

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

61617-1

VICE PRESIDENT WATSON

AM2011/32

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

**Application by Shop, Distributive and Allied Employees Association
(AM2011/32)
Fast Food Industry Award 2010**

**(ODN AM2008/10)
[MA000003 Print PR985113]]**

Melbourne

10AM, THURSDAY, 18 AUGUST 2011

Reserved for Decision

PN1

THE VICE PRESIDENT: Can I have the appearances, please?

PN2

MS D. DE MARTINO: If the tribunal pleases. De Martino, initial D, from the SDA, and MS S. BURNLEY, from the SDA.

PN3

THE VICE PRESIDENT: Yes, Ms De Martino.

PN4

MR N. TINDLEY: Good morning, your Honour. Tindley, initial N, of FCV Group, seeking leave to appear on behalf of the Australian Retailers Association.

PN5

THE VICE PRESIDENT: Mr Tindley.

PN6

MS V. PAUL: If it please the commission. Paul, initial V, appearing from Australian Industry Group.

PN7

THE VICE PRESIDENT: Ms Paul.

PN8

MS J. DUFF: Good morning, your Honour. Duff, initial J, from the National Retail Association.

PN9

THE VICE PRESIDENT: Ms Duff. Permission is granted, Mr Tindley. Yes, Ms De Martino?

PN10

MS DE MARTINO: Excuse me, your Honour. We would like to go off the record for a moment, please, if that's okay.

PN11

THE VICE PRESIDENT: Yes. We can go off the record for a moment.

PN12

MS DE MARTINO: Thank you.

OFF THE RECORD

[10.01AM]

ON THE RECORD

[10.10AM]

PN13

THE VICE PRESIDENT: Yes. Ms De Martino, I should note on the record that an issue has been raised as to a further subclause of clause 26.2 which I understand will be the subject of further discussions between the parties and may need to be dealt with at a later time, but in the interim, you intend to proceed with the application today insofar as it relates to part of clause 26.2.

PN14

MS DE MARTINO: Yes, your Honour. That's correct.

PN15

THE VICE PRESIDENT: Please proceed.

PN16

MS DE MARTINO: The Shop Distributive and Allied Employees Association seek to proceed under section 160, variation of modern award to remove ambiguity or uncertainty or correct error, to vary the Fast Food Industry Award 2010 to address the shortcomings of the overtime clause. It is our contention that the overtime clause does not operate effectively and is ambiguous and erroneous.

PN17

Under section 160, Fair Work Australia may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error. Clause 26.2 currently reads:

PN18

Hours worked in excess of the ordinary number of hours of work prescribed in clause 25.2 are to be paid at time and a half for the first two hours and double time thereafter except on Sunday, which will be paid at the rate of double time.

PN19

The ambiguity arises because clause 25.2 refers to ordinary hours and hours cannot be worked in excess of ordinary hours, only within or outside of. The overtime clause also does not refer to 25.3, Maximum Hours on a Day, nor 25.4, Working in Excess of 38 Hours Per Week, including averaging over a four-week period. We see this as an error of omission as anyone currently working in excess of these hours is in breach of the award where traditionally overtime would be payable.

PN20

The SDA has consulted with the Australian Industry Group, the AIG, the Australian Retailers Association, ARA, and the National Retailers Association, NRA. The first two parties have agreed to address some of the concerns with the proposed course to substitute the current clause. The proposed clause is contained within attachment A of our submissions. This submission has been made with the understanding that the ARG and the ARA will not oppose the SDA's proposed clause. The NRA has indicated that it will oppose this clause.

PN21

If the tribunal please, your Honour, before I proceed any further, we would actually like to thank you for the extensions of time granted for our submission. We put considerable effort into reaching common ground with some of the parties here today and this was made possible by your Honour's willingness to grant us extra time to fine-tune this clause.

PN22

The ambiguity as it currently stands within the overtime clause results in two serious consequences: firstly, for the employee who is not receiving his or her correct rates when working hours which have traditionally attracted overtime rates in the fast food industry and under the previous federal instrument, the National Fast Food Award 2000; secondly, an employer who engages an employee outside of clause 25, Hours of Work, will find him or herself in breach of the award.

PN23

For an example, an employer engaging an employee working for 11 hours and 15 minutes is technically in breach of the award and subject to a fine of up to \$33,000 under chapter 4, part 4(1), division 4 of Fair Work Regulations, and sections 539 and 546 of the Fair Work Act.

PN24

It is the SDA's contention that a variation to clarify the instances when overtime should apply is required in this case to correct this error and remove this uncertainty. The drafting of the proposed clause here is made with the intention to closely mirror the amended General Retail Industry Award overtime clause in order to provide clarity. Although there is some opposing to cross-referencing, the SDA believes that this is important for our members covered by this award who, in seeking overtime conditions, may not realise that they need to read other sections of the award in order to find the relevant information. A central reference point for all of the overtime provisions in a modern award makes it much clearer to understand and easier to locate.

PN25

The SDA's current submission to vary the overtime clause in the Fast Food Award is very similar to those same changes sought in the General Retail Industry Award, matter number AM2010/130, which your Honour saw fit to amend due to ambiguity. If I may tender the decision and determination of that award?

PN26

THE VICE PRESIDENT: Thank you.

PN27

MS DE MARTINO: Print number 505487 is the correction to determination, the original determination, print number 504525, and decision number FWA8806.

PN28

THE VICE PRESIDENT: Yes. Thank you.

PN29

MS DE MARTINO: In this instance, the SDA has not pressed that casuals be entitled to overtime when working in excess of 38 hours though we would like it noted that the SDA does firmly believe they are entitled to this. However, this is an issue we will take up next year during the 2012 review, which I'm sure we're all looking forward to. I think it might keep us quite busy.

PN30

If I may now turn our attention to the restaurant and catering submissions, I would just like to address some points here. Restaurant and Catering Australia assert that they have a considerable number of members across Australia operating businesses covered by this modern award. We would welcome such proof of this claim.

PN31

Firstly, Restaurant and Catering accuse the SDA of denying them procedural fairness with respect to our late submission, and I quote, "surreptitious closed-shop negotiations with other employer organisations". We vehemently deny such allegations. Firstly, as your Honour would be more than aware, we applied for an extension of time in order to find a common position, which we

managed to do with the ARA and AIG. Secondly, Restaurant and Catering never made themselves known to us or the tribunal to be an interested party in this matter.

PN32

The Australian Capital Territory and Region Chamber of Commerce and Industry, ACTRCCI, contacted us late in the proceedings, prior to our written submission, and we informed them of the amended clause sought, to which they indicated their in principle agreement. Restaurant and Catering, however, did not do so and are now disgruntled that they were left out. We actually could find no history of any submissions regarding the Fast Food Industry Award throughout the award modernisation process by Restaurant and Catering, therefore we have no way of anticipating they would be an interested party.

PN33

The onus was on Restaurant and Catering Australia to attend the first conference, which they did not. We consulted with three other parties involved in the initial hearing for mention and programming and would have done so with Restaurant and Catering had they also been involved.

PN34

Secondly, Restaurant and Catering accuse the SDA of attempting to misuse the provisions of section 160 to rewrite penalty rate provisions and question why the SDA has not made this application sooner. As I am sure your Honour and many other parties here today would be aware, the past 18 or so months of the modern awards coming into effect have been incredibly busy for us, with a whole swathe of other variation applications keeping us otherwise occupied, including a whole host of casual minimum engagement applications.

PN35

Another matter which we chose to address first was the ambiguity of the overtime provisions in the General Retail Award and following your Honour's decision in that matter, we then turned our attention to the Fast Food Industry Award overtime clause.

PN36

It is also concerning to note that Restaurant and Catering believe that our proposed clause (d) appears to give an additional entitlement for overtime worked on public holidays and not consistent with the award. Given that our proposed (d) is actually a cross-reference to the existing penalty already within the award, we query how could we be creating something new when we are referring to something already in existence. We would contend that our application is not at all misconceived and a strike-out is unwarranted.

PN37

If I may now turn to the NRA submission? For the record, the SDA made numerous attempts to engage the NRA in this matter to find a common position. Given the NRA's position on the overtime clause amendment sought by the SDA in the General Retail Industry Award was similar to ours on a number of key issues, we believe that they would hold a similar opinion in this matter and we would be able to reach a common position with them.

PN38

We actually advised the NRA of our intention to make this application on 12 5 and provided the original intended clause, and that would be the copy which was with our initial application. We asked for a written response by 31 May but none was forthcoming. On 2 June, I then called the NRA and they advised they would reply by the following week. Again there was no reply. On 22 June, I then emailed the NRA, advising we would file our application shortly, and give them an opportunity to consult with us before we did. We then filed on 23 June.

PN39

Following a telephone conference with your Honour on 1 July, at which I was not present but Ms Burnley was, with the ARA, AIG and NRA, discussion with all parties was open to find a common position, especially in light of the General Retail overtime amendment. The AIG and ARA were genuinely helpful and we believed that we would reach a position which all parties would find agreeable. However, the NRA, despite having the longest time to reach a position and despite contact from us and the AIG, only announced their position the day our extended submission was due.

PN40

Suffice to say, your Honour, the SDA is disappointed with the NRA's length of time to respond and now a final position which appears to be in complete contrast to the position they held in the General Retail overtime clause matter. If it please your Honour, may I quote their position back in November on that matter?

PN41

THE VICE PRESIDENT: Yes.

PN42

MS DE MARTINO: May I tender the transcript?

PN43

THE VICE PRESIDENT: Yes.

PN44

MS DE MARTINO: Thank you. The transcript is from matter number AM2010/130 on Monday, 1 November 2010.

PN45

THE VICE PRESIDENT: I might mark that transcript exhibit M1.

**EXHIBIT #M1 TRANSCRIPT OF MATTER NUMBER
AM2010/130 DATED 1 NOVEMBER 2010**

PN46

THE VICE PRESIDENT: I might mark your written submissions as well while I'm at it, Ms De Martino. Exhibit M2.

EXHIBIT #M2 SDA WRITTEN SUBMISSIONS

PN47

MS DE MARTINO: M2. Thank you, your Honour. I have only included an excerpt from the transcript here. Mr N. Tindley of the NRA stated at paragraph 49:

PN48

The NRA does not object to a more broad application of overtime for full-time employees. It is what employers have been familiar with. It had applied under pre-modern awards.

PN49

Then further on, at paragraph 61:

PN50

We do take the SDA's point that there is - certainly from our members' perspective, there is a benefit in having clarity around what constitutes a breach of the award and what mechanisms can be utilised to avoid the potential for that sort of breach. In the absence of an overtime provisions in circumstances where work outside that pattern is unavoidable, where you're potentially looking at breach of awards rather than a simple mechanism for preventing that. Certainly an effective modern award should not be one that opens employers up to the potential for significant and ongoing breaches of the award.

PN51

The NRA is now arguing the opposite. They claim there is no ambiguity and they oppose every chance sought. The SDA is confused as to why they have taken this line and question how the NRA think this can benefit their members, given the potential impact upon them in terms of breaching the award. Despite arguing that there is no ambiguity or uncertainty in this clause, the NRA relies upon correspondence from the Fair Work Ombudsman to support their interpretation of the clause. This correspondence at paragraph 4 states:

PN52

The FWO has identified a number of ambiguous provisions within the Fast Food Industry Award 2010 -

PN53

which serves only to highlight further the ambiguity and confusing surrounding the overtime clause. They seek the NRA's views regarding payment of overtime to casuals and payment of overtime penalty rates to full-time and part-time employees when working hours in excess of their ordinary hours of work outside the spread of hours and in excess of the maximum hours of a day. This is attached to the NRA's submission, your Honour, the Fair Work Ombudsman's letter.

PN54

The three key areas of working in excess of 38 hours per week with averaging, outside the spread of hours and in excess of maximum hours of a day is precisely what the SDA's proposed amendment seeks to address and rectify because of ambiguity.

PN55

Your Honour, I also contacted the Fair Work Ombudsman yesterday at 10 am to inquire upon maximum hours of work, as an example, under the Fast Food Industry Award. I queried if an employee works 11 hours and 15 minutes, is their employer in breach of the award. The response, after waiting on hold for several minutes, was, "I can't give you an answer because it's unclear. There is not a clear description in the award." This question has now been escalated to

specialists, and probably all the way up the food chain to the legal team, as it was too ambiguous for a general Fair Work adviser to give me a response.

PN56

I'm sure many of us here would understand it is a breach, your Honour, but this too serves to highlight the ambiguity, as well as the Fair Work Ombudsman's inability at first instance to interpret a modern award correctly, which is meant to be clear and simple to understand. Some industry groups have probably warned their members regarding this breach and therefore do not oppose the proposed changes in order to protect their members, but it appears that this time around, the NRA and Restaurant and Catering have failed to comprehend the implications of a lack of overtime provisions in the award. A breach of the award, as provided for in the Fair Work Act, could result in a substantial fine for the employer.

PN57

The NRA also opposed cross-referencing in the amended clause, despite their support for it in the General Retail overtime amendment, and here I refer once again to your Honour's decision for this amendment, where you saw the practicality of cross-referencing for clarity. For our members covered by this award who may wonder when they are entitled to overtime and penalty rates, they are quite likely to go straight to that section of the award rather than read the award from beginning to end and happen across overtime for part-timers or the rates on a public holiday which are in different sections of the award. This is why we consider cross-referencing important for ease of access to information and clarity. It is helpful for quickly navigating one's way through an award, from the most experienced industrial officer to a new junior just beginning their employment at the local fish and chip shop.

PN58

Your Honour, as was the case for the General Retail Award overtime clause, the overtime clause here in the Fast Food Industry Award just does not work. It is ambiguous. The ARA and AIG agree that there is ambiguity and through consultation we have reached a point where they do not oppose our application, and we thank them for their professional and constructive input into the development of this amended clause. The ACTRCCI also agree, and although their involvement was at the final stage of negotiations, they have reached a very similar conclusion, with some minor alterations on wording.

PN59

The drafting of the proposed clause is intended to reflect the amended overtime clause in the General Retail Industry Award for the purposes of clarity. We do not seek to create new provisions and at this point in time, we are not seeking to provide overtime for casuals in excess of 38 hours per week, but we seek to correct an award which does not compensate employees correctly for traditional overtime work and puts employers engaging staff to work outside of and in excess of clause 25, Hours of Work, in breach of the award and therefore subject to heavy fines. We thank the tribunal for its time in hearing our submissions.

PN60

THE VICE PRESIDENT: I may have missed it, Ms De Martino, but what you say about the modifications proposed by the ACT Region Chamber of Commerce and Industry?

PN61

MS DE MARTINO: We don't think they're necessary, your Honour. We carefully - - -

PN62

THE VICE PRESIDENT: They don't appear to change the substance. They appear to be differently expressed.

PN63

MS DE MARTINO: Different style.

PN64

THE VICE PRESIDENT: Different expressions, designed to provide more clarity; but you say they're not necessary?

PN65

MS DE MARTINO: We would say they're not necessary. However, there is one point that we would like to mention. Where we have "span of hours", we would like to change that to "spread", your Honour, for consistency with the terms used under Hours of Work, which calls it a spread of hours. I think we have "span" there in our application. We're quite happy to leave it to your Honour to decide on the final finessing.

PN66

THE VICE PRESIDENT: So in subclause of your proposed - - -

PN67

MS DE MARTINO: In subclause (a)?

PN68

THE VICE PRESIDENT: Yes.

PN69

MS DE MARTINO: Yes. Instead of "the span of hours", we would say "the spread" just for consistency.

PN70

THE VICE PRESIDENT: Yes.

PN71

MS DE MARTINO: In 25.2, it's called "spread of hours".

PN72

THE VICE PRESIDENT: Yes. Can I just ask you this question? The effect of the variation is to seek to make it clear that overtime is payable, amongst other things, for hours worked in excess of 11 on any day?

PN73

MS DE MARTINO: Yes.

PN74

THE VICE PRESIDENT: That's based on the interpretation of the award, that hours less than 11 hours on any day, subject to the other provisions about the spread of hours and weekly hours, are ordinary hours and hours in excess of 11 hours can be worked but will create an entitlement to overtime.

PN75

MS DE MARTINO: Yes.

PN76

THE VICE PRESIDENT: Doesn't that therefore accept that clause 25.3 is a reference to the maximum number of ordinary hours to be worked in a day rather than the maximum number of hours that can be worked in a day? So it's not a limitation on the number of hours that can be worked as such, it's a limitation on the number of ordinary hours that can be worked in a day.

PN77

MS DE MARTINO: Yes, that's correct. That has been the general approach, your Honour.

PN78

THE VICE PRESIDENT: Yes, and I think you said earlier that it might be said that it's a breach of the clause for people to work more than 11 hours, but not if that interpretation is adopted, that it's a reference to the number of ordinary hours.

PN79

MS DE MARTINO: Yes.

PN80

THE VICE PRESIDENT: My next question is should that be made clearer as well, that it's a reference to ordinary hours, not a maximum number of hours?

PN81

MS DE MARTINO: By altering 25.3?

PN82

THE VICE PRESIDENT: Yes.

PN83

MS DE MARTINO: Yes.

PN84

THE VICE PRESIDENT: Insofar as there might be some confusion about that. You may wish to take this on notice given I have raised it with you and it's not part of the application or the agreed variation. Given that there might be other matters that may need to be addressed, this might be another one that could be discussed between the parties and addressed in due course.

PN85

MS DE MARTINO: Yes, certainly, your Honour. We shall do that. Thank you.

PN86

THE VICE PRESIDENT: Yes. Thank you, Ms De Martino.

PN87

MS DE MARTINO: Thank you.

PN88

THE VICE PRESIDENT: Who would like to go next? Ms Paul?

PN89

MS PAUL: Your Honour, may I ask to go off the record shortly? There's an issue that has come up as part of our discussions previously which we would like

to discuss off the record. It won't take long.

PN90

THE VICE PRESIDENT: Yes. We will go off the record again.

PN91

MS PAUL: Thank you.

OFF THE RECORD

[10.32AM]

ON THE RECORD

[10.37AM]

PN92

THE VICE PRESIDENT: Yes, Ms Paul?

PN93

MS PAUL: Your Honour, we have written and placed submissions in relation to the fact that - - -

PN94

THE VICE PRESIDENT: I will mark the written submission exhibit P1.

**EXHIBIT #P1 WRITTEN SUBMISSIONS ON BEHALF OF
AUSTRALIAN INDUSTRY GROUP**

PN95

MS PAUL: Thank you, your Honour. The AI Group does not object to the correcting being made, your Honour, in relation to the overtime clause so as to fix any ambiguity. We do have some minor amendments we seek to make in relation to the proposed attachment A. We say that in terms of the principle, if the amendments sought are merely to rectify the error or to clear up the ambiguity, then we have no issue in terms of that. We say that any part of a clause that seeks to add additional terms are issues which need to be dealt with separately and we say that there is a minor amendment that needs to be made to rectify that issue in the attachment A and we're happy to have further discussions with the applicant in relation to that. As a principle, we have no problems with fixing with the ambiguity.

PN96

THE VICE PRESIDENT: Yes. Thank you, Ms Paul. Mr Tindley?

PN97

MR TINDLEY: Thank you, your Honour. The position of the ARA is, in general terms, that it does not oppose the variation, subject to the one issue that the parties are aware of and which will be deferred for further submissions. In our view, ARA's fast food members need to have the ability to work people in excess of 11 hours in a day, or 38 hours a week, 76 fortnight, 114 three weeks, or 152 in four weeks, and the variation sought by the SDA in general terms corrects what we say is an error or ambiguity in relation to the working of those additional hours.

PN98

In broad terms, we don't object to anything that goes to ensuring that there is an ability for 25.3 and 25.4 of the award to allow for work in excess of the hours prescribed in those two clauses, and that there be an overtime prescription for

those hours, but we don't support anything that goes beyond that. Those are the submissions of the ARA. Thank you, your Honour.

PN99

THE VICE PRESIDENT: Did the ARA file a written - - -

PN100

MR TINDLEY: No, your Honour. We felt that we could very briefly put our position here.

PN101

THE VICE PRESIDENT: Which you have.

PN102

MR TINDLEY: We certainly will in relation to the residual issue.

PN103

THE VICE PRESIDENT: Yes. Thank you.

PN104

MR TINDLEY: I did feel that I might need to defend myself, your Honour. I have been quoted in this matter and have since moved on, so I'm just sitting cautiously, waiting for Ms Duff's submissions, and I will reserve my position on that.

PN105

THE VICE PRESIDENT: Very well. There's no criticism. I'm just simply wanting to make sure I marked every submission that was received.

PN106

MR TINDLEY: Thank you, your Honour.

PN107

THE VICE PRESIDENT: Ms Duff?

PN108

MS DUFF: Thank you, your Honour. Your Honour, the NRA relies on its detailed written submission filed in respect of this matter and I don't propose to take your Honour through parts of that this morning.

PN109

THE VICE PRESIDENT: Yes. I will mark those written submissions exhibit D1 in these proceedings.

**EXHIBIT #D1 WRITTEN SUBMISSIONS ON BEHALF OF
NATIONAL RETAIL ASSOCIATION**

PN110

MS DUFF: Thank you, your Honour. There was just one comment made on behalf of the SDA that I wanted to address and that was the issue of inconsistency between the NRA's position in regard to the variation to the retail award and the current application on the Fast Food Award. The answer in relation to that difference of opinion is simply that our submissions filed in respect of this variation to the Fast Food Award reflect the current views as expressed to us by our members in consultation with them since the filing of the SDA's application.

PN111

THE VICE PRESIDENT: What do you say, Ms Duff, as to the current meaning of the award in relation to the ability or the entitlements for employees who work more than 11 hours in a day?

PN112

MS DUFF: My understanding is that several of my colleagues have actually discussed this issue with representatives of the Ombudsman and the view that was reached was that it is a technical breach of the award but it is not a breach of a kind that the Ombudsman would ever be interested in pursuing or prosecuting.

PN113

THE VICE PRESIDENT: If one of your members, for example, rostered employees to work 12 or 12 and a half hours, what would they be paid under the award on your interpretation as it currently stands?

PN114

MS DUFF: In accordance with the Ombudsman's view, they would be paid their ordinary rate.

PN115

THE VICE PRESIDENT: So what is the purpose of the 11-hour limitation in clause 25.3 if that's the case?

PN116

MS DUFF: Yes. I can see that point, your Honour. If your Honour is inclined to make an amendment to the current overtime provision, we would be prepared to concede that it is perhaps appropriate to reference the maximum hours of a day, and 38 hours a week, and leaving aside the other issue that the parties are to address and make further submissions on.

PN117

THE VICE PRESIDENT: Yes. Thank you, Ms Duff.

PN118

MS DUFF: Thank you, your Honour.

PN119

THE VICE PRESIDENT: Anyone wish to reply or say anything more?

PN120

MR TINDLEY: Apologies, your Honour. Ms Burnley and I were just having a brief discussion about what the programming might be for that residual issue, so perhaps if we had the opportunity just to discuss that, perhaps off the record, we might be able to come to a conclusion on that.

PN121

THE VICE PRESIDENT: Yes. That's a useful exercise. We will go off the record again. Thank you.

OFF THE RECORD

[10.44AM]

ON THE RECORD

[10.46AM]

PN122

THE VICE PRESIDENT: Thank you for those submissions. They do address a number of issues dealt with in the application. As indicated earlier, there are further issues that I consider, and the parties consider, desirable that there be some discussions between the parties and an ability to make further submissions, which the parties are agreed can appropriately be done in writing. I will direct that further submissions in relation to those additional matters, the subject of such written submissions as the parties wish to make; the SDA to file their written submissions and serve those submissions on the other parties represented in these proceedings by 9 September; any other party who wishes to make submissions should make those submissions in writing and serve it on the other parties represented today by 23 September; and I will reserve the right of the SDA to make a written submission in reply by 30 September. These proceedings are now adjourned.

<ADJOURNED INDEFINITELY

[10.48AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

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