



EVERYBODY OUT

APRIL EDITION

Everybody Out is an industry newsletter produced by the Australian Public Transport Industrial Association (APTIA), the industrial arm of the Bus Industry Confederation (BIC).

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The information contained within this Edition is developed within the Bus and Coach Industry. It is not intended that the information should be relied upon without the reader first seeking their own expert advice.

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IMPORTANT DATES

Please keep up to date with important changes or cancellations to industry events in the coming months by going to the [OzeBus industry calendar](#). We check regularly with State and International Associations on their event status. We will keep you informed as information comes to hand.

Please note the following recent advice:

- TasBus has postponed their annual conference event scheduled May 22-23 in Hobart.
- APTIA has cancelled the IWG breakfast scheduled in Melbourne on 24 June 2020 at the offices of KHG Lawyers. APTIA will look at re-scheduling pending post-virus environment.

THE BIC AND APTIA OPEN FOR BUSINESS

Now more than ever the BIC and APTIA, along with the State Bus and Coach Associations, are needed to ensure that public transport remains open and essential.

Bus and Coach Operators need to know what they can and can't do to ensure their survival.

Both the BIC and APTIA have developed strategies to keep their members informed and represented, which were discussed at length at the most recent Industrial Working Group meeting on Wednesday 25 March 2020.

I have outlined below a detailed account from myself and Michael as to the implementations of those strategies.

The BIC will:

- (i) Provide regular updates of its [Covid-19 Workplace Guide](#) which will include actions such as bus cleaning to ensure safety of employees and passengers on the buses.
- (ii) Develop an advocacy document in [support of public transport as an essential service](#) to be presented to each State and Federal government.
- (iii) Engage with its BIC Transport authority members to agree and provide ownership for the Industry /Government strategy.
- (iv) In the deregulated sector, advocacy should be based around rescue packages for school tourism and local charter/express services and the tourism sector generally (ACCI tourism taskforce).
- (v) Trade media communications, a [Covid-19 Industry web page](#) and BIC E-Bulletin will be used as the core to the Industry communications strategy.

APTIA will:

- (i) Ensure the bulletin Everybody Out will return as a monthly edition and be used to provide a question and answer response platform from requests received from its members.
- (ii) Weekly video meetings will be available to APTIA members to enable face to face discussions on various problems arising from an employment perspective.
- (iii) The Industrial Working Group will meet by video link each month until the crisis has passed to enable sharing of information between members about how they are coping with their employment issues during the crisis.
- (iv) Subject to further discussions with the State Associations, APTIA will consider initiating discussions with trade unions with a view to varying the PVTAs to allow better rostering, the ability to reduce ordinary hours to save jobs, to mandate taking of annual leave, providing a longer spread of annual leave by paying half pay and agreeing to shut down terms.
- (v) Rely upon the BIC to contribute to communications to APTIA members as outlined in point 5 above.
- (vi) Maintain contact with the Prime Minister, Deputy PM, Industrial Relations Minister Attorney General's and other key Ministers and politicians to ensure that bus public transport issues are understood in relation to Covid-19 impacts.

For APTIA members and State Association members APTIA will conduct by appointment face to face (on video) meetings each Wednesday.

To book such a meeting simply email me on imacdonald@bic.asn.au to make a time. It is possible to have multiple attendees at these meetings.

COVID-19 INDUSTRY HUB



BIC has launched a Covid-19 Industry Hub on the Ozebus website www.ozebus.com.au/covid. The Industry Hub contains the latest information for the bus and coach industry about the Covid-19 crisis that is impacting upon our businesses and lifestyle.

The site contains a [Healthwise Corner](#) in which advice is given by experts including Nikki Brouwers, well known to the industry, about the health (Mental and Physical) impacts of the restrictions upon normal life.

Other valuable pages include a copy of the Bus and Coach Industry Covid-19 issues report and the Bus and Coach Industry Workplace Guide – Edition 3.

The [vital links](#) page provides access to the National Government website, the Workplace relations websites and State based workplace websites.

This site is regularly updated and provides to BIC members comprehensive information relevant to their businesses.

IWG BREAKFAST CANCELLATIONS

The APTIA breakfast scheduled Melbourne on 24 June 2020 at the offices of KHG Lawyers has been postponed due to Covid-19 with the issues of self-isolation. Hopefully we can reschedule later in the year.

Fortunately, APTIA held a very successful breakfast, hosted by Piper Alderman, solicitors in February in Brisbane.

The breakfast scheduled for 23 September 2020 in the NSW Parliament has not been cancelled but is subject to how the virus is tracking.

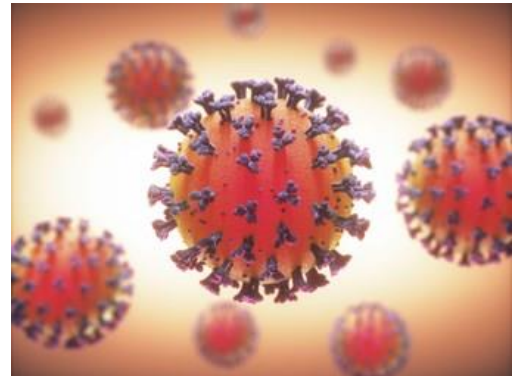


APTIA breakfast, Piper Alderman, solicitors, Brisbane

CORONA VIRUS AND THE BUS AND COACH INDUSTRY – QUESTION AND ANSWERS

APTIA is a direct point of contact for the industry members to enquire about the many issues that you are confronting each day with their workforce. I propose in this section of Everybody Out to details some of those regular questions that are concerning you and my response from an industry perspective as to how you should handle the problems you face.

Remember my advice is not legal advice and should not be relied upon with your obtaining your own separate legal advice.



Can I reduce my workforce of permanent employees to 3 days?

Subject to restrictions in an enterprise agreement it would be possible to reduce the days of work for a permanent to 3 days provided you still guaranteed 38 hours of ordinary hours in a week. However, if you were seeking to reduce the number of hours from 38 hours this would be a breach of the national employment standards.

Can my staff cancel their approved annual leave and long service leave?

An employer can require an employee who has accrued long service leave to take it provided one month's notice is given. The one month has been waived due to Covid-19. Similarly, any approved and scheduled LSL or annual leave must be taken and cannot be revoked unilaterally by an employee.

Can I terminate the employment of a casual driver of 4 months, who has anger problems with fellow employees after the 3-month probation?

Unfair dismissal provisions do not apply to an employer inside of 6 months and 12 months if a small business employer. However unlawful dismissal laws still apply as do adverse action claims. It is a safe practice to at least take such an employee through the disciplinary process with an accompanying person and an opportunity to respond to avoid the unlawful or adverse action routes.

How do I make the right decision as to which employees to consider for redundancies?

If there is insufficient work for part of the permanent and part time workforce and the immediate likelihood is that the lack of work will continue then an employer has the absolute discretion as to which drivers are made redundant or stood down. Laws relating to discrimination, leading to allegations of adverse action will apply. Care needs to be taken to be able to enunciate if called upon why decisions have been made. Some valid reasons will include 'last on; first off', based upon seniority or performance or value to the business.

What is likely to happen to the bargaining process during the covid-19 lock down?

The best circumstance is to postpone further bargaining meetings especially if the workforce is not operating at full capacity. It would be possible to continue to conduct meetings off site by telephone or video. However, it would be difficult for a bargaining agent to get a scope order to bargain in the current crisis.

To what extent can I change work patterns from complete shifts to broken shifts and eliminate overtime?

The starting point is that an employer must guarantee a permanent employee 38 hours a week. The PVTA does not prevent changes in the types of shifts i.e. complete to broken. In most cases overtime is voluntary with no guarantee or rostered overtime. Provided consultation occurs an employer can change the nature of the shifts including weekend or overtime shifts provided further that the 38 hours is adhered to or in the case of a part time employee those guaranteed hours of work.

What employment entitlements remain if I stand down an employee?

An employer can stand down an employee if there is no work for that employee because of no fault of the employer. Covid-19 and reduced services would meet the legislative requirement. In these circumstances the employee stays on the books of the employer and continues to receive the employee entitlements such as leave and LSL. Such an employee would also be eligible for the employer to apply for 'job seeker' payments provided the employer undertook to continue that employees' employment at the end of the crisis or six months.

When can I make an employee redundant?

An employee can only be made redundant when their job no longer exists. Where services are reduced and there is no need for a driver that could meet the criteria. Consultation must occur with the driver to explain why they are being made redundant and also any other opportunities for work must also be explored. In this regard cleaning or yard duties might suffice provided the pay rates were the same. In the event that the rates were less a severance adjustment would be needed to cover the shortfall.

Can I change the way I roster ordinary hours i.e. from Monday to Friday to 5 days over 7 days thereby removing voluntary overtime?

Provided an enterprise agreement does not exclude such activity and provided appropriate consultation occurs an employer can change the way rosters are made. The PVTA allows for rosters to be made over any day of the week.

Can I ask my drivers to take on the cleaning duties if there are no driving duties available?

Under most enterprise agreements and the PVTA drivers have specific job descriptions and whilst to keep these drivers I work it might be better that they do other work such as cleaning or yard work. However, the agreements and Award do not have a mechanism to change the type of work done or even to pay a lower rate. An employee may agree to reduce their wages, hours of work and even type of work undertaken but this is no defence against a claim that the agreement or Award is being breached.

Does a shut down for a casual break the 'continuous service' rule for the purposes of long service leave?

If a shut-down occurs and casual employees are laid off because of the shut down their entitlement to long service leave continues to accrue and the shut-down period does not affect the continuous service rule. However, if a casual is simply laid off to the extent that their employment is at an end then any protracted period in excess of thirteen weeks would be seen as a break in continuous service.

If I choose to shut down my workforce how do I choose which employees to stand down?

Again, this will require consideration of the laws of discrimination and adverse action i.e. you can't stand down an employee because of their colour, race, religion or because they have exercised a right such as inquiring about their wages or their prospects of future employment given the reduction in the work load.

What do I do with a driver over the age of 70 years who chooses to stay at home as directed by the Government?

This depends upon why he chooses to stay at home. If the driver over 70 is ill, then personal leave arrangements may be in play. You could suggest the driver takes some annual leave or even part of the long service leave if applicable. You may be able to simply stand the driver down, so he is able to allow you to seek a 'job seeker' payment. This will only apply if your income has reduced by 30%. Otherwise if no leave or otherwise is available the driver may have to be terminated so that the driver can make application under the 'job seeker' plan.

CORONA VIRUS AND THE BUS AND COACH INDUSTRY – INDUSTRIAL RELATIONS

The President of the Fair Work Commission has decided under his own initiative (see section 157 (3)) to make changes to all Awards or, at least 102, of which the PVTAs 2020 (due to come in on 13 April) is one, along these lines:

- An unpaid pandemic leave provision will allow an employee to take unpaid pandemic leave if they are required to isolate because of medical advice or as part of a Government response to the pandemic. The reasonable person test applies to any proof required of the requirement. This leave does not affect any other entitlements and does not discontinue the employees service. (This variation has a life which ends on 30 June 2020)
- Under the PVTAs, both the employer and employee can request that excessive annual leave is taken. It usually is available where there is at least 8 weeks outstanding and no less than 4 weeks still available.
- The proposed variation will allow an employee and employer to agree that the employee can take 4 weeks leave over an 8-week period where they will be paid at half pay for those 8 weeks. The deduction from their annual leave will still be just 4 weeks.

In addition, the Hospitality Award, the Restaurant and Catering Award and the Clerks Award have been amended along similar lines but with additional terms such as:

- A permanent or part time employee can have their ordinary hours of work reduced by from 38 hours or the agreed hours for part time employees to allow for those employees to continue to work in the business.
- In addition, the employer and employee can agree that the employee can undertake other classifications of work so long as they are qualified to do so.

It is also anticipated that the Fair Work Act 2009 will be amended to give effect to these changes in the national employment standards based on a sunset clause to give effect to the Award changes set out above.

CORONA VIRUS AND THE BUS AND COACH INDUSTRY – JOB SEEKER SUBSIDY (HOW IT WORKS)

The Morrison Government will provide a historic wage subsidy to around 6 million workers who will receive a flat payment of \$1,500 per fortnight through their employer, before tax.

The \$130 billion JobKeeper payment will help keep Australians in jobs as tackle the significant economic impact from the coronavirus.

The payment will be open to eligible businesses that receive a significant financial hit caused by the coronavirus. The payment will provide the equivalent of around 70 per cent of the national median wage. For workers in the accommodation, hospitality and retail sectors it will equate to a full median replacement wage.

The payment will ensure eligible employers and employees stay connected while some businesses move into hibernation. Prime Minister Scott Morrison said the JobKeeper payment would bring the Government's total economic support for the economy to \$320 billion or 16.4 per cent of GDP.

“We will give millions of eligible businesses and their workers a lifeline to not only get through this crisis, but bounce back together on the other side,” the Prime Minister said.

“This is about keeping the connection between the employer and the employee and keeping people in their jobs even though the business they work for may go into hibernation and close down for six months.

“When the economy comes back, these businesses will be able to start again, and their workforce will be ready to go because they will remain attached to the business through our JobKeeper payment.”

Treasurer Josh Frydenberg said the country was about to go through one of the toughest times in its history.

“Businesses will close, and people will lose their jobs. That is why we have doubled the welfare safety net,” the Treasurer said.

“However, today we are going even further. Australians know that their government has their back.

“That is why we are delivering an historic \$130 billion JobKeeper payment to support businesses and to help Australians in a job.

“This will keep Australian workers connected with their employer and provide hope and more certainty during these difficult and challenging times.”

JobKeeper Payment

The JobKeeper Payment is a subsidy to businesses, which will keep more Australians in jobs through the course of the coronavirus outbreak. The payment will be paid to employers, for up to six months, for each eligible employee that was on their books on 1 March 2020 and is retained or continues to be engaged by that employer. Where a business has stood down employees since 1 March, the payment will help them maintain connection with their employees. Employers will receive a payment of \$1,500 per fortnight per eligible employee. Every eligible employee must receive at least \$1,500 per fortnight from this business, before tax.

The program will commence today, 30 March 2020, with the first payments to be received by eligible businesses in the first week of May as monthly arrears from the Australian Taxation Office. Eligible businesses can begin distributing the JobKeeper payment immediately and will be reimbursed from the first week of May. The Government will provide updates on further business cashflow support in coming days.

Eligible employers will be those with annual turnover of less than \$1 billion who self-assess that have a reduction in revenue of 30 per cent or more, since 1 March 2020 over a minimum one-month period. Employers with an annual turnover of \$1 billion or more would be required to demonstrate a reduction in revenue of 50 per cent or more to be eligible. Businesses subject to the Major Bank Levy will not be eligible. Eligible employers include businesses structured through companies, partnerships, trusts and sole traders. Not for profit entities, including charities, will also be eligible. Full time and part time employees, including stood down employees, would be eligible to receive the JobKeeper Payment. Where a casual employee has been with their employer for at least the previous 12 months they will also be eligible for the Payment. An employee will only be eligible to receive this payment from one employer.

Eligible employees include Australian residents, New Zealand citizens in Australia who hold a subclass 444 special category visa, and migrants who are eligible for JobSeeker Payment or Youth Allowance (Other). Self-employed individuals are also eligible to receive the JobKeeper Payment. Eligible businesses can apply for the payment online and are able to register their interest via ato.gov.au

CORONA VIRUS AND THE BUS AND COACH INDUSTRY – AN EXAMPLE OF HOW AN OPERATOR IS DEALING WITH THE REDUCTION IN SERVICES

I have provided below how an Operator proposes to proceed with the payment of wages to essential services staff during the current COVID-19 Level 4 status. I have approval of the operator to share this with you but have refrained from providing the name of the operator.

This a letter written to staff members in anticipation of change.

“Firstly, I wish to acknowledge the efforts of all of you in maintaining services during the lockdown period that started last Thursday.

The Government have declared Public Transport as an essential service for the community during this time. As a Public Transport operator, we provide necessary services to enable people such as nurses and emergency staff to get to work, and to allow people to get to local Supermarkets or access medical services.

As a result, the Government has agreed to support public transport with payment to ensure that these services continue to be provided to the greatest extent possible, consistent with any advice received from the Ministry of Health, and to ensure that public transport services can return to normal quickly when we enter the recovery period.

As a result of this support, the Company will not be applying for the Government job seeker wage subsidy for active urban drivers.

I am seeking your feedback on the following process that we are proposing for wage payments for the duration of this crisis or until services return to normal:

- *All fulltime staff will be paid 80 hours per fortnight. This includes operational support and maintenance staff.*
 - *All part time staff will be paid 40 hours per fortnight.*
 - *The rostered hours may be less than your current hours, but you will receive the full wage payment as stated above.*
 - *Staff who are 70 years and over shall remain at home and will be paid 100% of the 40 or 80 hours for the category they fall in.*
 - *We may review the 70 years and older age threshold and we will consult with you if this changes.*
 - *Those with medically enforced quarantine requirements will be paid 100% of the 40 or 80 hours for the category they fall in. Proof will be required from your Doctor if you are quarantined.*
 - *Staff will be rostered for work during this period. **You will be required to attend at the times you are rostered.** The roster will be managed to fairly allocate work between staff who are required to work.*
 - *If you call in sick for a shift, the paid hours of that shift are taken from your sick pay to make up the 40 or 80 hours allocated to you. If there is not enough sick pay the hours of the declined shift are deducted from the 40 or 80 hours.*
 - *If employee is not sick but wishes not to work the option to use holiday pay offered or the hours of the declined shift are deducted from the 40 or 80 hours.*
 - *Once sick and holiday pay runs out or if the staff member does not have any, the hours of the declined shift are deducted from the 40 or 80 hours.*
 - *If you wish not to work during the lockdown period, you can choose to stand down and be eligible for the Government Covid-19 wage subsidy with the option to top up your salary through use of holiday pay.*
- Should you have any questions please speak to your Operations Manager. I am looking to implement this as soon as practicable so if you have any concerns or questions please raise these immediately."*

IMPORTANT DECISIONS

RTBU WINS THE RIGHT TO REPRESENT EXISTING MEMBERS BUT NOT ANY NEW EMPLOYEES OF PRIVATISED BUS OPERATORS

Australian Rail, Tram and Bus Industry Union [2020] FWC 1489 (19 March 2020)

The FWC has granted the RTBU a rule change allowing it to continue representing members transferred to privatised bus services in Sydney and Newcastle, but it has rejected proposals to extend eligibility to new drivers.

The change will let the union continue covering about 1000 State Transit bus drivers in inner western Sydney (State Transit Region 6) transferred to private operator Transit Systems under a five-year contract in mid-2018.

Coming into effect on March 26, it also protects the RTBU's right to maintain coverage of about 340 bus driver members in privatised services in Newcastle after outsourcing to Keolis Downer Hunter Pty Ltd.

Its right to represent these members was already preserved because the rules maintain coverage if a bus service is operated in conjunction with a tramway, as it is in Newcastle, but the change provides an assurance in case of future reorganisation.

However, Deputy President Tony Saunders found that other proposed changes aimed at extending coverage to new drivers on Sydney's inner-west services missed the mark, as they failed to adequately capture the relevant group.

The deputy president noted that a rule change proposal intended to target new drivers referred to employees of contract operator TSW, yet there was no evidence that the company intended to engage any relevant employees.

Despite being contractually obliged to employ legacy drivers transferred from the public system, he said TSW was using other entities in the Transit Group to employ legacy and new drivers, namely TSW Services and Transit Services.

Deputy President Saunders also observed that labour hire companies and labour providers do not "merely by employing staff supplied to a business, become a successor, assignee or transmittee" of a business.

"Neither TSW Services nor Transit Services is a party to the service contracts between relevant entities in the Transit Group with the New South Wales Government for the provision of public bus services."

Deputy President Saunders held that the proposed rule change would therefore not make any non-member drivers employed by these entities eligible to join the RTBU.

But although the RTBU had "missed its mark" in relation to new drivers in this region, he said there should "not be any great difficulty in drafting one or more rule amendments" to deal with the privatisation of NSW public bus services.

The TWU objected to the application, warning the rule change had the "obvious potential to cause disputes and demarcation issues in private bus operations".

Contending this was already demonstrated within Transit System's inner-west Sydney operations, the TWU claimed that RTBU delegates and members tried to prevent its representatives from visiting workplace and destroyed its materials.

The TWU also accused the RTBU of "persistently seeking to enrol as members employees of Transit Systems who are manifestly ineligible to join the union", and falsely telling new drivers that they are required to join the RTBU.

Deputy President Saunders accepted that RTBU delegates could, in their personal capacity, represent new drivers in disputes with Transit Systems because their agreement permitted a "representative of their choosing" in disciplinary matters.

However, RTBU had also continued to "recruit and accept as members persons who it knows the Commission has found are not eligible to be members of the RTBU".

Given the existence of two AIRC decisions and a recent FWC decision contrary to the RTBU's approach, he said it was unreasonable to keep recruiting the drivers before its rule change was determined.

It also demonstrated a "disregard of the limits of its present coverage", Deputy President Saunders said.

The deputy president also accepted that allowing two unions to represent members doing the same job in the same workplace could make bargaining more difficult and lead to "one upmanship".

However, he said the evidence "does not lead me to have any concern that such matters would be likely to cause such a level of disruption or disputation as to warrant the exercise of discretion not to consent to the proposed rule alteration".

USE OF MOBILE COUNTENANCED

McAuliffe v The Transport Secretary on behalf of the State Transit Authority [2020] NSWIRComm 1017 (16 March 2020)

In what a union has hailed as a victory for a common-sense approach to mobile phone use, a tribunal has reinstated a bus driver sacked for making two calls while parked with the doors open and the vehicle's dual braking system engaged.

The NSW State Transit Authority dismissed the driver last July for misconduct after an internal investigation found he had breached the transport code of conduct, regulation 300 of the Road Rules 2014 and regulation 97 of the Passenger Transport Regulations 2017.

The 12-year veteran made the two calls to cancel an early morning doctor's appointment after the previous evening accepting a last-minute request to work an unscheduled shift.

He made the calls – the second after an unsuccessful initial attempt – on his personal mobile phone after applying the bus's handbrake at a stop, opening the doors and standing with one foot out of the driver's cabin.

As NSW IRC Commissioner Janine Webster heard in evidence, opening the doors activates the bus's secondary braking system as an additional safety measure.

"The main factual matters that underpin the allegations are not in dispute, however, the characterisation of that conduct was contested," the commissioner noted.

Although agreeing that the bus driver breached the various regulations and codes, Commissioner Webster held it "necessary to consider the nature and seriousness of these transgressions in determining the appropriate punishment".

"I agree with the [STA] that it has a legitimate interest to ensure employees do not act in a manner that might bring it into disrepute.

"However, whilst [it] is entitled to expect compliance with its workplace policies and procedures, this does not mean that every transgression will justify the termination of an employee's employment."

The commissioner continued that, based on the evidence, there would need to be "multiple" system failures for the bus to move with both brakes engaged.

"Although there had been instances of brakes failing, these were highly unusual situations," she observed.

In the circumstances, the commissioner said she could not find that the bus driver jeopardised passengers' safety when he made the calls.

While agreeing with the STA that the driver making calls was not a "good look", and that the driver had a responsibility to be familiar with his employer's policies, Commissioner Webster also recognised the bus driver's long service, commendations he had received and his "comparatively good" driving record.

"Taking all of these matters into account, including the protective function of the Commission in these proceedings and the [STA's] legitimate and appropriate expectation that employees will comply with their procedures and policies, I have determined that the punishment of termination of [the bus driver's] employment is too harsh a consequence for what he did on 7 June 2019.

"Put simply, the dismissal of [the bus driver] was a disproportionate response to his misconduct, considering the nature and gravity of that conduct, his length of service, good employment record and his demonstrated remorse and contrition."

Ordering the bus driver's reinstatement within 21 days, the commissioner nevertheless declined to order that he be compensated for lost pay.

"This will represent a financial penalty to [the bus driver] which is appropriate given the conduct he engaged in and will hopefully send a message to others with respect to the seriousness of the [STA's] policy regarding the use of mobile phones while operating buses."

A RTBU NSW spokesperson has stated that the decision recognises that there is a "scale" in the seriousness of offences.

"Employers have been inclined to be very black and white about breaches in mobile phone usage," the spokesperson said.

"Should everyone get off for these breaches? No.

"But there has been zero recognition that a 'scale' exists.

"It is quite simply a matter of procedural fairness."

REGULAR AND CONSISTENT WORK FOR CASUALS

Angele Chandler v Bed Bath N' Table Pty Ltd [2020] FWCFB 306 (23 January 2020)

An FWC full bench has allowed a casual worker to claim unfair dismissal after finding a senior tribunal member wrongly focussed on her irregular "pattern" of days and hours in holding she had not met the minimum employment period.

Deputy President Amanda Mansini in September dismissed the Bed Bath N' Table sales assistant's application, finding that an "objective analysis" of her timesheets showed no "regularity of. . . engagements over the period".

"Whilst [she] worked at least 3 days each week, [the timesheet] shows the number of days worked each week, the days of the week worked and the duration of the shift on each occasion varied significantly such that no pattern is able to be identified," the deputy president concluded.

This meant the sales assistant had not served the minimum employment period of six months and had no protection against unfair dismissal.

In seeking permission to appeal, however, the self-represented worker argued that Deputy President Mansini's decision attracted the public interest because it was both contrary to many previous rulings by the Commission and affected the rights of more than 1700 BBNT casual employees.

Vice President Adam Hatcher and commissioners Ian Cambridge and Susan Booth agreed, determining that the deputy president's finding involved a "significant" error of principle.

"In her application of s384(2)(a) to the facts of the case, the deputy president proceeded on the basis that it was necessary to identify a consistent pattern of engagement in the number of days worked each week, the days of the week worked and the duration of each shift in order to be able to conclude that the employment was regular and systematic," the bench said.

"We do not consider this to be the correct approach."

Under the Fair Work Act, the bench said, the accepted authority is *Yaraka Holdings Pty Limited v Giljevic*, in which the ACT Court of Appeal judges noted in 2006 "that it is the 'engagement' that must be regular and systematic; not the hours worked pursuant to such engagement".

"In *WorkPac Pty Ltd v Skene* the Federal Court full court favoured (without needing to finally adopt) the view that the construction in *Yaraka Holdings* should be applied to the definition of 'long term casual employee'," the bench said.

"The Commission in its own decisions has consistently applied *Yaraka Holdings* to s384(2)(a), including in the full bench decisions in *Pang Enterprises Pty Ltd ATF Pang Family Trust v Sawtell* and *Bronze Hospitality Pty Ltd v Janell Hansson* as well as in numerous first instance decisions.

"By treating the degree of regularity in the pattern of hours worked by [the sales assistant] as disclosed by [the timesheets] as the only or decisive consideration in the application of s384(2)(a)(i) (rather than merely as one of a number of relevant considerations in the analysis), we consider that the deputy president misconstrued the provision.

"This erroneous approach resulted in the deputy president failing to take into account a number of matters which pointed to a different conclusion, including [the sales assistant's] contract of employment and the rostering system adopted by BBNT."

As evidence of the regular nature of the sales assistant's work, the bench pointed to timesheets showing the company rostered her on for three or four days for all but a few weeks during her employment.

"The employment can also be characterised as *systematic* – that is, arranged pursuant to an identifiable system – for two fundamental reasons."

"The first is that, unusually, [the sales assistant's] casual employment was the subject of a single and ongoing written contract . . . demonstrate[ing] that [she] was employed to work in a particular position in BBNT's operational structure in accordance with a pre-established and ongoing framework of legal obligations.

"The second reason is that the evidence demonstrated that, for the most part, [her] employment was the subject of a monthly roster system involving her having to indicate in advance her availability to work for the month in question and then working shifts in accordance with the roster that was subsequently prepared and posted."

As a result, the bench said, the sales assistant was entitled to hold a reasonable expectation that her employment would continue, on a regular and systematic basis.

The bench referred the matter back to the Commission for allocation to another member.



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