like to be paid more for those times.

*** NARANGODA AMAYURU PARANAHEWA

XN THE DEPUTY PRESIDENT

PN253

THE DEPUTY PRESIDENT: All right. I understand your objection. Mr Paranehewa, is there anything you want to say about that? I mean, you haven't provided evidence about your employment with Proper?---That is correct, Your Honour. However, the matter is still ongoing even with my current employer. So, as the matter with proper has been resolved, I would argue the – my employment with Proper is no longer relevant. However, the issue that I have with Proper is still present even with the current employment.

PN254

All right. So, for the purposes of this exercise, your evidence is, essentially, that the manner of payment that is employed by the entities that you're currently working for, is that your payment and your mileage allowance commences when you report at the first open for inspection and ceases when you complete the last one?---That is correct, Your Honour.

PN255

Okay. All right. So, on that basis, if that's – really, that's the applicant's evidence. It doesn't matter how many times it's happened to him or how commonly it happens, does it?

PN256

MR CLARK: No. That may be something that goes to merit, Deputy President, which we would seek to address in due course, but it's the applicant in terms of whatever evidence he believes is necessary.

PN257

THE DEPUTY PRESIDENT: Okay. So, your evidence is essentially that that's the way you paid, and that's what you're seeking to address by way of this application?---That is correct, Deputy President.

PN258

Okay. Thanks. Mr Clark, did you have any questions you wanted to ask the applicant to clarify matters?

PN259

MR CLARK: Yes, just a couple. Just to the – my question of the applicant, first one. How did you record the casual hours that you worked? Were you given a (indistinct), for instance, by the employer?---There is a platform that I am supposed to update my timesheets, and the kilometres I logged through the ATO's kilometre recording app.

PN260

Now, that's – the employer provided you with that platform for when you started and when you finished. Is that correct?---That is correct.

PN261

And did the employer instruct you as to when you were officially starting work in quotes, if I can put it that way (indistinct)?---Sorry, Mr Clark. I can barely hear you.

*** NARANGODA AMAYURU PARANAHEWA

XN THE DEPUTY PRESIDENT

PN262

I'm sorry. I'll speak up. Can you hear me now?---Yes.

PN263

Right. Okay. What were you told by your employer as to filling in your timesheet as to your commencing time and your finishing time?---Your time starts at the time you arrive at the (indistinct) first open for inspection, and your time or shift finishes at the time you conclude the last open for inspection.

PN264

Okay. Now, did that apply to both of your employers, same circumstance?---That is correct. That is correct.

PN265

Okay. Right. And you gave – I just wanted to get this as far as evidence is concerned. When – in each of those offices, was there an opportunity to report that (indistinct) you would go direct to (indistinct)?---It's a bit unclear what you said, Mr Clark, but - - -

PN266

THE DEPUTY PRESIDENT: Can you repeat the question, Mr Clark?

PN267

MR CLARK: Yes. When did – how long would you estimate it'd take you from – to go from your home office, if I can put it that way, to your first work location? Can you give us an example of, say, the closest to the furthest away in terms of time?---Okay. From my home office to my first open for inspection varies because the open for inspections change from a date or weekly basis. So, my first starting point is never the same. It could be half an hour away. It could be one hour away, but the time that I spent travelling to their office is around 20 minutes from where I live. However, I don't travel to the office. The keys are held in each location on a safety deposit box. So, I don't travel to the regular place of work. I travel directly to site.

PN268

Yes. Thank you?---Yes. And in terms of distance and time, it varies from a day-to-day point of view. It could be 15 minutes away. It could be 45 minutes away. It could be one hour away from where I live.

PN269

Okay. And did they (indistinct) - - -

PN270

THE DEPUTY PRESIDENT: Mr Clark, I can't hear you.

PN271

MR CLARK: Were you employed on a daily basis?---No, Mr Clark, I was employed on a casual basis, predominantly on Saturdays and on some weekdays.

*** NARANGODA AMAYURU PARANAHEWA

XN THE DEPUTY PRESIDENT

PN272

And were you always paid at least minimum three hours per engagement?---Okay. I can't hear you, Mr Clark.

PN273

THE DEPUTY PRESIDENT: Mr Clark, you keep – I don't know what you're doing at that end, but you keep fading in and out.

PN274

MR CLARK: Okay. Well, how's that, Your Honour?

PN275

THE DEPUTY PRESIDENT: That's better.

PN276

MR McDONALD: Deputy President, I do object to Mr Clark's questions. Mr Clark's not the applicant. He's in the same interest as the applicant. It's not appropriate that he, in our submission, be able to cross-examine him and try to make out a case for him, but if he wants to bring this – if Mr Clark has this evidence to bring, of course he can do it, but it's a matter for the applicant to bring his own evidence, but Mr Clark's in the same interests.

PN277

THE DEPUTY PRESIDENT: Mr Clark, it really isn't appropriate because the – you are obtaining evidence that the applicant could have put in his application. I know he's not represented, but it's really not appropriate that you keep on getting further evidence out of the applicant about what he does and doesn't do.

PN278

MR CLARK: Just trying to be helpful, Your Honour.

PN279

THE DEPUTY PRESIDENT: The issue really is in general terms what the applicant does, and I don't think the particular circumstances – if you wanted to join the application and put on evidence on behalf of the industry generally, you could have done that.

PN280

MR CLARK: Okay. Right, Your Honour. I don't think I've got any other questions.

PN281

THE DEPUTY PRESIDENT: Thanks for that. Cross-examination, Mr McDonald?

PN282

MR McDONALD: Nothing, Your Honour.

PN283

THE DEPUTY PRESIDENT: All right. Thank you. Mr Paranehewa, is there anything else you wanted to say?---No, Your Honour.

*** NARANGODA AMAYURU PARANAHEWA

XN THE DEPUTY PRESIDENT

PN284

THE DEPUTY PRESIDENT: Mr McDonald, I note your submissions about the matters that you objected to. I don't intend to strike them all out, but it's a question of weight that can be put on them is the way that I intend to deal with it. So, on that basis, I'll admit the statement as Exhibit A5.

**EXHIBIT #A5 WITNESS STATEMENT OF NARANGODA
AMAYURU PARANAHEWA**

PN285

Thank you. All right, Mr Paranehewa, that's your evidence. You're excused from giving evidence.

<THE WITNESS WITHDREW

[4.28 PM]

PN286

THE DEPUTY PRESIDENT: So, the respondents aren't calling any evidence, Mr McDonald?

PN287

MR McDONALD: No, Deputy President.

PN288

THE DEPUTY PRESIDENT: All right. Mr Paranehewa, do you want to speak to your application and make a submission about it or just rely on what you filed?

PN289

APPLICANT: Because my application refers to my previous employer Proper Pty Ltd and the respondent has an objection, I would like to submit further evidence of my employment with Proper along with several payslips.

PN290

THE DEPUTY PRESIDENT: Well, Mr Paranehewa, the issue is you really – you've had ample opportunity to do that, and it's - - -

PN291

APPLICANT: Deputy President, excuse my ignorance. However, I haven't been in a court set up before, first time being in front of a judge. So, I wasn't entirely sure how the proceedings would commence. If you excuse me for my ignorance, I would like to make that additional submission.

PN292

THE DEPUTY PRESIDENT: Well, the - however, the directions that were issued on 18 January require you to put in a witness statement explaining your standing to make the application, which included your interest in the real estate industry and who you'd been employed by.

PN293

MR PARANAHEWA: And to the best of my knowledge, I did, Your Honour. I wasn't entirely sure the evidence I provided was sufficient as I wasn't represented by a legal firm.

PN294

THE DEPUTY PRESIDENT: Okay. Well, Mr Paranahewa, I'm not sure what relevance that's going to have, because the issue in dispute is that currently you're working under an arrangement where you're paid from the moment that you arrive at your first open-for-inspection, and your payment ceases at the moment that you conclude your last open for inspection, and the issue is whether the award, as currently it stands, that's consistent with the award as it currently stands, and if it's not, whether the award should be amended to clarify that position. So I don't know that putting in any further evidence is going to take the matter any further in any event, because that's really the issue, isn't it?

PN295

MR PARANAHEWA: That is correct, Your Honour. So if you believe that is the case, then my current submitted evidence should suffice.

PN296

THE DEPUTY PRESIDENT: Yes, all right. Thank you. So there's no additional submissions you want to make?

PN297

MR PARANAHEWA: Not to the best of my knowledge, Your Honour.

PN298

THE DEPUTY PRESIDENT: Okay. Mr Clark, do you want to make any submissions about the basis upon which you assert that the award already covers the matters that the applicant's complaining about?

PN299

MR CLARK: Well, indeed, I made such a submission on 5 January, Your Honour.

PN300

THE DEPUTY PRESIDENT: Yes.

PN301

MR CLARK: And I pointed out various sections of the award, and I would also draw your attention to the transcript where Mr Patterson represented (audio malfunction) Federation of Western Australia, and at paragraphs - I just

PN302

Won't take you to them, but I'll give you the reference - - -

PN303

THE DEPUTY PRESIDENT: That's the transcript before the then-vice - well, now the president.

PN304

MR CLARK: Correct.

PN305

THE DEPUTY PRESIDENT: Yes.

PN306

MR CLARK: The paragraphs I just refer you to are paragraphs 20, 43, 44, 45, and 46. And the - in each of those paragraphs, Deputy President, Mr Patterson agreed with basically my submission of 5 January, which is that the award covers the situation involving the applicant where a person commences - a casual commences work from the time they either front up to the office, or when they go start travelling in their own vehicle to their first assignment, first house for inspection, if it's a property management area, or if you're a salesperson going for an appraisal. In fact, that applies whether you are a casual, part-time, or a permanent employee. Clause 13 of the award, which refers to casual, part-time, and full-time employment has a minimum engagement of three hours, and I submit, just like Mr Patterson agreed on 16 January, which was if a person - and we all understand the industry - a car - - -

PN307

MR McDONALD: Your Honour, I don't mean to - I'm sorry to interrupt, but the - the assertion that he makes, that (indistinct) has somehow agreed to (audio malfunction) Mr Patterson said the things that have been attributed to him, we don't agree with at all. Mr Patterson's also in the room here and shaking his head furiously. But he's not appearing on this occasion, but yes. We certainly don't think that that's borne out. I think there may be an issue - I think that there's clearly a distinction between casual employees and other employees, in our submission, but I - I don't think Mr Clark can bring his case on the basis of something that we've - that we're somehow supporting his contention.

PN308

MR CLARK: The reality of it is that the award does cover these people. The trouble is, it's not clear. It's very clear in terms of the allowances, that the sales persons or any of the employees are entitled to certain vehicle allowances, or motorcycle allowances. That's absolutely clear. Now, it's a question of, when do they start work? Well, I thought we were on the same page, basically, myself and Mr Patterson, which was, when you jump in your car and you go to your first appointment, while you're in the car, and travelling to your first appointment, that's work. And I'm happy to take that matter to any court.

PN309

THE DEPUTY PRESIDENT: Well, Mr Patterson - I'm not sure that Mr Patterson did agree with every proposition, and it was a directions hearing for the purposes of programming the matter for a formal hearing, so I'm at a bit of a loss here. So what do you say Mr Patterson agreed to, Mr Clark? You'd better take me to exactly what you're saying here.

PN310

MR CLARK: Well, what I'm saying, Your Honour, is this: that the essence of what my submission was, that a casual employee is covered by the award, is entitled to be paid the allowances - that's written into the award, 17.2C - - -

PN311

THE DEPUTY PRESIDENT: Not arguing that. It's the basis upon which the allowances are paid.

PN312

MR CLARK: Exactly. And it can only be if they're in - once they're sent out to do a task, and they're in the car headed towards that way, they are engaged in work. They are engaged in work, and funnily enough, if you look at the commercial sales award, they don't say when you start work; it says you get a car allowance of 91 cents per kilometre if you use your own vehicle; it doesn't say 'start time, finish time', because it's understood that sales people and those sorts of industries, and in this industry in particular - - -

PN313

THE DEPUTY PRESIDENT: But there's no - it's not - commercial travellers don't even necessarily have a place of work; they work out of their car.

PN314

MR CLARK: Exactly.

PN315

THE DEPUTY PRESIDENT: That's their point, they travel - the principal thing they do with travel, whereas real estate agents don't. That's not the principal thing they do.

PN316

MR CLARK: Well, they don't sell any properties if they don't travel, Your Honour.

PN317

THE DEPUTY PRESIDENT: I understand that.

PN318

MR CLARK: They don't get any clients.

PN319

THE DEPUTY PRESIDENT: But take me to where you say the award entitles a casual employee to be paid the hourly rate for being a casual employee, plus the travel allowance while they're travelling to their first - - -

PN320

MR CLARK: If you have a look at clause (audio malfunction) of the award.

PN321

THE DEPUTY PRESIDENT: Yes, I'm looking at it.

PN322

MR CLARK: Casual employees in clause 11, 'The minimum engagement for a casual employee is three hours'.

PN323

THE DEPUTY PRESIDENT: Yes.

PN324

MR CLARK: And you get to loading. Well, when are they working? Clause 13 refers to a 38-hour week, but when are people working? Now, in this industry, it is from the time they are heading out in their (audio malfunction) to go to a location. The three hours starts then, from the time they get into the vehicle, because they're at work. Now, I just regret that the applicant's not here in South Australia, because I would love to take it to court before the South Australian Employment Tribunal, and get a ruling. Unfortunately, he's in Victoria; I can't do that.

PN325

THE DEPUTY PRESIDENT: Well, what would they do about the national modern award?

PN326

MR CLARK: They enforce it, Your Honour. They're an eligible court, under the Act.

PN327

THE DEPUTY PRESIDENT: Right, okay.

PN328

MR CLARK: And they do regularly enforce Federal award, including pecuniary penalties.

PN329

MR PARANAHEWA: And in addition to - sorry to interrupt, Mr Clark - and in addition to Mr Clark's submission, in my witness statement and my other submissions, I have highlighted two other awards which specifically state how travel time and travel allowance is (indistinct). So in my application, I'm seeking a similar clarification. You may continue, Mr Clark.

PN330

MR CLARK: So, well, Your Honour, it defies imagination that if you're on a three-hour minimum engagement and you've got to travel an hour to get to that first engagement, which you're travelling - you are going - you are doing work, you are proceeding to work - - -

PN331

THE DEPUTY PRESIDENT: What's the difference if you're on a three-hour minimum engagement and you're going to your employer's office to work there? You're proceeding to work as well, aren't you?

PN332

MR CLARK: To the employers office?

PN333

THE DEPUTY PRESIDENT: Yes.

PN334

MR CLARK: I would say if there's a regular - that's not a problem, I don't think the employee's entitled to claim from that time. And, in fact - - -

PN335

THE DEPUTY PRESIDENT: But they're proceeding to work. Let's say they're going to be in the employer's office - - -

PN336

MR CLARK: Well, maybe my wording was incorrect. If you're going to your first appointment, you're not going to your office, you're starting work straight away, and so it's the same as if you were working a full-time, 38-hours a week. If you're going out to do an inspection, do an appraisal, pick up keys, whatever, you are performing work. It can't be other than that. Otherwise (audio malfunction) engagement. You could be out all day travelling, in some of the country areas, going out to a farm some miles away, and you're only getting paid from when you finally arrive at the station.

PN337

THE DEPUTY PRESIDENT: But it's one thing to say what you should be paid; it's another thing to say what the award presently provides for you to be paid, and the general principle, as I recall it, is that employees are required to travel to and from work on their own - under their own means, unless there's excess travel involved. That's generally when awards provide for travel, and if this award doesn't provide for excess travel, then that's an application to vary the award in that respect, isn't it? That's what that would require.

PN338

MR CLARK: Well, I think the award covers it, but it doesn't clarify - it doesn't have sufficient clarity, which is - I've never had a problem with it.

PN339

THE DEPUTY PRESIDENT: But it's one thing to say you're travelling to - you're entitled to be paid for the entire time you're in your car from when you leave home to when you get to the first site. It's one thing to say that, but to put in a clause that says, 'You only get the excess from between the office and where the first location is', is really a different thing entirely, isn't it?

PN340

MR CLARK: Well, I suppose in some awards there would be the time that you would normally take to travel to your office. Now, insofar as a casual only working maybe on a Saturday only, as the applicant does, there's no need for him to go to the office. So you're travelling to do a piece of work, you are travelling to a client or a potential client.

PN341

THE DEPUTY PRESIDENT: But, Mr Clark, the applicant in this case is seeking a variation that effectively deals with the excess travel. He's not seeking a - you're

arguing a different thing. You're saying the award already provides for all the travel, whether it's excess or not. And he's just saying, 'I'm just seeking an award clause that says it only - it's to cover excess travel'.

PN342

MR CLARK: Well, in the suggested amendment that I put forward, you'll note - I think that I need to change it, but in the allowance provisions, I've put in a position that if an employee's required to travel from one place to another for the purposes of work, time occupied travelling will be counted as time worked and paid as such. Further, if the employee is required to use their own vehicle to travel from one place to another, the additional kilometres travelled by the employee should be paid the relevant allowances as provided under subclauses 17.2, 17.3 or 17.5 and (b) - importantly - 'time spent by an employee travelling from the employee's home to their principal place of employment and return will not be regarded as time worked, nor will the employee be entitled to claim any travel expenses in this circumstance other than as provided for by this award'. I think I probably should add, for the avoidance of doubt, insert clause 13 as well as those relevant subclauses. Now, it's that - I don't want - the problem I have with the applicant's application as is is I think it impinges on people's current entitlements.

PN343

I don't necessarily want a variation to go in that says, 'Now they're entitled to excess travelling time', when I think people have already got rights under the current award. I don't want a tribunal to say, 'It's only inserted on this date in 2023 so it has no retrospective impact', and it obviously was never covered by the award because of the application or variation that's taken effect. So that's where I'm coming from. I say the award covers the applicant's situation okay and if he'd been here in South Australia I'd have been happy to take the point before the courts and prove it if necessary.

PN344

THE DEPUTY PRESIDENT: Well, has it been taken, Mr Clark?

PN345

MR CLARK: No, not that I'm aware of - not in this state, anyway, that's I'm aware of. You've got to remember this comes to the point also of the employer's argument that just because this applicant is there on his Pat Malone today in terms of putting an application to vary this award, they're trying make a big song and dance about it. Well, section 158 of the Act says it can be a registered organisation, it can be an employer, individual or an individual employee. Now, I find it a bit rich coming from employer associations who have spent the last 20 years trying to break down union representation in awards to atomise representation down to individual employers and employees and then when the award - sorry, the Act - allows that to happen, to then use it against employees who apply individually or perhaps just one or two of them, to vary an award, to take care of a problem that they can say, 'You don't speak for anyone else, you can't vary the award on that ground'. That's not what the Act says. You know, if they want to change the Act to like it used to be back 50 years ago when it was only registered organisations that had standing before the old arbitration commission, then by all means do that. I would actually welcome it in part. But

the world's moved on, the union membership is less than 10 per cent and it's virtually non-existent in this industry. So obviously some representation by individuals will occur and they shouldn't be just rightly cast aside.

PN346

THE DEPUTY PRESIDENT: I'm not suggesting individuals are lightly cast aside, Mr Clark. What I'm suggesting is that it seems there is a fundamental disagreement about what this award means with respect to casual employees, leaving aside permanent employees – I don't even know what the argument is there because the clauses don't seem to be different but anyway, there is a fundamental disagreement between you on behalf of the registered employer organisation or a registered employer organisation and employee organisation and the employer organisations about what the award means to start with.

PN347

MR CLARK: Well, we're on song, I thought, from 16 January.

PN348

THE DEPUTY PRESIDENT: Well, you're clearly not.

PN349

MR CLARK: Well, they've walked back from it, yes, that's true.

PN350

THE DEPUTY PRESIDENT: So is this the appropriate forum to deal with such a fundamental difference – an application by one employee with frankly not a lot of evidence about the industry generally?

PN351

MR CLARK: Well, Your Honour, he's given evidence as to what he's done and how he's been treated and I might also add, Your Honour, with respect to your comments on the over-award payments with respect to his current employer, his rate of \$34 an hour includes superannuation. So basically, the award rate – as you rightly pointed out – is \$30 and I think 95 cents. You add the 10.5 per cent to it, it comes up around \$34.

PN352

THE DEPUTY PRESIDENT: I was talking about the \$50, Mr Clark, not the lower rate in the other contract.

PN353

MR CLARK: Okay, and then (indistinct words) I disagree, respectfully, Your Honour, that they can just simply – the employer can simply offset the over-award payment against the – against under underpayment frame because the reality is he was paid wages which were subject to tax and he was paid superannuation on that amount so there was no component for a vehicle allowance at all. That stands on its own in the award. I would sue for an underpayment of wages with respect to non-payment of car allowance.

PN354

THE DEPUTY PRESIDENT: Well, Mr Clark, be that as it may, we're not dealing with an underpayment claim. We are dealing with an application to vary this award that will apply to every employer and every employee in the nation and I'm simply asking you is it your position that this is the appropriate vehicle to deal with this issue?

PN355

MR CLARK: Well, it's currently before the Commission and I say yes, because -
- -

PN356

THE DEPUTY PRESIDENT: Okay.

PN357

MR CLARK: - - - this applicant is one of many casuals and he's had two separate different employers and they've all approached it in the same way which is not to pay travelling time or excess travelling time, if you like, and car allowance for the kilometres travelled?---Your Honour, if I may redirect – the problem that I'm seeking clarification is what the Fair Work ombudsman cannot enforce so if there is underpayment in my current pay slips, like Mr Clark suggested, that's something that the Fair Work ombudsman can deal with under the current award definitions. However, the award currently doesn't define when and where – sorry, when the shift finish and start. So like I've suggested in my submissions there are two other example award where this is specifically defined. Casual employees, like Mr Clark mentioned, doesn't require to travel to the principal place of work so if I – if an employee is to travel to the principal or regular place of work it is understood in the industry that you are not paid, which is fine. And there are many other awards that specifies that clearly. So if it is excess travel – so for example I travel, if I have to travel to my regular place of work, that's only 10 minutes away. The problem I have is if I have to travel for one hour, that excess time between 10 minutes and one hour or 50 minutes, I'm not paid for.

PN358

So Mr Clark's argument is if I'm not travelling to the regular place of work and if I'm going to site directly, that 10 minutes should also be paid. But my application only supports evidence of current awards where only the excess time and allowance is paid for. So at this point in time, I am travelling excess hours to work and from work, from my start and finish. Personally, I'll be happy – or if the award can be clarified as per the two awards that I have suggested, to amend at least the excess time that I have to travel is paid for, that would be a step in the right direction, Your Honour.

PN359

THE DEPUTY PRESIDENT: Yes, I understand your submission. Is there anything else you want to say?---No, Your Honour.

PN360

Mr Clark.

PN361

MR CLARK: No, I'm – unless you want me to address you on the section 158 business.

PN362

THE DEPUTY PRESIDENT: No, thank you.

PN363

MR CLARK: Okay, I'll leave it there.

PN364

THE DEPUTY PRESIDENT: Thank you - on the basis that I don't think it's disputed that the applicant has the standing to bring the application, it's how the application should be dealt with in light of the broad – the breadth of its potential impact, against the problem that the applicant is seeking to highlight from his own personal position. In any event, thanks. Mr McDonald.

PN365

MR McDONALD: Thank you, Your Honour. It seems as though we're sort of looking for solutions but we haven't really identified what the problem is that we're exactly trying to cure. The applicant seeks to say that the award is silent on this. The award is silent on it because it doesn't provide that entitlement to casual employees, as the applicant would seek that it does.

PN366

THE DEPUTY PRESIDENT: Well, Mr McDonald, if it doesn't provide the entitlement to casual employees, it doesn't provide it to any employee, does it?

PN367

MR McDONALD: Yes, so their entitlements - - -

PN368

THE DEPUTY PRESIDENT: That's the logical conclusion of your argument. It doesn't apply to anybody, does it? It's not just casuals, it's anybody if your argument about this is correct.

PN369

MR McDONALD: Deputy President, I don't want to make this some sort of roving inquiry into how everyone's travel arrangements in the industry because we simply don't have an evidentiary foundation to do that and so many people would be affected if we start.

PN370

THE DEPUTY PRESIDENT: And I accept that but it could become a roving inquiry on the Commission's own initiative. If your argument is right, then nobody gets it for travelling in the way that the applicant is describing. It's not just a problem for casual employees. It's a problem for everybody.

PN371

MR McDONALD: Yes, Deputy President – part of the problem is we sort of know little bits and pieces. We're trying to sort of put things together about the applicant and what he does and we don't have any evidence really about how far

does he travel, where does he do these inspections, how many does he do? We don't know any of that. We're sort of in the dark but - - -

PN372

THE DEPUTY PRESIDENT: Sure, but does that – if it's a general issue does that matter, because on your argument, any employee covered by this award could be told, 'Don't come to the office tomorrow, drive two hours hence down the road, take the key with you the night before and have an open house and you're not going to get paid until you get there'.

PN373

MR McDONALD: Your Honour, it most definitely does matter, in our submission. This is a big industry. This is an important part of the award. We should – it's not – the Act isn't structured that it would just be some sort of roving inquiries about awards, and new issues being raised as part of that. There is a system of modern awards, it's supposed to be a stable system that provides certainty. The award like other awards have been reviewed to death. There is all these provisions, including the casual provisions, are completely up to date. They're very conventional provisions. They've been considered by various Full Benches and reviewed. The award is entirely in conformity with all of that so when we're sort of talking about there being a problem, there's a problem here, it's a problem everywhere.

PN374

We say the conventional arrangement is with casual employees that they're engaged. They get offered an engagement, wherever that might be, and they can decide whether or not they want to work that engagement. If it's a long distance away, they'll probably say no. If it's a short distance, maybe yes if it suited their arrangements at the time. That's what I understand the applicant's position is. He's got a full-time job, does a bit of casual work for a couple of agents on weekends and out of hours. He doesn't seem to be very typical from that point of view. I mean, the home finder – we were trying to work out what that was. We don't really have any evidence of that. It doesn't seem to be a like a conventional real estate agent, although we might be wrong about that but we sort of don't really know how all that works. But here we have someone who is quite properly headed into arrangements with particular employers for casual work on circumstances that suit him. There was one that didn't suit him because he had to travel too far so he went for one closer to home. I think he said if the travel was too much, 'I'd go for someone closer to home again'. That's all pretty understandable and with casual employees, the idea of paying them to travel to work, we say, has never been something that's been part of industrial – not something that's typically an award's, at all. I'm not aware of awards that provide for such a provision. The employer can offer an engagement or a particular location to an employee, and they can accept it. If you think of, say, the labour hire industry, you've got many, many casual employees who don't go – they're going from one employer to the next employer. Or from one place to another. They're not being paid travel time every time they go to a new place if they're a temp employee or something like that.

PN375

That's probably, so, the situation where someone does get paid to travel to work is probably the more common situation and has always been the case. Even in South Australia, Your Honour, there's decisions which – to that effect.

PN376

There was one, I know, it was an unreported decision which was cited in the submissions about a catering employee – and I also forwarded a copy of the unreported decision this morning. But I think about the court in South Australia makes it pretty clear about how the arrangement of casual employees work. Particularly since the amendments to the Fair Work Act in relation to section 15A.

PN377

I do cite a passage from it in the submissions but if it's convenient if I can perhaps read a paragraph of it. This is the decision, *Haseldine v Blue Moon Catering Service*. And this is a decision of the South Australian Industrial Magistrates' Court. And at page 3 it says:

PN378

A casual employee can be a person who has an arrangement with an employer. But when the employer requires his services, he will call on him. The employment is irregular. The employee not working on fixed days or at fixed times. When he's not working, he has no continuing contract of employment with the employer requiring him to work again at a specified time. Although he may have agreed as to when he will be available again. He works when so requested by the employer. Each time he performs a job he is working under a new contract of employment. It is necessary for the employee to arrange within when

PN379

And I emphasise:

PN380

And where he will work. He may not agree to work on some occasions.

PN381

And then it goes on to contrast a situation with a regular part-time employee where it would be quite different. But that's really the circumstances here.

PN382

THE DEPUTY PRESIDENT: Well, is it, Mr McDonald? Because I would have thought a 1974 case about casual employment's getting a little bit long in the tooth in the light of recent authority. And there are casual employees and there are casual employees. And if an employee is a casual employee, they can still be, you know, regularly and systematically engaged on every Saturday, or every Saturday and every Wednesday, for a period of time, et cetera. And if you're right there – if you're right on that argument, it brings me back to the point I made at the beginning of the day; are you really saying every time they turn up to an open house it's a separate engagement?

PN383

They can go, 'No, I won't do that one. I'll do the next one because it's closer to home'. Is that realistically how people are working?

PN384

MR McDONALD: It does seem to be happening. That seems to be the applicant's circumstance. So that he worked for one, but his distances were too far. And it seems as though each engagement is a different engagement. He does different open homes. Not the same thing. I don't know whether he works every week or he works sometimes, or whether they have as many places for - - -

PN385

THE DEPUTY PRESIDENT: But every real estate agent does different open homes. That's the point.

PN386

MR McDONALD: It's even not clear as to that. As to whether he's opening homes to – he has a job finder, is he opening homes for the sale; is he doing something in letting; is he canvassing to try and find people. We don't know any of that. But in terms of how these things are – how that's taken care of in Awards, we submit that the usual way is through the minimum engagement period. Making sure that there's a minimum engagement which is sufficient to make sure that the person is not going to be out of pocket for the travel that's going to be involved to work. And there's plenty of authorities, including very recent authorities, that go to that point. The minimum engagement is how this protection in relation to casuals, for how far they have to travel.

PN387

There's also an element of – with an individual such as the applicant – of working it out with his employer in relation to particular engagements about what is and is prepared to accept in a particular week. If one particular inspection is too far away, well that could be dealt with. But we don't even really understand how – what distances are involved. He's sort of thrown up a few figures, it could be 10 kilometres, it could be longer, but we don't really know. And I suppose it changes from week to week.

PN388

And the applicant seems to have been pretty good at working out a contract. He's sort of got the contract with Lewis now. He's got another one with another agency, on terms that suit him. So, one might say, 'Well, wouldn't you just sort of work these things out with the employer'. Go through what's being asked, and even work out whether or not that's acceptable to him.

PN389

And of course, the Award is supposed to be a safety net. It's not supposed to take into account every circumstance. He's paid more than twice above the safety net, in an all-up rate type concept.

PN390

THE DEPUTY PRESIDENT: On one contract, perhaps.

PN391

MR McDONALD: Then he's also – seems to have got another arrangement where he gets a commission in addition to that. We're not trying to, sort of, we don't know what the discussions have been between those particular employers and him. How they've struck the deal. Those employers probably don't have any idea what's going on here today. And it's not clear as to whether they're aware that he wants to be paid. Even though they've agreed on 50 bucks an hour, he's sort of wanting to be paid to go to and from work.

PN392

But I just don't think this is the – in our submission, it's just not really the forum to work through all of that. If there's some sort of grievance or dispute, he and the employer could be brought together to the Commission, or they could go through the dispute resolution procedure. We don't even know whether these employers have had this raised with them. And they could try and sort it out. That would - - -

PN393

THE DEPUTY PRESIDENT: But Mr McDonald, does that matter in circumstances where there's an application to vary a modern Award? There's nowhere that says, 'And by the way, you have to do five steps as a precondition under a dispute resolution procedure before you make an application to vary a modern Award'. The applicant's saying, 'I see a hole in the modern Award, and I'm applying to vary it. And I'm an employee under it, and I have standing to do it'. And nowhere does it say, 'And by the way, have you gone through the dispute settlement procedure before you made the application?'

PN394

MR McDONALD: In our submission, that would be implicit in demonstrating that the application was necessary. So, not whether it's desirable, but whether it's necessary to change the Award across the industry, to deal with the applicant's concerns. And in that type of circumstance, yes, we would say that you wouldn't be able to satisfy the necessary test. Unless you could, sort of, show that you haven't explored other more straightforward options at a local level, which may yield a better result for the applicant. I don't know whether he's thinking, for example, that say, \$50 an hour would be something that he would be paid for travelling if he's successful or whatever. But it seems as though his particular circumstances, they may warrant consideration, they possibly should be discussed with his employer if he wants to change the arrangement that he's agreed to. But it doesn't make this an appropriate forum for dealing with it.

PN395

And as Your Honour knows, in relation to the contract, it may well be that even if he was successful, it wouldn't change anything because of the contractual arrangements to which he's agreed.

PN396

THE DEPUTY PRESIDENT: Well, under one of them. But I don't – and again, I don't know that that's determinative either. Because the issue is, does an Award where potentially, employees can be required to start work at a location far in excess of the travel that they would undertake if they just travelled to work, to the employer's workplace, meets the modern Award objective. In that it's fair, you

know, all of the requirements of the modern Award objective. Is it necessary to meet the modern Award objective to put some provision in this Award that deals, for arguments sake, with excess travel. Because I think the cases you're quoting, for example, the part-time and casuals Full Bench about – for each attendance at the workplace to justify the expense and inconvenience, the minimum payment, is about a person who goes every day to the same workplace. Not a person who travels around. Because generally, Awards where people travel around, they start at a depot, and they all get in a bus and go somewhere. They're paid from that point. Or there's a provision that says where you're just going to drive to the normal start place, you get paid for the excess time. To have regard for the fact that, yes, you have to travel to your normal workplace every day, but there's nothing that says you have to travel anywhere you're told to go, on your time and money. And is that a fair provision, in the context of the modern Award objective.

PN397

MR McDONALD: In our submission, the casual employees, in terms of where they're offered work, that's a matter that's on a per engagement basis. The types of provisions that you're talking about, I think, are, yes, conventional in relation to permanent employees where there may be excess travel involved in certain industries. But in relation to the usual situation where a casual is employed, they have to make their own way to work. They have to pay for the costs of that travel to work. And they've got to be paid a minimum engagement which would compensate them for that. And that's part of the reason, too, why they get the casual loading. Because there's an irregularity about it. They're not going to start at the same place on every single occasion in the same way as the case here.

PN398

So we don't say that there's anything – there's nothing in the casual provisions of our Award which are really any different to other Awards. We're not aware of there being some general entitlement to casuals in relation to this. For example, say the Hospitality Award which is mentioned in the authorities, I mean, that certainly makes it clear that you don't get travel in relation – if you're a casual employee.

PN399

THE DEPUTY PRESIDENT: But you're generally going to a pub, a restaurant or a hotel where you work all the time.

PN400

MR McDONALD: If one's a caterer, though, you might be going to various different locations. Or you might be working for a group that's got various different hotels that you might get work at. It's not that – I'm sure a lot of people will do this – casuals would like to be paid for the travel to work but it's not something that I'm aware of in relation to, that provision is made for, in Awards.

PN401

Different in relation to permanent employees. But the casual employee, we say, in our submission, there's no authority that would give a basis for that. And, in fact, we would submit that the provisions in relation to minimum engagement – the pronouncements of the Full Bench in relation to those are very clear about it

really being designed to make sure that there's sufficient compensation to make the work worthwhile.

PN402

It would be a very significant change if employees were to – casuals were to get paid to be able to travel to and from work. And it will be up to employees to make decisions about whether it's worth their while, in the same way as the applicant does, as to whether a location is close to home, it might be more appealing than one that's further away from home. It might be, for example, (indistinct) that he's got some commission arrangement, which he has with one of his employers, that makes one of those provisions more saleable. It may be that, on some occasions, he just does one open house which is down the street, he's got it over with in 15 minutes, and is paid the minimum engagement of three hours. We don't know. We don't have the evidence about that.

PN403

But there's no reason to believe that the minimum engagement doesn't more than compensate for the travel time.

PN404

THE DEPUTY PRESIDENT: Okay. I understand your submission. So you basically say that there's no justification based on the evidence to make a change to the modern Award that would have broader scope beyond the applicant.

PN405

MR McDONALD: That's right. There is essentially two things here that the applicant has to demonstrate. One that it is necessary. Not just desirable. But absolutely necessary because otherwise the modern Award's objective wouldn't be met. And the grounds upon which he makes that point is set out in his application. And that's at 2.3 of his application. He says that:

PN406

The proposed variation to the Award is necessary in order to provide additional remuneration for employees working shifts, and irregular places of work.

PN407

Now, I don't think anything's been made out about working shifts, but in relation to a regular basis at work, we say that that is already compensated for both in respect of the casual loading and the minimum engagement. I have referred to some authority in relation to how that 25 per cent loading which is common across all awards are struck and drawn largely from the decision aforementioned in the metals case. But certainly we site a year of that irregularity and itinerance that's associated with casual employment, was very much part of the figuring of the fore mention of those cases and Your Honour's already gone to the – what was said in the casual part-time review. But that's how that itinerance is taken into account by – in the loading and in the – relation to the minimum engagement in our submission. But yes, so there's the idea of necessity but then there's also merit, whether there's really a justification.

PN408

Now, we're in a large industry and a larger ward where we're just hearing from one person who has particular experience, couldn't be said in any way to be represented of the industry more generally, but is talking about his own particular circumstances but in a very superficial sort of way. It's really hard to – for the Commission, I think to be satisfied that merit cases have been made out to justify a variation across the industry. And I think whether – there might be issues about how much weight is given, but as a practical matter, there needs to be justification industry-wide for the Commission to be able to move on whatever basis it moves and adjust its process – hasn't given the Commission that ability.

PN409

If I could just refer the Commission to one authority on that? It's a case Total Toning Fitness Pty Ltd, where Total Toning Fitness was an employer that was seeking to change appropriate shift provisions in the fitness industry award. In that – those authorities I have ordered through earlier this morning, Your Honour, it's – there's a hyperlink to it there. It's reported at [2021] FWCFB 6075. And just at paragraph 30 of that decision, the Bench says at the end of that paragraph:

PN410

'You consider the proposed variation could result in a change in rostering practices for some employees and provide some flexibility to rostering of the employees.'

PN411

But the sample of evidence before us is not sufficient to support the conclusions in – to this effect. And it's a similar sort of situation here. And the other points that they make in that decision are that as well as this Total Fitness talking about particular employees there, the industry's a broader industry and there are other employees who would be affected by the change that's proposed.

PN412

And at paragraph 33 and 34, they deal with that and just at the end of paragraph 33, after considering their conclusions that – edge's conclusions on an award's objective, it says:

PN413

'Classification structure in the award extends well beyond personal trainers and fitness instructors and we're not satisfied based on minimal evidence before us in making a determination to increase the maximum span of hours over which an employee could be rostered to work a broken shift from 12 to 13 hours is necessary, I emphasize that. Or the award to achieve the modern award's objective.'

PN414

We say that the situation is similar here. And the other point that they make in paragraph 34 is that:

PN415

We conclude by making the obvious observation that suit your variation to the award, but not the only one in which the applicant and others in the fitness industry can pursue terms and conditions that differ from those currently

contained in the award. Different terms and conditions might be pursued to enterprise bargaining. Process currently being undertaken by Mr Epper's employer or by the making of an individual flexibility agreement pursuant to Clause 5 of the award.

PN416

I will finish the quote there. But all of those types of options are available to the applicant or even just raising it with the employer and having a discussion about how things could work in a way that are hark to the applicant's satisfaction. And that is of course, if he is dissatisfied with the arrangements. And we're not – there's not really any evidence of it with the current arrangements, which is sort of relevantly recently entered into, but he does have any particular problem with the (indistinct) working reasonably well. They seem to be arranging very – doing work close to home. And he's getting the larger amount of money than what the award provides.

PN417

But none of that needs to necessarily be that – be taken to say anything the applicant is necessarily saying is wrong, but it doesn't mean that the award is – has to be changed to deal with the applicant's circumstance. There are other ways that this could be more easily sorted out.

PN418

That will conclude our submission unless Your Honour has any questions about it.

PN419

THE DEPUTY PRESIDENT: No, thank you. I understand your submissions. Mr Paranahewa, do you have anything you want to say in response?

PN420

MR PARANAHEWA: Yes, a couple of things, Your Honour. Mr McDonald referred to minimum engagement several times. Most of my shift, for example, the payslip I have provided goes beyond the minimum engagement, so the minimum engagement is a safety net like Mr McDonald explained. However, what if the minimum – what if the shift goes beyond the minimum engagement. So that puts the employer in a position where the employer gets unfair advantage, where that very specific scenario you mentioned, Your Honour, employer have the grounds to say, 'Pick up the keys the night before', go down to and open for inspection two hours away from where you work. Secondly, Your Honour, regarding the process of going through the grievances and disputes with the current employer, that process would only be applicable and enforced with what the Fair Work ombudsmen can enforce. As long as there is – it's not stipulated in the award or there is no clear evidence to support the entitlements. The Fair Work ombudsmen will not be able to enforce it, hence the grievances and disputes process resolution proceeds will not work. The 25 per cent casual loading, that is to – for a casual employee that is paid in regards – in comparison with a part-time or a permanent employee, that is to cover sick leave, annual leave and also long-service leave, that doesn't really take into account the travel that an employee has to do. It makes sense of the regular place of work.

PN421

Also the awards Mr McDonald highlighted, hospitality and the fitness industry. They are somewhat very different from the real estate industry where a person has to go from one site to another under the same employer, whereas hospitality industry you could be working for several employers moving from one side to another.

PN422

So the closest award that I can highlight is the manufacturing award 2020, where repairmen such as White Goods replacement, White Goods repairmen, service technicians, where a similar arrangement is compared to a real estate agent, where an employee has to travel from one side to another under the same employer.

PN423

THE DEPUTY PRESIDENT: So they're your submissions?

PN424

MR PARANAHEWA: That's all, Your Honour.

PN425

THE DEPUTY PRESIDENT: Okay. Mr Clark, anything further you want to say?

PN426

MR CLARK: Just a couple of points, Your Honour. One with respect to the representations made by the employers in their submissions from paragraphs 11 to 13, basically, quoting a number of decisions and you have already drawn attention to it, Your Honour, and I would support the comments that you made that basically the employers in this industry are trying to suggest that built into the 25 per cent loading is for their itinerant nature of the job, where quite clearly those decisions referred to particular industries where an employee, a casual employee goes to the one employer who locates him and does the work there. The 25 per cent loading is quite clear. And by the way to the applicant, doesn't include long-service leave. It depends on your long-service leave Act in your statement. So don't let them take it off you.

PN427

The 25 per cent loading has got nothing to do with the circumstances surrounding the applicant's name in this matter. It's not a bad red herring but it's one that's completely bogus. And I commend the comments that you have made in respect of that, Your Honour.

PN428

THE DEPUTY PRESIDENT: Well, I don't know that I said it was completely bogus, Mr Clark. There may be some awards where those travel arrangements, and I just look quickly at the hospitality award, excess travel doesn't apply to casuals, it only applies to permanent and part-time employees in the hospitality industry by the look of it. So there may be some awards where casuals are treated differently.

PN429

MR CLARK: Okay. The (indistinct) industry provides for additional (indistinct) of time and payments, Your Honour.

PN430

THE DEPUTY PRESIDENT: Yes, okay.

PN431

MR CLARK: If they try to (indistinct) place to place. But anyway, (indistinct words). The applicant has given evidence basically about how two employers, different employers in – where he's worked for has the same approach to the payment of time, for travelling and in, payment – no payment of allowances. Car allowances at all. And they're not built into the wage rates. They are not built in with wage rates. They have to be separately identified for the purposes of the Act. Now, so just on what the employer – the applicant has put forward, I say is strongly indicative of what happens in a number – to a number of employees, casual employees, with a number of employers.

PN432

MR McDONALD: Well, I object to that, Deputy President. That's not appropriate to (indistinct) assertion. We're just in closing submissions.

PN433

MR CLARK: Now. So the way Mr McDonald was talking about (indistinct) engagements when you are paired (indistinct words) to a house, is he's suggesting that my – that the applicant should be entitled to be paid a minimum of three hours for engagement, per engagement (indistinct words) each house he visits.

PN434

THE DEPUTY PRESIDENT: No, I think – I don't think that was the – I don't think that was the submission, Mr Clark.

PN435

MR CLARK: That would be the logic. That would be the logic. For me, his attitude towards pain of travel time.

PN436

THE DEPUTY PRESIDENT: And I don't think the applicant is saying that he's not – he's not - - -

PN437

MR CLARK: Is the applicant (indistinct words).

PN438

THE DEPUTY PRESIDENT: He's not paid the allowance or the travel at all. He's just saying he's not paid it for the first open house of the day and home from the last one.

PN439

MR CLARK: Your Honour, from the payslips we looked at, there is no reference there to travel allowance or car allowance.

PN440

THE DEPUTY PRESIDENT: But that's from – that's from Louis.

PN441

MR CLARK: No, I think there's one also for (indistinct) - - -

PN442

MR PARANAHEWA: Fletchers. Yes, Your Honour, if I may interrupt, the lack of kilometre payment is enforceable by the Fair Work Ombudsmen. That's not in the question here. The question here is what is not enforceable by the Fair Work Ombudsmen.

PN443

MR CLARK: (Indistinct words).

PN444

THE DEPUTY PRESIDENT: I don't think it's in issue, Mr Clark, that what people – I don't think the employers are putting in issue that once you start at the first location and you have started work and you are either paid the minimum engagement or you are paid until you finish, at the last one for the day. What's in issue is the travel there, and the travel back. Is that the case, Mr McDonald?

PN445

MR McDONALD: I am sorry, Deputy President. (Indistinct words).

PN446

THE DEPUTY PRESIDENT: It's not in issue, once you start at the first location for the day, that you are paid from hence forth while you are working. And if you are travelling to another location you are paid. If you are entitled to be paid the relevant vehicle allowance when you are travelling between locations, once you have started work. The issue is before you start work at the first location for the day, and when you complete work at the last location for the day. That's all we're looking at. And if the applicant hasn't been paid for the in between time, that's not a matter we're dealing with in this proceeding. He can go and make his claim. The issue is the first location and the last location. So I am not going to have you turn it into, you know, something that's a three ring circus, Mr Clark, when it's a one-ring circus. It's about one issue.

PN447

MR CLARK: Okay. Okay, Your Honour. I just wanted to make sure the applicant gets his just rewards.

PN448

THE DEPUTY PRESIDENT: Well, you can talk to him separately, Mr Clark, outside these proceedings, if you want to. But you know - - -

PN449

MR CLARK: Because he - he would – I will give him my phone number.

PN450

THE DEPUTY PRESIDENT: Good, you are not – well, you got – you have got each other's emails so - - -

PN451

MR CLARK: They've done the application declaring – and I will (indistinct) of free of charge give you some advice out of - - -

PN452

THE DEPUTY PRESIDENT: Okay. Could be worth your while, Mr Paranahewa, regardless of the outcome of proceedings.

PN453

MR PARANAHEWA: (Indistinct words).

PN454

MR CLARK: (Indistinct) penalties.

PN455

THE DEPUTY PRESIDENT: Okay. Good. Thank you. All right. But I understand – I understand your submission. Is that all you wanted to say?

PN456

MR CLARK: Yes.

PN457

THE DEPUTY PRESIDENT: All right. Thank you for your submissions. On that basis I will adjourn and reserve decision and issue it in due course. Thank you. Good morning.

PN458

MR CLARK: Good morning.

PN459

MR PARANAHEWA: Good afternoon.

ADJOURNED INDEFINITELY

[1.21 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

NARANGODA AMAYURU PARANAHEWA, AFFIRMEDPN236

EXAMINATION-IN-CHIEF BY THE DEPUTY PRESIDENTPN236

**EXHIBIT #A5 WITNESS STATEMENT OF NARANGODA AMAYURU
PARANAHEWAPN284**

THE WITNESS WITHDREWPN285