TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER MATHESON

AM2024/9

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

Application by The Australian Retailers Association (AM2024/9)

General Retail Industry Award 2020 – clause 16.6(b)

Sydney

10.00 AM, WEDNESDAY, 1 MAY 2024

Continued from 26/04/2024

PN1

JUSTICE HATCHER: Good morning. I'll take appearances. Ms Leoncio, you appear for the applicant, Australian Retail Association?

PN2

MS F. LEONCIO: Yes, that's correct, your Honour.

PN3

JUSTICE HATCHER: Ms Carroll, you appear for the National Retail Association?

PN4

MS L. CARROLL: That's correct, your Honour.

PN5

JUSTICE HATCHER: Mr Cruden, you appear for the Australian Industry Group?

PN6

MS L. CRUDEN: Yes, your Honour. Thank you.

PN7

JUSTICE HATCHER: Mr Friend, you appear for the SDA?

PN8

MR W. FRIEND: That's so, your Honour, thank you.

PN9

JUSTICE HATCHER: Yes. Mr Taylor, you appear for the AWU?

PN10

MR G. TAYLOR: Yes, your Honour.

PN11

JUSTICE HATCHER: And Mr Cullinan, you appear for RAFFWU Incorporated.

PN12

MR J. CULLINAN: Yes, your Honour.

PN13

JUSTICE HATCHER: All right. The Full Bench has read the outlines of submissions. Ms Leoncio?

PN14

MS LEONCIO: Thank you, your Honour. Now, I have in our written submissions, outlined the pertinent points in support of the application to vary the award, and in particular, clause 16.6 subparagraph (b), to clarify that the relevant penalty rate which applies within that minimum break period between shifts, is 200 per cent of within an hourly rate. And I don't propose this morning to read out or repeat matters that have been identified in those submissions.

PN15

But I seek to focus on the key issues in dispute which has been illuminated by the submissions that have been filed, particularly by the SDA dated 24 April 2024. But I continue to rely on the written submissions that are dated 17 April 2024.

PN16

Now, the Australian Retailers Association relies primarily on section 160 subsection (1) of the Fair Work Act, on the grounds that 416.6 of paragraph (b) is ambiguous or alternatively unsuited. An in the alternative the ARA relies on section 157 subsection (1), subparagraph (a) of the Fair Work Act.

PN17

There are five of the issues which I seek to take the Full Bench through this morning. First is the question of the existence of ambiguity or uncertainty, in particular in respect of the terms of the clause; second is the relevance of the award's history and in particular, the entitlement under the pre modern award instruments.

PN18

Third, the question of whether the discretion should be exercised; fourth, the application under section 157, and in particular whether the variation is necessary to achieve the modern award's objective; and fifth, I'll touch briefly on the issue of retrospectivity of the variation orders.

PN19

If I turn then to the first issue in terms of the existence of ambiguity or uncertainty there doesn't appear to be any dispute about the proper approach. And the Full Bench would be well aware of the relevant principles that apply in respect to (indistinct). At paragraph 12 of our submissions we refer to the paragraphs that are extracted from 51 and 52 of the Modern Award Superannuation Clause Review decision which is (2023) FWCFB 264 at 51 to 52.

PN20

And at that we note passages we specifically draw the Full Bench attention to the statement that there must be rival contentions as to the proper meaning of the provision which are reasonably arguable in respect of ambiguity, and in terms of uncertainty that the uncertainty may arise from the application of unambiguous terms to a given set of circumstances, or if the provision is doubtful, vague or indistinct in its expression.

PN21

And we say in respect of clause 16.6(b) (indistinct) we say there are clearly rival contentions as to the proper meaning of the provision. And I'll take you to 416 which is at paragraph 18 of the ARA's submissions. Clause 16.6 concerns breaks between work periods. And you'll see there subparagraph (a) deals with the entitlement which is that employees must have a minimum break of 12 hours between when the employee finishes work on one day and starts work on the next.

PN22

The focus of this application is of course the next subparagraphs. At paragraph (b) that states, 'If an employee starts work again without having had 12 hours off work the employer must pay the employee at the rate of 200 per cent of the rate they would be entitled to, and until the employee has a break of twelve consecutive hours.'

PN23

Now, in the ARA's submission the weight in terms of the 200 per cent is identified but of course, the question is what is that 200 per cent applied to. And there isn't a specific value in terms of a percentage that is referred to in subparagraph (b) in respect of which the 200 per cent is applied to. That is what we mean by there not being a specific reference or an express reference for 16.6(b) as to the relevant rate to which 200 per cent should be applied.

PN24

That gives rise to an ambiguity as to which is the relevant rate. We say contrary to the submissions of the SDA at paragraph 10 that it's not precise or unambiguous. There is a focus by the SDA on the words, 'at the rate they would be entitled to until the employer has a break of 12 consecutive hours.'

PN25

That does not include a specific value, of course, and it doesn't include any cross-reference or identification of any particular part of the award to which the relevant rate or the specific entitlement is said to be a foundation of the relevant rate. And the principles are that rarely, if ever, would you interpret an award as imposing a penalty on a penalty unless expressly made plain by the terms of the instrument.

PN26

And we say that's not apparent under the terms of this subclause and the clearest evidence of the existence of the ambiguity is really the fact that there are these rival contentions that are being advanced between the parties. We also refer to the fact that really there is a reading in into the clause in terms of the SDA's submission that the phrase refers to - and this is at paragraph 10, that it's referring to the applicable rate for the work at the time it is worked. That is not expressly identified and stated in the subclause.

PN27

We accept that it also doesn't say the minimum hourly rate but we say that that's where the ambiguity lies. There are these two wider contentions which exist. And we also say that the previous authorities, and in particular the four yearly review of modern awards, which was the plain language redrafting statement, (2018) FWC 6075, that the previous observations of the Commission have made those observations based on the terms of the clause.

PN28

So, I've extracted at paragraph 54 of the submissions the relevant statement. Now, this was in the context of the four yearly review. There had in that context been an exposure draft which had been issued by the Fair Work Commission and within the exposure draft there was a question about whether the rates of – at that time it said double rates, but as per the plain language the drafting process is now in its final form which is 200 per cent.

PN29

And the specific question that was raised is whether that rate is entitled to be – so, the 200 per cent, is it entitled to be paid as a percentage of the minimum hourly rate compounded with other applicable penalty rates such as weekend penalties.

PN30

And the former president, Justice Ross, drew the conclusion at paragraph 45, after having stated the two positions, one being what the SDA said was that the rate must be inclusive of all relevant overtimes and loadings, while Business SA and ABI and New South Wales BC opposed that submission, stating that multiple penalties were made payable and it's the penalty that was the greatest that was to be paid.

PN31

It was concluded at paragraph 45 that there was a resolution. The issue in dispute relates to the meaning of the words, 'the rate that an employee would be entitled to.' Item (a) is resolved on the basis that there is a level of ambiguity in the current provisions which continues to exist in the terms of the plain language exposure draft. That's what the 'PLED' stands for.

PN32

I merely refer to that as an example and illustration of the terms of the clause giving rise to an ambiguity. We say that's also a similar approach that was taken in respect of the application by – set out by Deputy President Masson in the application by *Fantastic Furniture Proprietary Limited* (2020) FWC 549.

PN33

Now, this was in the context of an application for approval of the agreement, and there was the question about whether or not the clause which was proposed in the enterprise agreement which refers to the base rate of pay, whether or not met the better off overall test. And there was a submission that was put by the SDA in that context that the terms of the award were unequivocal.

PN34

That submission was rejected at paragraph 20 of Deputy President's reasons. And we say that arises really, again, from just the terms of the close. So, just focusing on the terms.

PN35

It's clear from the Full Bench decision that the material that was before the Deputy President, and he ultimately rejected the SDA's submission in that case that there was to be a penalty on a penalty within the award, that there was a history of the clause that was traversed. That's apparent from the Full Bench decision which is set out at paragraph 59 of the ARA submissions.

PN36

And you will see there that the Full Bench extracted passages from Fantastic Furniture's contention and there's a reference at paragraph 17. 'It is abundantly clear that none of the pre modern award instruments contain a clause that required employees to pay a rest break penalty based on weekend penalty rates.' So, there

was, it appears from the submissions of reference, at least, to the pre modern award instruments.

PN37

I want to take you to this next issue which is about the relevant award history. So, just to pause there for a moment to emphasise that the terms themselves appear, or it's readily apparent from the terms themselves that there is the ambiguity. That's a view that is endorsed and supported by those various authorities.

PN38

In terms of the history of the award this is addressed in our submissions in paragraphs 30 to 40 and there was an award modernisation process whereby there was an exposure draft and there was then an award that was made and various other steps that were taken within that process, which are set out as well in the SDA's submissions at paragraphs 15 to 19. We don't take issue with that process. We accept that that's the process that was undertaken.

PN39

We don't see that there is a basis to draw any inferences about the lack of opposition in terms of the (indistinct). We say that in circumstances where the clause itself is ambiguous and in circumstances where none of the parties positively put forward that this was the way in which it should be construed, that is, a penalty on a penalty, that it's equally understandable why that opposition may not have been raised during that process.

PN40

What seems to be at the heart of the dispute in terms of the ARA and SDA and the modern award instruments is really about what's the relevant entitlement, what was the relevant applicable penalty rate within those pre modern award instruments, recognising that not all of the pre modern award instruments contained a penalty rate or penalty payment for work between them in break periods between – in the minimum break period between shifts, that there were three.

PN41

And there was the Northern Territory Award and the (Indistinct) in Queensland and WA, which adopted fairly similar language. We've outlined the terms in our submissions.

PN42

In terms of the construction of that clause and it's outlined at paragraph 35 of ARA's submissions, the key question really is about whether there's a distinction to be drawn between the words, 'double time', or 'double rates.' The provision, the statement at paragraph 45 in 30.3, and I might just take you to the SDA's submissions at paragraph 20 which set out the earlier part of the clause which refer to the double time.

PN43

So, at paragraph 20 subparagraph (c) of the SDA's submissions, you will see there clause 30.1 refers to 'all work done outside ordinary hours in excess of the daily spread of hours', so this is really dealing with overtime, 'shall be paid for at the

rate of time and a half for the first three hours and double time thereafter, such double time to continue until after the completion of the overtime work.'

PN44

Then if you turn over the page then at clause 30.3, and that's the clause that we say is the equivalent paragraph in terms of 16.6(b), there's the first sentence which talks about, 'whenever the time necessary it shall, whenever reasonably practicable, be so arranged that the employee have at least ten consecutive hours off duty between the work of successive days.' So, that's 16.6(a) really just establishing the minimum break period.

PN45

Then it goes on to say, 'If on the insistence of his or her employer an employee resumes or continues work without having had ten consecutive hours off duty, an employee shall be paid at double rates', so, it's described in this clause as 'double rates', until he or she is released from duty for such period and shall then be entitled to be absent from duty for such period until he or she has had ten consecutive hours off duty without loss of pay, ordinary time occurring during such absence.'

PN46

Now, the first thing I would say is that it's a mouthful. That sentence is quite long. There are a number of aspects that are being dealt with by that sentence. We've got the establishment of when that arises, in terms of the entitlement to the payment. We've got the actual rate that's to be applied. We've got the period of how long that would be applied for, and then what will happen after that period of work in terms of an absence.

PN47

And in my submission, in the context of what that sentence is trying to achieve, really the reference to double rates is a shorthand. It's clearly just a shorthand to describe what is earlier referred to as 'at the rate of', here it says, 'time and a half for three hours, or at the rate of double time.'

PN48

Now, the Full Bench would be well aware of the relevant principles in terms of the proper approach to construction, or the relevant principles that apply to proper construction instruments.

PN49

But of course, as identified recently in *WorkPac v Skene* that the framers of industrial instruments and awards such as these who were likely of a practical bent of mind may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry, rather than with legal niceties and jargon so that it posed an approach to interpretations that are appropriate and a manner of more pedantic approach is misplaced.

PN50

And we say to try to draw a distinction between double time and double rates in this particular clause, we say that is a narrow and pedantic approach and it's misplaced.

PN51

If we then turn to what that is referring to, we say, as I've said, it's nothing more than a shorthand. Double' rates' is the same as 'double time' and that is 200 per cent on the minimum hourly rate. That's a sensible reading of the clause. And we say if it was intended that the rate was to be doubled, a rate that included penalties or loadings, that it would be much more clear and stated in much clearer and unambiguous terms.

PN52

So, that, we say, provides the background. There doesn't seem to be any suggestion that in moving to the modern award, in establishing the general retail industry award that there's intended to be some drastic dramatic change from the pre modern award entitlements to the modern award entitlements. There seems to be no one suggesting that that's the case in respect of this entitlement. And we say it is clear that the pre modern award where it existed was 200 per cent of the minimum hourly rate, hourly rates.

PN53

The third issue that I want to quickly touch on is about the exercise of the discretion and a contention that's raised in the SDA's submissions at paragraphs 30 to 32, which suggests that there is a reduction of penalty rates. I just want to be very clear about the position put. There is no reduction or absorption of penalty rates within that minimum rate period penalty rate.

PN54

What we say is that that's separate and distinct from a penalty rate, from an overtime rate which is separately provided in other parts of the award and there's no (indistinct) expressly over (indistinct) between 16.6 and the other provisions of the award that provide the penalty loadings and overtime.

PN55

So, we're not suggesting that there is any relationship or any kind of absorption or reduction. What we do say is that there's a 200 per cent penalty rate that applies in these circumstances and it may be that there are the same hour of work penalty rates that apply under a different clause.

PN56

If that's the case and there was a higher penalty rate that is to be applied then that is the rate that is to be applied. There is not a mathematical equation to try to seek to absorb within the 200 per cent, a concept of a penalty rate. And what we say is that there's a comparison that is drawn between a Saturday penalty rate and a Sunday penalty rate, and a minimum break period.

PN57

And we say the rate that is set is 200 per cent. That is higher than the Saturday rate. And it's not a question of, well, if you reduce that down by 125 per cent the penalty rate isn't all that big because it's only a 75 per cent (indistinct). And in my submission, in dealing with the question of a disincentive, well, when you look across the award and the relevant rates that have been prescribed the specific rate that is identified is the disincentive.

PN58

So, that's to say where a 200 per cent penalty rate has been applied, that is a significant penalty rate in the context of the General Retail Industry Award and that provides a disincentive. Now, equally there's a public holiday rate of 250 per cent. And if that applies then that's the disincentive. 250 per cent is a significant penalty rate and that's the disincentive that would prevent someone from rostering you to work with in the minimum break periods during that time. It's 250 per cent. That's already a significant disincentive.

PN59

The fourth issue that I just wanted to touch on briefly is the question of section 157. So, this is an alterative argument, we say, for the reasons that I've outlined in the submissions and also further developed this morning. The Full Bench should be satisfied that there is an ambiguity (indistinct) and so the discretion should be exercised under section 160.

PN60

In the alternative if the Full Bench is against us on that point we say, well, it's necessary to make the variation to achieve the modern award's objective. An, again there is no dispute about the relevant principles that apply. Both parties rely on the approach taken by His Honour Justice Tracey in *SDA v NRA* that there is a distinction to be drawn between that which is necessary and that which is more desirable.

PN61

So, this is not a case where this is more desirable. We're saying it's actually necessary to achieve the modern award's objective. And we say on any view the payment of penalty rates is a range of 500 per cent to 550 per cent, potentially in some instances. We say it can't be said that that provide a fair and relevant minimum safety net for terms and conditions.

PN62

And we say that if it is the case that this provision is intended to provide a benefit, which is the way it's been described by the SDA, for an employer to be able to roster employees during this period, well, the penalty rate is set at such a level that it would effectively be prohibitive in most instances.

PN63

If we were talking about 400 per cent, 500 per cent, 550 per cent there's nothing that has been put in the materials to indicate why a rate at such a high level is necessary. And in the ARA's submission the variation is necessary to ensure that the award provides, as I say, a fair and relevant human safety net of terms and conditions, taking into account employment costs and the promotion of efficient and productive terms of work.

PN64

JUSTICE HATCHER: Ms Leoncio, on that context, the odd thing about this clause, of course, is that paragraph (a) purports to have a mandatory requirement for a minimum rate but then paragraph (b), when it is non meaningful?

PN65

MS LEONCIO: There is a restriction. So, that clause 16.6(a) is a provision that applies. So, there's a restriction in the sense that employees are entitled to that minimum break period. Previously, under the pre modern award instruments the wording is along the lines of, 'if it's necessary.' But that wording isn't reproduced there.

PN66

But what 16.6(b) really does is just to describe the consequences. So, whilst there's no express permission set out in 16.6(b) that in those circumstances you're no longer bound by 16.6.(a), in my submission there's nothing clear. It doesn't clearly state that you're required to provide that and that these are the consequences if you don't provide it, in terms of the payments that would be made to the employee. But I appreciate - - -

PN67

JUSTICE HATCHER: On one view you could take out paragraph (a) and that clause would mean the same thing.

PN68

MS LEONCIO: Well, it doesn't necessarily – I'll need to read this more clearly but I don't think that necessarily makes clear that it's the next day of work.

PN69

JUSTICE HATCHER: Sure. That's just a minor adjustment for the drafter to do. (a) doesn't really have any work to do, does it?

PN70

MS LEONCIO: I'm only looking at it, at this stage, briefly. I might have to take that on notice but I think that the way in which you read the clause that (b) really provides for an ability for that word to be scheduled within that period and then the relevant disincentive. But I see your Honour's point in respect of those two subparagraphs.

PN71

JUSTICE HATCHER: Yes, all right.

PN72

MS LEONCIO: Yes. Well, the final point, really, was just to touch on retrospectivity, that there's been opposition both by the SDA and RAFFWU in respect of respect of retrospective operation. That's in the variation application that's been made. We continue to rely on our paragraphs 68 and 69 of our written submissions. But I just wanted to be clear that we were only speaking on that retrospective operation where we succeed on section 160 subsection (1).

PN73

So, where there is an added activity which exists, and therefore we say in those circumstances, given the way in which the award modernisation process occurred, and the four yearly review plain language redrafting process, that the particular chronology of events really demonstrates the exceptional circumstances in terms of there not being that clarity in terms of what the provision or clause means, and

therefore that without establishing the exceptional circumstances of the respective operation.

PN74

And we have identified the relevant date as 1 October 2020 because that's the date that the plain language redrafting version of above award took effect, and we say that that's a relevant point in time which it's open to the Bench to speak to make the variation order operative form. Now, if there are any other - - -

PN75

JUSTICE HATCHER: Although the logic to your case, it says it's been ambiguous since January 2010, hasn't it?

PN76

MS LEONCIO: Yes. Well, it's also open to the Full Bench to retrospectively set it at that one, as well. We just say that that's another point from which it can be made. Now, unless I can assist the Bench with any other matters they are the submissions of the ARA.

PN77

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

PN78

MS CARROLL: Thank you, your Honour. The National Retail Association has filed written submissions in this matter. I don't seek to repeat what's set out there, nor the matters that Ms Leoncio has just outlined. There's nothing further that we would add beyond those submissions.

PN79

JUSTICE HATCHER: Thank you. Ms Cruden?

PN80

MS CRUDEN: Thank you, your Honour. Similarly, to the ARA, the Australian Industry Group is content to rely upon our written submissions filed in the matter on 17 April 2024. We do note that we support the written submissions filed by the ARA in respect of the matters under consideration and the proposals therein, including to specifically note their proposal with respect to potential variation regarding how the amendment would interact with the public holiday penalty that was outlined in the ARA's written submission. Thank you, your Honour.

PN81

JUSTICE HATCHER: Thank you. Mr Friend?

PN82

MR FRIEND: Thank you, your Honour. It might be convenient if I deal with the matters in the same order as has been dealt with for the five points for the sake of ambiguity.

PN83

AS you will have seen from our written submissions we submit that there is no ambiguity.

PN84

The argument for ambiguity seems to arise from the assertion that the use of the word, 'rate of 200 per cent', without saying something more by specifying a particular amount, or the reference point creates an ambiguity. But in our submission the clause quite clearly specifies what rate is to be applied and that's the rate that the employee would be entitled to.

PN85

JUSTICE HATCHER: The difficulty with that is that to the extent that paragraph (a) purports to require a minimum rate of 12 hours, it's difficult to say that the employee would be entitled to anything, because they're not meant to be working in that period.

PN86

MR FRIEND: Well, that's so, you Honour. But the rate that would be entitled for doing the work that they're doing. So, if it's ordinary time hours, it's that rate. If it's public holiday hours, it's that rate. If it's Saturday hours, it's that rate. I think the use – the word, 'would', has been used because of the different types of possibilities that might arise when the work is done.

PN87

But if I could take up that point about (a) and (b), it is in a sense – it could be said that (a) is otiose to the clause if you've got (b) there and I understand your Honour's point there. I suspect that what the drafters were trying to achieve was to maintain a rule and to express their intention that there should be a 12 hour break.

PN88

And that's something to be aimed for and that should be the rule, but to impose what is a fairly high penalty if there's going to be a relaxation of that. Because one of the points that we make when we look at the history here is that in a number of jurisdictions through the modern award it couldn't ask or require an employee to work within the rest break here.

PN89

One of the things that a modern award did was it gave employers that flexibility but at a cost, and that's the cost that's set out in (b). So, when you understand it in terms of the history it makes sense, and (a) does have some work to do by establishing what is a norm which we say should be implied within most cases.

PN90

So, our submission is this. There's no ambiguity. If one comes to look at the matters, if you do take the view that there is an ambiguity the award history would resolve that. And if we just go to that which is set out in paragraph 20 of our submissions, there were a range of different provisions through the country in the relevant awards, the Victorian Shops Award, if we prohibit work in the rest period.

PN91

In the ACT there is no relevant provision. The Northern Territory was the one that was dealt with before, with the same clause 'double time' and 'double rate' are

used. But double rate is not a shorthand for double time. It's the same length. 'Double time' is a well understood term. 'Double rate', in my submission is equally a well understood term and it's double the rate that is otherwise paid.

PN92

JUSTICE HATCHER: When you say that is there some authority for that proposition?

PN93

MR FRIEND: No, I haven't got authority for that. It's just the language, your Honour.

PN94

JUSTICE HATCHER: I'm only asking that because some of my brief review of some of the more ancient authorities, 'double rates', and 'double time', seem to have been used interchangeably in decisions and are used in the same sentence. In some clauses both expressions are used interchangeably.

PN95

MR FRIEND: Yes. I couldn't identify any decision where 'double rates' was assigned a different meaning. But if there is such a decision I'd like to know what it is.

PN96

JUSTICE HATCHER: Yes, well, I haven't got one, right? Is it at least accepted that the clause as it has existed since 2010, and then from 2020 was meant to pick up the concept of double rates which was found in the Northern Territory and Western Australian State Awards – sorry, the West Australian State Awards and the Northern Territory Federal(?) Award?

PN97

MR FRIEND: I think we have to accept that, yes, your Honour. But in making the modern award there is an attempt to create the same conditions throughout the country where there were different conditions that apply. And that those awards that have been something otherwise will be accepted, that that's what was intended.

PN98

And it may well be that that's the (indistinct) that what was intended was the payment of a hundred per cent of the ordinary time rate plus whatever penalty is due on the day. In other words, if you're working on a public holiday you get a penalty for the public holiday plus a hundred per cent of ordinary time rate, but not double the public holiday penalty. Otherwise there's no disincentive. In the case of the public holiday there is simply no disincentive to roster an employee a 12 hour day, ten hour day, if that's what's been agreed.

PN99

In terms of the discretion that's a matter that we don't have any submissions to make, other than if the commission forms the view that there was an ambiguity then it needs to be resolved. Of course, with our submissions there's no ambiguity and there's nothing to be done. The section 157 application, we submit that there

is no necessity. But again, much of this will depend upon what differences in the terms in relation to ambiguity.

PN100

If there's no ambiguity there's nothing that needs to be done. There's no problem, as your Honour pointed out since 2010. And it does provide a disincentive to what is work that shouldn't be encouraged without a proper break. The modern award's objective in paragraph (d)(a) would suggest that there should be a penalty in such circumstances if we're going to have an amendment which removes all penalties that doesn't apply with the modern award's intentions.

PN101

Similarly, there shouldn't be retrospectivity unless there is ambiguity, and that (indistinct) remarks has been suggested – particularly in circumstances where there's no suggestion that there has been a problem. Certainly we wouldn't want to see employees claiming (indistinct) pay on the basis of the interpretations of (indistinct).

PN102

Finally, I perhaps wanted to just tease out something that was said previously which was that the proposal that the ARA makes doesn't absorb any penalties. But if we've understood it correctly, what they propose is that if a person is called back within 12 hours to do work on a Saturday they get 200 per cent of the ordinary time rate.

PN103

That means that the penalty for working on the Saturday, the 25 per cent that's payable under the (indistinct) is absorbed into the hundred per cent penalty which is payable on your proposal for working within the 12 hour break. If you're called back to work on the Friday you get, on their proposal, 200 per cent of minimum rate. If you're called back to work on a Saturday, 200 per cent minimum rate. Sunday, that's 200 per cent.

PN104

JUSTICE HATCHER: So, let's pause there. When you say, 'called back to work' - - -

PN105

MR FRIEND: Yes.

PN106

JUSTICE HATCHER: What are we talking about? I mean, this clause only applies where you come into work on a particular day for 12 hours, not having (indistinct) since you ceased work on the previous day, not - - -

PN107

MR FRIEND: That's what I - - -

PN108

JUSTICE HATCHER: Not – yes.

PN109

MR FRIEND: No. All I'm trying to talk about – I'm sorry, your Honour but (indistinct). If you work on a Thursday and you don't have a 12 hour break and you come back on a Friday, under the ARA proposal it's 200 per cent of the minimum rate. But if you work on a Friday and you come back to work without a 12 hour rate(sic) on the Saturday, it's the same. Which means that they're proposal absorbs the Saturday penalty.

PN110

JUSTICE HATCHER: But there's – I've seen this award has a recall clause somewhere there.

PN111

MR FRIEND: I think so.

PN112

JUSTICE HATCHER: I mean, what's the penalty rate if you recall the same day without having had a break? Is it clause 19.11, by any chance?

PN113

MR FRIEND: I think that's the – 19.11, yes, I'm told.

PN114

JUSTICE HATCHER: All right.

PN115

MR FRIEND: That's just a minimum period.

PN116

JUSTICE HATCHER: Yes. Otherwise the applicable rate would apply, I assume, would it?

PN117

MR FRIEND: Yes. Yes.

PN118

JUSTICE HATCHER: (Indistinct).

PN119

MR FRIEND: So, the point I was making is that proposal from ARA does absorb those other things.

PN120

JUSTICE HATCHER: Yes.

PN121

MR FRIEND: And if there is some desire to make a change then it should not, in my submission. There should be a one hundred per cent penalty to discourage working in those circumstance with those people being required to work without an appropriate break. But any other penalty that's payable for the time worked should also be paid. But our primary position of course, that there's no ambiguity

and it should be double whatever is payable to you. Unless there's anything further I can assist with those are the submissions of the SDA.

PN122

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

PN123

MR TAYLOR: Thank you, your Honour. I agree with the submissions of the SDA for the reasons given by Mr Friend, and I've got nothing else to add at this time. Thank you.

PN124

JUSTICE HATCHER: Thank you. Mr Cullinan?

PN125

MR CULLINAN: We rely on our written submissions and as identified in the support and submissions of the SDA. Thank you, your Honour.

PN126

JUSTICE HATCHER: All right. Anything in reply, Ms Leoncio?

PN127

MS LEONCIO: No, your Honour, thank you.

PN128

JUSTICE HATCHER: All right. Well, we thank you for those submissions and we will reserve our decision and now adjourn.

ADJOURNED INDEFINITELY **[10.55 AM]**