

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT HATCHER

AM2018/9

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

**Application by Independent Education Union of Australia-New South Wales/Australian
Capital Territory Branch
(AM2018/9)**

Educational Services (Teachers) Award 2020

Sydney

3.13 PM, FRIDAY, 29 OCTOBER 2021

Continued from 23/08/2021

PN1

VICE PRESIDENT HATCHER: Can I take the appearances, please. Mr Taylor, you appear with Dr Wright for the IEU?

PN2

MR I TAYLOR: Yes, if it please.

PN3

VICE PRESIDENT HATCHER: Ms Lombardelli, you appear for ACA and ABI?

PN4

MS J LOMBARDELLI: Yes, your Honour.

PN5

VICE PRESIDENT HATCHER: Mr Kenchington-Evans, you appear for the AEU?

PN6

MR J KENCHINGTON-EVANS: Thank you.

PN7

VICE PRESIDENT HATCHER: Ms Lo, you appear for AFEI?

PN8

MS S LO: Yes, your Honour.

PN9

VICE PRESIDENT HATCHER: Mr Spence, you appear for Catholic Employment Relations?

PN10

MR S SPENCE: Yes, your Honour.

PN11

VICE PRESIDENT HATCHER: Firstly, could I thank everybody for appearing today at very short notice. I had hoped to publish the final decision and determination today, but the correspondence from the IEU - from Dr Wright - which I received today and which the parties should have been copied into, drew my attention to something which I had missed.

PN12

In the primary decision in this matter, at paragraph 657, we set out the new classification structure and in respect of levels 3 and 4 they have made reference to three years' satisfactory service at the preceding level. Now, Dr Wright's correspondence drew my attention to the fact that somewhere along the line in clause 14.1 - and this is reproduced in the draft determination - at level 3 it has become three years' satisfactory teaching service at proficient level, then at level 4 it has become six years' satisfactory teaching service at a proficient level.

PN13

Particularly in relation to level 4, that peaked my concern that the requirement of six years' satisfactory teaching service might lead to a continuation or a revisiting of matters which should have become redundant upon promotion from level 2 to 3. I can't quite track down the point at which that change was made, although I suspect it emanates from the conference before Dean DP.

PN14

That's the final matter I just wanted to work out before the final determination is published. I understand the parties may not be on notice about this, but primarily Mr Taylor or Ms Lombardelli, can you assist with this issue?

PN15

MR TAYLOR: Let me start as best I can. Following the primary decision the parties considered the various issues and proposed, as your Honour will recall, submissions as to why matters that had been proposed in that primary decision might be dealt with slightly differently. One of the matters of detail about which the joint parties were in agreement was to change the wording for levels 3 and 4 in the way that you have just identified so that instead of a number of years at level 3 and then a number of years at level 4, it would be the number of years since achieving a proficient status.

PN16

The reason that the joint parties thought that was the better view was a concern that these new levels are only going to take effect from now to 1 January next year, so there might be some lack of certainty in the following years as to whether someone has in fact had sufficient service to now be eligible, for example, at level 4. In particular submissions were put to the Full Bench that without the change someone who currently has perhaps five years' service might then be level 3, but their employer might say they have to then be at level 3 for three full years before they can get to level 4.

PN17

As such, the joint parties put forward the language which was reproduced by the Full Bench in paragraph 8 of the draft determination, clause 14.1. Clause 14.1, as published in the draft determination on page 2, reflected the submissions that had been put by the joint parties which were accepted by the Full Bench in paragraph 74 of that 11 October decision.

PN18

The issue that Dr Wright picked up is that in clause 17.1 that language of the criteria hasn't been reproduced when the table at 17.1 was prepared for the purpose of the draft determination. Rather, the previous language was reproduced. He has written to the Commission bringing that to your attention, because the assumption was that the intention was that the criteria in the two tables would reflect each other and specifically that the criteria was always intended to be as set out at 14.1, and not as set out in the proposed 17.1, and that that was simply an oversight or a typo that could be corrected so that the two would have had the same criteria description.

PN19

VICE PRESIDENT HATCHER: I understand the rationale in respect of the initial operation of the classification structure in a transitional way, but I'm concerned that down the track someone seeking to move from level 3 to level 4, that the employer will have the capacity to somehow go back six years instead of three years, which was never the Full Bench's intention. That is, matters which should have been closed off when a person moves from level 2 to level 3 should not be capable of being reopened when a person is seeking to move from level 3 to level 4, if you get my drift.

PN20

MR TAYLOR: Yes, I do, and that hadn't been something that we had focused on. There were those two issues, the one I've already identified and that is the concern to make sure there is no suggestion that levels are reset so that someone wouldn't have to - if they're almost at six years, wouldn't have to then wait another two and a half years to get to the level 4. Then there was a second issue as to what 'satisfactory' meant and whether it should be there at all and, if it was there, how it should be defined.

PN21

The combination of the fact that as drafted 14.1 would appear to require that each of the six years are satisfactory rather than simply the final year, is something which I think in fairness no party had turned their mind to and that you're now raising as something that may then require some thought to be given perhaps going back to the issue of satisfactory service. I'm speaking off the top of my head now and I don't think we should proceed on that basis, but it may be that what the Full Bench intended was something along the lines of the level 4 after six years' teaching service at a proficient year, the final year being satisfactory.

PN22

It's something along those lines that I think the parties - certainly for our part - were thinking without having actually turned our mind to the fact that the literal reading of it would require all six years to have been satisfactory.

PN23

VICE PRESIDENT HATCHER: Well, I'm wondering whether a better approach would be to revert to the original form, but then to have a transitional provision which deals with the issue which obviously occupied everybody's minds. It does seem to me to be a transitional rather than an ongoing problem that has caused this change.

PN24

MR TAYLOR: Yes, yes. It's a problem that will no longer be the case after three years, but for a three-year period there is the potential for there to be this issue that arises of someone who is already partway through the next three years will be reset, which was in the joint parties' view not the intention of the Full Bench and the Full Bench, I think, accepted that proposition in the approach it adopted.

PN25

It is a matter perhaps of some language that could be put forward and for our part we would be content for the IEU to propose some wording which it would certainly sit down with ABL on to make sure that ABL was also content with it,

and then forward that to the Commission for other parties to consider and comment upon. I accept the force of what your Honour is saying to us about the fact that the change in language may have an unintended consequence of requiring six years' satisfactory service as against simply six years' service and the service is considered satisfactory at the point of transition.

PN26

VICE PRESIDENT HATCHER: All right. Ms Lombardelli, do you want to add anything to that?

PN27

MS LOMBARDELLI: Nothing further to add, thank you, your Honour, other than we agree with the propositions that Mr Taylor is putting forward and are happy to have those conversations, and try to come up with and formulate some wording which is agreeable to the parties.

PN28

VICE PRESIDENT HATCHER: All right. Do any of the other parties wish to say anything about this?

PN29

MS LO: Vice President Hatcher, Ms Lo from AFEI. As suggested by Mr Taylor, we would welcome the opportunity to file written submissions and comments on any proposed wording.

PN30

VICE PRESIDENT HATCHER: All right. Thank you. Perhaps I will direct the parties to confer about the problem I have identified as a matter of urgency. As I said, I had hoped to publish this today since the operative date is not that far away now and I want to publish it, in any event, by close of business Monday. I will direct the parties to confer and if an agreed position is reached be sent to my chambers for further consideration.

PN31

MR TAYLOR: Thank you, Vice President.

PN32

VICE PRESIDENT HATCHER: All right. Again, I thank everyone for attending at short notice regarding this problem and we'll now adjourn.

ADJOURNED INDEFINITELY

[3.25 PM]