



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT**

**AM2024/13**

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

**Application by Cuch  
(AM2024/13)**

***Amusement, Events and Recreation Award 2020***

**Sydney**

**9.34 AM, FRIDAY, 22 MARCH 2024**

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JUSTICE HATCHER: Good morning, Mr Cuch, you appear on your own behalf?

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MR M CUCH: Yes, I do, thank you, and on the company's behalf as well.

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JUSTICE HATCHER: All right. Just as a technical matter, I think the application needs to be made in the company's name.

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MR CUCH: Okay.

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JUSTICE HATCHER: Because the company is the employer. Under the Fair Work Act, people who can make applications are employers and employees.

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MR CUCH: Okay.

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JUSTICE HATCHER: So can I proceed on the basis that your business is the one making the application?

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MR CUCH: Yes, correct, yes, because I've had discussions with the employer and I've got permission to do it, and I've forwarded the meeting to him, but, obviously, he's busy at work, or decided to let it go with me for now, but if I need to inform him that he needs to make the application, then I'll get him to send it in.

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JUSTICE HATCHER: Okay. So what do you do for the business? What do you  
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MR CUCH: I'm pretty much the general manager there, so I look after HR for people, employing people, if he's got issues with the legislation, with the state government or local government, or, you know, getting new leases acquired, all that sort of stuff, so pretty much his right-hand man, I suppose.

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JUSTICE HATCHER: All right. And the employer is the entity - is it a company? Is it the employer identified at paragraph 1.2 of the application?

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MR CUCH: It's a gentleman called Aaron Thompson and it's in a family trust trading as Mega Fast Karts & Laser Skirmish, but it's the Aaron Thompson Family Trust.

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JUSTICE HATCHER: And that number there is the ABN, is it?

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MR CUCH: Correct.

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JUSTICE HATCHER: All right. Just turning to the substance of the application - I'm only raising this for your response - but I'm just wondering why you can't do this already under the award. Why does the award have to be changed to do this?

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MR CUCH: I made enquiries with the Fair Work Ombudsman and they said that there were protections in the award where you couldn't do that, you had to either take time in lieu within six months or get paid the overtime, and, at my age, I would prefer being able to take the time off.

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You know, obviously I'm happy to work for monetary gain and do the extra hours, but I really value the time off, and the fact that you are limited by having to take it within the first six months as time in lieu and not being able to have it as annual leave, because we have nine and a-half months where we are quite busy and then we have three and a-half months where we're not very busy, and to be able to have it as annual leave, to be able to take it in that three and a-half month quiet period is what we are looking to do, and the Fair Work Ombudsman, on multiple times, said that that was not possible due to the protections in the Act - in the award.

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JUSTICE HATCHER: And, what, they suggested that you make an application to vary the award, did they?

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MR CUCH: Correct, yes, so it was then able to, by agreement, have annual leave instead of the overtime, so then, therefore, I wouldn't have to need to take it as time in lieu within six months, I could take it later as annual leave.

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JUSTICE HATCHER: And why couldn't it be done as an individual flexibility arrangement?

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MR CUCH: They said the award has protections in it where that can't happen.

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JUSTICE HATCHER: Okay. This is something you personally want for yourself, is it?

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MR CUCH: Yes, it is. That's how this whole thing's come about, that the owner and I - Aaron Thompson and I - have agreed that we would like to make that arrangement, but the award doesn't let us make that arrangement - after speaking with the Fair Work Ombudsman.

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JUSTICE HATCHER: Sorry, perhaps I confused you earlier. So you are making this application in your own interest as an employee?

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MR CUCH: Correct. But the owner - - -

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JUSTICE HATCHER: You are covered by the award, are you?

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MR CUCH: Yes.

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JUSTICE HATCHER: You said you are a manager. Why do you say you are covered by the award?

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MR CUCH: I'm employed under the award as a manager.

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JUSTICE HATCHER: Managers aren't usually covered by awards. I'm just wondering - I mean do you say - - -

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MR CUCH: Well, my employment is - - -

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JUSTICE HATCHER: Are you at some grade in the award?

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MR CUCH: Yes, I am level 10 in the award.

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JUSTICE HATCHER: Well, that's about golf professionals.

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MR CUCH: Yes, it is, but, because of the duties that I do for him, he's paying me at level 10. The Fair Work Ombudsman said that all my duties would come in under level 9, after speaking to him and telling him what all my duties are. However, the owner, Aaron Thompson, chooses to pay me at level 10 because of everything I do for him, which is basically running the business for him.

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JUSTICE HATCHER: Okay. Mr Cuch, can I just explain this to you. When someone applies to vary an award, the award obviously applies to a whole industry and a large number of people.

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MR CUCH: Yes.

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JUSTICE HATCHER: For the Fair Work Commission to be satisfied that it should vary an award, it would have to be satisfied that the variation is something that is to the benefit of employers and employees of the industry generally.

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MR CUCH: Yes.

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JUSTICE HATCHER: We don't vary awards just to suit the interests of one person.

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MR CUCH: No. No, and that's why I put in there that the benefit would be to everyone, was that they would then get leave loading on top, as opposed to trying to swap like for like and there being no real benefit to anyone's interests to make a change because you've already got something that protects you, is there's a benefit that people can take the time later than within the six-month period, if they wanted the time off, and they also get the 17 and a-half per cent leave loading by having it being able to be varied into annual leave, rather than be paid for it outright, if they prefer the leave rather than the money.

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JUSTICE HATCHER: I have no doubt that's your perspective on the matter, but the issue I'm raising is, in the absence of some information about what other people in the industry think about this, it's hard to say we should vary it just for one person.

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MR CUCH: Yes, and I understand that.

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JUSTICE HATCHER: For example, if employers generally don't want to have these agreements because they don't want to pay that sort of money, well - and they say this shouldn't be done - - -

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MR CUCH: Well - - -

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JUSTICE HATCHER: Anyway, you want to proceed with this application, do you?

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MR CUCH: Yes, please. If it's possible to have it done, I would like to proceed with it.

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JUSTICE HATCHER: All right. Well, the normal course is that we require applicants to vary awards to file some documents in writing, which would include a written submission, and that needs to address the requirements of the Fair Work Act concerning variation of awards and the merits of the variation.

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MR CUCH: Yes.

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JUSTICE HATCHER: And evidence, usually by way of witness statements by individuals, which discuss the circumstances of the application.

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MR CUCH: Yes.

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JUSTICE HATCHER: So are you prepared to engage in that process?

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MR CUCH: Yes, yes, absolutely. I'm prepared to get the owner involved, obviously, because he's already given me permission, and I'm doing this on his behalf as well, so we can draw up an agreement to be able to do that. So we're not looking to, I suppose, diminish the award in any way, but just add another layer where it gives a bit more flexibility and benefit to an employee.

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JUSTICE HATCHER: All right. How long might you need to do that?

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MR CUCH: Is there a form that I use to fill that out, because I'm not - - -

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JUSTICE HATCHER: We can send you information about preparing witness statements and submissions, but, ultimately, you are the applicant - - -

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MR CUCH: Yes.

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JUSTICE HATCHER: - - - and we can't give you legal advice about how to do things.

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MR CUCH: No, I know.

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JUSTICE HATCHER: We can give you some information.

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MR CUCH: Okay.

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JUSTICE HATCHER: There's various provisions of the Fair Work Act which apply to varying awards - - -

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MR CUCH: Yes.

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JUSTICE HATCHER: - - - which you will need to address.

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MR CUCH: Okay.

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JUSTICE HATCHER: We can't help you with that because that's up to you, as the applicant.

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MR CUCH: Okay. Thank you.

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JUSTICE HATCHER: Bearing all those things in mind, how long might you need?

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MR CUCH: Probably four weeks, I would imagine, to get the witness statements and any advice, if needed, on how to write the submission.

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JUSTICE HATCHER: All right. Well, given your position, I would probably respectfully suggest to you that you will find that that's not enough time.

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MR CUCH: Okay, yes.

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JUSTICE HATCHER: Look, I'm inclined to say eight weeks. Is that suitable?

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MR CUCH: Okay. I'm happy with that. I'm not trying to rush it. I wasn't sure what the right amount of the time needed is.

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JUSTICE HATCHER: All right. Well, I would prefer you took more time and we got submissions which address the situation properly.

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What will happen now is that my chambers will issue a direction along the lines of what I have just said, that is, directing you, as the applicant, to file your submissions and written evidence within a period of eight weeks, and then I will call the matter back on after that and we will see where the land lies then.

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MR CUCH: Okay. Thank you.

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JUSTICE HATCHER: All right. Is there anything else you wish to raise?

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MR CUCH: No, no, it was just - this is my first experience with the process, so I initiated it and now I'm just following your experience on how I go about it.

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JUSTICE HATCHER: All right. Okay, well, if there's nothing else, I thank you for coming this morning and we will now adjourn.

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MR CUCH: Yes.

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JUSTICE HATCHER: You will get that direction in writing later today, or, at the latest, next Monday.

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MR CUCH: All right, fantastic. Thank you for your time.

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JUSTICE HATCHER: All right, thank you. The Commission is adjourned.

**ADJOURNED INDEFINITELY**

**[9.44 AM]**