



Everybody Out

Australian Public Transport Industrial Association

Industrial arm of the Bus Industry Confederation

PUBLIC TRANSPORT
INDUSTRIAL RELATIONS NEWS

Welcome to the July 2020 Edition of Everybody Out

PUBLIC TRANSPORT INDUSTRIAL RELATIONS NEWS

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.

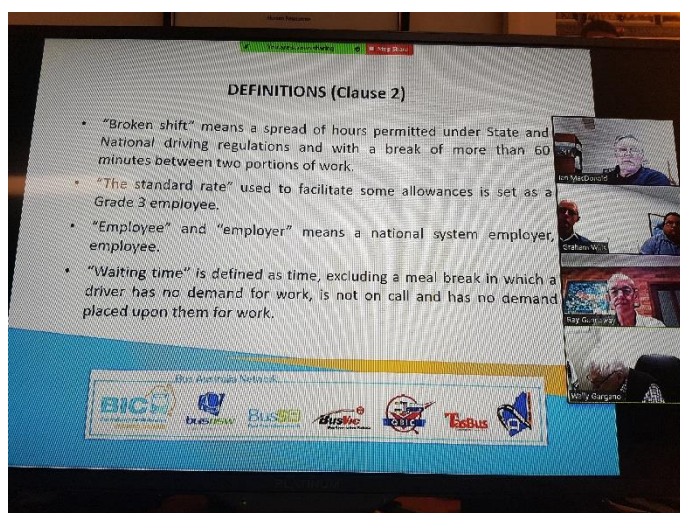


Wayne Patch, Chairperson

In this issue:

MEMBERS NEWS

- The Passenger Vehicle Transportation Award 2020 – Presentations





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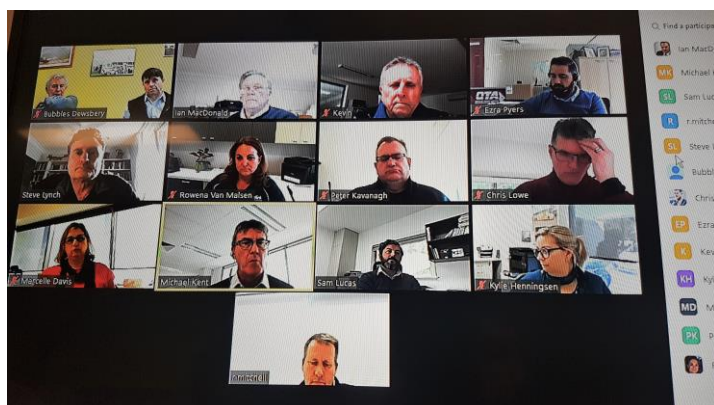
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APTIA has just concluded presentations, hosted by its State Association members, at which it has provided members with a comprehensive overview of the Passenger Vehicle Transportation Award 2020, which came into existence on 13 April 2020, after a lengthy 4 year review, which took 6 years. APTIA thanks the State Associations for their support.

The Passenger Vehicle Transportation Award 2020, the Fifth Edition of the PVTA Explanatory Notes and the Presentation can be found on the APTIA website on www.aptia.com.au

- **Industrial Working Group Meeting**



BIC's Industrial Working Group has met regularly over the last month to consider APTIA's position with respect to its appearance at the Attorney General's roundtable discussions and to develop an industry position regarding the decision on Rossato's case.

This has involved receiving legal advices on the decision and developing a long-term strategy, pending the outcome of the High Court Appeal to Rossato's decision and any legislation that may flow from the Attorney General's Industrial Working Groups.

It is expected that the roundtable discussions will wrap up by October with a view to introducing legislation into the last Parliamentary sessions for the year, assuming they sit at all.

BIC/ APTIA through its ACCI membership has direct input to the Roundtable discussion on casual employment.

Our position has always been that any definition of a casual should allow employers and casual employees to agree upon their casual status with an estoppel protection against a claim to the contrary.



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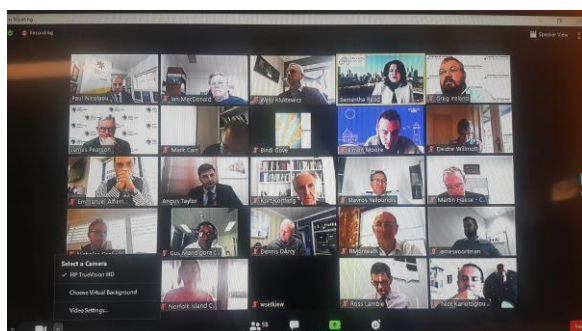
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With Rossato's case now subject to an application for leave to appeal to the High Court the IWG has agreed to the following strategy for industry members:

- (i) Regularly review casual engagements within the workforce to identify patterns that may suggest permanent employment. Obtain advice about converting those employees to permanent employment arrangements and, if necessary, consider changing the make-up of the work force to become less reliant upon casuals.
- (ii) Review employment contracts and payslips to ensure casual loading amounts are separately identifiable and that contracts have effective off-set clauses and if employment changes to include unpaid leave provisions.
- (iii) Educate managers, HR, and payroll to ensure there is an understanding of how and when a casual employee may merge into a permanent employee so that the nature of the relationship can be managed.
- (iv) Ensure casual arrangements reflect (at least) the types of distinguishing characteristics that were present in the Birner decision, such as variable rosters, no requirements to apply for leave and an ability to reject shifts.
- (v) Keep an eye out for potential legislation and the impacts upon the workplace from such legislation, such as a definition of a casual employee.
- (vi) In the event that school bus casuals cannot be accommodated as casual consider variations to the Passenger Vehicle Transport Award 2020 to allow for a flexible part time employee along with annualization of wages.

APTIA's members are also encouraged to take this issue up with their respective State Governments to flag potential future changes to the employment of casuals within the industry.

• BIC/ APTIA Online



ACCI Video Conference - Hon Angus Taylor



ACCI Workplace Policy Committee Meeting



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As members of ACCI, both BIC and APTIA are invited on a weekly basis to Zoom Conferences with various persons, relevant to our industry, at this particularly important moment in time for the economy.

Of recent days, these meetings have included the Treasurer, Josh Frydenberg, and Davis Fredericks, the Secretary of the Department of Industry, Science, Energy and Resources.

APTIA was fortunate to raise the following question with the Secretary on behalf of BIC's manufacturing base:

"As you probably know the bus industry is one of the few, if not the only, remaining vehicle manufacturing industry in Australia.

That industry is suffering during the pandemic because of border closures, which impact upon its ability to provide cross border, after sales service.

However, it is also suffering because State Governments, with budgeted vehicle procurement programs, are decelerating the procurement of new buses rather than accelerating procurement at a time when the economy needs as much stimulus as possible.

Would you consider this issue during your discussions with your State counterparts?"

At the same time, the ACCI workplace policy committee has been meeting regularly with updates from the Attorney General's industrial working groups. APTIA has taken specific interest in the following areas:

- Casual employment
- Bargaining
- Wage compliance



Finally, over 350 business leaders mainly from Victoria attended on Tuesday 4 August, an ACCI/ VECCI Zoom conference with the Treasurer, the Hon Josh Frydenberg, at which the Treasurer gave his



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assurances that the Federal Government would stand beside all Victorian businesses during the crisis and had all of their backs covered.

The Treasurer talked in terms of his working relationship with the Victorian Government and indicated further financial support for Victorian businesses.

The Treasurer referenced an extension of eligibility for Job Keeper and a retention of the higher Job Keeper payments until March 2021.

INDUSTRY NEWS – What you need to know

- **Covid 19**

Job Keeper Eligibility:

The current system is due to expire on 27 September 2020 and the new arrangements will include:

- Payments will be reduced to \$1,200.00 a fortnight for employees who on 1 March 2020 worked more than 20 or more hours a week up until 3 January 2021. After 3 January 2021, until 28 March 2021 payment reduced to \$1,000.00 a fortnight.
- Payments reduced to \$750.00 for employees who on 1 March 2020 worked less than 20 hours a week. After 3 January 2021 payments reduced to \$650.00 a fortnight.

Businesses will still be required to prove their reduction in GST revenue for the June 2020 and September 2020 quarters. The ATO will be given a wide discretion to test the loss of revenue for eligibility.

The Fair Work Act

Amendments have been made to the Fair Work Act 2009 to enable employers who are eligible for the Job Keeper program to temporarily vary working arrangements for eligible employees to keep them in employment.

These variations include the ability of an employer to stand down employees where there was no work, to require an employee to work less hours, from different locations and to undertake different duties provided they are qualified to do such work. In addition, an employer can require that an employee takes annual leave at half pay, provided at least two weeks remains.

These amendments cease in their entirety on 28 September 2020. To date there is no suggestion of an extension being sought.



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Similarly, the Passenger Vehicle Transportation Award 2020 was varied to allow for 14 days unpaid pandemic leave and the taking of annual leave at half pay. These variations lapsed, on 30 June 2020 and no application was made to extend the changes.

Pandemic Leave

In most States there is no such leave other than an extension of personal leave (i.e. sick leave). An employee required to isolate because they have had contact with a carrier or who show symptoms are not entitled to any paid pandemic leave, as there is no such thing, yet.

In Victoria however the Federal Government has now announced that a fortnightly payment of \$1,500.00 will apply for those persons seeking to isolate either, because, they have the virus or, because they have associated with someone who has and they are not eligible for paid personal leave.

In addition, an FWC full bench has in the face of employer opposition decided to grant paid pandemic leave for aged care workers covered by the aged care, nurses, and health professionals' awards for a three-month period.

Vice President Adam Hatcher, deputy presidents Richard Clancy and Lyndall Dean and commissioners Paula Spencer and Tim Lee made the landmark decision.

It entitles award-covered aged care workers, including "regular and systematic" casuals, to take up to a fortnight's paid leave each time they must self-isolate because they display COVID-19 symptoms or have come into contact with a suspected case.

Employer peak bodies ACCI and the AFEI opposed the temporary provision, arguing it was unnecessary, could cause employers to incur non-recoverable costs and might compromise the ability of labour hire companies to provide staff.

Safety Measures

Employers have an obligation to provide a safe system of work for their employees and bus drivers are no different. BIC maintains its current health policy advice i.e.

- (i) Permission for drivers to wear masks and gloves if they requested them.
- (ii) The provision of sanitisers on all buses.
- (iii) Removal of the requirement to collect cash fares.
- (iv) Practice distancing on the buses for the passengers.
- (v) Relaxation of the distancing practice once restrictions are removed and passenger numbers increase.
- (vi) The seat behind the driver to be left vacant.
- (vii) No standees to be allowed.
- (viii) Reduced capacity as approved by the State regulator.
- (ix) Such restrictions on capacity to be gradually removed as confidence grows in dealing with the pandemic.



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- (x) Provision for temperature checks on arrival at depots.
- (xi) Encouragement to drivers to get tested if they are showing symptoms.
- (xii) The provision of flu injections for drivers.
- (xiii) The regular and comprehensive cleaning of the buses with disinfectants, after each shift.
- (xiv) To practice distancing in the depots by limiting numbers in the staff rooms.
- (xv) Agreement to stagger start and finish times if approved by the State regulator.

Coach and Charter



BIC has been leading the charge to protect the coach and charter industry with advocacy to relevant Ministers and Bureaucrats. The campaign has also been taken up by various State Associations and with the extensions to Job Keeper the Government has acknowledged that it is listening.

BIC is also represented on ACCI's tourism committee and has been contributing to the Tourism Task Force established by ACCI to promote support for the tourist industry.

A Covid Hub can be found on the BIC website which follows the advocacy regarding the coach and charter industry at www.ozebus.com.au/covid

• Casual Employment

Attorney General Working Group – Casuals and Fixed Term Employment

APTIA has been invited to appear at the A-G's Roundtable Working Group (Casual and Fixed Term Employment) on Thursday 6 August as an expert to give reasons why casual employment in public transport is an important mode of employment.

The session is a Q & A session at which APTIA is able to present for 15 minutes on the current legal framework surrounding casual and fixed term employment in our industry and thereafter be part of a Q & A session with other participants.



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From what APTIA understands the working group is looking for solutions, not issues.

These meetings are chaired by Tim Marney, a principal of the Nous Group, on behalf of the Attorney General, and includes senior representatives from five employer groups and five trade unions i.e. the ACTU, United Workers Union, Health Services Union, Australian Nursing and Midwifery Federation, Council of Small Business Organisations Australia, National Tertiary Education Union, Australian Retailers Association, Australian Higher Education Industrial Association, Australian Industry Group and Australian Chamber of Commerce and Industry.

The Roundtable Working Group is one of the five Working Groups created by the Prime Minister in May 2020, who announced the establishment of an industrial relations taskforce designed to provide expertise and insights as a guide to practical industrial relations reform as a pathway out of the economic abyss created by the COVID pandemic.

An Industry Perspective (Casual Employment and the Award)



The position put by the President of TasBUS most eloquently at our IWG meetings.

"As we discussed TasBus suggest we need to protect the current PVTa in its current form the best we can. In protecting our award there may be a need for slight administration changes to our employment protocols, such as suggestions by your legal advice.

The industry created PVTa has served us extremely well. especially for operators who operate under the award and also as the basis for negotiated agreements.

One would think that since the creation of the PVTa complaints in our industry would have decreased because it has been designed for the bus industry operational needs. Over the past ten years any confusion or interpretation in the PVTa has been addressed in the latest version of the award.

While understanding court cases and other industrial issues may eventually have an impact. Keeping an eye out for potential legislation and the impacts upon the workplace from such legislation, such as



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a definition of a casual employee will help in this regard. We do not have a broken award and we should be very protective of any changes."

ASIC advices

The Ai Group has expressed "significant" concern about ASIC advice that companies in the wake of the *Rossato* ruling must in their financial reporting provide for any leave, redundancy and public holiday pay prospectively owed to past and present regular casuals.

ASIC has issued the advice in a [FAQ](#) on its website, referring to the full Federal Court's [ruling](#) in May that coal mining worker Robert Rossato is a Workpac employee with leave entitlements despite the labour hire company engaging him as a casual.

While Workpac has applied for special leave to appeal to the High Court, and IR Minister Christian Porter has signalled his intention to intervene, ASIC refers to the decision in a FAQ about its "focus areas for companies, directors and auditors for financial reporting given the impact of the COVID-19 pandemic".

It says companies "should provide for additional employee entitlements (including annual leave, personal and carer's leave, compassionate leave, public holiday pay, and redundancy payments) for past and present 'casual employees'" employed in circumstances covered by *WorkPac v Rossato*.

"The decision did not allow an offset for any casual loading paid," ASIC says.

For those, whose status might be a grey area, the corporate watchdog also warns that a "provision or contingent liability may be required for 'casual employees' employed in circumstances that were not clearly covered by the decision".

Ai Group chief executive Innes Willox told Workplace Express the ASIC advice is "of significant concern".

"[It] highlights the importance of casual employment reform, which one of the Government's five IR working groups is currently considering," Willox said.

Porter says it is appropriate for ASIC to provide guidance on potential legal liabilities arising out of *WorkPac v Rossato*.

He has also flagged, after Workpac sought leave to appeal the decision, that it might be "necessary to consider legislative options" given its potential to "further weaken the economy at a time when so many Australians have lost their jobs".

ASIC chair James Shipton says that "in the current environment, the quality of financial reports and related disclosures is more important than ever for investors and to maintain confident and informed markets".



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"Entities with businesses adversely affected by the COVID-19 pandemic should focus on the reporting of asset values and financial position," he says.

"Investors will expect clear disclosure about the impacts on an entity's businesses, any risks and uncertainties, key assumptions, management strategies and future prospects

Rossato's case – The latest news?

Workpac has sought leave to appeal to the High Court against the decision to declare Rossato was not a casual employee. It is expected that the hearing could take place in the middle of next year.

However, a new decision of the Federal Court, ***Birner v Aircraft Turnaround Engineering Pty Ltd [2019] FCA 1085***, has arisen since Rosssato's case which takes a more practical and realistic approach to casual employment.

The decision and its implication are summarised below.

In a departure from the controversial precedent set by *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, the Federal Court has found that an employee working 40 hours most weeks pursuant to an employment contract referring to his employment status ambiguously as "casual full time" was a genuine casual employee and not permanent. In reaching its conclusions, the Court had regard to the "conduct of the parties to the employment relationship"; and "the real substance, practical reality and true nature of that relationship".

In Birner's case, Justice Collier found that the following findings relating to the employee's working arrangements were "not disturbed by the Full Court authority of *Skene*":

- The parties agreed the employee would be paid at the rate of \$45.00 per hour
- Payroll and record keeping was done on the understanding the employee was a casual employee
- The hours available to the employee were set out in a roster available to him one month at a time, and seven or so days in advance
- The employee was at liberty to reject rostered shifts
- There was no requirement to complete a leave application form
- The employee on at least two occasions chose not to work rostered shifts
- The employee's roster changed, and became more variable, after he suffered a workplace injury
- The employee's shifts were sometimes seven hours, and other times nine hours in duration
- The employee was, on occasion, rostered to work for fewer than 40 hours in a given week, and never more than 40 hours per week
- The absence of specific reference to a casual loading is not, by itself, determinative that the employment relationship was not casual



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The Birner case does not overrule the decision in *Skene*.

Until legal clarity occurs, employers are strongly encouraged to undertake the following risk mitigation steps:

1. Regularly review casual engagements within the workforce to identify patterns that may suggest permanent employment. Obtain advice about converting those employees to permanent employment arrangements.
2. Review employment contracts and payslips to ensure casual loading amounts are separately identifiable and that contracts have effective off-set clauses.
3. Educate managers, HR, and payroll to ensure there is an understanding of how and when a casual employee may merge into a permanent employee so that the nature of the relationship can be managed.
4. Ensure casual arrangements reflect (at least) the types of distinguishing characteristics that were present in the Birner decision, such as variable rosters, no requirements to apply for leave and an ability to reject shifts.

IMPORTANT DECISIONS

- **Dismissal upheld for driver who borrowed monies**

Ivance Cuculoski v Australian Transit Group T/A Buswest [2020] FWC 3361 (30 June 2020)

The FWC has upheld a bus company's sacking of a Crown Casino shuttle driver who borrowed \$90 from a patron while off duty in the venue.

Australian Transit Group (trading as Buswest) dismissed the shuttle driver in February after looking into what Crown Perth described as an "unusual complaint" from a customer.

Claiming to be an acquaintance, "as he is a frequent patron of Crown, but not a friend", the customer accused the driver of asking him when he boarded the shuttle to lend him some money as he was short on cash.

The customer said he told the driver he only had "food shopping money" of \$105, but "thinking he was doing someone a favour he handed over \$90 and was told he would get it back the next day".

With the driver yet to repay the money at the time of the complaint, Crown told Buswest – which it contracts to deliver the shuttle services – that his behaviour was unacceptable and reflected badly on the casino.

Buswest alleged that the driver became aggressive during a meeting about the complaint, shouted that he had done nothing wrong and stormed out after refusing to accept a warning letter.



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Crown forwarded an email the same day from one of its casino workers who said the driver told her Buswest asked him to "sort it out with Crown".

Telling her that he wanted to keep his job, the Casino worker said he also explained that he was friends with the patron, and they had both previously borrowed money from each other.

Four days later, Buswest said it again had to apologise to Crown after the driver returned to the casino and discussed the issue with staff members.

The driver told the FWC in challenging his dismissal that he was off duty in the casino at the time he borrowed the money, not driving the shuttle as claimed.

He said he repaid the patron as soon as he could find him again, about a week later.

Commissioner Bruce Williams this week accepted that the "trigger for [the driver's] termination was conduct that happened when he was not working".

The commissioner was satisfied that the driver borrowed the money when he was himself a Crown patron on the casino's gaming floor, noting he was also off duty when he twice returned to discuss the issue with staff.

But it was relevant that Buswest had a contract with Crown, he had driven the Crown shuttle for four years, borrowed money from one of its patrons who knew him as the shuttle driver, and his actions caused Crown to complain to his employer.

"By borrowing money from someone who was a passenger on his bus whilst at the premises of his employer's client, [the driver] damaged the relationship between his employer and its client the Crown Casino," Commissioner Williams said.

Seeking support from Crown staff on his own volition to protect his job after attending disciplinary meetings also damaged Buswest's interests, he said.

Commissioner Williams held that both actions separately constituted valid dismissal reasons.

Whilst Buswest did not rely on his "abusive and disrespectful" behaviour at the disciplinary meeting as a dismissal reason, the commissioner said this was "entirely unacceptable behaviour itself" which might separately have been a valid reason.

He said the driver never accepted that he did anything wrong and was "unfortunately blind to the fact that his conduct has damaged the relationship between his employer and their client, the Crown Casino".

Finding Buswest afforded the driver a fair process, Commissioner Williams said it was also relevant that he did not have an unblemished record as he was verbally counselled for speeding and poor driving behaviour on numerous occasions.

Commissioner Williams dismissed the application, concluding that the dismissal was neither harsh, nor unjust or unreasonable.



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- **Redundancy during COVID 19**

Rachael Freebairn v Dandiie Pty Ltd ATF the DM & IT Moore Family Trust, TJL Business Advisors Pty Ltd ATF the Lumtin Family Trust, and Profitwatch Pty Ltd ATF the Rosemark Trust T/A TJL Business Advisors and Accountants [2020] FWC 3915 (27 July 2020)

An employer that made a worker redundant just days before JobKeeper's announcement must pay the remaining sum she would have gained as a recipient, after the FWC found a proper consultation process would have resulted in her getting it.

The FWC held that TJL Business Advisors and Accountants failed to comply with consultation requirements in the clerical award when informing an administrative assistant, it was making her redundant due to a COVID-19-related business downturn.

After telling the assistant during the March 25 meeting that it selected her for redundancy as she would be "better off financially" if she applied for JobSeeker, TJL asked if she had any "questions, comments or suggestions", but she did not.

TJL's audit and assurance director told the FWC that if the assistant had expressed an interest in working reduced hours as an alternative to dismissal, he would have considered it and discussed it with the other partners.

The assistant told the tribunal she would have accepted reduced hours if TJL had suggested it or offered it as an alternative.

Commissioner Hunt said the dismissal meeting was the first time the company spoke to any of its administrative employees about changes it would need to make due to COVID-19, and the assistant was the only one to be made redundant.

Commissioner Jennifer Hunt said the director spoke about COVID-19 related changes for administrative employees during the assistant's dismissal meeting but failed to discuss "measures to avoid or reduce the adverse effects of the changes on employees".

She said employer did not comply with the clause 38.1 consultation obligation "by merely asking employees whether they have any questions, comments or suggestions".

Nor did it meet the obligation by telling the assistant she would be "marginally better off financially by being dismissed and in receipt of JobSeeker payments than by remaining in employment on reduced hours", the commissioner said.

Rather the ability to reduce her hours, as provided to the assistant's colleagues, was the "kind of option which a proper consultation period, certainly one exceeding 15 minutes, is aimed at achieving".



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An earlier meeting with administrative employees also failed to satisfy consultation obligations, as the "trigger" for giving notice of changes to those who might be affected and holding discussions with them, was making a "definite decision".

She said that trigger did not come about until TJL made its decision on the morning of March 25 to make the assistant redundant and reduce her colleagues' hours.

TJL accepted it also breached its clause 38.2 obligation to provide information in writing about the changes and their effect before reaching a decision, for discussion during the consultation process.

Concluding the dismissal therefore did not amount to a genuine redundancy within the meaning of s.389 of the Fair Work Act, Commissioner Hunt found the assistant's separation harsh and unreasonable.

Had TJL complied with its consultation obligations, the commissioner accepted that the assistant would have stayed employed for long enough to qualify for JobKeeper, announced the following Monday, March 30, and kept working with its support.

The director conceded if "JobKeeper had been announced before these discussions took place [on March 25], it is possible that there would have been a different outcome", with its other administrative employees since obtaining the payment.

But Commissioner Hunt also accepted that the assistant would only have remained employed until mid-May, when TJL decided to close one of two offices she worked in, due to the effects of the coronavirus pandemic.

The commissioner further noted that the assistant did not apply for JobSeeker or other government payments, as she was concerned about the effect it might have on her unfair dismissal claim or other alleged entitlements.

Turning to remedy, the commissioner calculated that if the assistant had stayed employed until the closing of the office almost seven weeks later and qualified for the \$1500 fortnightly JobKeeper payment, she would have received \$5000.

Deducting the sum from the \$1150 per fortnight TJL paid during her notice period, Commissioner Hunt ordered the employer to pay the assistant \$3190 in compensation.



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IMPORTANT DATES

APTIA BREAKFAST – Sydney (23 September 2019) Cancelled

BIC NATIONAL CONFERENCE Cancelled

NB: Dates for the BIC and APTIA Annual General Meetings will be advised.



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