EVERYBODY OUT

APTIA
Industrial Arm of the Bus Industry Confederation
moving people

JANUARY/ FEBRUARY 2021

Everybody Out is an industry newsletter produced by the Australian Public Transport Industrial Association (APTIA), the industrial arm of the Bus Industry Confederation (BIC). The editor of this newsletter is Ian MacDonald, National IR Manager of the BIC. Enquiries relating to the contents of this newsletter can be directed to:

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APTIA Chairman

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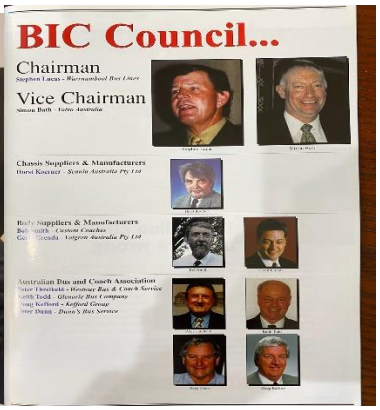

It is appropriate to acknowledge the sadness that I felt with the passing of Michael Apps, the Executive Director of BIC. Michael was my mentor and the guiding force behind the development of APTIA. He oversaw APTIA's its registration under the Fair Work (Registered Organisations) Act 2010 in 2011.

Michael was the inspiration and driving force behind initiatives that BIC undertook over a 20-year period and more than 10 years with APTIA.

These long-remembered photos reflect the BIC Council in 2002 when Michael took over, Michael's long-term former BIC Chairman and friend, Stephen Lucas, delivering a eulogy at Michael's Farewell Service and better times when we were both in our element chatting up politicians in the Federal Parliament.

Industrial Working Group

The Industrial Working Group met on 2 February 2021 and resolved to make a submission to the Senate Education and Employment Committee in support of the **Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.**

The IWG position supported the bill but sought amendments which would limit casual conversion only in circumstances where 52 weeks could be offered.

In further support of the submission APTIA attended Parliament last week and met with cross bench senators in support of the APTIA's submissions and also attended the Senate Committee hearing during a presentation by the National Secretary of the Transport Workers Union.

APTIA'S position is that the Bill:

(i) Provides a definition of casual employment, based upon a firm advance commitment
(ii) Provides a mechanism for casual conversion where casual employment is regular and consistent
(iii) Allows a set off of the casual loading, provided it is properly identified, if a casual is found not to be a casual
(iv) Provides a less costly mechanism for claiming unpaid wages, without the need to make application to a Federal Court, and
(v) Ensures a clearer procedure to seek approval of Agreements with respect to casual employees.

Set out below is a press release issued in support of the APTIA submission

"The Bus Industry Confederation, which represents bus operators across the country, as well as manufacturers of buses and coaches, has recently, through its Industrial arm, **the Australian Public Transport Industrial Association,** lodged a submission to the Senate Committee for Education and Employment in support of the Government's **Fair Work Amendment (Supporting Economic Recovery) Bill 2020**, known as 'the Omnibus Bill'.

APTIA's submission focusses on supporting the need for a suitable definition of casual employment, the ability for a casual, in certain circumstances, to convert to more permanent work and the need to prevent double dipping, where, to do so, would discriminate against permanent and part time bus drivers.

BIC National IR Manager Ian MacDonald makes the point

"Permanent and part time employees would be discriminated against if double dipping was allowed, because casual drivers would be receiving 25% more than a permanent or part time bus driver, whilst also receiving the same leave entitlements, but doing the same job of driving school buses."

The Industry intends to lobby Federal Parliamentarians to seek refinements to the Bill, designed to give the industry more certainty.

Chairman of APTIA, Wayne Patch made the comment

"The debate, at the moment, has been highjacked from its original intent, which was to bring more secure employment to the workforce and the Bill, in defining 'casual employment', does just that."

MacDonald went on to say

"Our school bus drivers carry school children to and from school, across the nation, every school day, but only for 40 weeks a year. The workforce is an aging one, with the average age in excess of 56 years, and, in many cases, for the drivers it is a second or third career move or just some extra work whilst they also get the benefit of a pension."

APTIA argues that these casual school bus drivers have no problem with this pattern of work, but do not fit the mould of permanent employees. Neither do they want to be permanent drivers.

As MacDonald says

"Our school bus drivers just want to work when it suits them and take breaks also when it suits them. Casual employment allows this to happen."

APTIA Breakfasts

APTIA will hold its first breakfast at the offices of and hosted by Piper Alderman, solicitors on Wednesday 17 March. COVID-19 -19 has restricted numbers but the breakfast will be one of the first opportunities of bus operators to converse face-to-face since early January 2020. It will be a good day.

The issues for discussion will be:

(i) The vaccination roll out and issues surrounding it.
(ii) A definition of casual employment and how to manage any change, either from legislative or judicial outcomes.
(iii) First aid kits – are they essential for work health and safety to be on every bus?

KHQ Lawyers will host a breakfast in Melbourne on Wednesday 23 June 2021 and Kinnect will host a breakfast in Sydney on Wednesday 15 September 2021.

Long Distance Tourist & Coach

The Bus Industry Confederation has resolved to establish a Long-Distance Tourist Coach Advisory Board which will act as an advisory body to enable BIC to better understand the issues which affect this industry and also to act as a support mechanism for the work undertaken by the various State Bus and Coach Associations on behalf of their Coach members.

At this point in time with the LDTC industry having been decimated by COVID-19 and with tourism on its knees it is particularly important, that BIC provides this support. As part of the Australian Chamber of Commerce and Industry (ACCI) BIC has direct access to the ACCI Tourism Restart Taskforce.

The Group which will have representatives from BusNSW, BusVic and QBIC will also have members from the larger LTDC operators.

The Group Has identified three specific areas to address its attention.

(i) LTDC industry seeks to be included as a recipient of any proposed Government relief packages for Australia's tourism industry.

(ii) LTDC industry looks to Government to support the industry tourism relief provided by the Federal or State Government.

(iii) Future investment into the LTDC industry through technology as an interface to whole of journey travel.

INDUSTRY NEWS – What you need to know?

What is happening with the Workpac v. Rossato case?

The High Court has agreed to hear the Appeal of Workpac against the decision of the Federal Court to determine that labour hire employees of Workpac were not casual workers but full time or part time workers.

I have set out a summary of some of the submissions made to the High Court who will hand down their decision later this year. The decision, especially if the Government's Omnibus Bill is not successful, will have significant ramifications for the bus and coach industry where casual employment is a regular occurrence.

Work Pac submissions:

(i) Just as the Morrison Government's Omnibus IR Bill says a casual will be defined on the basis of their job offer, rather than subsequent conduct, the labour hire company at the centre of a landmark casual's case has told the High Court employment contracts must be decisive.

(ii) As it seeks to overturn the full Federal Court's momentous Rossato judgment paving the way for casuals to claim leave entitlements, Workpac has told the High Court a worker's classification depends entirely on their contract's express or implied terms.

(iii) The company says in High Court submissions filed last month that where employment contracts are written, as in the case of former Workpac coal miner Robert Rossato, their terms are "identified and construed without reference to post-contractual conduct".

(iv) Workpac argues ss65 (2)(b), 67 (2) and 384 (2)(a) of the Fair Work Act "explicitly recognises that casual employment can be for 'a long term' and can involve employment on 'a regular and systematic basis', 'at least 12 months of continuous service', and 'a reasonable expectation of continuing employment . . . on a regular and systematic basis'".

(v) It says Justice Richard White (with Justice Michael Wheelahan agreeing) "wrongly held otherwise" and "wrongly gave significant weight to the regularity and predictability of the rostering patterns of WorkPac's client – notwithstanding that it was a stranger to the contracts between WorkPac and Mr Rossato".

(vi) Workpac further argues that because it paid Rossato more as a casual than a permanent field team member (FTM) would earn for the same work, it should now be allowed to "appropriate the whole of the contractual overpayment, or at least the amount of the casual loading" to discharge any obligation to have provided paid leave.

Attorney General's submissions:

(i) IR Minister Christian Porter has told the High Court that a Federal Court bench "erred" when it concluded that labour hire company Workpac could not rely on a legislative provision to offset loadings paid to the worker at the centre of a landmark case on casual leave entitlements.

(ii) The minister outlined to the High Court as an intervenor in Workpac's challenge to last year's full court finding that coal mining worker Robert Rossato had an entitlement to paid leave entitlements while engaged on six consecutive employment contracts over almost four years to April 2018.

(iii) The minister in his submission says, however, that the full court "erred in concluding that r 2.03A (Double Dipping Regulation) could have no application to a case of the present kind". "The full court adopted an unduly narrow interpretation of the words 'in lieu of' in the regulation," argues Porter.

Preparing for the end of Job Keeper

The second extension period for JobKeeper started on 4 January 2021 and extends until 28 March 2021, after this JobKeeper comes to an end. This will be a tough time for a number of businesses.

By now, the majority of employers will have already considered a number of other costs saving options to avoid redundancies. These may include reducing the office footprint by working in a smaller office space or negotiating your lease. They could also consider cutting discretionary expenses – such as travel, food and beverage and training and event costs – renegotiating contracts with suppliers and temporarily cutting out services and subscriptions you no longer need. Once such options have been exhausted, many employers will have little option but to look at reducing their staffing costs, including more creative ways of keeping existing staff on board without being forced to make redundancies (such as offering retraining and redeployment opportunities or standing employees down for a short period).

The majority of employees working in companies still relying on JobKeeper should be aware by now that the end of the subsidy may mean changes within the organisation, but that does not mean they still should not offer clear and consistent communication about the organisation's financial position and plans for the future.

It is never easy to make redundancies. It is also important to ensure you have gone through the proper procedures and have all the relevant information to hand. Do not forget that a redundancy is only valid if that role is no longer viable or does not need to be performed anymore. And it is not a 'last in, first out' situation either – decisions cannot be based on tenure. They must be based on the needs of the business. Make it clear that the business no longer requires this particular role to be performed because, as *HRM* has previously reported, mislabelling underperformance as a redundancy can backfire.

People have a range of emotions they display when being confronted with the news of job loss – especially during the precarious times we are living in. However, if things get too emotional be prepared to arrange another time for the employee to come back when they are able to talk through things rationally. This is a tough time for everyone involved.

People have a range of emotions they display when being confronted with the news of job loss – especially during the precarious times we are living in. However, if things get too emotional be prepared to arrange another time for the employee to come back when they are able to talk through things rationally.

Despite the end of JobKeeper, the Government is still looking for ways it can continue to support employers to navigate their way through the continuing economic uncertainty with the launch of the Job Maker scheme.

In summary, this is a new subsidy that will be offered to eligible employers who employ additional job seekers aged 16-35. It applied from 7 October last year until 6 October this year.

The scheme is designed to not only help young people find their way into the job market, but also help to provide a pathway to re-employ new full time workers at a subsidised and more affordable rate than in the previous year.

It is, of course, not an ideal scheme considering it only supports a young portion of the workforce back into employment, but the additional funds that could be unlocked might help some employers to find a way through the challenges of the year ahead and emerge stronger on the other side.

ALP industrial relations policies

Anthony Albanese's Industrial Relations reforms

- 'Job security' explicitly inserted into the Fair Work Act
- rights for gig economy workers through the Fair Work Commission
- portable entitlements for workers in insecure industries
- casual work properly defined in law
- crack down on 'cowboy' labour hire firms to guarantee same job, same pay
- a cap on back-to-back short-term contracts for the same role
- more secure public sector jobs by ending inappropriate temporary contracts
- government contracts to companies and organisations that offer secure work for their employees.

The leader of the ALP opposition, the Hon Anthony Albanese, MP, gave a recent speech in which he outlined some of the industrial relations policies that the ALP will take to the next election. The ALP has resolved to oppose the Governments IR Omnibus Bill in its entirety which could mean there will be no meaningful industrial relations reform

other than as determined by the Judiciary based on current laws until the ALP is returned to Government with a majority in the Senate.

The leader indicated that 'secure' employment', meaningful wage increases and same pay for same jobs as the platform of their policies.

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

APTIA provided a comprehensive submission to the Senate Employment and Education Committee which is reviewing the Bill and has sought to lobby cross bench Senators Lambie, Roberts and Griff with respect to the industry's position which is to support the Bill but with amendments which improve the definition for casual school bus drivers who wish to remain in their casual employment.

Notwithstanding the apparent consensus accord with the Attorney General's Round Table meetings the ALP opposition and the Union movement has resolved to oppose the Bill in its entirety.

A summary is set out below of the Government and the Opposition positions.

The Morrison Government's IR omnibus Bill will for the first time introduce a statutory definition of casual work as being employment that is offered without any "firm advance commitment" it will continue indefinitely and follow an agreed pattern of work.

The legislation will also address so-called "double dipping" on entitlements by allowing employers to offset any loadings paid against future claims for other benefits.

Due to be introduced later this week, the legislation will create a new minimum standard for casual workers to convert to permanent roles, although it will still allow employers to refuse on reasonable grounds.

"We have a situation where employers are delaying making hiring decisions because of ongoing confusion about the legal status of casual employment," IR Minister Christian Porter said after releasing select details of the Bill today.

"Similarly, Australia's 2.3 million casual employees need certainty about their work arrangements and entitlements.

"That is why we are taking decisive action, firstly by fixing the longstanding problem that Labor created when it neglected to include a statutory definition of casual employment in the Fair Work Act back in 2009."

Porter said the new definition of casual employment will be an "objective common-sense test" based on the circumstances that exist between employee and employer at the time of engagement, with a guide as to the relevant circumstances.

He argued that the definition "adopts the central objective concept" determined by the Federal Court.

The legislation will define a person as a casual employee if employment is offered and accepted without any firm advance commitment that the work will continue indefinitely and follow an agreed pattern of work.

The meaning of "firm advance commitment" will be guided by specific factors, including whether the employee can elect to accept or reject work; the employment is described as casual employment; and the employee will be entitled to a casual loading or a specific rate of casual pay.

The new definition will apply to casuals from the date they commence their casual employment.

The government argues that employers face a "massive potential liability" from having to pay entitlements twice owing to the full Federal Court's *Rossato* decision, which is due to be challenged in the High Court (see Related Article).

The legislation will enable employers to offset amounts already paid through casual loadings against any claims to be paid for benefits such as sick leave or annual leave.

A court will be required to deduct any identifiable casual loading paid to compensate the employee for the absence of one or more entitlements under the NES, a Fair Work instrument or employment contract from any amounts later found to be payable to the employee.

It will apply to past and future employees.

The government says the legislation will also strengthen the process for regular casuals to convert to full-time or part-time employment based on the nature of their regular hours.

"This will be an enhancement of the existing award rights of conversion and effectively gives regular casual employees the reasonable choice as to the status of their employment," Porter said.

"The certainty for employers will not be compromised by the choice made by an employee."

An employer must make an offer to a casual employee to convert if the employee has worked for the employer for a period of 12 months and has worked a regular pattern of hours on an on-going basis for the past six months (previously 12 months).

The employer must also weigh whether the employee could continue to work full-time or part-time without significant adjustment to hours of work.

An employer may decide not to make an offer or accept an employee request if they have reasonable grounds not to do so, consistent with arrangements established by the FWC.

If an employee declines an initial offer to convert, a further right to request will be available every six months, as long as they remain eligible.

Porter said the definition of casual employment is likely to be broader than some business groups want, while unions are likely to say it should be broader still, suggesting the government had struck the right balance.

"It is essential that the definition provides certainty as to who is and is not a casual employee and also that it is an objective standard," he said.

"The definition achieves these ends.

"It is consistent with the central concept taken from Federal Court decisions.

"The other key issue of job security for long-term regular casuals is also resolved by strengthening processes for casuals to convert the nature of their employment to more secure and predictable arrangements.

"The changes to casual conversion rights strike that essential balance, ensuring those working regular shift patterns who want greater job security can convert to part-time or full-time work, while maintaining the existing rights for employers to refuse such requests if there are reasonable grounds for doing so.

"Similarly, the solution we will introduce to the double-dipping problem created by the Rossato decision will give business the confidence and certainty they need to invest, grow and start hiring again knowing that they will not have to pay people twice for things like sick leave and loadings always meant to compensate casual workers for those things."

Porter has argued the changes will create more certainty and more jobs, through having a statutory definition of casual employment and stronger rights for casuals to convert to permanent jobs.

The legislation provides that casual employees can request a switch to permanent after 12 months' employment if they have worked a regular pattern of hours on an on-going basis for the past six months (previously 12 months).

While One Nation has generally supported previous IR legislation in the Senate, Senator Malcolm Roberts flagged in October that he might object to the measures dealing with casuals due to his concerns over their use in the coal industry.

Porter claims the Bill would greatly strengthen the present casual conversion arrangement found in many awards, where the employee had to request permanent employment.

"This becomes a process where the employer is required to make the offer to the employee and then even after that offer is made, the employee has a residual right every six months to make a request," explained Porter.

Porter said the legislation maintained the current dispute resolution arrangements on casual conversion, where the FWC can act as a conciliator and arbitrate by consent of the parties, with there being the ability to further pursue the matter in the courts.

"We're trying to adopt the best of the present system . . . [under which] almost all disputes are resolved by conciliation."

The legislation will also enable employers to offset amounts already paid through casual loadings against any claims to be paid for benefits such as sick leave or annual leave.

A court will be required to deduct any identifiable casual loading paid to compensate the employee for the absence of one or more entitlements under the NES, a Fair Work instrument or employment contract from any amounts later found to be payable to the employee.

"If you are paid that 25%, that should be used to offset your other claims, which we just think is a basic issue of fairness," Porter said.

Unions to oppose "extreme" aspects of casuals' definition

Unions will campaign for the Senate to block "extreme parts" of the IR Bill dealing with casual employment, says ACTU secretary Sally McManus.

The Bill will be introduced on Wednesday, along with separate legislation aimed at making it easier for unions to de-merge within five years of their amalgamation (see Related Article).

McManus today told RN Breakfast that details of how the legislation will deal with casuals released by IR Minister Christian Porter were "very disappointing", although she was still waiting to see the final Bill.

"Essentially what the government's announced is exactly what the employers wanted," she said.

"It allows employers to put a label on someone and call them a casual, even if it's a permanent job."

McManus argued the changes would entrench casual work and take rights away from workers that were won through the courts – such as the *Rossato* decision (see Related Article) – leaving them worse off.

"If they [the Senate] can't fix that, then they should obviously reject it."

But McManus said today that employers would still be able to designate a worker as a casual at the time of their employment and then have them work full-time regular hours.

She said the legislation's claim to have stronger rights to convert to employment did not stand up because the casuals could not seek to have their request enforced by the FWC, leaving the expensive option of challenging it in the Federal Court.

"If workers did have somewhere to go to enforce their rights, this legislation would not be nearly as bad."

"There's no point having a right to something if you can't actually do something about it, if you can't actually enforce it."

Under the legislation an employer may decide not to make an offer or accept an employee request if they have reasonable grounds not to do so, McManus arguing this gives employers a "get out of jail card" due to the broad definition of what was reasonable and the lack of enforcement.

The Opposition's IR spokesperson, Tony Burke, said Labor had not seen the legislation and could only go on the details released by the Minister, which were about "removing security of employment".

"I set one simple test for the government with this legislation . . . does it create jobs with decent pay and secure work?" Burke said.

"At the moment from what we've seen from the government, that's a fail."

Burke said the Workpac legal proceedings showed that casuals workers engaged through a labour hire company were being paid less than permanent employees doing the same work, even after they received a 25% loading.

IMPORTANT DECISIONS

Bench Upholds Dismissal Decision for APTIA member

Mark Bartlett v Ingleburn Bus Services Pty Ltd t/as Interline Bus Services [2020] FWCFB 6429 (30 November 2020)

Late last year APTIA represented Ingleburn Bus Services with respect to the termination of a driver, who had comprehensive representation from the Transport Work Union. The dismissal was upheld at first instance by Deputy President Boyce. The Transport Workers Union appealed this decision which was ultimately dismissed by Vice President Hatcher, Deputy President Millhouse and Commissioner McKinnon. A summary of the decision is set out below"

An FWC senior member who considered a bus driver's submissions on procedural fairness to be "unduly pernickety" wrongly found he was properly notified and had a chance to respond, but a full bench has upheld his sacking.

Ingleburn Bus Services Pty Ltd (trading as Interline Bus Services) dismissed the driver in December last year over multiple instances of misconduct, including swearing, defacing his vest and walking in front of a colleague's moving bus to antagonise him.

Deputy President Gerard Boyce in August dismissed the driver's unfair dismissal claim, finding it unquestionable that he wilfully walked in front of the bus and that it added to his record of "repeated incidences of misconduct".

In November last year, Interline directed the driver to fill out an incident report after a member of the public complained that he took no action when her son was bullied by other children while on his bus.

The driver only wrote on the incident report "fuck off I know nothing".

Interline suspended him and asked him to provide a verbal response to the swearing incident before summarily dismissing him for gross misconduct.

The company also handed him a dismissal letter dated almost a week earlier, which stated that it was dismissing him because of the swearing incident, walking in front of the bus, defacing his vest with an image of two pistols and three other incidents.

Deputy President Boyce said he did not consider the swearing incident to be serious misconduct justifying dismissal without notice.

But given the numerous other instances of misconduct over which the driver received warnings, the deputy president held that Interline had a valid reason to dismiss him.

He also rejected the driver's claim that Interline denied him an opportunity to respond, describing the submissions as "unduly pernickety" given he was put on notice about the allegations and discussed them with his employer.

The deputy president said the driver had not contended that Interline denied him an opportunity to respond to the allegations and that if he got that chance he would have said something different.

"Significant error of fact"

An FWC full bench this week quashed Deputy President Boyce's decision, finding his consideration of whether Interline notified him of a valid reason and gave him a chance to respond to it as required by s.387 (b) and (c) of the Fair Work Act to be "plainly attended by appealable error in three respects".

Vice President Adam Hatcher, Deputy President Amber Millhouse and Commissioner Sarah McKinnon said Interline only notified and gave the driver a chance to respond to the swearing incident before his dismissal, not the additional matters.

Therefore, given Deputy President Boyce found the swearing incident did not by itself justify dismissal, the bench ruled that when he concluded that Interline properly notified the worker for the purpose of s387(b), he made a "significant error of fact".

Finding the deputy president also wrong to find the driver had an opportunity to respond, it said he appeared to consider that because Interline provided a chance to respond to the earlier incidents at the time they occurred, this satisfied s387(c).

"We do not agree," the bench said, noting s387(c) requires an opportunity to respond "to the reason for which the employee may be about to be dismissed".

"The earlier incidents occurred many months or years before the dismissal, and any opportunity to respond to each incident individually at the time it occurred does not constitute an opportunity to respond to a reason for dismissal consisting of four incidents of misconduct considered collectively."

"Unfairly narrow" chance to respond

The bench said the deputy president also wrongly considered a denial of procedural fairness regarding s387(b) and (c) could not weigh in favour of a finding of unfair dismissal unless the applicant can point to something they might have said, or did say, that could have made a difference to the outcome".

The bench said the subsections are in fact concerned with the "observance of fair decision-making procedures, and not necessarily with the character of the decision" that emerges from the.

"Where a denial of procedural fairness has been found, the usual approach is that it will not be treated of significance only if it is firmly established that it could have made no difference to the outcome," the bench continued.

In approaching it from a "starting point that unfair dismissal can only flow from a denial of procedural fairness where there are demonstrated consequences of that denial", it said he "misapprehended the statutory task as it relates to s387(b) and (c) … and closed his mind to the possibility that [the driver] had been unfairly dismissed on procedural fairness grounds".

Finding the driver's opportunity to respond "unfairly narrow in scope", the bench said a proper chance to address all reasons might not have changed the result, "but it is at least a real possibility that [the driver] would have addressed the cumulative effect of his conduct" when asked why he should not be dismissed.

However, on quashing Deputy President Boyce's decision and redetermining the application, the bench agreed with his conclusion that the driver's dismissal was not unfair.

It said "on balance" the valid dismissal reason, "which was the cumulative result of a series of instances of misconduct over a sustained period of time, outweighs the denial of procedural fairness in the process leading to dismissal".

Bench again declines paid pandemic leave bid

Health Sector Awards - Pandemic Leave [2020] FWCFB 7059 (24 December 2020

A five-member FWC full bench has confirmed the provisional view it reached in August last year that there is not a strong enough case, with the COVID-19 pandemic relatively well-controlled in Australia, to insert paid pandemic in awards covering paramedics and NDIS, home care and patient transport workers.

The same full bench in July last year rejected unions' applications for such an entitlement in nine awards in the health and social services sectors.

But later the same month, as the Victorian COVID-19 second wave escalated, it established a paid pandemic leave entitlement for aged care workers.

The bench – Vice President Adam Hatcher, deputy presidents Richard Clancy and Lyndall Dean and commissioners Paula Spencer and Tim Lee – in August issued a statement expressing its provisional view against inserting the provisions in further health and aged care awards.

Unions, however, continued to press for the entitlement in the Social, Community, Home Care and Disability Services Industry Award (SCHADS Award) and the Ambulance and Patient Transport Industry Award and sought to provide further evidence in a case that proceeded to a hearing on October 22.

The bench, in a decision published on Christmas Eve, before the emergence of allegedly more infectious coronavirus strains, found, in the wake of bringing the Victorian second wave under control three months earlier, "no evidence that significant numbers of employees in the NDIS, home care or NEPT [patient transport] sectors have had to self-isolate in the period since then".

"There is indeed no evidence that *any* have needed to do so.

"There is no other evidence that the resilience of those sectors in terms of their capacity to provide essential services to their client bases is currently under threat from the COVID-19 pandemic.

"In those circumstances, we cannot be satisfied that the introduction of a paid pandemic leave entitlement in the SCHADS Award or the Ambulance Award is necessary to meet the modern awards objective," the bench concluded.

However, it acknowledged the circumstances of the COVID-19 pandemic can change rapidly and stood over the application to insert the paid pandemic leave provisions, saying it would "continue to review the situation" and granted liberty to parties to apply to bring the matter back on at short notice.

Consultation required before coronavirus layoff

Michelle Sposito v Maori Chief Hotel [2021] FWC 700 (12 February 2021)

A Melbourne hotel that claimed an inability to engage in face-to-face discussions before making a chef redundant during the city's second COVID-19 lockdown must compensate her for unfair dismissal, after falling foul of award consultation obligations.

The Maori Chief Hotel retrenched its chef in July last year, telling her via email and registered post that the government-mandated coronavirus restrictions left it with no choice but to close down and it did not expect business to bounce back until a vaccine became available.

The directors apologised in the email for not speaking in person with the chef, who had worked at the hotel for 15 years, but said it was "not possible in the current environment".

They said in the email to contact them if she had any questions, and in the letter said she could "seek information about the terms and conditions of employment" from the FWO.

The chef said in support of her unfair dismissal application that she did not respond because the directors made it "abundantly clear that I was being made redundant as they were closing down the business suggesting permanent closure".

But she belatedly filed the application in November, after the hotel advertised on its Facebook page that it was "looking for chefs" to work "35-40hr p/w nights & weekends included contracted award wage".

The Maori Chief Hotel told the tribunal it was an "overly ambitious advert" placed by the venue manager and that it had in fact re-engaged two former casual bar workers who performed no kitchen duties.

The employer also objected to the application on jurisdictional grounds, arguing it complied with the Small Business Fair Dismissal Code, and maintained the dismissal amounted to a genuine redundancy within the meaning of s389 of the Fair Work Act.

But Commissioner Tanya Cirkovic noted that, except for summary dismissals, the code requires employers to have a valid reason based on conduct or capacity.

As redundancies are based on business or operational needs, she found the chef's dismissal inconsistent with the code.

Nor did it constitute a genuine redundancy, Commissioner Cirkovic said, given the employer did not comply with its consultation obligations at clause 38 of the hospitality award.

Commissioner Cirkovic said the Maori Chief Hotel had "sensible and credible reasons" for dismissing the chef, accepting evidence that it had gross income of $55,000 between April and November last year, compared to $409,370 over the same period in 2019.

The commissioner also accepted, despite the job advertisement, that the hotel abolished the former chef's position when it dismissed her and had not since filled it or required the new employees to discharge those responsibilities.

However, she found it breached s389(1)(b) of the Act by failing to comply the award requirement to tell the chef her position would be made redundant and discuss any "measures to avoid or reduce the adverse effects of changes" on her.

"It simply sent her the letter advising her of her redundancy, effective on the expiry of five weeks' notice," the commissioner said.

One of the directors cited in explanation for not making contact a "stressful period", "unusual circumstances" and his belief that any conversation about the chef's dismissal would be "emotionally charged" due to the pandemic and her personal circumstances.

The director added that because any conversations would not be "face to face" due to lockdown restrictions, he was reluctant to contact the chef and instead left it to her to initiate discussions.

Commissioner Cirkovic said she the submissions had not persuaded, as nothing prevented the employer from calling the chef or arranging to speak to her via other means.

Finding redundancy non-genuine because of the way the company carried it out, the commissioner found the hotel's "failure to comply with the consultation provision in the award rendered the [chef's] dismissal unfair".

Commissioner Cirkovic awarded the chef compensation of two weeks' pay, to cover the further period she would have remained employed if the hotel had complied with the award's consultation provision and engaged in the required discussions.

IMPORTANT DATES

QBIC Annual Conference 2021

9 and 10 April 2021; SeaWorld Resort Gold Coast

APTIA Breakfasts

Wednesday 17 March 2021hosted by Piper Alderman, Brisbane

Wednesday 23 June 2021, hosted by KHQ Lawyers

Wednesday 15 September hosted by Kinnect, Health Specialists

BIC National Annual Conference (Including BIC and APTIA AGMs)

21 to 24 November 2021; Hotel Sofitel, Brisbane

Please contact me if you need assistance:

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