



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AG2023/2110

**Sch. 3A, Item 26A(4) - Application to extend default period for Division 2B State
employment agreements**

**Application by ISS Health Services Pty Ltd
(AG2023/2110)**

Sydney

11.00 AM, FRIDAY, 30 JUNE 2023

PN1

JUSTICE HATCHER: Mr O'Rourke, are you there?

PN2

MR D. O'ROURKE: Yes, I am. Sorry about that. Just a technical fault.

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JUSTICE HATCHER: All right. You appear for the applicant in this matter. Correct?

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MR O'ROURKE: That is correct.

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JUSTICE HATCHER: Ms McCarthy, you appear for the United Workers Union.

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MS M. McCARTHY: Yes. Good morning.

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JUSTICE HATCHER: Mr O'Rourke, just to start off with a technical matter, am I right in thinking that the agreement which you're seeking to extend was an agreement approved by the South Australian Commission. Is that right?

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MR O'ROURKE: Not exactly sure on that. It does go back, the original agreement, to 2004, so it is some years old. By way of background, the Tempo agreement was the EA, and then that expired and then that agreement calls up the private contractors. That is also now a terminated agreement.

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In the arrangement we have with our client, we match the wage rates to the SA Health public sector for our employees and then we refer for other conditions to the Tempo or private contractors respectively.

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JUSTICE HATCHER: I'm just looking at the first page of the document. It bears the stamp of the Industrial Relations Commission of South Australia. Do you see that?

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MR O'ROURKE: Yes, I do; yes.

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JUSTICE HATCHER: I can see you're nodding, Ms McCarthy. Am I right to assume, therefore, that it was a state agreement under the South Australian Commission's banner?

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MS McCARTHY: Yes, I do believe it's correct that the Industrial Relations Commission of South Australia - - -

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MR O'ROURKE: Yes.

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MS McCARTHY: - - - as it was constituted at the time, did approve this instrument.

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JUSTICE HATCHER: All right. This is just a technical matter, Mr O'Rourke, but do you have your application with you?

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MR O'ROURKE: The F18 document?

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JUSTICE HATCHER: Yes.

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MR O'ROURKE: Yes, I do.

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JUSTICE HATCHER: Can I just ask you to turn to page 3 of 8?

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MR O'ROURKE: Yes.

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JUSTICE HATCHER: You'll see section 2, 'The application', and it says, 2.1, 'Which application is being made?' and you've put a cross next to the first box. Do you see that?

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MR O'ROURKE: Yes, I do.

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JUSTICE HATCHER: I think it should be the second box, because it's actually division 2B, State employment agreement. That's why I asked if - - -

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MR O'ROURKE: Yes. Yes, rereading that, I do agree.

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JUSTICE HATCHER: Yes.

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MR O'ROURKE: I'm happy to provide a written statement on that or adjust - - -

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JUSTICE HATCHER: No, that's all right. Do you agree with that, Ms McCarthy?

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MS McCARTHY: Yes, thank you.

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JUSTICE HATCHER: All right. Unless you object, I'll take it that you've amended your application to, as it were, tick the second box instead of the first box.

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MR O'ROURKE: Agreed.

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JUSTICE HATCHER: Can I then turn to the grounds for the application itself. It seems to me that the employer has issued a notice of employee representational rights so a notification time has arisen, but – and I'm referring to the provisions of item 20A of schedule 3 of the transitional Act. Has bargaining actually commenced, or is it occurring?

PN33

MR O'ROURKE: It is scheduled for 26 July to occur. The reason for that, I am just closing two other EAs and we were proposing to talk to Mary and her colleagues in relation to obtaining a log in that regard. So that is the reason for the 26 July, some time away now.

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JUSTICE HATCHER: All right.

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MS McCARTHY: Your Honour, I would say that in our view bargaining is occurring, in the sense that a notice of employee representational rights was issued on 14 June. My friend is correct that the first bargaining meeting is scheduled for 14 July, but we would say in those circumstances that it does mean that bargaining is occurring.

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JUSTICE HATCHER: All right. I only observe that sub-item (7) of item 20(O), schedule 3 to the Transitional Act has separate requirements for a notification time and for the occurrence of bargaining, that is, it treats them as two separate things.

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It's clear that a notification time has occurred, but it doesn't seem to me that it automatically follows that bargaining is yet occurring, unless there's some other event which has occurred.

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MS McCARTHY: There's certainly been discussions between the parties, some substantive discussions, in terms of what might be included in a new agreement. There just hasn't yet been that face-to-face meeting.

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If it was felt, I think, by the Commission, that this is a technical problem in whether or not we're satisfying that the bargaining is occurring, I would suggest, perhaps, if it was possible, to hold this application over until that meeting occurs, because we are talking about a two-week period.

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Come 15 July we'll be in a position where certainly there will have been a bargaining meeting, but in saying that, I do think that there are other pathways under which this application could be granted.

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JUSTICE HATCHER: I haven't asked you this yet, Ms McCarthy, but I'm inferring that the UWU supports the application.

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MS McCARTHY: Very strongly supports the application. My friend identified, I believe, that this is an agreement which provides parity for these workers to have the wages equivalent to what is in the state public sector enterprise agreement. It is significantly higher than what would be under the modern award.

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JUSTICE HATCHER: What would be the relevant modern award?

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MS McCARTHY: I believe there would be more than one modern award. So the health and other support services award I believe would be relevant in relation to classification structures with regards to gardening, personal care workers, laundry hands, theatre technicians, which under the instrument are described as gardening or ground services, direct care, utility services, client and allied services.

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So our analysis about a comparison between the levels of that modern award and the parity wages which are provided in this instrument, on an hourly minimum rate of pay basis it's somewhere between \$2.50 and close to \$4 an hour that is greater under this instrument than it is under that modern award, or would be under the modern award.

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JUSTICE HATCHER: (Indistinct) either parties, but is it said that the current rates that are actually being paid - payable pursuant to a term of the zombie agreement?

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MS McCARTHY: Yes. It's contained in schedule 1 of the instrument. There is a reference in schedule 1(1), I believe it is, which appears on page 16 of the instrument, where it provides that the wages following 1 July 2004 will follow the wage increases of the government award.

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The government award was defined in this instrument as being the South Australian Government Health Ancillary Etc. Award. That award brought its

wages from the South Australian public sector weekly paid enterprise agreement. That was an agreement approved by the Commission in January 2022.

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JUSTICE HATCHER: Yes.

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MS McCARTHY: It contains rates of pay – where I referenced the \$2.50 to close to \$4, those are the rates of pay which are drawn in and which have been applied by virtue of this instrument.

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JUSTICE HATCHER: Are there any detriments that you can identify – this is again addressed to either party – that might be relevant to the better off overall test?

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MS McCARTHY: I think it's likely that if an assessment was made under the BOOT test perhaps there are some provisions that might exist in a modern award that aren't replicated in this instrument, however I've read the recent decision of Suncoast Scaffold. I understand the distinction that's been drawn between the section 193 test of BOOT and the less stringent overall assessment that is contemplated I think by sub-item (9).

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We believe that the significantly higher wage rates are the most pressing matter in terms of an assessment of whether a group are better off overall under this instrument as they would be under a modern award.

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I can certainly say that we have a significant cohort of membership amongst these employees who are covered. We have had active engagement with our members in relation to this application and there is a strong consensus of support from the workers who are covered by this instrument to have this application granted.

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JUSTICE HATCHER: Do you agree with all of that, Mr O'Rourke?

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MR O'ROURKE: Yes, I do, and the only final point to Ms McCarthy is in the past those higher wages have been the reason. As such, there hasn't been a strong motivation for the agreement, but given this change, there is now a stronger motivation around that.

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JUSTICE HATCHER: Ms McCarthy, did you say there might be another modern award applicable as well?

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MS McCARTHY: I think potentially the Cleaning Services Award would be applicable, and my analysis of that is that if you assess, for example, a level 1

cleaner under the Cleaning Services Award as opposed to this instrument - I have moved to a weekly rate of pay just because that is how the award is expressed.

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This is a 38-hour week, but the difference at level 1, for example, is \$135.90, a level 2 is \$116.50, a level 3, \$88.60. So that is an additional payment by virtue of the parity provision of this instrument.

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JUSTICE HATCHER: Do any other unions have an interest in the employees of the company covered by the agreement?

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MS McCARTHY: I don't believe so. I'm not aware of – sorry, for clarification, this instrument or - - -

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JUSTICE HATCHER: This zombie agreement the subject of the application.

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MS McCARTHY: I don't believe there is any other party to this. We are, under clause 4, defined as 'the union' - the Liquor, Hospitality and Miscellaneous Union, which has subsequently become United Workers Union. So, no, there's no other union.

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JUSTICE HATCHER: How many employees are covered by the agreement?

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MR O'ROURKE: About 850 or so, thereabouts, and across a couple of different sites – for all sites.

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JUSTICE HATCHER: Do I have a copy of the notice of employee representational rights?

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MR O'ROURKE: No, but I can provided that post that meeting. That is no issue.

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JUSTICE HATCHER: All right. Mr O'Rourke, can you do two things. First of all, can you send me a copy of the notice, and secondly, can you send me a copy of the schedule of rates which you're currently paying?

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MR O'ROURKE: Yes. No problem whatsoever.

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JUSTICE HATCHER: All right. So final question, broadly speaking, as I understand it, the extension is sought for the purpose of allowing time to negotiate a replacement agreement. Correct?

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MR O'ROURKE: Yes.

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JUSTICE HATCHER: The application refers to 6 December 25. Why is a period of that length required?

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MR O'ROURKE: The initial view was we have been in negotiation in the past for up to those periods of time, so over the last five to seven years, and due to the, I guess you'd call it, extra complications in relation to that, they have extended and gone on for some time.

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Also the breadth of different sites and employees. To adequately get out and consult, we thought it was better to provide a little bit more time than we would expect to do that comfortably. So that was really the only reason, is just the extra complications, but also just to get out to all of our employees and adequately consult as part of the process.

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JUSTICE HATCHER: Ms McCarthy, what do you say about this?

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MS McCARTHY: We support the two-year time frame. I think my friend is right, that given this agreement has the parity provision in it has probably been a factor as to why in the past those negotiations haven't led to a new agreement, because the parties all generally are very happy with these provisions.

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I think it's probably right that if there was a one-year extension, we would almost certainly be in a position where we would have a new agreement, given that we have commenced bargaining, but we do support the two-year application, and I think my friend is right, that in the past there has been some stopping and starting and delays where we haven't quite got there, so that history might inform – without predicting how things might go, that there could be some protraction in terms of negotiations.

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JUSTICE HATCHER: Either now or at some later stage, is there anything further that either party wants to put in support of the application?

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MS McCARTHY: I would just say that – sorry.

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JUSTICE HATCHER: Mr O'Rourke?

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MR O'ROURKE: That's fine. No, you go ahead.

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MS McCARTHY: Our position, I think, would be that sub-item (6)(b) is also a pathway through which the extension could be granted, and that is that reasonable criterion, and we say that, independent of the sub-item we've discussed, this could apply.

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Looking at the Bench's decision in Suncoast, there were four considerations that were referring to, I think, at paragraph 39 that tended against the making of the application in that case, and we say all of those factors in this case tend towards the making of the application.

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That is, that many of the employees who were employed at the time that this agreement was made in 2004 are still employed, because it's a stable workforce. We can, if the Commission required it, provide independent views and evidence of the strong support of the making of the application, and certainly our members and, I believe, my friend's employees, are very aware of the making of the application.

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This is in relation to private contractors in hospitals employed by the applicant that are covered by this agreement and there's clear evidence that the continued operation, we say, of this agreement would be critical for the applicant as a business, because these parity arrangements are a requirement of the commercial contract that the applicant has with the government to provide the services under which this work is performed.

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So we say all of those factors in Suncoast that tended against using sub-item (6)(b) would apply in favour here.

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JUSTICE HATCHER: Do you want to add anything either now or at some later stage in writing or orally, Mr O'Rourke?

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MR O'ROURKE: No, look, I'm comfortable with everything today in relation to what's been discussed.

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JUSTICE HATCHER: All right. Mr O'Rourke, if you send in that information – so again, that's the notice of employee representational rights and - - -

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MR O'ROURKE: Schedule of rates.

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JUSTICE HATCHER: - - - a schedule of the current rates, then the Commission will decide the matter on the basis of what's been put today, the application and that further material.

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If there's nothing further, we'll now adjourn, which means you can simply disconnect.

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MS McCARTHY: Thank you.

ADJOURNED INDEFINITELY

[11.20 AM]