



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2023/7

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

**Application by Mallett
(AM2023/7)**

**Road Transport and Distribution Award 2020
[MA000038]**

Sydney

9.41 AM, TUESDAY, 11 APRIL 2023

PN1

JUSTICE HATCHER: I'll take the appearances. Mr Mallett, you're the applicant in this matter?

PN2

MR C MALLETT: I certainly am.

PN3

JUSTICE HATCHER: Yes. And also appearing, Ms Bhatt, you appear for the Australian Industry Group?

PN4

MS R BHATT: Yes, your Honour.

PN5

JUSTICE HATCHER: Ms Biviano, you appear for the Transport Workers Union?

PN6

MS L BIVIANO: Yes, your Honour.

PN7

JUSTICE HATCHER: Mr Mallett, your application concerns clause 13.6 of the award, is that right?

PN8

MR MALLETT: That's correct, yes.

PN9

JUSTICE HATCHER: What is it that you're - you seem to have a few alternatives in your application, what is it that you actually want to be changed?

PN10

MR MALLETT: Mainly, first and foremost, is to update it so it's easy to understand what actually applies to who.

PN11

JUSTICE HATCHER: What's the difficulty?

PN12

MR MALLETT: So we've got like 13.6 spread of hours, so you've got (a) and (b), ordinary hours work, spread of ordinary hours, might be altered by an hour. Then you go down to (c), 'The times within which ordinary hours of work may be performed will not apply to 1, 2, 3, and 4'. Then underneath that, there's a provision that, 'Provided that instead of the times in clause (a) and (b), an employer may require an employee to commence ordinary hours 12 to 6', and they get the 30 per cent.

PN13

When I was first employed I was employed based on that 30 per cent. Then they decided, 'We don't have to pay you that', but when I read through it, section (c)

doesn't link to the provision and the provision doesn't link to section (c), it only links to (a) and (b). So when I read through it, if I'm, asked by my employer to work between 12 and 6 am I should get the 30 per cent, but I've been told that I'm not entitled to that and it should be overtime, even though it's the start of my shift.

PN14

JUSTICE HATCHER: I mean, speaking for myself, it seems to me fairly clear that the part beginning with the words, 'Provided that is part of paragraph (c) of the clause', that is applies to those listed in paragraph (c).

PN15

MR MALLETT: When I read through it and the way the award is written, there is full stop at the end of every section. So you've got (a), that section there, there's a full stop at the end, not during it. (b), you've got a full stop at the end of the section and it's just a run on sentence. There's only a period at the end of each section. You come down to 4, there's a period at the end of that section and then it moves on to the provision. The provision doesn't actually state that it refers to (c), it only refers to (a) and (b). Also with, 'Provided that instead of'. If (c) says, 'The ordinary hours do not apply to those jobs', how can the provision be for that, because it has to apply first for the provision to then be enacted.

PN16

JUSTICE HATCHER: So if it said, 'May require an employee listed in paragraphs (i) to (iv)', that would clarify the matter, would it?

PN17

MR MALLETT: Yes, just so it's easier to understand, basically, because I've been going backwards and forwards on this issue because they just decided to stop paying us the 30 per cent. Fair Work Ombudsman, I got - first off they agreed with my assumption, that I should be getting the 30 per cent, then they changed their mind, then they had some sort of a group meeting with their colleagues and came to the determination that that's how they saw it. So I never really got a proper determination that was explained exactly how that portion works. So, basically, if the provision is for (c), if it can just be said in there that, 'This applies to those in (c)', would make it a lot clearer for people to understand.

PN18

JUSTICE HATCHER: All right. So, Ms Bhatt and Ms Biviano, do you oppose that change being made, on the assumption that do I express that interpretation is correct?

PN19

MS BHATT: Your Honour, we agree with the view that your Honour has expressed about how that provision is to be interpreted and we would not impose a variation that gives effect to that.

PN20

JUSTICE HATCHER: Ms Biviano?

PN21

MS BIVIANO: Your Honour, we also agree with your interpretation and would not oppose a variation which gave effect to that.

PN22

JUSTICE HATCHER: All right. It seems to me, Mr Mallett, that you're pushing on an open door, that is, nobody is opposed to that clarification being made. An appropriate course, and if anyone wants to take a different view they can say so, but an appropriate course might be for the Commission itself to do a draft variation, which would give effect to what Mr Mallett has proposed and put that out for comment and then parties could come back and express a view about whether that clarifies the matter and meets the intent of the application. Would you be content with that, Mr Mallett?

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MR MALLETT: Yes, that's no problems at all.

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JUSTICE HATCHER: Ms Bhatt?

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MS BHATT: Yes, your Honour, thank you.

PN26

JUSTICE HATCHER: Ms Biviano?

PN27

MS BIVIANO: Yes, your Honour.

PN28

JUSTICE HATCHER: All right. Well, we'll undertake that step. We'll send a copy to subscribers and to you, Mr Mallett, and publish it on the site. I'll then bring the matter back on, in approximately two weeks, and parties can comment on whether there's any issue with that variation being made.

PN29

MR MALLETT: Excellent.

PN30

JUSTICE HATCHER: All right. Thank you everyone for their attendance and we'll now adjourn.

ADJOURNED INDEFINITELY

[9.48 AM]