



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

ACTING PRESIDENT HATCHER

AM2022/32

s.158 - Application to vary a modern award

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

Real Estate Industry Award 2020

Sydney

12.00 PM, MONDAY, 16 JANUARY 2023

Continued from 23/11/2022

MISSING AUDIO

[12.00 PM]

[Mr N Paranahewa, the applicant, appeared in person.

Mr G Paterson appeared for the Real Estate Employers' Federation.]

PN1

ACTING PRESIDENT HATCHER: - - - Real Estate Employers' Federation of Western Australia?

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MR LILLEYMAN: We do, Acting President.

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ACTING PRESIDENT HATCHER: All right, Mr Paranahewa, this is your application. So the usual course is – assuming the application is not agreed – that the Commission would make directions for the programming and hearing of the matter. That would normally involve a direction for you to file any evidence or submissions you want to make in support of your application. How do you want to proceed in the matter? Do you confirm you want to go ahead with this and secondly, how do you want to proceed?

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MR PARANAHEWA: I would like to proceed as per the official process.

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ACTING PRESIDENT HATCHER: All right, okay, and did you have any evidence that you want to file in support of your application?

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MR PARANAHEWA: I do. I would also like to clarify the issue at hand with the use of some diagrams or illustrations while we have got the technology at hand. I would imagine everyone can share the screen.

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ACTING PRESIDENT HATCHER: We're not hearing the matter now.

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MR PARANAHEWA: Right.

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ACTING PRESIDENT HATCHER: I'm just trying to program the matter to be dealt with. So if you've got any material that you want the Commission to look at then you can file that. So if that's evidence or submissions, that's a matter for you. So how long might it take you to put all the material you want to put on in support of your application?

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MR PARANAHEWA: Let me just have a look – it's only a very – like a hand-drawn diagram that I've got. It's an image. I can possibly upload that or send it to everyone in a minute or two at the most.

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ACTING PRESIDENT HATCHER: I'm not suggesting you need to do it that quickly but what we would welcome is any material that you've got or a submission that actually explains what the issue is and explains how you should resolve it and any evidence about how this relates to your experience in your life as a casual real estate agent.

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MR PARANAHEWA: Yes, I can definitely explain how it's related to my experience. So I've been working as a real estate agent - - -

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ACTING PRESIDENT HATCHER: Mr Paranahewa, I'm not asking you to do this now. I want you to do it in writing and I'll just ask you how long would it take you to put that sort of material before the Commission in writing? You may say you don't want to say anything in addition to what's in your application but if there is anything further you want to say in support of your application, I'm asking you if you put it in writing how long would that take you?

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MR PARANAHEWA: Sorry, Acting President, I'm just unsure what the requirement is. In addition to what's in the application already, are you asking do I have any more?

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ACTING PRESIDENT HATCHER: Yes, correct – so it's up to you as the applicant to persuade the Commission that this variation is appropriate and necessary.

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MR PARANAHEWA: Yes.

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ACTING PRESIDENT HATCHER: So I'm asking you, is there any submissions or explanation that you want to put on in addition to what's in your application?

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MR PARANAHEWA: I might add just one image and I can upload it into a system within a minute or two at the most.

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ACTING PRESIDENT HATCHER: Thank you. Mr Paterson, Mr Lilleyman, is this application opposed?

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MR PATERSON: Your Honour, yes we do oppose the application. Briefly, our submission is that the proposed variation is unjustified or unwarranted. There is certainly no history of problems in relation to the subject matter which is contained in this application. So we're a little puzzled as to the motivation. We do understand that the applicant has had some personal difficulties in a previous position he held in real estate and as my friend Mr Clark from the union in South

Australia alludes in his correspondence, there would be a remedial course available to the applicant to seek redress in relation to his concerns. We just cannot work out the motivation or the reason to vary the award from its existing terms to address the issues contained in Mr Paranahewa's application. That's our position, succinctly put.

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ACTING PRESIDENT HATCHER: Well, I mean, assuming he had standing to do so – and I haven't heard that that's in contest, that he's entitled to have this application heard - - -

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MR PATERSON: No – yes, we don't contest that.

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ACTING PRESIDENT HATCHER: - - - so I've explored with him what further material he would like to file. He says he wants to file this diagram. He can do so fairly quickly. How long – and (indistinct) to you too, Mr Lilleyman – how long might it take you to file any material, if any, in response?

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MR PATERSON: Well, from my organisation's position, Your Honour, it's a bit difficult to say until we see the evidence. Sorry, Your Honour?

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ACTING PRESIDENT HATCHER: Well, assuming it's no more than what he has just indicated - - -

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MR PATERSON: Yes.

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ACTING PRESIDENT HATCHER: - - - that is, it will be the application or the amended application plus this diagram – assuming it's no more than that – how long would you need?

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MR PATERSON: I wouldn't think it would take very long, Your Honour – maybe a couple of weeks. I don't even know, you know, what sort of witness statements we might need to construct. The evidence will be difficulty from our side because we don't know that there's a problem.

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ACTING PRESIDENT HATCHER: Yes.

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MR PARANAHEWA: Acting President, if I may – I'm actually – I actually made the application to the Fair Work Commission on the direction of the Fair Work ombudsman. At the moment the issue that I have presented to the Fair Work Commission, there is no clear guidance in the current award so that the employee can lean on to get payment for certain amounts, certain amount of hours that are

(indistinct) in the industrial (indistinct). So Mr Clark's email, which was dated on 9 January - the application is not about the rates of pay or the amount of allowances. It's about when the allowances or rate of pay start and finish.

PN31

ACTING PRESIDENT HATCHER: Let me see if I understand this: your issue is about when payment commences, if you're directed rather than attending a real estate office, to attend at a home for sale, for example, which might be some distance away? Is that the point?

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MR PARANAHEWA: That is correct.

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ACTING PRESIDENT HATCHER: Okay, well, I mean, I think - - -

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MR PARANAHEWA: And for the sake of this discussion, I can quickly elaborate the issue in a diagram if I can share the screen with everyone. Hopefully maybe we'll be able to move on from that point onwards as I - - -

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ACTING PRESIDENT HATCHER: Again, I'm not here to hear the application today. I just want to program the matter for hearing.

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MR PARANAHEWA: Okay.

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ACTING PRESIDENT HATCHER: Mr Paterson, Mr Lilleyman, you've heard that. I mean, does the award address that issue or not?

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MR PATERSON: We say it does. We say the award is clear to the extent that whenever a real estate operation employee is required to use their own vehicle in the course of employment, they must be paid. Clause 17 deals with it quite clearly, in our view.

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ACTING PRESIDENT HATCHER: I think that's about the payment for the cost of the vehicle.

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MR PATERSON: Yes, and - - -

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ACTING PRESIDENT HATCHER: I think the applicant might be making a different point – that is to the extent that – I'm presuming we're talking about now an employed real estate agent who is not on commission only – that is they're on an hourly rate – if for example the real estate office is five minutes from their home or perhaps the real estate agent doesn't have an office as such and they're

directed to turn up for an open house or to collect some keys at a real estate property which is say an hour's drive away from the agent's home, when does their hourly rate start? Is that the issue?

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MR PARANAHEWA: That is correct, Your Honour.

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MR PATERSON: If they're travelling in the course of employment, then we would say that payment has to be made. I don't think there's any dispute about that.

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ACTING PRESIDENT HATCHER: The question is does that award make that clear?

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MR PATERSON: We say it does. Just further to that point, Your Honour, bear in mind too that unlike people in other industries, and who come under other awards which might have the type of award provisions that the applicant is talking about here, real estate people use their car as a tool of trade and they're constantly travelling around during the course of the day. It would be very rare for them to be spending extended periods in the office. So they will be constantly moving from one house to another, doing open for inspections or collecting keys or doing whatever. When they're doing that, well, we say the clock is ticking on their working week. It doesn't stop when they get in the car to travel to a particular location. If they're working they're working.

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So if the applicant was required to travel half an hour to do an inspection or to talk to a prospective vendor then we say that's part of his working week and he'd be paid for it. If he's being paid a per-kilometre allowance, under the relevant award – under the Real Estate Award – then he would be paid for the distance that he travels to that appointment. We say that that's clear and certain.

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ACTING PRESIDENT HATCHER: So just to be clear, just so I understand this – clause 17 - - -

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MR PATERSON: Yes, clause 17 is the allowances clause.

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ACTING PRESIDENT HATCHER: That compensates for the cost of the vehicle.

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MR PATERSON: It does. There's three options, Your Honour – three options available. The default option is to pay the employee a weekly standing charge and then a per-kilometre rate, a smaller per-kilometre rate for each kilometre they travel in the course of employment. Where the employee and the employer agree, they can agree to a lump sum weekly rate. The highest rate is around \$240 a

week. So it doesn't – that eliminates the need for kilometres to be kept because it doesn't matter how many kilometres you travel, you get that weekly rate. The third option that's available is – and it's probably used more frequently where the employee doesn't do a lot of travelling – is they can get paid a loaded-up per kilometre rate. I think that's probably the rate that would have or should have been applied in the applicant's circumstances several years ago. So they're the three options.

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ACTING PRESIDENT HATCHER: So when you say a loaded-up rate, what does that mean?

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MR PATERSON: That's 91 cents – that takes into account the recurrent costs and the petrol costs, if you like.

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ACTING PRESIDENT HATCHER: So again, I understand the issue may not be about the cost. It's about the time.

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MR PATERSON: That's right, that's correct, Your Honour, yes.

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ACTING PRESIDENT HATCHER: So does any clause of the award make it clear when – in regard to these issues – when working time starts and finishes? I mean, for example, this is not uncommon – for example, the Building Industry Award has clauses about this in terms of travelling to distant building sites and the like.

PN56

MR PARANAHEWA: Also the manufacturing award, Your Honour. That applies to me as well. In the manufacturing award clause 30.5 specifically derives excess under transfers travelling and working away from usual places of work, specifically defines if you are working from places other than normal place of work that travel time needs to be billed for or paid for. What I'm seeking with this proposed change is to add a similar clause to the real estate award so that time is captured for the employee's payment.

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ACTING PRESIDENT HATCHER: Yes, I understand. All right, well, I think you understand what the issue is.

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MR PATERSON: One interesting point that has come out of what has just been said by the applicant and that's the question of – as you raised earlier, Your Honour – is the question of jurisdiction. I have sort of been working on the assumption that the applicant was an employee working in the real estate industry. It would appear that he no longer is.

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MR PARANAHEWA: I am. I am working across several different industries. Both awards are applicable to me.

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MR PATERSON: Okay, well, that would obviously be part of the applicant's evidence then as to - - -

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ACTING PRESIDENT HATCHER: Just so we just tick this off: Mr Paranahewa, can you just confirm, you were working as a real estate agent at the time you filed this application?

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MR PARANAHEWA: I am.

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ACTING PRESIDENT HATCHER: Sorry - - -

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MR PARANAHEWA: I was working as a real estate agent at the time of the application and I am currently working as a real estate agent on a casual basis.

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ACTING PRESIDENT HATCHER: All right, just so we can deal with this issue: you might want to file a short statement of evidence that just describes those matters – that is where you're working and when you were working as a real estate agent.

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MR PARANAHEWA: Yes.

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ACTING PRESIDENT HATCHER: All right, well, that seems to deal with that, Mr Paterson.

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MR PATERSON: Yes, thank you.

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ACTING PRESIDENT HATCHER: So I hear clearly what you say. It does seem to me that you actually are (indistinct). It's simply a question of whether the award actually says so.

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MR PATERSON: Well, I think the issue is, Your Honour – it talks about, 'in the course of employment', and I mean, okay, that will be a matter of fact, whether the person was travelling in the course of employment but if they're travelling to do an appointment, to do an open home or the like, then we say there can be no doubt that that's in the course of employment. I understand that as the applicant has pointed out some modern awards do more clearly express this issue. There's no question about that. What I would say in relation to that – this might be part of our evidence - - -

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ACTING PRESIDENT HATCHER: Sorry, Mr Paterson, you've just gone on mute.

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MR PATERSON: Is that better, Your Honour?

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ACTING PRESIDENT HATCHER: Yes, yes.

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MR PATERSON: Yes, sorry – I don't know what I did there. In those circumstances, the travel would be more unusual or unexpected in its nature. In real estate, Your Honour, it's just part and parcel of every-day activity, that real estate agents are travelling to and from appointments.

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ACTING PRESIDENT HATCHER: As I said, the better analogy is probably with the building construction award where there as a matter of course, employees don't have a home case. They go to a building site and work there and that may change.

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MR PATERSON: That's right, yes.

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MR PARANAHEWA: Or repairmen or servicemen of equipment.

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ACTING PRESIDENT HATCHER: Anyway - - -

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MR PATERSON: That's an interesting one in itself, Your Honour. Under that award that my friend has just alluded to, I was just having a look at that quickly this morning. I do note that the motor vehicle allowance is not payable in respect of the distance travelled to the employee's normal place of employment, which is not unusual, or secondly the place at which work is to commence. Now, there is a provision in a modern award that my friend has alluded to as a supporting award, which would negate the proposition that he's put.

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ACTING PRESIDENT HATCHER: All right.

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MR PATERSON: But they're submissions that will be dealt with in due course.

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ACTING PRESIDENT HATCHER: Okay. So if I just – for an abundance of caution – if I give you two weeks, Mr Paranahewa, can you have your material on in a further two weeks, Mr Patterson?

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MR PATERSON: Yes, I think that's fair enough, Your Honour.

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ACTING PRESIDENT HATCHER: Now, Mr Lilleyman, do you want to add anything to all that?

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MR LILLEYMAN: No, look, I agree with Mr Paterson's – what he has outlined and the two weeks post receiving these submissions. The only point that I would wish to raise I think is perhaps this is a misguided application and it would have been dealt with under the dispute resolution clause, if there was an actual issue with his employer but this is an application that's been made now and we'll obviously address it as required.

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ACTING PRESIDENT HATCHER: All right. Well, I'll make directions along the lines that I have just indicated. So they will be sent in writing to the parties. The matter will be referred to a Full Bench for hearing and the parties will be advised of the hearing date. We will conduct the hearing via Teams methods so that parties don't have to physically attend. Is there anything further I need to deal with now?

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MR PATERSON: Not from my end, Your Honour.

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MR LILLEYMAN: No, Your Honour.

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MR PARANAHEWA: No.

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ACTING PRESIDENT HATCHER: All right, thank you for your attendance. The directions and listing will be sent to you in writing and we'll now adjourn.

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MR PATERSON: Thank you.

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MR LILLEYMAN: Thank you.

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MR PARANAHEWA: Thank you, Your Honour.

ADJOURNED TO A DATE TO BE FIXED

[12.18 PM]