



AUSTRALIAN INDUSTRIAL
RELATIONS COMMISSION

JUSTICE GUDICE
PRESIDENT

s47F(1)

I refer to your letter of s47F(1) concerning the hearing before
Commissioner Deegan.

It is not my practice, nor is it appropriate, to comment on the conduct of matters
before other members of the Commission, other than in properly constituted appeal
proceedings.

The course for you to follow, should you wish to challenge the Commissioner's
decision, is to do so by way of appeal. I strongly advise, however, that you take
advice from a practitioner who is experienced in Commission matters before
instituting an appeal.

Yours sincerely,

To,
Fair Work Ombudsman Officer
10 Rudd Street
Canberra City
ACT 2600

Fairwork Ombudsman CANBERRA s47F(1) GOODS RECEIVED: Y / N Signed:

Re: **Objection to FWA Commissioner's speech in Practitioners' Forum.**

Dear Sir Madam,

s47F(1)

is represented by Australian Government Solicitor (AGS).

My employer

It has come to my knowledge that Commissioner of FWA – Canberra will be giving speech at National Press Club of Australia in National Circuit, Barton on 18 February 2010 which is organised by AGS as seen in attachment to this letter.

At the conclusion of this forum there is arrangement for refreshments as mentioned in the attachment, The AGS who are organisers of the event may use this opportunity to have informal chat to influence the working relationship with the Commissioner.

The Commissioner's involvement in such forums leads to the possibility of unfairness to the self represent litigants like myself, I therefore hereby raise my objection to the Commissioner's attending this or any other future forums organised by legal representatives.

At this stage I am not raising my above objection with the Law Society however if no action is taken to address my objection by your office I will seek assistance from other sources.

I will appreciate you early action and informing me about the same on my address below

s47F(1)

Yours Sincerely,

s47F(1)

Encl: as above.

Australian Government Solicitor *the leading lawyers to government*



Invitation to HR Practitioners' Forum

How not to get yelled at by me!

How not to dismiss an employee

Commissioner Deegan will give a brief overview of the unfair dismissal and general protections (dismissals) areas of the *Fair Work Act 2009*. In particular she will give general advice on how such matters should be handled so as to avoid unnecessary adverse criticism from the tribunal.

Presenter

Commissioner Deegan – Fair Work Australia

Commissioner Deegan is the Canberra Fair Work Australia resident member. She has been a Commissioner of FWA and its predecessor, the AIRC, since 1996. A lawyer, Commissioner Deegan was a public servant for a number of years, the Industrial Registrar and then the Australian Government's Special Labour Adviser at the International Labour Organisation in Geneva from 1993 until taking up her appointment as a Commissioner.

Date

Thursday 18 February 2010

Time

4.00 – 5.00 pm

Venue

National Press Club of Australia
National Circuit, Barton

RSVP

Please contact
Olive Bassett-Macleod
by Tuesday 16 February 2010
T 02 6253 7247
cbrevents@ags.gov.au

Refreshments will be provided at the conclusion of the forum at 5.00 pm.

Please note that there are limited places for this forum, so book early in order to secure your attendance.

If you do not wish to receive similar messages in the future, please reply to: unsubscribe@ags.gov.au

s47F(1)

Thank you for your letter dated s47F(1) to the Fair Work Ombudsman (FWO) Officer concerning a FWA Commissioner's speech for a Practitioners forum. The FWO has asked me to reply on their behalf.

In your correspondence to the FWO you have expressed concern about FWA Commission members' involvement in forums such as the AGS HR Practitioners' Forum.

s47F(1)

In any case, it would not be a ground for disqualification as all tribunal members and representatives are well aware of the requirement that they not discuss cases in which they are involved.

If you have any further queries please do not hesitate to contact me directly.

Yours sincerely



FAIR WORK
AUSTRALIA

PRESIDENT'S CHAMBERS

s47F(1)

I refer to recent correspondence in particular your emails of s47F(1)

s47F(1)

You have raised a number of matters in your correspondence.

Firstly, you suggest that the terms of s.386 of the Fair Work Act are unclear and require amendment. This is not something on which it would be appropriate for me to comment. As you will appreciate, Fair Work Australia does not have a legislative role. Nor does it have any responsibility at the policy level, except in relation to the interpretation of legislation. It is not my role to comment on such matters. Your views ought be directed to those in a position to influence legislative policy.

Secondly, you make a number of adverse comments in relation to the proceedings before Commissioner Deegan. You have accused the Commissioner of not giving you a fair hearing in relation to both procedural and substantive issues. As you know, the Fair Work Act makes provision for an appeal to a Full Bench of Fair Work Australia.



FAIR WORK
AUSTRALIA

VICE PRESIDENT MICHAEL LAWLER

s47F(1)

Re: AG2011/461

I refer to your email message of s47F(1) addressed to Justice Giudice concerning the approval of the *Aerial Capital Group Limited Enterprise Agreement 2010-2013*. I am replying as the delegate of Justice Giudice in his absence on a period of leave.

It is not the President's practice nor is it appropriate for me, to comment on proceedings before members of the tribunal, except in a properly constituted appeal.

However, I note that the application was listed for hearing before Commissioner Deegan on s47F(1) s47F(1) to provide the parties with an opportunity to deal with any outstanding issues with the proposed agreement. I have enclosed a copy of the transcript of the hearing. I hope it will assist you in understanding the process of how the Commissioner made the decision to approve the agreement.

Yours sincerely,

Michael Lawler
Vice President

S&C
Spark & Cannon
1300 982 050



FAIR WORK
AUSTRALIA

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

51364-2

COMMISSIONER DEEGAN

AG2011/461

s.185 - Application for approval of a single-enterprise agreement

**Application by Aerial Capital Group Limited
(AG2011/461)**

Canberra

2.02PM, TUESDAY, 14 JUNE 2011

PN1

THE COMMISSIONER: Yes, could I have the appearances please, for the transcript.

PN2

MR D. BATES: Good afternoon, Commissioner. If it pleases the commission, my name is David Bates. I appear on behalf of the employer. I'm accompanied this afternoon by MR R. DICOVZKI and also by MR M. BRAMSTON.

PN3

THE COMMISSIONER: Thank you, Mr Bates. Mr Bates, you'll know - you won't necessarily know why this is being listed again, but it's being listed because I still have concerns about the agreement. I am prepared to accept the undertaking about the cashing out of annual leave.

PN4

MR BATES: Thank you, Commissioner.

PN5

THE COMMISSIONER: So that's not a problem. I am still concerned that - if that was the only thing, it would go through.

PN6

MR BATES: Of course.

PN7

THE COMMISSIONER: I am concerned about the fact that the agreement itself says that it's a stand-alone agreement without reference to any award but then references awards. I find that totally incongruous and I think it could cause a great deal of confusion. A person could read that and think they have no other rights; and then you tell me that the penalties from other awards apply.

PN8

MR BATES: I understand.

PN9

THE COMMISSIONER: That's a major concern to me because I think if it's supposed to be a stand-alone agreement and penalties are supposed to apply, they should be set out so that people know. For the same reason I find it difficult to accept an agreement that says that penalties under particular awards will be paid unless they are built in to the person's rate of pay. That makes it very awkward for me because I don't know what the rate of pay is. For all I know those penalties could be built into the rate of pay that's in this agreement, in which case that's a totally different BOOT test for me to do. Because I'd have to go through to see what penalties and whether they would pass the BOOT. It doesn't say it's on top of or anything of that nature.

PN10

I may as well get them all out of the way. The minimum rates for professional employees gives me great concern. I've read what the ombudsman wrote to you but I do not read in it anywhere that these employees that are dealing with the - you say the IT engineers are award-free, when they can quite obviously come in under the modern award as an information technology employee. The lowest rate under that award is 39,000 and the rate for an IT engineer under yours is 29,000.

PN11

MR BATES: That's correct.

PN12

THE COMMISSIONER: It makes it very awkward for me to do the BOOT test, Mr Bates. I'm prepared to accept that there was a mistake made with the date on the signature page. That's of no great concern to me. I assumed it was a mistake -

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PN13

MR BATES: Thank you, Commissioner.

PN14

THE COMMISSIONER: - - - and you don't go around signing agreements before they've been voted on. But I really think that it's not clear enough. And in any case it fails the BOOT test for the IT engineers who would, under the way I read the Professional Employees Award, fall quite clearly within information technology employee, which the minimum rate is 39,000. So what do you say, Mr Bates?

PN15

MR BATES: Where would the Commissioner like me to start?

PN16

THE COMMISSIONER: Anywhere you like. If there's anything else you want to throw in, feel free.

PN17

MR BATES: No, Commissioner, I won't be adding to the list of items.

PN18

THE COMMISSIONER: Good.

PN19

MR BATES: I think we have a substantive list.

PN20

THE COMMISSIONER: Yes.

PN21

MR BATES: If I may start with relation to the stand-alone agreement and the nature of the agreement's interaction with modern awards.

PN22

THE COMMISSIONER: Yes.

PN23

MR BATES: It was my understanding, Commissioner, that the intention of the parties was to create an enterprise agreement which in effect was as simple as possible so that parties were not needing to refer to external documents throughout the life of the agreement.

PN24

THE COMMISSIONER: Lovely.

PN25

MR BATES: To that end, Commissioner, the intention was to incorporate those into the agreement without the agreement becoming so lengthy that it became unwieldy. So in order to achieve that objective, Commissioner, the idea was that although it was a stand-alone agreement to be read on its own, if there was express reference made within the agreement itself to an external document then the relevant passage of that external document could of course be read into the agreement as part of it.

PN26

THE COMMISSIONER: I see.

PN27

MR BATES: Therefore if we were to make a point that penalties from an otherwise applicable award would have applied to that employee, they certainly would continue to apply to the employee. That said, I fully take on board the Commissioner's concerns regarding the lack of span of hours clause, which we canvassed previously. That is understood.

PN28

THE COMMISSIONER: It's a bit hard to work out your penalty rates if you haven't got a span of hours.

PN29

MR BATES: Indeed. And certainly my client is able to identify for you what the span of hours would be. The intention was certainly that existing overtime or penalty rates that exist under those awards would continue to apply to these employees.

PN30

THE COMMISSIONER: I see. So how are the employees supposed to know that?

PN31

MR BATES: I'm joined today by one of the bargaining representatives on behalf of the employees who's also the supervisor of the employees in the call centre.

PN32

THE COMMISSIONER: Call centre supervisor.

PN33

MR BATES: That's correct. It's my understanding from discussions that I've had with him that the employees were aware that that was the intention of the agreement, that it was in fact discussed within the workplace quite clearly, and that when employees were asked to take part in the vote on the agreement, questions had been previously raised during the course of the normal good faith bargaining negotiations and at these points had been covered off with the employee.

PN34

THE COMMISSIONER: I see. All right. Perhaps I'll hear from him.

PN35

MR BATES: Indeed.

PN36

THE COMMISSIONER: If you'd like to tell me how you thought the - well, how did you believe the span of hours and the penalty rates for call centre employees worked under this agreement?

PN37

MR DICOVZKI: Under this agreement, the core hours being 7.00 to 7.00 and penalty rates being paid after those hours and obviously on weekends, and the hourly day would be 7.6 hours per day.

PN38

THE COMMISSIONER: Okay. So you were 7.00 to 7.00 and according to you, Mr Bates, it's 8.54 to 5.00. I'll accept those in the call centre. I take that back.

PN39

MR BATES: Thank you, Commissioner.

PN40

THE COMMISSIONER: Call centre operates 24 hours a day. It doesn't say anything about a span of hours in your letter. So who told you it was going to be 7.00 to 7.00?

PN41

MR DICOVZKI: 7.00 to 7.00?

PN42

THE COMMISSIONER: Yes.

PN43

MR DICOVZKI: 7.00 to 7.00 core hours, I believe, was discussed on the first committee meeting that we had.

PN44

THE COMMISSIONER: I see. It didn't concern you that there was nothing in the agreement that pointed out that it was 7.00 to 7.00?

PN45

MR DICOVZKI: No. It must have been an oversight.

PN46

THE COMMISSIONER: Oversight. Pretty important oversight if people don't get penalty rates. Look, I don't want to hold it up, Mr Bates, but I just don't know how people could have voted for this. They obviously didn't read it or they read stuff into it that wasn't there. Because if I hadn't raised it it wouldn't even have been raised now, and the ombudsman would have got this and said, "Okay, you've got IT employees running around being paid \$29,000. You've got call centre employees who don't have a span of hours; can be asked to work any time and don't get any penalty rates. And somebody from the tribunal has signed off on it. It must be okay."

PN47

MR BATES: Commissioner, may I ask for an opportunity for the managing director of the company to address you on those points, or - - -

PN48

THE COMMISSIONER: You can if it's going to assist - if you think, Mr Bates.

PN49

MR BATES: He's asked if he could speak, so I'd appreciate it - - -

PN50

THE COMMISSIONER: Mr Bramston, why don't you address me - - -

PN51

MR BATES: Thank you very much.

PN52

THE COMMISSIONER: - - - and see if you can convince me that these people knew what they were getting into when they - it wasn't set out in their agreement.

PN53

MR BRAMSTON: Commissioner, I believe they all did read it and there certainly has been a lot of discussion between staff and management on those issues, such as 7.00 to 7.00.

PN54

THE COMMISSIONER: Yes.

PN55

MR BRAMSTON: Certainly nobody in our business would work beyond 7.6 hours and not be paid shift loadings or overtime. That's been a common practice for many years. On the BOOT test with the technical staff, my take on the BOOT test is it's better off overall on a range of things, not just salary.

PN56

THE COMMISSIONER: That's right, but you've got \$10,000 worth of salary to make up. It would have to be pretty good better off overall other conditions.

PN57

MR BRAMSTON: A technical person brought into our business on \$29,000 has to receive a substantial amount of training; I'm talking in the many tens of thousands of dollars. They then get a skill for life.

PN58

THE COMMISSIONER: That's all very well, but it doesn't meet the award requirement. What it says is - look, you've got apprentices and trainees, right? Minimum rate; TPSP level 1, basic technical skills, cablers and installers, 40 grand. You've got professional employee, 29,000.

PN59

MR BATES: If I may, Commissioner - - -

PN60

THE COMMISSIONER: Yes.

PN61

MR BATES: - - - I think one of the issues here is the definition of who would fall within the scope of coverage of the Professional Employees Award.

PN62

THE COMMISSIONER: And you said your IT engineers and your voice communication people, or something.

PN63

MR BATES: Indeed. One of the issues with the Professional Employees Award of course is that for it to actually have coverage over an employee and for it to apply to an employee the employee would need to have not only appropriate qualifications and the ability to become a member of the Australian Computer Society, for example, as one of the requirements in the coverage clause, but he or she should also have a certain number of years' experience in that profession.

PN64

THE COMMISSIONER: It depends which - - -

PN65

MR BATES: There are general gatekeeper provisions within that award, Commissioner, that would appear to suggest that an employee needs to have either some mix of the qualifications - - -

PN66

THE COMMISSIONER: Experienced people do, or - let me see. Okay, "This award covers employers throughout Australia when selected employees performing professional engineering and professional scientific duties," that's a different crowd.

PN67

This award covers employers throughout Australia principally engaged in the information technology, the quality ordering system, or the telecommunications services industry and their employers.

PN68

So you're saying that they don't fall within that?

PN69

MR BATES: They do fall within that, but then if you read further on you would find that there are a number of other definitions which refer to - - -

PN70

THE COMMISSIONER: That's true. They've got the classification structure and it's got graduate professional engineer - - -

PN71

MR BATES: Indeed.

PN72

THE COMMISSIONER: - - - professional scientist, and information technology employee.

PN73

MR BATES: Indeed.

PN74

THE COMMISSIONER: That's the first one, just straight out information technology:

PN75

An employee at this level undertakes initial professional tasks of limited scope and complexity such as minor phases of broader assignments in office, plant, field or laboratory work.

PN76

Then you go on to what the professional engineers do and then you go on to professional scientist. But the only definition in the front of the award is for an experienced information technology employee. Now, an experienced information technology employee is further on, as I understand it. You have an experienced one who needs qualifications or a graduate provision - - -

PN77

MR BATES: Yes.

PN78

THE COMMISSIONER: - - - or you have just a straight out base information technology employee, is the first level under this award. It looks like the first level under this award is whatever I said, 39,000. I can't see why your guys don't fall within that if they're IT engineers.

PN79

MR BATES: All I can say on that point, Commissioner, is that on two separate occasions I've had lengthy discussions with the ombudsman regarding the interpretation and the application of this award. In both of those cases I was advised that this award would only have application to an employee who was either duly qualified, and therefore eligible for membership of the Australian Computer Society, as an example - - -

PN80

THE COMMISSIONER: I think the ombudsman person is only reading the "experienced information technology employee means a professional information - - -"

PN81

MR BATES: Perhaps.

PN82

THE COMMISSIONER: "- - - with the undermentioned qualifications in particular employment." "Graduated with a university degree, or if they haven't graduated, have sufficient" - that's experience.

PN83

MR BATES: Yes.

PN84

THE COMMISSIONER: That's not what it says under level 1 information technology. It doesn't say "experienced", it just says "information technology employee". That's what concerns me.

PN85

MR BATES: To ensure that I understand the Commissioner's view, if the pay rates in the agreement had included the minimum rate from the modern award; if that had been - - -

PN86

THE COMMISSIONER: If you just had - I think if the agreement had just had two lots - you know, the call centre people and the - - -

PN87

MR BATES: Yes.

PN88

THE COMMISSIONER: Sorry, the admin staff. Sorry, you've got Aerial technical staff starting on 40 grand. Right?

PN89

MR BATES: Yes.

PN90

THE COMMISSIONER: You've got a professional employee which you call a professional employee but you tell me are IT - engineer - one would read IT engineer, you think professional.

PN91

MR BATES: Understood.

PN92

THE COMMISSIONER: On 29. You've got a person who has basic technical skills, cablers and installers, on 40,000, but an IT engineer or a voice communications person who's dealing with that sort of stuff is on \$10,000 less.

PN93

MR BATES: Indeed. And so that I - - -

PN94

THE COMMISSIONER: Yes, so if that professional employee thing hadn't been there I think I would have been inclined to say okay. What do these people do? Who are they? Are they just people you drag off the street to do your IT engineering?

PN95

MR BRAMSTON: Well, not quite, but close. What we typically do is we'll take somebody who has no experience in that part of the world that says, "Look, I'd like to be a cabler. I'd like to be a voice technician." They have to come into business. They typically have no skills whatsoever. Our training bill for that person can be anywhere between 10 and \$30,000 in the first year. As soon as they actually have qualifications, they pass some exams or something, then they're upgraded to the next level. It's typical in our business to bring somebody in who has no skills, to give them an apprenticeship, but to leave them on their current salary level.

PN96

For example, we could take someone out of the call centre who may be on 16 to \$18 an hour, put them in as an apprentice to learn a new trade where they have no skills whatsoever, allow them to go off and do the apprenticeship over three years, which we meet the full cost of, and at the same time we continue to pay them at the salary rate that they were on when they were in the call centre.

PN97

THE COMMISSIONER: That's fine and that might be the way you do it. I have to read this the way you can do it. I can read this as if you just apply the terms of this agreement you've got people who are IT engineers on \$29,000.

PN98

MR BATES: I understand, Commissioner. I suppose there are two submissions that I would make on this point. The first one is it's quite clear - certainly I would

suggest that the employer had no ill intent with this clause, that the intention was not of course to reduce anyone's salary. Certainly the - - -

PN99

THE COMMISSIONER: You couldn't reduce anyone's salary.

PN100

MR BATES: Of course.

PN101

THE COMMISSIONER: I'm just wondering what your IT engineers are being paid currently. Because even under your agreement you can't reduce anyone's salary.

PN102

MR BATES: No, of course. I understand. I'm attempting to paint the picture, I suppose, that the employer has good intentions here. There was no intention to take away anyone's entitlements. The second submission that I would make, with respect, is in relation to the application of the modern award. If it was made out that an employee was clearly covered by the Professional Employees Award then it would be those minimum rates from that award that would apply in relation to the - - -

PN103

THE COMMISSIONER: If they're not, I reckon they should be covered by some other award, like even the - well, yes, the manufacturing award. You know, it has provisions in that for people who do this sort of work. It just seems that you can't call a person an IT engineer and pay them \$29,000 a year, that's all.

PN104

MR BATES: Understood.

PN105

THE COMMISSIONER: If you can, well, you're getting away with murder.

PN106

MR BATES: Certainly no-one has the intention of getting away with murder, Commissioner. You have my assurance of that.

PN107

THE COMMISSIONER: That's all right. If it was an apprenticeship or a trainee position, there must be - you know, if it said "trainee so and so" I probably would have tried to find a provision in an award that - you know, as a trainee you get it. I mean, someone doing an apprenticeship or something, fair enough. There are apprenticeship provisions. To just have - you know - I'm not sure that the Professional Employees Award does apply. Calling them professional employees has thrown me completely.

PN108

MR BATES: I understand.

PN109

THE COMMISSIONER: I think this is what's happened. If the person had been called - I don't know. See, I can't work out why you would call somebody who's an IT engineer an IT engineer and put them under professional employee - you

would if you looked at that award - when you look at somebody else who you've put in as a technical employee who's going to be earning \$10,000 more and has only basic technical skills.

PN110

MR BATES: Of course the background to that, Commissioner, was that the employer was using the term "professional employee" to describe employees doing these functions long before the Professional Employees Award 2010 was introduced. So I agree entirely with the Commissioner's point of view that the name of the award and the name of this classification of employee can cause confusion. However, where an employee is covered by the Professional Employees Award 2010, clearly it's the minimum rate from that award that would form the foundation or the minimum pay rate that's contained within the agreement, as you can see before you, Commissioner.

PN111

THE COMMISSIONER: Okay. It says "professional employee". For all I know you could put somebody in - because there's nothing in there, only I've got this letter from you now saying it applies to IT engineers and voice communications people, but neither - you know, doesn't necessarily make me feel any better. All it is is under the award it just talks about professional employee, and by rights I suppose you could have a lawyer - professional employee.

PN112

MR BATES: Indeed, but a lawyer would be of course award-free and the lawyer would be entitled to only the national minimum wage - - -

PN113

THE COMMISSIONER: You would think so.

PN114

MR BATES: - - - which is what's provided for in the agreement. I don't know about the calibre of lawyer that you'll get for 29,000 - - -

PN115

THE COMMISSIONER: What about accountant, then, if we're going to get - you know, you're going to have accountants on less than clerks.

PN116

MR BATES: Again, I would suggest again, Commissioner, that accountants are also excluded from modern award coverage.

PN117

THE COMMISSIONER: It depends what they do.

PN118

MR BATES: Yes, of course. Unless they're covered by the Banking, Finance and Insurance Award.

PN119

THE COMMISSIONER: Quite.

PN120

MR BATES: But the vast majority of accountants in private practice are indeed award-free and entitled only to the national minimum wage, but of course market conditions would prohibit that.

PN121

THE COMMISSIONER: It just seems to me that the people that - you know, by rights if you've got voice communication and IT engineers, then the least you could pay them is under the basic technical skills, cablers and installers, because that's what they do, isn't it?

PN122

MR BATES: I understand the Commissioner's point of view. The agreement was made specifically with reference to the modern award system that we have. I fully acknowledge that there are inconsistencies in relation to the award where employees could be left award-free while other employees doing a similar function are in fact captured by another award and are therefore entitled to a much higher minimum rate of pay. But this goes to the third point, if I may, Commissioner, that you raised earlier, which was the notion, I suppose, of what these minimum rates of pay in fact are and whether the penalties, loadings, et cetera, were meant to be on top of those.

PN123

Indeed, they are. The intention of the parties was that the agreement would be a minimum rates agreement, so the lowest possible salary or wage was what was provided for in the schedule with all other amounts to be paid on top of that. So for the purposes of the BOOT test of course it is - - -

PN124

THE COMMISSIONER: And I would feel a lot happier about that if the agreement said that, Mr Bates. If the agreement said, "The rates at the back of this agreement are the minimum rates that will be paid to any person and they are entitled to all the penalties under each of these awards." But when you've got an agreement which says, "The agreement stands alone and is not to be read in conjunction with any other industrial instrument," rather suggests that that's not the case. I know you said it is now.

PN125

MR BATES: The agreement does contain a clause which specifies that the minimum rates are in fact the minimum rates and nothing prevents the employer from paying more.

PN126

THE COMMISSIONER: Pay more - - -

PN127

MR BATES: Minimum rates.

PN128

THE COMMISSIONER: That's fine, you can always pay more. It doesn't mean that they don't include penalties because there are no penalties in the agreement and the agreement is to be read by itself.

PN129

MR BATES: My client would certainly be happy to provide an undertaking which would make it very clear that the minimum rates are in fact the amounts exclusive of applicable loadings and penalties and to give effect to that.

PN130

THE COMMISSIONER: And that the loadings and penalties under the award - - -

PN131

MR BATES: Would continue to apply - - -

PN132

THE COMMISSIONER: - - - the applicable awards continue to apply.

PN133

MR BATES: Indeed.

PN134

THE COMMISSIONER: How many of these IT engineers and voice communications people are employed?

PN135

MR BATES: Approximately eight, Commissioner.

PN136

THE COMMISSIONER: I really would like to know what their position - you know, what they really come under. Because, All right, they may not be under professional - you say you've had these conversations with the Fair Work ombudsman.

PN137

MR BATES: Indeed.

PN138

THE COMMISSIONER: But, you know, the Fair Work - where? Here?

PN139

MR BATES: Commissioner, it was by Fair Work Infoline on a number - - -

PN140

THE COMMISSIONER: So it could be anywhere.

PN141

MR BATES: Yes. Well, I actually asked for their location, Commissioner, and both times it was Melbourne.

PN142

THE COMMISSIONER: Who aren't necessarily familiar with what would apply if the modern award doesn't apply here because they're not familiar with Canberra common rule awards.

PN143

MR BATES: Indeed.

PN144

THE COMMISSIONER: Aerial has been around for a long time so they're going to be covered by Canberra common rule awards at least.

PN145

MR BATES: Unfortunately when you contact the Fair Work Infoline or indeed write to the Fair Work ombudsman, you cannot specify where you would like to have that correspondence sent to.

PN146

THE COMMISSIONER: That's fine, except that you can't necessarily then rely on the information you get. The only information you can rely on - and only to a certain degree because I'm sure they give you all the disclaimers possible, and then they do their letters so that you can't hold anything against them, by telling you, "These are the awards that could apply and they may apply to you."

PN147

MR BATES: Indeed. And that would be, Commissioner, my precise experience of working within this system over the past two years.

PN148

THE COMMISSIONER: Yes. And what it doesn't say is, "These people are award-free." What about the Passenger Vehicle Transportation Award 2010? You couldn't use that?

PN149

MR BATES: The view was that that award wouldn't have applied because the employees that were covered by this enterprise agreement were not involved in actually driving the vehicles, et cetera, and that the Clerks Award was more appropriate for call centre employees.

PN150

THE COMMISSIONER: For the admin and call centre, it probably is.

PN151

MR BATES: That's correct.

PN152

THE COMMISSIONER: What about the others?

PN153

MR BATES: No, our view was that that was not an applicable - not the most appropriate award for those employees. However, again, if the commission reached a different view, if we were able to be provided with a binding opinion as to which modern award - - -

PN154

THE COMMISSIONER: You won't get a binding opinion except from a court. You should know that, Mr Bates.

PN155

MR BATES: Indeed.

PN156

THE COMMISSIONER: The only people who can make binding opinions around here are courts, but we're not.

PN157

MR BATES: Perhaps we would have a far better chance of having the agreement pass the BOOT test and be removed from your - - -

PN158

THE COMMISSIONER: That would be good.

PN159

MR BATES: - - - quite long workload and provide certain - - -

PN160

THE COMMISSIONER: It's what I wanted. You're really doing terrible things to my statistics, Mr Bates. This agreement has got me letters, emails, saying, "We note you had an agreement lodged so many months ago and it hasn't been dealt with yet." I feel a bit chastened by that.

PN161

MR BATES: I apologise, Commissioner.

PN162

THE COMMISSIONER: I want to get rid of it one way or another.

PN163

MR BATES: I'm here to help the commission.

PN164

THE COMMISSIONER: I am happy to approve it but I want an undertaking that means there's not going to be somebody on \$29,000 a year who I think must be covered, given what they do, by an award - - -

PN165

MR BATES: By an award.

PN166

THE COMMISSIONER: - - - that actually pays more than the minimum wage.

PN167

MR BATES: And what process would the commission recommend that we follow to determine in a matter which would be binding or - not binding, but would be acceptable to the Commissioner that there was in fact no award, or indeed to identify the correct modern award?

PN168

THE COMMISSIONER: I don't know, Mr Bates. We could have a hearing, I suppose, and you could argue it. I can't see any other way of doing it. I'm just - you know, professional employee is just a classification under this agreement.

PN169

MR BATES: Indeed.

PN170

THE COMMISSIONER: It doesn't tell me - I mean, your letters have tried to expand on it, but there's no definition. It doesn't say what they do, so I don't know whether they're covered by - you know, for all I know there isn't an award that covers them. So you reckon there are eight of these people?

PN171

MR BATES: Indeed.

PN172

THE COMMISSIONER: I just can't quite get my head around why they're not people covered by the technical bit, the basic cabling and installers; because that's what they do, don't they?

PN173

MR BATES: My understanding is that their work is slightly different.

PN174

THE COMMISSIONER: How different? Yes, Mr Bramston, how different?

PN175

MR BRAMSTON: Commissioner, they may not do cabling at all.

PN176

THE COMMISSIONER: What do they do?

PN177

MR BRAMSTON: They're IT people that come in and they can work on a range of things from switches to phone apps to - - -

PN178

THE COMMISSIONER: Okay, but when you say they're IT people, are they hardware IT people or software IT people?

PN179

MR BRAMSTON: They can be both.

PN180

THE COMMISSIONER: Both.

PN181

MR BRAMSTON: And they tend to come in without any experience in our industry and they need to take a time to - - -

PN182

THE COMMISSIONER: But do they come in with experience in IT?

PN183

MR BRAMSTON: One example is a guy who's just completed a university degree and he's - - -

PN184

THE COMMISSIONER: In what?

PN185

MR BRAMSTON: Software IT.

PN186

THE COMMISSIONER: Okay. So he'd be in, wouldn't he?

PN187

MR BRAMSTON: But he has no experience - - -

PN188 THE COMMISSIONER: Doesn't make any difference. What are you going to pay him, 29,000? Because if you do you're in real trouble, Mr Bramston, because if he's got a university degree he's at least under professional employee, surely.

PN189 MR BRAMSTON: He has no understanding of our industry - - -

PN190 THE COMMISSIONER: No understanding of your industry.

PN191 MR BRAMSTON: None whatsoever. He could not generate - - -

PN192 THE COMMISSIONER: But how difficult is it?

PN193 MR BRAMSTON: He could not generate a dollar's of income if he went out in the marketplace because we could not even put him alone in front of a customer because he's got no skills.

PN194 THE COMMISSIONER: See, this is where I'm getting confused, Mr Bramston. What exactly do these people do? They work for you, don't they?

PN195 MR BRAMSTON: They do.

PN196 THE COMMISSIONER: You don't sell them to other people, do you?

PN197 MR BRAMSTON: No, we go out and do services for customers.

PN198 THE COMMISSIONER: For customers?

PN199 MR BRAMSTON: In a range - yes, both in enterprise and government and in small to medium enterprise. They go in, they can work on any form of the IT service that we're in from maintaining voice technology to maintaining network. They need to be trained in - - -

PN200 THE COMMISSIONER: All right, now I'm getting - see, I thought you were running a taxi business.

PN201 MR BRAMSTON: We do a lot of things. We're an international marketing company.

PN202 THE COMMISSIONER: I see. Right, now i think the Professional Employees Award does apply. Now I know what you do, it does apply. Anybody with a degree is covered by it.

PN203

MR BRAMSTON: Sorry, the people - not everybody has a degree.

PN204

THE COMMISSIONER: No, some of them have just got experience and some of them are just information technology employees. My problem was I was beginning to think that you were an employer who wasn't covered by the Professional Employees Award. Now I am satisfied you are an employer who's covered by that award because you sell these people outside. Therefore it's confusing having those two separate provisions in there.

PN205

MR BATES: In terms of providing a solution to this, Commissioner - - -

PN206

THE COMMISSIONER: Yes.

PN207

MR BATES: - - - would it be - if we provided an undertaking to remove that classification - - -

PN208

THE COMMISSIONER: Of professional employee?

PN209

MR BATES: Indeed, and to provide a new minimum rate for all employees who were performing these functions that is somewhat in line with - - -

PN210

THE COMMISSIONER: With the Professional Employees Award.

PN211

MR BATES: - - - as a minimum, would that satisfy the commission?

PN212

THE COMMISSIONER: I think it probably would. It would be a number of undertakings, wouldn't it, Mr Bates?

PN213

MR BATES: Indeed.

PN214

THE COMMISSIONER: It would be an undertaking about the span of hours for the call centres and the penalties applying under all the awards; undertaking about the minimum rates to say that all the penalty rates under the awards apply, and the span of hours, as I assume - the 7.00 to 7.00 is the award span of hours, is it? Do you know, Mr - - -

PN215

MR DICOVZKI: At the moment?

PN216

THE COMMISSIONER: Yes.

PN217

MR DICOVZKI: Sorry - - -

PN218 THE COMMISSIONER: A call centre - is that what you were told, 7.00 to 7.00 was the award span of hours?

PN219 MR DICOVZKI: No, that's core hours.

PN220 THE COMMISSIONER: The core hours. Core hours as opposed to span of hours.

PN221 MR BATES: Yes, if it pleases the commission, I believe that's the term used inside the company for the hours that the employees are engaged for. The core hours of the business are 7.00 to 7.00.

PN222 THE COMMISSIONER: But it's a 24-hour call centre.

PN223 MR BATES: Indeed, but the core hours - so in other words when the vast majority of calls come into the centre, when the vast majority of employees are rostered to work, Commissioner.

PN224 THE COMMISSIONER: I see. Okay. When will the - so does the Clerks Award cover these people for their shift entitlements?

PN225 MR BATES: Indeed.

PN226 THE COMMISSIONER: It does? It doesn't say that though, does it? Shift entitlements - - -

PN227 MR BATES: The Clerks Award would. The penalty and overtime provisions, which would incorporate those amounts, would continue to apply - - -

PN228 THE COMMISSIONER: Including shifts.

PN229 MR BATES: Yes, as a result of the term that's already in the agreement regarding those terms will be read in.

PN230 THE COMMISSIONER: It's already in the agreement?

PN231 MR BATES: There's a clause in the agreement which specifically states that overtime penalties, et cetera, that would exist to an employee if it was not for the effect of this enterprise agreement being approved by you, would indeed continue to apply.

PN232

THE COMMISSIONER: Where's that? I think I did read it because that's what I thought was contradictory to, "This isn't supposed to be read with any other industrial instruments."

PN233

MR BATES: Indeed, yes.

PN234

THE COMMISSIONER: Yes, I've got it:

PN235

Employees shall also receive all applicable loadings and allowances as would otherwise have applied in addition to the minimum rates set out in schedule A.

PN236

Then we get down to this:

PN237

Unless such amounts have been expressly incorporated into an employee's annual salary or rate of pay.

PN238

MR BATES: To clarify what was meant there, Commissioner, was if an employee for example was given a contract of employment or given a letter in conjunction with the enterprise agreement that said, "You'll be paid \$90,000 per year and this includes all your penalties, allowances - - -"

PN239

THE COMMISSIONER: And what if he was given one saying, "You're getting the minimum rate under this but that actually incorporates all your other allowances?"

PN240

MR BATES: I certainly understand the Commissioner's concern. That was not the intention and it is certainly one that we're willing to resolve by way of a very clear black and white undertaking - - -

PN241

THE COMMISSIONER: Well, that would be good because you're going to need one. All right. So far as I can see, Mr Bates, I'm happy to accept these undertakings mainly because you've brought along the employee bargaining rep who tells me that that's what everybody was expecting anyway. If you get rid of that professional employee provisions so that the lowest rate for somebody is the minimum rate under the Professional Employees Award, now that I'm happy that Mr Bramston is actually operating an organisation that falls under the award, because if he's selling these people outside it may be he can't get any money in for them, but he'd be in the same position as every other employer employing professional people with those sorts of qualifications.

PN242

MR BATES: Yes.

PN243

THE COMMISSIONER: Because it's your qualifications that you're paying for, not their experience. It's one or the other. Some - and you get more money if you're experienced, but a first year out graduate happens to be reasonably well paid despite having no experience in your industry, because they've done the work. Hopefully you can train them up fast because they're graduates. Look, I think the best thing you can do is for you to put it all together and send me the undertakings to cover all those matters including the NES problem as well, the four weeks, two weeks - - -

PN244

MR BATES: Indeed.

PN245

THE COMMISSIONER: Then I will probably - unless there is something in the way those undertakings are expressed - I will approve the agreement. So the faster you get them to me, the faster I'll approve it. But I certainly feel that they've become terms of the agreement so they're incorporated in.

PN246

MR BATES: Of course.

PN247

THE COMMISSIONER: If that's what people were expecting then all I'm doing is clarifying what seems to be an internal inconsistency in the agreement; even though it's to stand alone it does include all the terms and conditions of the award; and you make it clear that that means that they can't get anything less than the minimum rate under the agreement plus the allowances even if it says they're incorporated. That's the most - even if they have a contract of employment that says the penalty rates and allowances are incorporated into their annual rate of pay, that cannot be a lesser amount than the minimum rate under the agreement together with the relevant allowances and things. And then the ombudsman can work that out when they sue for underpayment. Okay.

PN248

MR BATES: Thank you, Commissioner.

PN249

THE COMMISSIONER: All right. Is there anything else, Mr Bramston, you want to say?

PN250

MR BRAMSTON: No.

PN251

THE COMMISSIONER: Okay. As I said, I was a bit confused because I didn't realise that your business was so wide-ranging. I thought we were just talking about people who were installing things in taxicabs. We're not, are we?

PN252

MR BATES: No.

PN253

THE COMMISSIONER: Therefore the Professional Employees Award does apply and it applies squarely. So I think you'll find that most of these people aren't award-free. Okay? That's just my opinion since I'm not a court. Okay?

PN254

MR BATES: Thank you, Commissioner.

PN255

THE COMMISSIONER: Thank you. I'll adjourn.

<ADJOURNED INDEFINITELY

[2.36PM]

FAIR WORK
COMMISSIONMAILED
s47F(1)

s47F(1)

I refer to the correspondence you provided to the Registry on s47F(1) regarding your hearing before Commissioner Deegan. I apologise for the delay in responding.

I regret that you feel that that in your case the Tribunal has not carried out its functions in a fair and just manner. I do not have the authority to intervene in the way Members run conferences or hearings. Members exercise individual authority and are not subject to direction or overview by the President as to the procedure they adopt in handling matters. However, I am taking a number of steps to improve the Tribunal's performance and, in particular, to promote a consistent and fair hearing process. For your information I have attached a copy of the Tribunal's *Future Directions* which contains a number of initiatives which are relevant to the concerns raised in your correspondence. I also enclose a copy of the Member Conduct Guide for your information.

I also note that you have lodged an appeal against the decision of Commissioner Deegan, s47F(1), which is listed before a Full Bench on s47F(1). The hearing is the appropriate avenue for you to raise your concerns as this will provide all interested parties with an opportunity to be heard.

I am sorry that you regard your experience with the Fair Work Commission negatively and I have taken note of the matters you raise.

Yours faithfully,

JUSTICE IAIN ROSS AO
President



s47F(1) ED



FAIR WORK
AUSTRALIA

s47F(1)

THE HONOURABLE JUSTICE ROSS AO
PRESIDENT

s47F(1)

I am enclosing a guide which provides information about appealing a decision. I would recommend that you seek independent legal advice if you are considering lodging an appeal.

To be put in contact with providers in your local area who offer free legal advice with regard to employment issues you can contact the National Association of Community Legal Centres. They have a list of contact numbers for the different States and Territories on their web site <http://www.naclc.org.au/directory/>.

s47F(1)

Yours sincerely,

JUSTICE IAIN ROSS AO
President



Guide

Appealing a decision

1. Overview

If you do not agree with a decision made by a member of Fair Work Australia in your case, you may seek to appeal against that decision. There are time limits for appeals and you need to act promptly.

This guide outlines who can make an appeal, how to lodge an appeal application, the required timeframes and the provisions for seeking a 'stay' of the original decision pending the appeal.

Please remember that Fair Work Australia staff can give you information about the procedure for lodging an appeal. They cannot, however, advise you on whether you should appeal. You may need legal advice to make this decision.

2. Who can appeal?

You can seek to appeal a decision or order in a case in which you were directly involved if that decision was made by:

- a single Fair Work Australia member, or
- the General Manager of Fair Work Australia (including a delegate of the General Manager) in matters concerning the *Fair Work (Registered Organisations) Act 2009*.

An appeal related to an unfair dismissal application (s.394 application) can only, to the extent that it is an appeal on a question of fact, be made on the ground that it involved a significant error of fact.

Appeals will only be heard with the permission of Fair Work Australia. Appeals must be given permission where it is in the public interest to do so.

Fair Work Australia cannot grant permission to appeal under the *Fair Work Act 2009* with relation to s.394 applications unless it considers that it is in the public interest to do so.

3. Timeframes

A notice of appeal (Form F7) must be lodged (submitted) with Fair Work Australia **within 21 days** after the date the award, order or decision appealed against was issued.

If the notice is lodged after the 21 days, an extension of time must be sought as part of the application. You must provide reasons for seeking an extension of time. Fair Work Australia will then consider whether or not to grant such an extension.

4. How to make an appeal application

The Form F7 Notice of Appeal can be obtained from any Fair Work Australia office or online from the Fair Work Australia website.

In completing the form you must specify if you are seeking an extension of time and if you are seeking to 'stay' (stop) in part or in whole the operation of the original decision or order.

If you are seeking to stay the decision or order, a separate stay hearing may be conducted. You will be notified if required to attend such a hearing.

When lodging the Form F7 Notice of Appeal you must also include:

- three additional copies of the completed Form F7 (four copies in total) and
- three copies of an appeal book.

The **appeal book** must contain the following documents:

- any order relating to the matter made by Fair Work Australia
- the reasons for the decision (as published in the decision or separately)
- the transcript of the proceedings from which the appeal is brought, or the relevant extract from the transcript, and
- each document that was an exhibit or written submission in the proceedings, and relates to the grounds of appeal set out in the notice.

After lodging the notice of appeal with Fair Work Australia, you must, as soon as practicable, serve a copy of the notice of appeal and the appeal book on the other parties to your proceedings. The parties are those individuals and organisations directly involved in the case.

Rules 9 and 10 of the *Fair Work Australia Rules 2010* detail how applications may be served. The rules are available from the Fair Work Australia website and from all Fair Work Australia offices.

5. Further information

You can contact Fair Work Australia:

Online: Get live online help—go to the 'Live Help' link in the top right hand corner of the Fair Work Australia website at www.fwa.gov.au.

By email: Send an email to inquiries@fwa.gov.au.

By telephone: Call the national Fair Work Australia Help Line on 1300 799 675.

By post: Write to the Fair Work Australia office in your capital city. Contacts details are on the Fair Work Australia website at <http://www.fwa.gov.au/index.cfm?pagename=headercontact>.

In person: Visit the Fair Work Australia office in your capital city. Locations are on the Fair Work Australia website at <http://www.fwa.gov.au/index.cfm?pagename=headercontact>.

If you need help to communicate with us, you can use the Translating and Interpreter Service on telephone number 131 450. If you have a hearing, sight or speech impairment, you can use the Speech to Speech Relay through the National Relay Service on 133 677.

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This guide is not intended to be comprehensive, but is designed to help employers and employees gain an understanding of Fair Work Australia and its work. Fair Work Australia does not provide legal advice.

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E-MAILED
s47F(1)



Australia's National Workplace
Relations Tribunal

s47F(1)

The Honourable
Justice Iain Ross AO
President

I write in response to your email dated s47F(1) and in particular to your request for Commissioner Deegan to disqualify herself from hearing your s47F(1) application.

As Commissioner Deegan has since resigned from the Commission, s47F(1) Your matter will be listed for hearing in due course.

In the circumstances there is nothing more I can add.

Yours sincerely,

JUSTICE IAIN ROSS AO
President

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MAILED
s47F(1)



Australia's National Workplace
Relations Tribunal

s47F(1)

The Honourable
Justice Iain Ross AO
President

s47F(1)

As I understand it there are two outstanding matters you wish me to address:

- (i) the allegation that the Commissioner failed to adhere to the Code of Conduct; and
- (ii) whether it is appropriate for a Commissioner to make a ruling against an applicant when the applicant is the complainant in an outstanding matter against the Commissioner.

It is convenient to deal with the second matter first. There is no impediment to a Member continuing to deal with a matter in circumstances where a party has made a complaint and that complaint is being investigated. So the answer to your question is that it was not inappropriate for the Commissioner to continue dealing with the matter.

As for the first matter I have reviewed the audio recording of the proceedings which were the subject of your complaint. The tone used by the Commissioner was inappropriate and in my view you were not treated with the level of courtesy and respect which I would expect all Members to afford those appearing before the Commission. In the normal course of events I would raise these issues with the Member concerned and counsel them about their inappropriate conduct. However in this case Commissioner Deegan is no longer a Member of the Commission having resigned her appointment on 30 July 2014.

I regret that you were not treated with courtesy and respect in the hearing of your matter but given the Commissioner's resignation I do not propose to take any further action.

Yours faithfully,

JUSTICE IAIN ROSS AO
President