

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch v Brisbane City Council* [2023] QIRC 115

PARTIES: **Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch**
(Applicant)

v

Brisbane City Council
(Respondent)

CASE NO: CB/2020/81

PROCEEDING: Request for help to make certified agreement

DELIVERED ON: 28 April 2023

HEARING DATES: 19 July 2021
14 June 2022

FULL BENCH: O'Connor VP
Hartigan DP
Power IC

HEARD AT: Brisbane

ORDERS: **The application is dismissed.**

CATCHWORDS: INDUSTRIAL LAW - QUEENSLAND - AGREEMENTS - application for help to make a certified agreement pursuant to s 175 of the *Industrial Relations Act* 2016 - where unresolved matter removal of the 'cap' on the classification levels that casual bus operators may attain - where casual passenger service employees wage level progression - where application opposed by council - where introduction of merit-based recruitment into

traineeship - where introduction of full roster availability requirement by respondent - where proportion of casual bus operators increased beyond the numbers provided for in the certified agreement - where applicant claims requirement to undertake a traineeship pathway in order to be appointed to full and part-time vacancies has outlived its usefulness - where employer claims no basis or evidence for removing this pathway has been demonstrated by the applicant - application dismissed.

LEGISLATION:

Further Education and Training Act 2014
Human Rights Act 2019 (Qld)
Industrial Relations Act 2016 (Qld), s 175

CASES:

John Goss Electrical Pty Ltd and the Employees of John Goss Electrical Pty Ltd (1998) 158 QGIG 218
WorkPac Pty Ltd v Rossato [2021] HCA 23
WorkPac v Skene (2018) 264 FCR 536

APPEARANCES:

Ms C. Jones for the Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch.

Mr G. Evans for the Brisbane City Council.

Reasons for Decision

- [1] This application was filed by the Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch ('the ARTBU/the Applicant') on 18 November 2020 seeking assistance of the Queensland Industrial Relations Commission ('the Commission') in negotiations with Brisbane City Council ('the Council') relating to the classification levels for casual Bus Operators in the proposed *Brisbane City Council 2020 Certified Agreement* ('the Proposed Agreement').
- [2] Conferences were held before the Commission on 7 and 21 December 2020 and 9 February 2021 without success and the matter was subsequently referred to the President for approval to proceed to arbitration before the Full Bench.

Applicant's Submissions

- [3] The Applicant submits that the only matter which they consider unresolved is the removal of what is said to be a 'cap' on the classification levels that casual Bus Operators may attain. The 'cap' in the existing Clause 3.10.1 of Schedule 10: Passenger Services Employees of the *Brisbane City Council Certified Agreement 2018* (EBA9) is being reiterated in Clauses 3.13.7 and 3.13.8 of Schedule 10: Passenger Services Employees of the Proposed Agreement. Although there are peripheral clauses that either impact this clause or are impacted by this clause, the premise of the Applicant's case remains the concern with the inability for a casual employee to move beyond classification level 2.
- [4] Clauses 3.13.7 and 3.13.8 of Schedule 10: Passenger Services Employees of the Proposed Agreement state:
- 3.13.7 Casual Bus Operators will be eligible for progression to Passenger Services Employee Level 2 (Pay Classification 28 BO 0201) provided that they:
- (a) have completed 12 months' full-time equivalent service as a casual Bus Operator
- (b) are assessed as being eligible to progress using the existing performance appraisal mechanism for the progression of full-time Bus Operators.
- 3.13.8 Progression beyond Passenger Services Employee Level 2 is available through the traineeship pathway. Where a casual Bus Operator has progressed to Passenger Services Employee Level 2 and takes up the offer of a traineeship, they will continue to be paid at the equivalent rate for the duration of the traineeship, rather than as provided in Clause 3.6.1. Where the employee is then offered a permanent role in accordance with the conditions outlined in Clause 3.6.1 (c), they will progress to Passenger Service Employee Level 3 immediately upon commencement in the permanent role.¹
- [5] The Applicant seeks the following changes to Schedule 10: Passenger Services Employees of the Proposed Agreement to give effect to their bargaining claim:
- In clause 3.2 remove the word 'permanent' and add extra wording to include 'casual employees' in the introduction to the clause to read as follows:

3.2 Bus Operators (including casual Bus Operators) will progress between classification levels as outlined . . .
 - By removing clauses 3.6.2, 3.13.7 and 3.13.8 and inserting the following in lieu thereof:

3.13.7 (Equivalent Hours Progression for casual drivers)

Casual bus operators shall be eligible for progression between classification levels.

¹ Applicant's submissions filed 16 August 2021, [3].

Casual bus operators must accrue 832 hours of ordinary time worked for attainment of each 6 month progression pay point increment; or 1664 hours of ordinary time worked for attainment of each 12 month progression pay point increment.

3.13.8 Where a casual Bus Operator takes up the offer of traineeship, they will continue to be paid at their existing classification rate for the duration of the traineeship rather than as provided in clause 3.6.1 (Trainee Bus Operators).

Upon completion of the traineeship, the (formerly) casual Bus Operator will progress to the next classification level and progression will continue thereafter according to clause 3.13.7.

[6] The Applicant submits that although the disputed clause was relevant to the Bus Operators, it has now outlived its usefulness and should be amended in a manner which allows Bus Operators who are casual employees to progress through all of the classification levels that permanent Bus Operators are entitled to progress through.

[7] The reasons for the change are broadly categorised as follows:

- (a) the introduction of merit-based recruitment into the traineeship phase of employment has excluded some Bus Operators from attaining a higher classification level;
- (b) the introduction of a 24x7 availability requirement by the Council means that Bus Operators who have specific hours of work requirements are excluded from attaining a higher classification level;
- (c) the length of time that Bus Operators may remain casuals for has increased as a result of the above criteria;
- (d) the proportion of Bus Operators who are casual has increased beyond the necessary numbers as provided for in the enterprise agreement;
- (e) the cap acts as an incentive for the Council to keep a greater number of Bus Operators in casual employment for longer than necessary thereby increasing the instability of its workforce and decreasing the quality of life for more casual Bus Operators because of the disparity between the rates of pay; and
- (f) the cap is contradictory to several existing and agreed clauses in both the current agreement and the Proposed Agreement.²

Background

[8] Historically, the Council employed a three-stage process by which Bus Operators would become permanent employees with the BCC.

[9] Although there are currently external appointments directly into the Traineeship stage for the majority of employees, Bus Operators begin their employment as a casual employee. There was historically a 'list' of people who wished to become Trainees with the

² Applicant's submissions filed 16 August 2021, [6].

qualification a Certificate III in Driving Operations ('the Traineeship') under the *Further Education and Training Act 2014*.³

- [10] The Applicant submits all that a casual employee was required to do if they wanted to become permanent was to add their name to the bottom of that list at their depot and once their name made it to the top of the list and a school of Trainees was announced, they would enter the Traineeship. Once the Traineeship was completed the Bus Operator would then be offered a position as a permanent Bus Operator and would progress through the remaining classification levels in the enterprise agreement.
- [11] Although the timeframes varied, the period of time that a Bus Operator could expect to be a casual, was approximately two years. The Traineeship would last a further two years and after around four years with the Council as a Bus Operator, an employee could expect to become a permanent employee.
- [12] There are of course Bus Operators who come into the Council as a Trainee and do not follow this process. They are paid according to the Trainee rates of pay in accordance with the enterprise agreement.
- [13] It was only after a Bus Operator had completed these previous steps, they would be able to progress through the classification levels beyond level two. Casual employees who were caught by the cap could expect to progress through the necessary stages in roughly the same timeframes as the classifications allow.
- [14] What is contended by the ARTBU is that the Council has introduced new barriers to progressing through this process which now mean that the cap at classification level 2.0 for casual employees is no longer appropriate.⁴

The barriers

- [15] The Applicant submits that approximately five years ago the Council introduced a 'merit-based' recruitment process for the Traineeship. In short, this meant that existing casual employees no longer have automatic entry into a Traineeship and can be forced to remain as a casual Bus Operator indefinitely with no prospect of ever progressing beyond classification level two.
- [16] Casual bus operators must go through an interview process and be 'liked' by their Depot Team Leader who must be one of the referees on their application in accordance with the Council's processes. The Applicant submits that this disadvantages people who come from non-English speaking backgrounds, people with literacy issues, people who do not get on with their Depot Team Leader and people who do not interview well.⁵

³ Applicant's submissions filed 16 August 2021, [8].

⁴ Ibid, [15].

⁵ Applicant's submissions filed 16 August 2021, [18]-[19].

- [17] The Applicant submits that the second barrier is a newly introduced requirement that those undertaking traineeships only do so if they can guarantee they have full roster availability, i.e. they must be available to work any shift at any time on any day of the week. This excludes all casual employees who have specific hours of work requirements from taking up a traineeship and therefore progressing to a permanent Bus Operator and in doing so, accessing the higher classification levels.⁶
- [18] The third barrier the Council has placed in the way of Bus Operators being permanent employees is that they have told employees who had already attained permanency earlier in their career and who now wanted to access flexible working hours arrangements that the only way they can do so is to opt to become a casual employee.⁷ This means an employee who needs or seeks to work fixed or restricted hours, must resign their permanent employment status to become a casual and therefore become covered by the classification cap.⁸
- [19] Due to the nature of casual work, there is no obligation on the employee to accept any work offered, the casual employees can turn down shifts. This provides employees a form of flexible working arrangement and in return, an employee gives up their right to have security of employment.
- [20] The Applicant claims this disadvantages parents with childcare responsibilities; those nearing or past retirement age who wish to work fewer hours and those who cannot work certain days or hours because of illness or impairment. Even though not tested, it is suggested that the full roster availability requirement of the Council is indirect discrimination under the *Human Rights Act 2019* (Qld). Such employees cannot be permanent and therefore access the pay rates attached to the classifications beyond level 2.0 in the Proposed Agreement.⁹
- [21] In the submissions of the Applicant these employees are economically, financially, and socially disadvantaged.¹⁰
- [22] The Applicant submits there are several clauses in EBA9 and the Proposed Agreement which advance their position. Within Clause 13, 'Use of contingent workforce' the Applicant states the following in relation to the relevant clauses:

Clause 13.1	The use of a contingent workforce is not encouraged by the existing and proposed agreements as evidenced by this clause. However, the current classification cap acts as an economic incentive for the Council to keep employees at or below classification level 2 and thereby contradicts the agreed terms of both agreements.
-------------	--

⁶ Ibid, [20]-[21].

⁷ Ibid, [22].

⁸ Ibid, [23].

⁹ Ibid, [25]-[27].

¹⁰ Ibid, [28]-[36].

Clause 13.02 Bus Drivers comprise the majority of employees in the Council's overall workforce. There are currently over 2000 Bus Operators operating out of seven depots across the Council's local government area operating more than 1200 buses.

It cannot be said that the funding for these positions is not ongoing; nor can it be said that it is not a guaranteed activity. Therefore, under clause 13.2 of the Proposed Agreement, it would appear that Council over-utilises casual employment. The logical inference that one draws then, is that this is a result of the financial incentive offered by keeping employees at a lower classification level like that imposed by the classification cap.

Clause 13.3 Most of the Council's over 500 casual Bus Operators can expect to be offered regular and systematic hours of work averaging 38 or more hours per week. This is not in accordance with the provisions of clause 13.3. The work they are performing is not emergent, specialist, special projects or meeting peaks and troughs in the workload. The Applicant claims this contradiction leads one to believe that the Council is financially incentivised to employ more casual employees than the agreement allows for.

Clause 13.10 This clause supports the previous clauses which encourage and promote permanent employment further by offering a pathway for conversion to permanency of employment for all other employees of Council except Bus Operators.

The manner in which the Council operates its pathway to permanent employment does not comply with clause 13.10 and intends to give no effect to it whatsoever. It works in complete opposition with this clause by ignoring the above considerations in its own processes.¹¹

[23] The Applicant asserts that the current classification cap, is inconsistent with several provisions of EBA9 and the Proposed Agreement. Whilst some of the clauses could be said to be 'motherhood statements' and not, therefore enforceable, once an agreement is struck, it is submitted that an agreement ought not to be granted approval in circumstances where it contains statements that are blatantly ignored in the remainder of the agreement.¹²

[24] The Applicant submits the removal of the classification cap will lend meaning to the above clauses and give life to the intentions of the parties under the relevant provisions rather than allowing them to have no bearing on the Bus Operators whatsoever as they currently do.

The No-Disadvantage Test

[25] In their submissions the Applicant argues that before an enterprise agreement can be approved, the Commission should be satisfied that the agreement passes the

¹¹ Applicant's submissions filed 16 August 2021, [38]-[42].

¹² Ibid, [43].

no-disadvantage test pursuant to Part 3 of the *Industrial Relations Act 2016* ('the IR Act'). This test measures the Proposed Agreement against the underpinning Award, the *Brisbane City Council Bus Transport Employees Award 2016* ('the Award'). The Award contains no such classification cap and if employees fell under this Award, they would be entitled to progress through all of the classification levels.

[26] The Applicant submits although the current IR Act is relevant, the 'No-Disadvantage Test' has remained largely unchanged since the decision of Fisher IC in *John Goss Electrical Pty Ltd and the Employees of John Goss Electrical Pty Ltd* in which Fisher IC stated:

The no-disadvantage test is to be applied on a global basis. It follows then that provided any disadvantages in wages and conditions are offset overall by improvements such that employees do not suffer an overall reduction compared to the Award, then the no-disadvantage test is taken to be satisfied. ...

The Commission should not approach the assessment of whether an Agreement satisfies the no disadvantage test as a strict accounting exercise but should consider both the financial aspects and quality of life aspects and take into account the 'value' of the intangibles.¹³

[27] Therefore, the Applicant submits that factors other than the economic impacts should be considered. The classification levels are largely dictated by time. Some of the classification levels are increased at six-monthly intervals and some at 12-monthly intervals.

[28] The following are duties exclusively retained for employees at classification level three and above:

- a. mentoring;
- b. buddy-driving;
- c. training of new Bus Operators; and
- d. further training opportunities for the Bus Operator themselves.¹⁴

[29] The Applicant states that because casual employees are restricted to the first two classification levels under the enterprise agreement, they are unable to participate in the above duties. This restriction reduces their career opportunities and ultimately impacts on job satisfaction. Some casuals have been in the industry for over 10 years and have an extensive knowledge of bus operations and the classification restriction is acting in a manner that disadvantages both the casual employee and the Council workforce at large by withholding that wealth of knowledge from newer employees.¹⁵

[30] Although stated earlier that not all Bus Operators classified level three and above carry out these additional duties, the listed tasks are restricted to permanent employees only

¹³ *John Goss Electrical Pty Ltd and the Employees of John Goss Electrical Pty Ltd* (1998) 158 QGIG 218.

¹⁴ Applicant's submissions filed 16 August 2021, [52].

¹⁵ *Ibid*, [53]-[55].

and casual Bus Operators are unable to demonstrate or share their skills in this area. This is a significant disadvantage for those who wish to pursue these tasks.¹⁶

Council's non-compliance with its own classification restrictions

- [31] As outlined by the Applicant's witnesses in their affidavits it is submitted that Council is not concerned with ensuring those who are classified above level two are only carrying out the tasks within their classification level. It is possible that the Council has been using its casual workforce to carry out tasks above their current classification level whilst paying them at a lower classification level.¹⁷
- [32] The Applicant submits that classifications at level three and above only refer to the Bus Operators carrying out 'specialised services'. The Applicant's witnesses understand these 'specialised services' as the collection of driving jobs that are not numbered service routes such as Nightlink, School Charters, Sporting Charters, Ekka services etc.¹⁸
- [33] The Applicant states that casual employees routinely carry out these 'specialist services' and are paid at their substantive classification level (either level 1 or level 2) due to their casual status. If it is accepted that this is what is meant by 'specialist services' under the classification structure, then casual employees who perform these services are underpaid.

Role of a Bus Operator

- [34] The Applicant outlines the role of a casual Bus Operator firstly undertaking a 22-day training course when they are taught how to drive a bus, taken through their Heavy Rigid Licence and trained in the basic duties of bus driving. This is followed by route training, 'under-tuition' or 'buddy-driving' then driving a bus in service working out of a fixed depot. Thereafter, Bus Operators drive the public around in service and progression is then merely experienced based.
- [35] The Council's Traineeship provides additional training such as escalation training, transporting passengers with disabilities and emergency procedures. However, the Applicant argues that once a Bus Operator has been transporting the public in serviced routes for two years this certificate offers negligible additional information.¹⁹
- [36] The Applicant submits the Bus Operator is of the same value to the Council whether they are casual or permanent. This being the case, it is an artificial cap that exists and for which there is no practical justification.²⁰

Council's Submissions

¹⁶ Applicant's submissions filed 16 August 2021, [56].

¹⁷ Ibid, [57].

¹⁸ Ibid, [59].

¹⁹ Ibid, [69].

²⁰ Applicant's submissions filed 16 August 2021, [72].

- [37] The Council opposes the changes to Schedule 10 proposed by the ARTBU in the Proposed Agreement.
- [38] The Council rejects the submission of the ARTBU that the disputed clause 'used to be relevant to Bus Operators (but) has now outlived its usefulness and should be amended in a manner which allows Bus Operators who are casual employees to progress through all of the classification levels that permanent Bus Operators are entitled to progress through'. In their submission, the Council argue that the proposed changes are intended to alter the existing arrangements so as to grant to casual Bus Operators the same rights of advancement as permanent Bus Operators, but without undertaking the required training and without relinquishing their casual employment status. Unlike permanent Bus Operators casuals retain the right to choose their own working hours.²¹
- [39] The Council submit that for many years all Bus Operators have had (and retain under the Proposed Agreement) the same rights of advancement to Levels 3 and 4. That pathway for all Bus Operators has been subject to the requirement that advancement for all groups above Level 2 is conditional upon completing the Traineeship, which requires conversion from casual to temporary/full-time employment.
- [40] The ARTBU's submissions accept that Schedule 10 of the Agreement reflects the existing and long-standing arrangement for progression of all (including casual) Bus Operators. However, it submits that the reason for change in the Proposed Agreement is because the Council has purported to 'introduce new barriers' to progressing through the Traineeship pathway to permanent employment. Those purported 'new barriers' are:
- (a) a 'merit based' recruitment process for the Traineeship;²²
 - (b) a requirement that those undertaking the Traineeship guarantee they have 'full roster availability';²³ and
 - (c) the Council has told permanent employees that the only way that they can access flexible working arrangements is to opt to become a casual employee.²⁴
- [41] The Council rejects each of those contentions on the basis that:
- (a) a 'merit based' recruitment process for the Traineeship is neither new nor unreasonable; and
 - (b) it is a legal requirement in Queensland that a casual employee cannot enter into a Traineeship, as a consequence of which a Trainee must become a full-time/part-time employee; and
 - (c) 'full roster availability' is no more than a reflection of the fact that the work to be performed by those employees involves the provision of a seven day per week 'all hours' public transport service, which requires the Council to have the capacity to roster employees accordingly;

²¹ Council's submissions filed 14 September 2021, [5].

²² Applicant's submissions filed 16 August 2021, [16]-[19].

²³ Ibid, [20]-[21].

²⁴ Ibid, [22].

- (d) because full-time Trainees are required to perform Bus Operator work whilst undergoing the Traineeship, it is appropriate and necessary that they provide Council with the same roster availability as full-time permanent employees; and
- (e) the Council has substantial policies in place to accommodate requests by permanent and temporary employees for flexible work arrangements. The existence and terms of which policies and processes were not the subject of bargaining and are not in dispute in these proceedings and are not referred to in the Applicant's submissions.²⁵

History of casual progression for Bus Operators at the Council

[42] The Council submit that casual Bus Operators were first introduced to the Council workforce by award amendments in 1998 and 2005 and first appeared in a certified agreement in *Brisbane City Council Enterprise Bargaining Certified Agreement 2005* (EBA6).

[43] The *Brisbane City Council Enterprise Bargaining Certified Agreement 2010* (EBA7) contained the following clause:

3.10 Casual Passenger Service Employees

3.10.1 *Wage level progression*

...

- (b) Progression of casual employees beyond Passenger Services Employee Level 2 is available to casual employees by means of them making application for appointment to full and part time vacancies that are advertised for Passenger Services Employee roles.

[44] The Applicant was a party to EBA7 and subsequently EBA8 and EBA9 where Clause 3.10.1(b) was replicated. The Applicant supported the certification of all three agreements.

[45] The requirement to undertake a Traineeship in order to be appointed to full and part-time vacancies beyond Level 2 was introduced in or about May 2002. That requirement was introduced administratively by the Council and does not appear in the current EBA9 agreement. The Council submit this is a sensible, balanced and rational approach and has not been opposed despite the certification of multiple certified agreements prescribing the method by which a casual employee might progress beyond Level 2 in obtaining a Certificate 3 by undertaking a Traineeship.²⁶

[46] In their submissions Council state this fundamental change in position by the ARTBU should be supported by compelling evidence that circumstances have altered to such an extent that the well-settled historical method of casual Bus Operator progression should

²⁵ Council's submissions filed 14 September 2021, [9].

²⁶ Council's submissions filed 14 September 2021, [13].

be removed and not replaced. No basis for removing this pathway has been demonstrated by the ARTBU.

- [47] The primary reason why such compelling evidence is required is because of the nature of the changes sought being to remove the Traineeship pathway altogether from the Council's scheme of progression for casual Bus Operators. Why this significant reduction in training and competency requirements undertaken by all existing Level 3 and Level 4 Bus Operators should now be removed in the case of casual employees would require careful explanation as to its implications. No such case is made out on the evidence.
- [48] In the view of Council, it would appear the reason for the proposed abolition of the completion of a Traineeship as a step for progression for casual Bus Operators, is the fact that a casual employee cannot lawfully complete a Traineeship, and also remain as a casual. Rather than fulfilling the training qualification standards applicable to all Bus Operators, which involves conversion to full-time or part-time employment, the ARTBU solution is to discriminate in favour of casual employees and against permanent employees, and to abolish those training standards in relation to casual employees.
- [49] The ARTBU offer no replacement for the Traineeship, other than time spent 'on the job' as a casual employee, and this is a factor that militates against accepting their proposal. The Council state it is not sufficient for a casual employee to give subjective and self-serving evidence as to their own relative competence, especially by comparing themselves to another employee who has undertaken training they have not personally undertaken. Notably absent is some expert and objective evidence on this subject.²⁷

Merit based recruitment for Traineeship

- [50] The Council submit that merit-based recruitment for admission to a Traineeship is not new and has been undertaken since on or about 2016. This method of recruitment was supported by the ARTBU in EBA9.
- [51] Prior to introducing merit-based recruitment for the Traineeship in 2016, the Council consulted with the ARTBU about this change. The ARTBU commenced a dispute process which was ultimately not pursued, and this became the accepted practice. The Council submit this arbitration proceeding is not an appropriate venue for reinvigorating that lapsed dispute.²⁸
- [52] In their submissions the Council state the recruitment process for the Traineeship is not contained in the Proposed Agreement and this is consistent with the recruitment process for all other positions covered by industrial instruments within the Council workforce.

²⁷ Ibid, [17].

²⁸ Council's submissions filed 14 September 2021, [21].

- [53] The Council submit the ARTBU has not sought in this application to argue for a change to the recruitment process for the Traineeship. It has instead sought to attempt to introduce provisions that abolish the longstanding (since 2002) Council requirement that all prospective Bus Operators (including casual employees who apply for such position) undertake a Traineeship in order to qualify for appointment to Council positions. As such, the content of the longstanding recruitment process administered by Council is not a matter at issue in this arbitration as the recruitment process itself will be rendered moot in the case of casuals. Accordingly, the Commission is not requested to make a determination as to the merits of the contents of the recruitment process for the Traineeship.
- [54] Should such a determination be requested, the Council submit that compelling evidence would be required to persuade the Commission to require the Council to abandon its reliance upon a merit-based recruitment process for the Traineeship as the basic requirement for advancement within the Bus Operator classifications. The only alternative to a merit-based recruitment process is one based on length of service. In terms of public safety and operational efficiency this could not, on the submission of the Council, be considered.²⁹
- [55] However, rather than attempting to bargain about the recruitment process for the Traineeship, the ARTBU seeks to avoid that question by proposing the removal of the Traineeship altogether as a qualification for progression for casual Bus Operators beyond PSE2.
- [56] The ARTBU's proposal seeks to remove the entire Traineeship step from casual career progression by charactering the attainment of this qualification as being a cap on casual employment and the issue is whether it is justifiable it should be removed for that reason.³⁰
- [57] Council submits the limitation on casual employees being employed above Level 2.0 reflects the fundamental principle adopted by Council to encourage, recognise and remunerate advanced skills, training and the availability to be directed to perform work at unsocial hours.³¹
- [58] The Council relies on the evidence of Mr Luke Cruwys, Manager, Transport Operations, Transport for Brisbane who states the necessity for the Traineeship to ensure Bus Operators who progress into higher classifications are appropriately trained and qualified and that the Council is provided with evidence of such training and qualification in the form of independently verified and nationally recognised certifications.³²

²⁹ Ibid, [24].

³⁰ Ibid, [27].

³¹ Ibid, [28].

³² Exhibit 11, Affidavit of Luke Cruwys sworn 14 September 2021, [22], [23], [104].

- [59] For a number of years, the substantial majority of the Bus Operator workforce has undertaken this training, obtained such certification and been rewarded under successive agreements with higher classifications and wages. Casual employees are equally entitled and encouraged to seek positions within the Traineeship path for the same rewards.
- [60] The ARTBU proposal is to remove this independent and nationally recognised verification of an employee having acquired the relevant skills and abilities and permit casual Bus Operators to progress to the highest classification levels and wage rates alongside permanent Bus Operators without having undertaken that training and certification.
- [61] Without the Traineeship, the ARTBU propose that casual Bus Operators would progress solely on hours worked, without Council ever being able to independently ensure those individuals are appropriately trained and skilled in the variety of competencies taught in the nationally recognised Traineeship.
- [62] The ARTBU justify this on the mere assertion that all casual employees who have a particular period of service without undertaking a Traineeship, are of equal value to Council as a permanent employee who has undertaken the Traineeship. This assertion is not evidence and not supported by any expert or empirical assessment.
- [63] In arguing for the removal of the Traineeship as a prerequisite for progression, the ARTBU has not provided any evidence that the Council requirement for undertaking the Traineeship as a mandatory step is unreasonable or is not necessary or appropriate as a training and qualification tool that has outlived its usefulness or that it should be treated as unnecessary in the case of casual employees. Rather, the ARTBU merely complains about the Council imposing merit criteria on the recruitment to the Traineeship, training, and merit criteria on the progression above Level 2. The ARTBU submissions suggest that by doing so Council is discriminating against a number of employees.³³
- [64] If the ARTBU had genuine complaints about discrimination occurring in relation to Traineeship places being offered, or discriminatory practices in relation to roster availability, it would have formalised such complaints in a manner whereby they could be answered in detail, or it would have referred to the existing flexibility policies of the Council. The ARTBU has chosen not to do either.³⁴
- [65] The Council submit that the proposal by the ARTBU to alter the method by which it recruits entrants to the Traineeship should have been raised during the bargaining process for the Proposed Agreement. It is entirely inappropriate to attempt to utilise the arbitration process to solve their issue in relation to the recruitment process by attempting

³³ Council submissions filed 14 September 2021, [34].

³⁴ Council submissions filed 14 September 2021, [53].

to remove the Traineeship altogether as a qualification for advancement within the classification structure for casuals.³⁵

Full roster flexibility

- [66] In their submissions Council submit some insight into the real complaint of the ARTBU can be gained from the fact that a casual employee is legislatively prevented from undertaking a Traineeship in Queensland.³⁶ Therefore, the Traineeship can only be undertaken by a person who is engaged as a part-time or full-time employee.
- [67] The ARTBU misrepresents the actual requirement imposed by the Council for recruitment into a Traineeship by suggesting employees be available 24 hours a day, 7 days a week as this is an exaggeration. The Council requirement that employees be full-time/temporary is because the Council requires those employees be available during the Traineeship to be rostered across the full spectrum of public transport services provided by the Council under its contract with the Queensland Government. It would not be possible to provide the contracted public transport service if all employees were free to pick and choose which rostered hours they were prepared to undertake.
- [68] This requirement of roster availability is not set out in EBA9 or the Proposed Agreement and is instead an inherent business and occupational requirement which Council can require of the full-time temporary and permanent positions.
- [69] The ARTBU proposal to abolish the current system of required training qualifications for casual employees to advance would reduce the standards of training competency skill and safety the Council requires as a condition of advancement in its Bus Operator workforce.
- [70] There is a fundamental difference between the employment relationship that the Council has with its full-time permanent workforce and its casual workforce. The inherent responsibilities of a full-time permanent employee to be available to be rostered across all services cannot be required of a casual employee.
- [71] The capacity of a full-time permanent employee is one of the attributes including the completion of a Traineeship for which higher classification levels and salaries are offered. An employee with those attributes has made a commitment which is of a higher value to the Council and involves more effort and training achievement.
- [72] By contrast, a casual employee is entitled to accept or refuse particular rostered times as they see fit and this significantly reduces the reliance that the Council can place on the

³⁵ Ibid, [35].

³⁶ Exhibit 10, Affidavit of Janet Hewitt, Learning and Development Manager, Transport for Brisbane at Brisbane City Council affirmed 13 September 2021, [39]-[47].

availability of that employee as well as introducing difficulties into the rostering and planning process.

- [73] Further, it cannot be said that because some casual employees have elected to work in this way means they are representative of a diverse casual workforce and that standards should be set for all casuals by reference to their individual preferences.
- [74] Rather than seek to bargain about the 'full roster flexibility' requirement for participation in the Traineeship, the ARTBU simply seeks to remove the Traineeship altogether as the gateway for progression for casual Bus Operators beyond PSE2. The ARTBU does not address in any constructive way its actual concern in relation to full roster flexibility as a condition for participation in the Traineeship but proposes to abolish the entire qualification.
- [75] In their submissions, the Council state it is an inherent and entirely reasonable requirement of the full-time employment status imposed upon the Traineeship by law, that roster availability must be expansive. The ARTBU's complaint is against the legislative requirement that casuals cannot be Trainees.
- [76] The Council submit it is entirely inappropriate for the ARTBU to seek to use the arbitration process to attempt to remove the Traineeship as a gateway to the progression process simply because it proposes that casual employees, who will not, or cannot, commit to roster availability should be placed on an identical footing with those employees who undertake the training and other commitments that casuals do not wish to undertake.³⁷

Casual employment the only flexible work arrangement

- [77] The ARTBU submits that the Council has told employees who had already attained permanency earlier in their career and who wished to access flexible working arrangements, that the only way they can access such arrangements is to become a casual employee. Other than an unattributed and untestable hearsay comment,³⁸ the ARTBU has not provided any evidence of any employees being told this by Council. In any event, the affidavit of Mr Cruwys clearly outlines such evidence is highly likely to be untrue. The Council has approved flexible work requests for more than 100 Transport for Brisbane employees for a wide range of different reasons under its flexible work policies, which has been ignored by the submissions and evidence of the ARTBU.³⁹
- [78] The Council state any suggestion by the ARTBU that permanent employees who need or want flexibility in their working arrangements must become casual is rejected as untrue.

³⁷ Council submissions filed 14 September 2021, [54].

³⁸ Exhibit 2, Affidavit of Sandra Lopez affirmed 11 August 2021, [3].

³⁹ Council submissions filed 14 September 2021, [55].

Summary of response to ARTBU's arguments

- [79] The Council submit that the ARTBU's proposal is based on its arguments the 'cap' on casual progression and the imposition of the Traineeship as the pathway to progression beyond PSE2 should be removed because the Council has 'introduced new barriers' to progressing to permanent employment which now mean that the cap at PSE2 for casual Bus Operators is inappropriate.⁴⁰
- [80] These purported 'new barriers' are not new as already stated and in any event entirely reasonable and justified, (such as a merit-based recruitment process for entry into the Traineeship and the condition of full roster flexibility), or non-existent (the requirement for permanents to become casual if they seek to access flexible work arrangements).⁴¹
- [81] The ARTBU has not adduced any objective or expert evidence to show that the Traineeship is no longer appropriate or applicable or that it should be removed as a management and safety tool. Instead, the ARTBU proposes removal of merit and training as aspects of casual progression through the classification structure. In place of merit and training it is proposed that mere length of service be the only criterion for casual employees in order to provide for casual employees who have an unwillingness or inability to comply with merit tests and training requirements.
- [82] The Council submits the proposals of the ARTBU are unfair, uncosted and counterintuitive, and should be rejected.⁴²

Evidence - Applicant

- [83] In his affidavit Mr Thomas Brown, Assistant State Secretary, ARTBU affirmed he was a Bus Driver with the Council for 21 years prior to being elected to his current position in 2014.⁴³
- [84] Mr Brown deposed that due to changes in the way the Council manages its casual Bus Operators over the life of the clause, it has outlived its usefulness and incentivises the Council to use a larger contingent workforce than is necessary under the existing (and proposed) agreement.
- [85] There have been two significant changes to the recruitment pathway in which a Bus Operator moves from a newly employed casual Bus Operator to a permanent Bus Operator.

⁴⁰ Ibid, [57].

⁴¹ Ibid, [58].

⁴² Ibid, [62].

⁴³ Exhibit 1, Affidavit of Thomas Brown affirmed 9 August 2021, [1], [2].

- [86] Mr Brown said Bus Operators are usually recruited into permanent employment via a three-stage process. They are recruited as casuals then after approximately two years they become trainees. Following a two-year traineeship, which can vary, they become permanent employees.
- [87] The current cap on casual employees' classifications (and therefore pay levels) is unfair.
- [88] The Council recruits several people into a traineeship on an irregular basis which appears to be determined by need. This became a merit-based recruitment process approximately four years ago. This process is referred to at Schedule 10 Clause 3.13.8 of the Proposed Agreement.
- [89] Mr Brown said there are Bus Operators who continue to drive regular routes with reasonably regular hours of work, who do less well in job interviews or are not in favour with their manager or team leader, who miss out on a traineeship. They are only excluded from the pathway to permanency because of the merit-based process.
- [90] Even more recently, the Council has decided that if Bus Operators are to take up a traineeship, they must be available across all shifts in the roster. This means that any Bus Operators who need to work fixed or flexible hours are excluded from the traineeship.
- [91] In his affidavit Mr Brown said in a practical sense there is no difference in what permanent Bus Operators do compared to casual Bus Operators. However, on paper there is a difference between casual Bus Operators and Bus Operators at classification level 3 or above and this is reflected in the Award.
- [92] Succinctly, the paper differences are the length of time spent at the respective levels including operating specialised services, instructing new Bus Operators and covering routes in other depots. Specialised services are identified as night-link; sporting fixtures; school routes; school sporting events; charter buses; riverfire; bridge-to-bridge; ANZAC morning routes and other special events. Casual Bus Operators perform all the specialised services. They do not perform mentoring or instructing new Bus Operators.
- [93] Mr Brown said there are many members desirous to become a driver mentor or buddy driver but are restricted from doing so by the classification cap. Some have 10 years or more of experience as a driver and a wealth of knowledge to pass on to new recruits. Clause 3.3 of Schedule 10 in the 2019 Certified Agreement sets out the timeframes Bus Operators will remain at each progression level.
- [94] The combination of the merit-based recruitment system and the newly imposed full roster availability requirement, has created a situation where people who would otherwise have

become trainees and then permanent employees are now left with no choice but to stay in a casual role.⁴⁴

- [95] Mr Laurence Barker is employed by the Council as a casual Bus Operator having commenced in January 2015. Mr Barker averages approximately six days a week typically working more than 38 hours per week. He has twice unsuccessfully applied for a traineeship. He does not believe as a professional driver for over 30 years world-wide that he should be required to undertake a traineeship when he has demonstrated that he can drive a bus over the last six years at the Council.⁴⁵
- [96] Mr John Douglas chooses to be a casual Bus Operator with the Council as he is of retirement age and has the option of working when it suits him. He has held this position for over 12 years. He said he is required to drive the buses in the same manner as permanent Bus Operators, yet they get paid more for doing the same job.⁴⁶
- [97] In her affidavit, Ms Deborah Bowen-Saunders deposed she has been a casual Bus Operator with the Council for 13 years and chooses to be casual because she needs to set her own hours. Ms Bowen-Saunders works out of the Eagle Farm Depot which operates approximately 60 routes, and she must know all of them and be ready to do any route on any day. She would like the opportunity, given her experience, to instruct and/or mentor new drivers but cannot because she is a casual.⁴⁷
- [98] Mr Robert Dunstan is a retired Bus Operator who worked for the Council for six years as a casual prior to his retirement. Mr Dunstan chose to remain a casual as it was widely known that 'if you wanted to work hours that suited you, it must be as a casual employee'. Prior to joining the Council Mr Dunstan worked at Sunbus for six years as a qualified Bus Operator having completed a Certificate III in Driver Operations.
- [99] While employed at the Council Mr Dunstan was able to work as many hours as he wanted and there were weeks where he worked in excess of 60 hours. He estimated that he worked a minimum of 38 hours per week for 40 weeks of the year and the remainder of the weeks he would take as holidays because it suited his lifestyle. He claimed that he worked regularly and systematically as a full-time employee on a casual contract. He said his training, qualifications and experience should not have been worth less to the Council than a permanent employee just because of his casual status.⁴⁸
- [100] Mr Qudratullah Farooq has been employed as a casual Bus Operator with the Council for approximately 10 years. After about one year in the job Mr Farooq commenced a traineeship not having to apply or go through an application process. After completing one year of the traineeship, he discontinued as he wanted to do some study. When he

⁴⁴ Exhibit 1, Affidavit of Thomas Brown affirmed 9 August 2021.

⁴⁵ Exhibit 4, Affidavit of Laurence Barker sworn 11 July 2021, [1]-[3], [5], [8], [10].

⁴⁶ Exhibit 6, Affidavit of John Douglas affirmed 12 August 2021.

⁴⁷ Exhibit 7, Affidavit Deborah Bowen-Saunders affirmed 11 August 2021.

⁴⁸ Exhibit 8, Affidavit of Robert Dunstan affirmed 12 August 2021.

had completed his studies in approximately 2016 or 2017, he sought to return to the traineeship but was told that this time he had to apply and go through a merit-based recruitment process. Mr Farooq applied, was interviewed and was unsuccessful. He applied again approximately 8-12 months later and was again unsuccessful and did not try again because he felt dejected. He said he does exactly the same job as a permanent employee yet the impact on his income is significant.⁴⁹

[101] In her affidavit Ms Sandra Lopez said she has worked as a Bus Operator at the Willawong depot for 14 years. She was a permanent Bus Operator then sought flexibility to care for her children and the only way she could do that was to become a casual. Now her children have finished school she no longer requires the flexibility and would like to be a permanent employee again. However, she is unable to because the Council requires all permanent employees to work a full roster. Ms Lopez believes 'this is very unfair' that Council seems to think 'that casuals get some sort of compensation for being treated like second class citizens because of the loading we receive'. She said that by removing the classification cap is one way in which 'we could be treated more fairly'.⁵⁰

[102] Mr Ronald Sapwell has been a casual Bus Operator with Council working at the Willawong depot for 10 years. Mr Sapwell chose to be a casual as he likes the flexibility. He does not think it is fair that as a casual he can only attain classification level 2 which is \$71.00 per week less that he would be paid if there was no wage cap imposed. He has exactly the same responsibilities as every other permanent driver, yet he has to do it for less money because of the casual classification cap. Mr Sapwell said he would like to mentor new drivers and that Council would benefit by his ability to pass on his skills and knowledge which he found beneficial when he was new to the job.

[103] In his affidavit Mr Steven Wildermuth deposes that he chooses to be a casual Bus Operator because of the flexibility as he likes to take approximately 12 weeks' leave per year. He works out of the Virginia depot which operates approximately 50 numbered routes, and he is required to know all of these. He said he must have the same skills as a permanent Bus Operator and does not think it is fair that he gets paid less.

Evidence - Council

[104] Mr Cruwys in his affidavit deposed he is currently seconded to the position of Manager, Transport Operations, Transport for Brisbane at the Council having been employed by the Council since August 2016.⁵¹

[105] In his current position Mr Cruwys said he is responsible for leading Council's bus operations across seven bus depots, seven maintenance garages, the network coordination centre and the maintenance workshop. He was also responsible for the

⁴⁹ Exhibit 5, Affidavit of Qudratullah Farooq affirmed 11 August 2021.

⁵⁰ Exhibit 2, Affidavit of Sandra Lopez affirmed 11 August 2021.

⁵¹ Exhibit 11, Affidavit of Luke Cruwys sworn 14 September 2021.

development of the negotiation strategy and part of the lead negotiation team for EBA9 and the Proposed Agreement.

- [106] Mr Cruwys said that Transport for Brisbane is an organisational division within Council and is responsible for the operation and management of the Brisbane bus, City Cat and CityFerry services. Council operates bus services from seven depots and services approximately 450 routes across the region as well as providing additional services including bus services for special events and school transport.⁵²
- [107] In his affidavit Mr Cruwys deposes that Council has contractual obligations to the State of Queensland (acting through the Department of Transport and Main Roads) (DTMR) to provide public transport services, including bus services across the Council region. As part of those arrangements Council is required to meet particular performance criteria and capabilities which include Missed Trips, On-Time Running, Customer Experience and Customer Safety.⁵³
- [108] Bus Operators are employed by Council to operate buses and provide the public transport service to users. Council structures the training and performance criteria for Bus Operators on its performance indicators to meet its contractual arrangement with DTMR. Bus Operators are required to undertake annual performance reviews.
- [109] Mr Cruwys said all Bus Operators commence their role as casuals. If a casual Bus Operator is successful in applying for admission to a traineeship to obtain Certificate 111 in Driving Operations, it is necessary they convert their casual employment to full-time/temporary employment. When a traineeship is successfully completed, subject to meeting Council conduct standards, the former trainee is offered a permanent Bus Operator position.⁵⁴
- [110] Casual Bus Operators are an integral part of Transport for Brisbane's workforce which allows a group of "contingent" employees to provide flexibility to the team and enable scheduling of work which would otherwise be difficult to deliver.
- [111] Clause 3.13.8 of Schedule 10 of the Proposed Agreement reflects the long-standing agreed practice that progression beyond level 2 can only occur when a casual employee has completed their Traineeship. Advancement upon completion of a Traineeship has been the accepted Council standard of independently assessed competency which Council rely upon to provide the necessary evidence to support the progression of an employee beyond level 2 in the classification structure, in addition to the required period of service.⁵⁵

⁵² Exhibit 11, Affidavit of Luke Cruwys sworn 14 September 2021, [6]-[7].

⁵³ Ibid, [8].

⁵⁴ Ibid, [16].

⁵⁵ Exhibit 11, Affidavit of Luke Cruwys sworn 14 September 2021, [22].

[112] Bus Operators progress through the classification structure in the certified agreement based on demonstration of competency and tenure.

[113] Mr Cruwys referred to data produced in relation to Council's Bus Operator workforce from 2006 to 2021 including the total number of Bus Operators, broken down by employment type and the total number of casual employees who have been converted from casual to full-time employment. The Workforce Data shows:

- the Council's casual workforce has remained in a range 15 to 25% of Council's total operator workforce since 2006;
- Council has consistently provided a pathway for casual conversion to full-time employment since 2006; and
- Council has substantially increased the incidence of part-time employment.⁵⁶

[114] Mr Cruwys noted that an individual listed as a casual employee may only represent a small percentage of a full-time equivalent employee due to restrictions upon that person's availability for rostering. He said for this reason, comparing the actual number of casual employees to the number of full-time or part-time employees is likely to be a false comparison as it would be necessary to factor into that comparison, the extent of the actual availability of the casual cohort, compared to the availability of full-time and part-time employees.⁵⁷

Recruitment of Bus Operators

[115] Council currently recruits Bus Operators in temporary traineeship positions and in casual positions. Casual employees are primarily recruited from external applicants whereas both external applicants and existing casual Bus Operators can apply for a position in the Traineeship.⁵⁸

[116] Council does not recruit external applicants directly into permanent Bus Operator positions. Council's Bus Operator recruitment is focused on recruiting individuals with customer service skills who can meet the customer service performance criteria.

Approved Annual Budget

[117] Based on the budget allocated for the financial year and taking into consideration the network requirements, Transport for Brisbane utilises a Staffing Prediction Model (SPM) to determine the number of Bus Operators required to service Council's public transport service commitments at each bus depot up to 16 months in advance. The SPM analyses a variety of data including bus routes, introduction of new business (if any planned), absenteeism, turnover, time required to undertake training and traineeships.⁵⁹

⁵⁶ Ibid, [24]-[25].

⁵⁷ Ibid, [27].

⁵⁸ Ibid, [29].

⁵⁹ Exhibit 11, Affidavit of Luke Cruwys sworn 14 September 2021, [33].

[118] Based on this data input, the SPM generates Council's Bus Operator workforce needs on a month-to-month basis, indicating whether Council is predicted to have more or less Bus Operators than will be required for each depot. The SPM information is then used to drive the resourcing and recruiting requirements.

[119] In reviewing planned and unplanned leave for Bus Operators, Mr Cruwys said there are 20.5% of Bus Operators absent from work on such leave at any one time and this number is consistently above 20%. The casual workforce represents a lower percentage than this however this group is critical in providing coverage of these leave types.⁶⁰

[120] This data together with rolling turnover of 9.9% and training requirements are fed into the SPM. This predicted level of leave, training, and turnover in part explains Council's need to employ a portion of its workforce in a flexible casual mode.

[121] Ms Janet Sarah Hewitt, the Council's Learning and Development Manager, Transport for Brisbane submitted an affidavit. Ms Hewitt has approximately 20 years' experience specialising in learning and development, including managing training programs and contracts registered with registered training organisations (RTO). In her current role, she is responsible for the management of the Transport for Brisbane learning and development of Bus Operators, which includes:

- a. the mandatory training program (classroom and practical on bus training) all Bus Operators are required to complete before they commence providing public transport services (Induction Training); and
- b. the traineeship program for Council Bus Operators, which will enable those Bus Operators to attain a Certificate III in Driving Operations (TL131216).⁶¹

[122] The Induction Training is not mapped against nationally recognised training, nor is it facilitated by an RTO or a Supervised RTO. It is specifically designed and implemented by Council to align with the performance measures under Council's contract with Translink (DTMR), the position descriptions and role requirements for Bus Operators, Transport for Brisbane's vision and Council's policies. Council has a contract with Translink to provide the bus operation services in the contracted service area.⁶²

[123] In accordance with the Training Package Rules, trainees must complete a total of 18 units comprising:

- a. Six core units;

⁶⁰ Ibid, [36].

⁶¹ Exhibit 10, Affidavit of Janet Sarah Hewitt affirmed 13 September 2021, [2].

⁶² Ibid, [13].

- b. One licensing/industry elective relevant to vehicle type applicable to the role from the licensing/industry elective units listed, which for Council Bus Operators is 'Drive heavy rigid vehicle' (TLIC3004);
- c. All units within one of the specialist elective groups relating to the trainee's role, which for Council Bus Operators is 'Group C - Bus'; and
- d. Given Council's traineeship is for the 'Group C Bus' elective, six general elective units from 'Group N – General elective' units are selected by Council to align with the performance measures in Council's contract with Translink.⁶³

[124] The Traineeship is delivered with a combination of classroom and on-bus training, and trainees are required to successfully complete classroom and on vehicle assessments. The Training Package is reviewed every five years by the State and Commonwealth Governments in conjunction with the Transport and Logistics Industry Skills Council.⁶⁴

[125] Council may seek to have a Bus Operator's prior experience or training assessed as recognition of prior learning (RPL) so that a Bus Operator is not required to undertake all or some of the training or assessment for relevant units required under the Training Package rules.⁶⁵

[126] Ms Hewitt's evidence was that a restriction is imposed on traineeships for casual workers. There is a State-wide legislative restriction which is imposed in relation to all traineeships and apprenticeships in Queensland. In order for an existing casual Bus Operator to gain admission to a traineeship, it is necessary for them to change their employment status from casual to temporary full-time for the duration of the traineeship. This is a requirement of the Queensland Department of Small Business, Employment and Training (DSBET) for traineeships and apprenticeships.⁶⁶

[127] Council trainees must complete the traineeship within two years (24 months) of commencement. Ms Hewitt does not accept the claim of Mr Brown that Traineeships can take more than two years to complete. It was the evidence of Ms Hewitt that this was the exception and not the norm. If a Traineeship cannot be completed within the requisite two years, then an application is brought to the DSBET for an extension.

Consideration

[128] In short, the ARTBU primary concern is said to be the inability of casual employees to move beyond classification level 2. What is described by the ARTBU as a 'cap' arises out of Clause 3.10.1 of EBA9 and replicated in Clauses 3.13.7 and 3.13.8 of the Proposed Agreement.

⁶³ Exhibit 10, Affidavit of Janet Sarah Hewitt affirmed 13 September 2021, [28].

⁶⁴ Ibid, [39].

⁶⁵ Ibid, [32].

⁶⁶ Ibid, [40].

- [129] The Council opposes the proposed changes advanced by the ARTBU. The proposal advanced by the ARTBU would move away from the existing arrangements that the pathway for advancement for all groups to level 3 and 4 was conditioned on the completion of the Traineeship.
- [130] The ARTBU presses for the amendment to create, in effect, two pathways to advance through the classification levels.
- [131] The ARTBU submission argues that the disputed clause "... used to be relevant to the Bus Operators, [sic] has now outlived its usefulness and should be amended in a manner which allows Bus Operators who are casual employees, to progress through all of the classification levels that permanent Bus Operators are entitled to progress through."⁶⁷
- [132] The ARTBU contends that the current arrangements introduce 'new barriers' to progressing through the traineeship pathway to permanent employment.
- [133] Whilst the ARTBU does not object to the continuation of the traineeship, they do seek the removal of the 'cap' applied by the Council to casual employees.⁶⁸ It is "... the weaponisation of the traineeship that the Applicant asserts, is the issue; not its existence."⁶⁹
- [134] The 'weaponisation' is said to arise in circumstances where the Council is using the traineeship "... as a means by which the Respondent selectively keeps casual employees on a lower rate of pay whilst they are effectively still performing the same job as those who have been chosen by the Respondent to progress through the traineeship to attain a permanent role with the Respondent."⁷⁰
- [135] The ARTBU assertion that the refusal of the Council to admit casual employees to a traineeship is a barrier to accessing a higher classification beyond Bus Operator Level 2 fails to recognise the application of the merit-based recruitment process/legal requirement/full roster availability.
- [136] The Council points out in its submissions that casual Bus Operators who retain and exercise the right to choose their own work hours, days and weeks; do not commit to mandatory roster availability in the context of a 24/7 service; and who have not undertaken the required level of nationally accredited training, do not perform the same role as a full-time permanent employee. In addition, it does not appear in contention that Bus Operators paid at classification of levels 3 and 4 perform or are able to perform the additional responsibilities including inductions, mentoring and instruction tasks.

⁶⁷ Applicant's closing submission filed 24 June 2022.

⁶⁸ Applicant's submissions in response filed 24 September 2021, [3]

⁶⁹ Ibid, [5]

⁷⁰ Ibid, [6]

[137] Under the proposal advanced by the ARTBU, a casual bus operator would be able to progress through the higher levels of classification without the necessity to undertake the traineeship.

[138] The ARTBU argues that the merit-based recruitment system and the newly imposed 24/7 availability requirement has created a situation where individuals who would otherwise become trainees and then permanent employees, are now left with no choice but to stay in a casual role.⁷¹

[139] The ARTBU relied on the evidence of Mr Brown who deposes that:

20. The merit-based process means that you must be able to interview well and, dare I say it, be liked by your manager, to get into Traineeship.
21. Additionally, Brisbane City Council also requires that all Traineeship applicants have their Depot Team Leader as a referee. This is not something that applicants are able to opt out of.
22. This means that there are some people who, for example, might drive buses perfectly well, but who do less well in job interviews or are not in favour with their Team Leader, who simply miss out on a Traineeship. Under these circumstances, they may end up remaining a casual Bus Operator indefinitely.
23. These people are unable to earn beyond pay-point two due to the current cap.
24. They are perfectly adequate Bus Operators and continue to drive regular routes with reasonably regular hours of work. They are only excluded from the pathway to permanency because of the merit-based process.⁷²

[140] In cross examination of Mr Brown the following exchange took place:

O'CONNOR VP: Well, getting back to the - I think something was put to the witness, but I'm not sure that you answered it. It related to whether or not there was nothing unorthodox about a merit-based appointment process?

Well, there is, because if there was anything - if it was okay, why did 50 per cent of casual bus drivers fail the merit-based recruitment process?

MR EVANS: You understand that there are necessarily limitations placed ---? Fifty per cent of bus drivers --- on the numbers of people who can flow through to traineeships?--- failed the recruitment process to become bus drivers. That's whether - that's what's wrong with it.

And it's for that reason that you criticised the merit-based recruitment process itself? ---Yeah. It's not doctored towards what these people are doing day in and day out. It's doctored towards a corporate position.

So it should be doctored towards a position that casual bus operators can go through? --- Absolutely.⁷³

⁷¹ Exhibit 1, Affidavit of Thomas Brown affirmed 9 August 2021.

⁷² Ibid.

⁷³ TR1-20, LL5-23.

[141] The ARTBU contend that the method by which BCC appoints people to permanent employment, and thereby removes the earnings cap applied only to casuals, is an artifice; an artifice that results in approximately 25% of their workforce not being recognised for their length of tenure and their years of experience in the role of Bus Operator.⁷⁴

[142] The notion of the "artifice" is buttressed by the submission that all bus drivers do the same job.⁷⁵ The applicant submits that passengers or passers-by are unlikely to notice whether their bus driver is employed as a casual or permanently.

[143] They state that Council is wrong to delineate between casual and permanent based on a completion of a certificate III in driver operations.⁷⁶ Moreover, the obligations for traineeship completion, whilst ancillary are nonetheless in the applicant's submission, important.

[144] The relevant classification descriptions are set out in Schedule 1 of the Award. Advancement to Bus Operator Level 3 requires satisfactory completion of one year as a Bus Operator Level 2, with competency confirmed. The description of Bus Operator Level 3 in the Award is as follows:

In addition to the skills acquired in Bus Operator 2, this level would include the use of the following indicative skills if required by the Council:

- operating specialised services;
- sound knowledge of the routes of other depots;
- instructing new drivers in route and bus operations;
- inducting new drivers to aspects of depot operations and information;
- communicating with all types of customers with an advanced degree of courtesy and accuracy of information; and
- carrying out duties associated with passenger surveys and service monitoring.

[145] The ARTBU called evidence from Ms Lopez a casual Bus Operator and Mr Dunstan a former casual Bus Operator with Council to support the contention that the Council does not value a fully trained workforce and uses the Traineeship as an arbitrary method to choose who it prefers to pay more.

[146] Ms Lopez commenced her employment with Council in 2007 first as a casual and subsequently as a permanent employee. She completed a Certificate III in 2007. Because of personal circumstances, Ms Lopez resigned from Council in 2013. Sometime in 2014 she reapplied for employment with Council as a casual. Her evidence was that having regard to her personal circumstances permanent employment would not work for her. In her evidence she said: "I used to be a permanent driver but when I had children and my marriage ended, I needed flexibility in my work hours to look after my two children and

⁷⁴ Applicant's closing submissions filed 24 June 2022, p 2.

⁷⁵ Ibid, p 3.

⁷⁶ Ibid, p 4.

the only way I could do that, was to become casual." In her oral evidence, Ms Lopez acknowledged that she could have availed herself of flexible work arrangements but chose not to because she did not believe that it would be suitable to her particular needs. She was asked in cross-examination:

Do you understand that as a permanent council officer, there are flexible work arrangements which are available and which you can seek out?

Yes, but at that particular time, when I spoke to my team leaders, I would have been on a very long waiting list to get on to the hours that I would prefer to look after my children.

Okay. So you didn't look into flexible work arrangements at the time or just prior to resigning your employment from council in 2013?

No, I didn't. At that time I don't think some of those arrangements would have been able to help me as a single parent with the income that I needed.⁷⁷

[147] Mr Dunstan's evidence was that he commenced employment with Sunstate Buses for six years before commencing employment with the Council in June 2014. He says that he completed a Certificate III in Driver Operations while working for Sunbus. Mr Dunstan did not apply for permanent employment with Council; he told the Commission that the Council had suggested that his qualification was out of date; there is no evidence dealing with equivalency of his qualification; or that he applied to TAFE for RPL.

[148] Much of the evidence advanced by the ARTBU does not go to the determination of the question before the Commission.

[149] The argument advanced by the ARTBU is not about the acceptance or recognition by Council of pre-existing qualifications held by a casual employee. Rather, what is solely advanced by the ARTBU is an application to amend Clause 3.10.1 to remove the alleged 'cap' on progression for casual Bus Operators.

[150] It is not in contention that the current and proposed arrangements require that a driver convert from casual to temporary/full-time employment. The Council argues, with some validity, that it would not be financially responsible (even if legally possible) to train casual employees who may not commit to long term employment with the Council.

[151] The evidence before the Full Bench is that merit-based assessment is applied universally across the whole operation of the Council. In respect of Bus Operators, merit-based assessment has operated since 2016. In cross-examination, Mr Brown accepted that within Council a merit-based process is used to recruit applicants across the whole organisation however "[w]ith bus drivers it doesn't work."⁷⁸ Mr Brown accepted that the ARTBU has not sought to agitate either in this application, nor elsewhere, any change to the merit-based assessment process.

⁷⁷ TR1-32, L42-TR1-33, L4.

⁷⁸ TR1-20, L35.

[152] The Full Bench has before it the evidence of Mr Cruwys whose affidavit sets out in some detail the process for recruitment, induction, and training.

[153] In respect of the merit-based recruitment process he states the following:

64. Prior to the introduction of merit-based recruitment, casual Bus Operators could apply for a position in the Traineeship by putting their name on a list of Bus Operators interested in participating in the Traineeship. There was a list located at each depot and as a need arose for additional permanent Bus Operators, the required number of casual Bus Operators would be selected from the top of the list and would be granted a position in the Traineeship. Through this process, entry into the Traineeship was based on tenure and the date when a Bus Operator expressed interest in the Traineeship by writing their name on the list at a particular depot. Selection was not based on the merit of the applicant and the process was decentralised, with lists maintained at each depot.
65. This process was not considered optimal or best practice, as a result of which in or about 2016, just prior to the commencement of negotiations for EBA9, Council implemented merit-based recruitment for the Traineeship. The reason for the change was to transition from the decentralised/depot based process which was based on when a casual Bus Operator put their name on a list held at the depot, to a transparent merit based process run through the Council's Recruitment Centre. This shift aligned the Traineeship recruitment process with the Council's organisation-wide recruitment process, and assisted in minimising local favouritism or prejudice for or against particular employees in local depots.
66. Significant engagement was undertaken with the RTBU on the change in the process and shift toward merit-based recruitment. The RTBU commenced a dispute process in relation to the introduction of the merit-based recruitment process however, ceased agitating the dispute.⁷⁹

[154] The RTBU contend that merit-based process 'opens up the doorway for prejudice and discrimination.'⁸⁰ Indeed, the RTBU challenges the evidence of Mr Cruwys that the adoption of the merit-based process has 'assisted in minimising local favouritism or prejudice.'⁸¹

[155] It is contended by the RTBU that a group of individuals have been discriminated against by reason of an inability to comply with the requirements of Clause 3.10.1 due to their protected attributes. The Applicant has not placed before the Full Bench any specific or cogent evidence to support their contention that existing Clause 3.10.1 may operate to unlawfully discriminate, nor is there material before the Full Bench as to the Applicant's alleged 'protected attributes'. At the highest, the evidence was that because of personal circumstances some individual employees could not commit to a 24/7 roster. Further, it was never put to the Council's witnesses in cross-examination that the reason for the existence of Clause 3.10.1 was because of a protected attribute.

⁷⁹ Exhibit 11, Affidavit of Luke Cruwys sworn 14 September 2021.

⁸⁰ TR1-6, LL21-24.

⁸¹ Exhibit 11, Affidavit of Luke Cruwys sworn 14 September 2021, [65].

[156] Notwithstanding that submission, it was never put to Mr Cruwys that the current merit-based recruitment process was affected by prejudice, discrimination or favouritism. Moreover, there was no evidence advanced by the ARTBU to suggest that the merit-based recruitment process caused or promoted prejudice, discrimination or favouritism. In other respects, the evidence of Mr Cruwys was not otherwise challenged in cross-examination.

[157] It was also asserted by the ARTBU that the traineeship programme is being utilised by the Council to punish employees in circumstances where an employee:

- a. Does not or cannot make themselves available across the full spectrum of rosters that the Council operates; or
- b. Does not have a good relationship with their Team Leader (who are required by the Council to be listed as a referee for the application).⁸²

[158] Again, it was never put to Mr Cruwys nor Ms Hewitt that the training was being utilised by Council to punish employees. There is simply no evidence before the Full Bench to suggest that the traineeship offered by the Council is being used as a punishment against employees.

[159] Whilst the ARTBU contend that they do not seek the removal of the traineeship and maintain that the training and career advancement of their members is essential and to be encouraged; they mount an attack on the Certificate III training offered by Council. The ARTBU assert, absent any evidence that: '...it defies logic to accept that the training provided to the traineeship covers the same information as the induction plus additional elements.'⁸³ The uncontradicted evidence of Ms Hewitt would suggest otherwise.

[160] A distinction needs to be drawn between 'competency' and 'competence'. It is not suggested by the Council in these proceedings that a casual Bus Operator is not competent to perform their duties. Rather, what is advanced by the Council is that by undertaking the traineeship a Bus Operator's competency is enhanced by means of improving their skills and abilities to perform the tasks required of them. In other words, those who have undertaken the traineeship will have the ability to perform their tasks better than the average person, or a person with basic competence.

[161] As Ms Hewitt observed in her evidence:

23. The traineeship is designed and intended to increase the overall capabilities and skills of Council's Bus Operators, above the level attained by the mandatory Induction Training, and providing to Council an independently assessed and nationally recognised training qualification for each Operator who undertakes the Traineeship. The Traineeship is the only formal qualification which Bus Operators can attain to enhance their skills and training in the operation of buses, and which is recognised by industry as providing an objective assessment of skills and

⁸² Applicant's submissions in response filed 24 September 2021, [20].

⁸³ Applicant's closing submissions filed 24 June 2022, [30]

competency of the trainee. The Traineeship is a rigorous standardised training program which increases the level of professionalism, skills and qualification of drivers across various industries, including bus operations.⁸⁴

[162] The Applicant submits the traineeship is currently being utilised as a means by which the Council selectively keeps casual employees on a lower rate of pay whilst they are still performing the same job as those who have been chosen by them to progress through the traineeship to attain a permanent role.⁸⁵

[163] Much is made in the ARTBU's submissions that '[a]ll bus drivers do the same job'.⁸⁶ The evidence before the Commission does not support that contention. The higher classification descriptions in Schedule 1 of the Award build on the qualifications and training at Level 3. As the evidence suggests, an employee at Level 2 cannot be called upon to instruct new drivers; induct new drivers in aspects of depot operations and information; or provide mentoring and training of other employees. They cannot undertake those tasks because a casual employee who has not undertaken and completed a Certificate III does not have the requisite skills to do so.

[164] The Full Bench notes the submission of the Council that the proposal advanced by the ARTBU does not provide for a prohibition on a casual employee from making an application for conversion from casual to full-time employment under the proposed Agreement after reaching level 4 or 5 some years earlier than a full-time employee, whilst working less hours than a full-time employee.

[165] The inequity of the ARTBU's proposal is further highlighted by the fact that the current proposal before the Full Bench would apply, not only to those casual employees who were unable to gain entry into the training programme, but it would also apply to casuals who were yet to be engaged by Council.

[166] Moreover, the dual pathways which would arise if the ARTBU's proposal was to be adopted would see one pathway requiring a merit assessment, attainment of an accredited two-year traineeship and the requirement to agree to a 24/7 roster as the foundation for any progression. The alternate pathway would see a casual employee progress to a higher classification solely on the basis of the effluxion of time.

[167] The Council argue that the proposed amendments are likely to place pressure on the current scheme of incentivising the undertaking of traineeships, that it is unlikely to survive in its present form.⁸⁷ Moreover, the Council contend that the proposed amendment would have a detrimental effect on its ability to recruit employees into full-time traineeships because of the significant relative disadvantage imposed on full-time trainees when compared to casuals.

⁸⁴ Exhibit 10, Affidavit of Janet Hewitt affirmed 13 September 2021.

⁸⁵ Applicant's submissions in response filed 24 September 2021, [6].

⁸⁶ Applicant's closing submission filed 24 June 2022, pp 3-4.

⁸⁷ Respondent's submissions in reply filed 4 February 2022, [10].

[168] It is, in our view, a reasonable inference to draw that the ability to permit casual employees to advance to higher classifications without undertaking a traineeship would serve to diminish the ability of Council to encourage Bus Operators to undertake a traineeship. The proposal would, if accepted, disincentivise employees to undertake full time employment; and potentially casualise the workforce. Both undesirable outcomes.

[169] What needs to be recognised is that the Council is obligated to provide a 24/7 bus service for the people of Brisbane. The Council's capacity to provide that service is dependent upon a permanent staff who have committed to full roster availability which permits the Council to assign to permanent staff a roster on a 24/7 basis.

[170] The very nature of casual employment is that an offer of employment is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work.⁸⁸ Accordingly, an employer can elect to offer work and the employee can elect whether to accept or reject work. Even in circumstances where an employee's rosters gave them the qualities of regularity and systematic organisation, those qualities are "entirely compatible with the notion of 'casual employment'.⁸⁹

[171] In the closing submissions of the Council the following is submitted:

None of those factors relied upon could conceivably justify the creation of a separate, voluntary, parallel, merit-free, and qualification-free path for all casuals who cannot, or choose not to, commit to full roster availability, which path allows all casual employees to progress to the same entitlements and wage levels that exist to reward full-time, permanent, meritorious and qualified employees who have committed to roster availability.⁹⁰

[172] We accept the validity of those submissions.

[173] What may have been a well-intentioned proposal to enhance the remuneration of casual Bus Operators and to deal with some perceived problems in attaining a traineeship, would, we believe, result in serious and undesirable outcomes.

[174] The ARTBU has failed to advance a case to persuade the Full Bench to grant the orders sought. The Application is dismissed.

⁸⁸ *WorkPac v Skene* (2018) 264 FCR 536, 574 [170].

⁸⁹ *WorkPac Pty Ltd v Rossato* [2021] HCA 23, [96].

⁹⁰ Respondent's closing submissions filed 6 July 2022, [16].