



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2024/34

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

Working from home term — Clerks—Private Sector Award 2020

Sydney

9.30 AM, FRIDAY, 13 SEPTEMBER 2024

PN1

JUSTICE HATCHER: Good morning. I'll take the appearances. Mr Robson, you appear for the ASU?

PN2

MR ROBSON: That's correct, your Honour, and with me online is Ms McEwen.

PN3

JUSTICE HATCHER: Thank you. Ms Tobin, you appear for the ACTU?

PN4

MS TOBIN: Yes, President.

PN5

JUSTICE HATCHER: And Ms Bhatt, you appear for the Australian Industry Group?

PN6

MS BHATT: Yes, your Honour.

PN7

JUSTICE HATCHER: Mr Izzo, you appear for ABI and Business NSW with Ms Lawrence?

PN8

MR IZZO: Yes, your Honour.

PN9

JUSTICE HATCHER: Ms Rooke, you appear for the Civil Contractors Federation?

PN10

MS ROOKE: Yes, your Honour.

PN11

JUSTICE HATCHER: Are there any other appearances in Sydney? No? All right. And then via Teams, Ms Tinsley and Mr Morris, you appear for the Australian Chamber of Commerce and Industry?

PN12

MR TINSLEY: Yes, your Honour.

PN13

JUSTICE HATCHER: Mr Tindley, you appear for the Australian Retailers Association?

PN14

MR TINDLEY: Yes, your Honour. Your Honour, could I also point out that I didn't catch the name of the person from the ASU. It was very hard to hear when he stood up. It may be the positioning of the microphone.

PN15

JUSTICE HATCHER: All right. That's Mr Robson.

PN16

MR TINDLEY: Robson. Sorry, Mr Robson.

PN17

JUSTICE HATCHER: All right. There are two matters to discuss today, but first of all, arising from the statement issued by the Full Bench on 29 August concerns the list of identified issues. Does any party want to make submissions that that list of issues should be modified in some way?

PN18

MS BHATT: Your Honour, just one proposition that we seek to raise and it relates to question 4, and the submission is simply this, that added to the list of award provisions that should be minimum engagement periods. It is a matter that we raised in the context of the award - - -

PN19

SPEAKER: (Indistinct).

PN20

MS BHATT: I'm sorry.

PN21

JUSTICE HATCHER: Yes, go on. Just hold on, Ms Bhatt. Can I ask any party that is not participating in the proceedings to ensure that their microphone is turned off, and parties which are – that is attending by Teams – and parties which are not speaking, can I ask them to leave their microphones off while another party is speaking to avoid any feedback problems. Go ahead, Ms Bhatt.

PN22

MS BHATT: Thank you, your Honour. I was only going to say that that's a matter that we have raised in the context of the award review in relation to submissions about the issue of working from home. There's no other modification that we seek to the list of questions.

PN23

JUSTICE HATCHER: All right. Look, I'll have the Full Bench consider that, but I should indicate that I was aware that that issue was raised that there was perceived to be an overlap between that issue and the contemplated part-time review that will occur next year, and I think, speaking for myself, the preference is they should be dealt with in that separate context, but I note what you've said, Ms Bhatt.

PN24

MS BHATT: I was mindful of that overlap too. Thank you.

PN25

JUSTICE HATCHER: That's all right. Any other parties? Mr Izzo?

PN26

MR IZZO: Your Honour, we had sent in some correspondence that raised two issues.

PN27

JUSTICE HATCHER: Yes.

PN28

MR IZZO: The first is to echo what Ms Bhatt has said about minimum engagements. We identified the two relevant clauses. They are clause 10.5 and clause 11.4 in the award.

PN29

I heard what your Honour said about where that issue should properly sit. We would respectfully submit that it should be considered in this case for two reasons.

PN30

One is that the minimum engagement clause pertains to casual employees as well as part-time employees, and the second reason, and we'll be advancing, or we would seek to advance submissions about this if it is included in this stream, is that much of the rationale for the minimum engagement clauses pertain to travelling to the workplace and returning from the workplace, which is an issue that we think will heavily be considered as part of these proceedings.

PN31

So that's why we had thought minimum engagements would be appropriate to be considered in this particular proceedings, but obviously it's a matter for the Full Bench.

PN32

JUSTICE HATCHER: All right. Thank you.

PN33

MR IZZO: That's the first issue. The second issue, which might not necessarily require redrafting of the issues for consideration – there's a number of references to working from home.

PN34

In relation to the specific obligations on employers - and they're very much encapsulated at issue 4 - a number of those obligations, the rationale for them, a lot of it pertains to the employee being required to be at the employer's premises, and we say if they're no longer at the employer's premises then there should be some relief or modification of that obligation.

PN35

So from our perspective it's not so much about looking at those clauses in the context of working from home, but more when the employee is no longer working at the employer's premises.

PN36

I'm not particularly wedded to how that issue is dealt with, but what we wouldn't want to see constrained is the analysis of those clauses being only varied or

modified to the extent that someone is specifically working from home, because much of the rationale, taken in the engagement clause for instance, is about the issues associated with travelling to and from the workplace, and so that's what we

- - -

PN37

JUSTICE HATCHER: Mr Izzo, it needs to be made clear that the subject matter of this proceeding is working from home and not something broader than that, but you might conceivably raise that under issue 2, that is, how should working from home be defined.

PN38

MR IZZO: Certainly.

PN39

JUSTICE HATCHER: Yes. All right. Anybody else? Mr Robson?

PN40

MR ROBSON: Thank you, your Honour. I just note that we oppose the inclusion of both matters raised by the other parties in these proceedings, I think particularly in the case of the remote work term, as you've noted. That potentially substantially expands the scope of this case.

PN41

I give one example where the interaction of the word 'remote', or not being required to work at the employer's premises gives rise to, you know, substantial new issues; for example, a number of people engaged under this award would be working for labour hire providers, or they might work for firms that, say, provide bookkeeping services. They may very rarely attend the employer's premises themselves, but there will be places that are not that but they need to attend. That's a separate case to the one identified by the Commission in its statement.

PN42

In terms of the – I have two additional questions we would like to propose to the Full Bench, and this relates to the question 3 about whether it should be a clause that supports an employee's right to request or merely a facilitative provision, and this is that question, is there any distinction between circumstances where an employee chooses to work from home and circumstances where they are required to work from home by the employer; should different provisions, if any, apply to each of those circumstances and what are they?

PN43

JUSTICE HATCHER: All right.

PN44

MR ROBSON: The second question we want to propose to the Full Bench is, is there any need to consider provisions addressing privacy, surveillance and safety while working from home.

PN45

JUSTICE HATCHER: What was the first one, surveillance?

PN46

MR ROBSON: Privacy, surveillance and safety.

PN47

JUSTICE HATCHER: Mr Robson, can I just ask you to forward the precise text of those questions to my Chambers after we finish?

PN48

MR ROBSON: Of course, your Honour. May it please.

PN49

JUSTICE HATCHER: Yes. All right, anybody else? Ms Tobin?

PN50

MR TINDLEY: Your Honour - - -

PN51

JUSTICE HATCHER: Sorry, just wait. We'll start with Sydney first, Mr Tindley.

PN52

MR TINDLEY: Sorry.

PN53

JUSTICE HATCHER: Ms Tobin?

PN54

MS TOBIN: Your Honour, the ACTU supports the inclusion of the questions proposed by the ASU. In relation to the additional points raised by ABI and AIG, the ACTU opposes the inclusion of both of those.

PN55

Just in relation to the minimum engagement clause issue, I'd just like to add that the ACTU opposes the inclusion of that on the basis of the comments made by the Full Bench in its report on the modern awards review relating to the connection between the erosion of conditions such as minimum engagement periods, and gender and equality, and gender evaluation, especially given that in the Clerks Award the minimum engagement period is already set at three hours.

PN56

JUSTICE HATCHER: All right. Thank you. Mr Tindley, did you want to say something?

PN57

MR TINDLEY: One very minor, well perhaps narrow matter in relation to question 4, and a matter that a number of retail businesses raised with the ARA, is the clothing and footwear allowance. The allowance under the award provides for a weekly allowance for a full-time employee, and a per shift allowance for the casual part-time employees - - -

PN58

JUSTICE HATCHER: Sorry, what clause is that, Mr Tindley?

PN59

MR TINDLEY: 19.4, your Honour.

PN60

JUSTICE HATCHER: Yes.

PN61

MR TINDLEY: Your Honour, the feedback the ARA has received is that on some occasions employees of retailers who are working from home may be required to wear a uniform for meetings, outward facing meetings, but largely are free to dress in the way that suits them, and so there's perhaps a question as to whether an employee working from home, particularly a full-time employee, there may be a treatment of that allowance that moves to the per occasion required. But we would just say that that's an issue that we thought may be relevant.

PN62

JUSTICE HATCHER: So 19.4(d) is about the cost of laundry. That doesn't really change, does it?

PN63

MR TINDLEY: Well, the way that the allowance is put in the award is a per shift amount, and then a five-time shift amount for a full-time employee. So it's in essence, in our view, contemplating that – you know, that the single laundering of an item is 71 cents, and having to do it five times is \$3.55. Obviously that changes over time and a full-time employee working from home doesn't have the same obligation as a full-time employee working in an office required to wear a uniform of the employer in the office.

PN64

JUSTICE HATCHER: Thank you. Anything else, Mr Tindley?

PN65

MR TINDLEY: No. Thank you, your Honour.

PN66

JUSTICE HATCHER: Anything else from any other party on Teams? Ms Tinsley?

PN67

MS TINSLEY: Thank you, your Honour. Just to raise our support for the points raised by Ai Group and ABI.

PN68

JUSTICE HATCHER: Thank you. All right. We'll take those matters into account. Now as to the programming of the matter, my inclination is simply to direct any interested party, to the extent they wish to, to file a draft determination submission and any evidence by X date and then any material in reply by Y date, and then set some hearing dates.

PN69

Do the parties have any views about that, including as to the timescale? Ms Bhatt, you don't have much on at the moment, so it won't take you long, will it?

PN70

MS BHATT: No, that's right, your Honour. It's the X date and the Y date that I'd like to say something about.

PN71

JUSTICE HATCHER: Yes.

PN72

MS BHATT: Your Honour, on account of the large number of very significant other matters that we're involved in for the balance of this calendar year, I don't anticipate that we will be in a position to file material before next year, and realistically we envisage that that would be in March of next year.

PN73

I say that also bearing in mind that there are a number of matters that have already been timetabled for the first quarter of next year that we will be involved in, primarily concerning the Retail Award and the SEA's junior rates case.

PN74

I wanted to raise one other matter concerning the potential timetabling of the matter, and that is whether there might be merit in some discussions taking place between the parties, perhaps facilitated by the Commission.

PN75

Now, it might not be that we can develop, for example, agreed award clauses, but there might at the very least be some matters of fact that can be agreed between the parties.

PN76

If one considers, for example, question 4, which is of particular interest to us, to some extent that might rest on certain factual propositions about employee preferences for the way that they wish to work when they're working from home.

PN77

We would be hopeful that at least in relation to such matters there might be some common ground between the parties, and the sort of timetable I foreshadowed would hopefully allow some time for those discussions to take place before we start preparing our material.

PN78

As for reply material, your Honour, we'd say that a period of at least eight weeks should pass before material in reply is required to be filed.

PN79

JUSTICE HATCHER: All right. One other option, not disconnected with what you've just said, is that if the parties could come up with some agreed formulations the Commission could undertake a survey of employees, which

might touch upon some of the issues about the way people actually do work at home and the way they prefer to work at home.

PN80

MS BHATT: It might do, your Honour, and casting my mind back to proceedings during the pandemic concerning working from home, my recollection is that the Commission did facilitate the conduct of a survey, although I think that was a survey of employers, not of employees, but certainly we'd be very happy to work towards some such proposal that might be of use to all the parties and the Commission.

PN81

JUSTICE HATCHER: All right. Thank you. Mr Izzo?

PN82

MR IZZO: Your Honour, we're agnostic in relation to the timetabling, and certainly don't oppose the course proposed by Ms Bhatt, but we will fit in with whatever the Commission determines.

PN83

In relation to a survey of employees, that's something that we would think would be of assistance. Knowing how discussions between the parties usually go on these types of matters, hopefully we could progress it some way.

PN84

It might be that the Commission ultimately needs to determine any outstanding questions or some elements of dispute, but we'd certainly be keen to try and work on that collectively with the unions and then present to you the best agreement we can come up with, and it might be that the Commission needs to determine the balance of the survey, but we'd be very supportive of that if that could be achieved.

PN85

JUSTICE HATCHER: And of course I don't exclude a survey of employers too if the parties think that there's some information on that score which might be useful.

PN86

MR IZZO: Understood.

PN87

JUSTICE HATCHER: All right. Mr Robson?

PN88

MR ROBSON: Thank you, your Honour. We agree with the submissions put by Ai Group about the timetabling. There is quite a lot on at the moment. March is suitable, but preferably the end of March rather than the beginning. We agree that there's value in conciliation, particularly discussing the concept of a survey.

PN89

The other idea that had come to us was some type of data profile, like that prepared for the gender and valuation review matter concerning the Pharmacy Award. Really establishing that sort of consensus evidentiary base I think will reduce the burden on these proceedings.

PN90

JUSTICE HATCHER: I'm just wondering whether, if we can get agreement upon and undertake a survey, and as you say a data profile, whether that might expedite the matter in the sense that that might serve as an evidentiary foundation upon which all parties could proceed rather than putting them to the task of filing separate evidence.

PN91

MR ROBSON: I think that might be possible. I think we'd have to see what the parties can agree on in terms of the survey, your Honour, but certainly a survey would reduce the amount of individual lay witnesses that we'd need to bring.

PN92

I don't think our intention would be to bring very many of them in any case, and I think it allows us to focus on an agreed set of – like a shared understanding of what the circumstances are in the industry, which I think will make things move more quickly.

PN93

JUSTICE HATCHER: It sounds to me so far that the timetable would lead probably to a hearing in June after the completion of the annual wage review. Is that sort of what we're looking at?

PN94

MR ROBSON: I think so.

PN95

JUSTICE HATCHER: Yes, all right.

PN96

MS BHATT: I think so.

PN97

MR ROBSON: Thank you, your Honour.

PN98

JUSTICE HATCHER: All right. Ms Tobin?

PN99

MS TOBIN: Your Honour, the ACTU agrees with the proposals put by Ms Bhatt and Mr Robson.

PN100

JUSTICE HATCHER: All right. Thank you. Ms Tinsley?

PN101

MS TINSLEY: Thank you, your Honour. Not opposed to any of the points raised previously.

PN102

JUSTICE HATCHER: All right. Mr Tindley?

PN103

MR TINDLEY: Your Honour, we came with an ambitious plan of being done before all the retail and junior rates things were in play early next year, where clearly that's not what the other parties need so we'll fall in line.

PN104

JUSTICE HATCHER: Well, if the parties reach agreement at conciliation perhaps it will be done by Christmas.

PN105

MR TINDLEY: Could be. Your Honour, the only other point I'd make is I think that the proposal for there to be some facilitated discussions is helpful. I think that that's not a process that should be in any way I guess abandoned.

PN106

I think there would be an ability for a more focussed set of discussions after parties have put their respective positions forward. So I think perhaps there's some utility, you know, in the pre-Christmas period, but I think that the real utility comes when parties know what each other's cases are, and what positions are, and can start navigating around those.

PN107

JUSTICE HATCHER: Thank you. Well, I'll take into account what's been put. Is there anything else that anybody wants to raise? No. All right. Mr Robson, I'll look forward to getting your additional questions. The Full Bench will consider what's been put, and other than that we'll now adjourn.

ADJOURNED INDEFINITELY

[9.56 AM]