

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

CORAM: MURPHY C

24 February 2020

Matter No IRC 2019/00258837

Notification under section 130 by Local Government NSW of a dispute with the New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union and Others re negotiations for a new Award to cover local government in New South Wales

STATEMENT AND DIRECTION

- 1 On 19 August 2019, Local Government NSW (“LGNSW”) notified the Industrial Relations Commission of New South Wales of a dispute pursuant to s130 of the *Industrial Relations Act 1996* (NSW) regarding the terms and conditions of a new award to succeed the *Local Government (State) Award 2017* (the “Award”). The nominal term of the Award expires on 30 June 2020.
- 2 The other industrial parties to the dispute proceedings are the Development and Environmental Professionals’ Association (“depa”), the Local Government Engineers’ Association of NSW (“LGEA”), the Nurses and Midwives Association of NSW (“Nurses Association”), and the New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union (“USU”).
- 3 The dispute was initially listed for compulsory conference on 28 August 2019, at which time procedural directions were made, including a timetable for the parties to exchange their respective logs of claims, conciliation, and a hearing to make a new award.

- 4 At a report back of the matter on 6 November 2019, the industrial parties provided the Commission with an update on the progress of the award negotiations, and arising from a request by the USU, additional dates for conciliation were set for 3 December 2019, 24 February 2020, and 16 March 2020.
- 5 On 3 December 2019 I chaired a compulsory conference with the industrial parties and issued a Statement and Direction relating to the requirement under the Award for employers to have a training plan and training budget.
- 6 On 24 February 2020, the USU raised a number of issues where the parties have been unable to reach agreement and sought the Commission’s assistance through conciliation. In particular, the USU raised concerns regarding insecure forms of work in local government including the engagement of casual and labour hire employees and term contract employees under the Award.
- 7 With respect to casual employment, Mr Papps submitted that a recent USU survey of employers covered by the Award revealed that a significant number of employers engage ‘long term’ employees as casuals, contrary to the requirements of subclauses 26(i) and 26(viii) of the Award. These subclauses provide as follows:

“(i) A casual employee shall mean an employee engaged on a day to day basis.

...

(viii) A casual employee shall not replace an employee of the employer on a permanent basis.”

The USU has advanced a number of amendments to subclause 26(viii) which they say will address some of their concerns regarding the engagement of casual employees in local government.

8 Mr Dansie, representing LGNSW, firmly opposed the USU's proposals submitting that it would have significant detrimental effects on both employers and employees. It would have detrimental effects on employers who, for operational reasons, require the flexibility of casual employment. It would also have detrimental effects on employees who chose to work as a casual because they require flexibility in the days and hours that they work, such as students that schedule work around studies and parents that schedule work around family responsibilities.

9 Mr Dansie also submitted that where the USU (or any other union) has a legitimate belief that individual employers are not meeting their award obligations with respect to casual employment, this can be addressed with that employer as an Award enforcement issue. Seeking an award variation that will potentially affect all employers covered by the 2017 Award, including those that are meeting their existing Award obligations, and which will potentially have detrimental effects on employees who chose to work as a casual, is unnecessary.

10 With respect to labour hire employees, Mr Papps indicated that the USU's survey of employers revealed that a number of employers have been engaging labour hire workers in a manner inconsistent with the provisions of the Award. Specifically, Mr Papps referred the Commission to subclause 28(i) of the 2017 Award which prohibits employers from replacing permanent employees of the employer with employees of a labour hire business. Subclause 28(i) of the 2017 Award provides as follows:

“(i) An employee of a labour hire business shall not replace an employee of the employer on a permanent basis.”

11 The USU seeks to amend subclause 28(i) during the making of the 2020 Award to provide as follows:

“An employer will not use a labour hire business to supply staff to an employer on a permanent basis.”

- 12 In response to this proposal, Mr Dansie, submitted that the award provision is already adequate. Whilst noting that employers should not be using labour hire workers on an ongoing basis to fill positions included within the employer’s organisation structure, Mr Dansie reminded the Commission that employers are not prevented from outsourcing services to contractors, including labour hire businesses. Mr Dansie also noted that the issue raised is primarily an enforcement issue and should the USU have concerns with individual employers allegedly breaching their award obligations, the matter should be taken up with those employers as opposed to all employers.
- 13 With respect to employees engaged on term contracts, Mr Papps indicated that the USU’s survey of employers revealed that a number of employers have been engaging employees on term contracts in a manner inconsistent with the provisions of the Award. Specifically, Mr Papps referred the Commission to subclause 34 of the 2017 Award which prohibits employers from engaging people on term contracts except in certain identified circumstances set out in subclause 34(i)(a)-(i).
- 14 I adjourned into conciliation and chaired conferences with the parties both jointly and separately.
- 15 Arising from conciliation, the USU now seeks a direction from the Commission that all employers covered by the 2017 Award be required to produce to the Commission documentation identifying the total number of casual, labour hire, and term contracts employees currently engaged, and that the industrial parties be granted access to inspect such documentation for the purposes of assisting them in conciliation of the matters in dispute. Mr Papps’ justification for such a direction is that not all employers responded to the USU’s previous survey concerning casuals, labour hire and term contract employees.

- 16 The USU’s request for a direction from the Commission was supported by both Mr Robertson on behalf of depa and Ms Vasilangos on behalf of the LGEA. Both Mr Robertson and Ms Vasilangos advanced submissions in support of the USU, pointing to the aforementioned survey results as evidence of non-compliance by employers with respect to their obligations regarding casual, term contract, and labour hire engagement under the 2017 Award.
- 17 Mr Dansie is opposed to the Commission making the direction sought by Mr Papps. Mr Dansie reiterated his previous submission that the issues raised by the USU are an enforcement issue – should the USU have concerns with individual employers allegedly breaching their award obligations, the matter should be taken up with those employer as opposed to all employers. Further, the USU is on a fishing expedition and asking the Commission to do the union’s work.
- 18 Sections 134 (1), 134 (2) and 164 (1) (b) of the *Industrial Relations Act 1996* (NSW) (“IR Act”) confers on the Commission powers to compel parties to do certain things to assist the parties to resolve an industrial dispute. The relevant excerpts are:
- “134 (1) *The Commission, when attempting the conciliation of an industrial dispute, is to do everything that seems to be proper to assist the parties to agree on terms for the resolution of the dispute.*”
- “134 (2) *During conciliation proceedings, the Commission may make a recommendation or give a direction to the parties to the industrial dispute. Failure to comply with any such recommendation or direction may not be penalised but may be taken into account by the Commission in exercising its functions under this Act.*”
- “164 (1) *The Commission may exercise the functions of the Supreme Court in relation to:*
- a. ...
- b. *Compelling the production, discovery and inspection of records and other documents, ...*”.

19 Having considered the submissions of the parties, I have formed the view that the conciliation of the issues regarding the engagement of casual, labour hire and term contract employees would be assisted if the parties to the dispute have an opportunity to inspect documents identifying the number of casual, labour hire and term contract employees engaged at a specified point in time. Accordingly, pursuant to sections 134 (1), 134 (2) and 164 (1) (b) of the IR Act, I direct that:

- (1) All employers covered by the *Local Government (State) Award 2017* (“Award”) shall produce to the Industrial Relations Commission of New South Wales copies of the documents or things referred to in 2 below by sending the said documents by post to the following address by no later than 4pm on 30 March 2020:

Industrial Registrar – re Case No: 2019/258837 – LG (State) Award
Industrial Relations Commission of New South Wales
PO Box 927
Parramatta NSW 2124

- (2) The documents or things that must be produced are a statement disclosing:
 - a. the total number of persons who performed paid work for the employer on 25 February 2020, including employees directly employed by the employer and employees of labour hire businesses; and
 - b. the number of casual employees employed by the employer who performed paid work for the employer on 25 February 2020;
 - c. the number of employees employed on a term contract who performed paid work for the employer on 25 February 2020; and

- d. the number of employees of labour hire businesses engaged by the employer who performed paid work for the employer on 25 February 2020;
 - e. for each person performing paid work for the employer as a casual employee, on a term contract, or as an employee of a labour hire business on 25 February 2020:
 - i. the type of work or position that the person occupied (the “position”) on 25 February 2020;
 - ii. the number of days, weeks or years that the person has performed work in the position on an ongoing basis without significant adjustment; and
 - iii. if the person has performed work in the position on an ongoing basis without significant adjustment for more than 6 months, the reason the position is filled by a casual employee, an employee on a term contract or an employee of a labour hire business.
- (3) Local Government NSW shall take all reasonable steps to communicate Directions 1 and 2 above to all employers covered by the Award (whether LGNSW members or not) by no later than 5pm on 28 February 2020.
- (4) The parties to the dispute are granted access to inspect and photocopy the documents or things referred to in 2 above at the Commission’s premises at 10 Smith Street, Parramatta.

John Murphy
Commissioner