[2010] FWA 2959

FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.158 - Application to vary or revoke a modern award

Liquor, Hospitality and Miscellaneous Union
(AM2010/41)

Cleaning services

COMMISSIONER WHELAN MELBOURNE, 18 MAY 2010

Application to vary the Cleaning Services Award 2010.

[1] This is an application by the Liquor, Hospitality and Miscellaneous Union (LHMU) to vary the provisions of the *Cleaning Services Award 2010.*[1] The variations relate to Schedule A—Savings provisions, and in particular to those parts of Schedule A which refer to employees previously employed under the provisions of the *Caretakers and Cleaners Award*,[2] the *Private Contractors (Public Hospitals) Award*[3] and the *Health Services Employees Award*[4] all of which were NAPSAs (Notional Agreement Preserving a State Award) having application in the State of South Australia.

[2] During the course of the proceedings a number of issues were able to be resolved by agreement between the LHMU and the Building Services Contractors Association of Australia (BSCAA) concerning the application of both Schedule A and Schedule B—Transitional provisions – other than shopping trolley collection contractors, and amendment to those Schedules agreed.

[3] The issues still in dispute concern the appropriate saved rate for employees engaged as casuals who work on weekends or public holidays and were previously engaged under the NAPSA known as the *Caretakers and Cleaners Award* and employees engaged as casuals and who work on weekends or on shifts as defined in the NAPSAs known as the *Health Services Employees Award* and the *Private Contractors (Public Hospitals) Award* (the Health Services Awards).

[4] The LHMU claims that the wording of the awards and their application in South Australia mean that the shift penalty, weekend penalty or public holiday penalty as the case may be, is applied to the base rate plus the casual loading of 20%. The BSCAA states that the loading and the penalty rate should be separately applied to the base rate.

The submissions

[5] Ms Harrison for the LHMU referred to the wording of the relevant award provisions. The *Caretakers and Cleaners Award* as at 31 December 2009 was the product of a section 99 review under the *Fair Work Act 1994 (SA)*.

[6] Clause 5.2 of the award provides, *'The minimum rates of wages payable under this award are contained in Schedule 1'*.

[7] Schedule 1 sets out the minimum rates of wages for work in ordinary time and at S1.4.2 provides, *'A cleaner in casual employment = 1/38th of the weekly rate plus 20 per centum'*.

[8] Ms Harrison also referred to clause 6.4 which deals with *'Saturday, Sunday and Public Holidays for Cleaner'*. Clause 6.4.1 titled *'Cleaners employed at retail shops'* says, *'For all time worked within the weekly hours prescribed by clause 6.1 on a Saturday before 12.00 p.m. shall be paid at the rate of time and a quarter, and for all time worked after 12.00 p.m. on a Saturday at the rate of time and a half'*.

[9] Clause 6.4.3 states, *'All time worked by cleaners on a Sunday shall be paid for at the rate of double time'*.

[10] Clause 6.4.4 states, *'All time worked on a public holiday shall be paid at the rate of two and a half times the rates ordinarily applicable'*.

[11] The LHMU submits that the penalty rates set out in clause 6.4 should be applied to the amount specified in clause S1.4.2. She referred to the case of *Donnelly v Trevor and Kathy Lambert t/a K & L Cleaning*[5] where Industrial Magistrate Cunningham set out the award entitlement and calculated the payments the applicant should have received on the basis that the Saturday penalty was applied to *'the weekly rate divided by 38 and then increased by 20% as a casual loading'*. Ms Harrison submitted that the case was directly on point. While this case was decided prior to the 2005 review of the award, the same wording that is now contained in clause 6.4 of the NAPSA is used.

[12] Ms Harrison referred to a decision of the Industrial Relations Commission of South Australia in *Re Clerks (Retail Industry) Award*.[6] This case involved penalty rates for working Saturdays in ordinary time. The amount to be paid to casual employees working on a Saturday was reserved. Ms Harrison submitted however that the calculation of penalty rates upon the casual hourly rate in other South Australian awards was acknowledged by the advocate for the employers.

[13] Ms Harrison submitted that the union was not proposing that the afternoon and night penalty rates, which are dealt with in clause 6.6 of the NAPSA should be calculated cumulatively on the casual hourly rate. Clause 6.6 refers specifically to the penalty being calculated as a percentage of *'the full–time ordinary hourly rate'*. It is the only clause in the award to use that terminology.

[14] Prior to the 2005 review of the award the afternoon and night shift amount was paid as a flat dollar amount per hour and was not percentage–based. The flat dollar amount was calculated by adding 30% or 15% to 1/38th of the total weekly rate. As a result of the section 99 review the flat amounts were converted to a percentage. The initial variation did not reflect the basis on which the penalty had previously been paid and was varied by consent in proceedings before Dangerfield C of the Industrial Relations Commission of South Australia on 2 March 2006. Ms Harrison produced transcript of the proceedings and referred in particular to passages at pages 29, 30, 33 and 34 in support of her argument that clause 6.6 was unlike the other penalty provisions in the award with respect to the way it was calculated.

[15] In relation to the *Health Services Employees Award* and the *Private Contractors (Public Hospitals) Award*, Ms Harrison submitted that there were no relevant decisions as these awards often reflected a flow–on from the state government award. The relevant provisions of both awards are essentially the same although the *Health Services Award* was subject to a section 99 review in December 2005.

[16] Ms Harrison drew attention to clause 4.2.4.2 of the *Health Services Employees Award* which specifies, *'For ordinary working hours a casual employee is entitled to be paid the hourly rate as defined for the work performed plus 20%'*.

[17] She also drew the Tribunal's attention to clause 6.4—Shift work, clause 6.5 which relates to Saturday and Sunday work and clause 6.6. Clause 6.6.3 states, *'The casual employee will be paid at the rate of 250% for work performed on a public holiday'*.

[18] The key difference in the wording between this award and the *Private Contractors (Public Holidays) Award* is that the equivalent clause to clause 6.6 also contains the sentence, *'This payment shall not include the additional 20%'*.

[19] Both awards have however been applied to exclude the 20% loading from the 250% public holiday penalty. Otherwise penalties have been calculated in the loaded rate.

[20] Ms Frenzel for BSCAA submitted that the LHMU's claim has the same characteristics as the matter determined by the Tribunal with respect to the application of public holiday penalty rates in New South Wales. She referred firstly to the SA Health Awards. The casual rate is composed of the base rate plus 20%. That loading compensates casual employees for the lack of entitlement to various forms of paid leave. This is clear from both the *Metals (Casuals) Case*[7] and the wording of the relevant clause itself. The casual loading should not be, and is not commonly, applied to penalty rates. The compensation for leave is a different industrial entitlement to compensation for the disability of working shift work or weekend work.

[21] In the federal jurisdiction the ordinary time rate, the base rate, the appropriate rate is the basis for the calculation of penalties. The casual rate is also calculated on the base rate.

[22] The metal industry awards have a different history which is now reflected in the *Manufacturing and Associated Industries and Occupations Award 2010*. Clause 14.1 of that award provides:

> *14.1 A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of one thirty-eighth of the minimum weekly wage prescribed in clause 24.1(a) for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee's all purpose rate*[8] (my emphasis).

[23] This is an important distinction because none of the former SA awards in this case characterise the casual rate as being an all purpose rate.

[24] Ms Frenzel submitted that any idea that penalty rates were payable on the casual rate in the SA Retail Award does not seem to have translated to the Modern Award.

[25] In relation to the *Caretakers and Cleaners Award* Ms Frenzel rejected the LHMU submission that because clause 6.6 was the only penalty clause to provide that the penalty was to be based on the *'the full–time ordinary hourly rate'* that where a clause was silent it should be implied that the penalty was payable on the loaded rate. In the absence of any specific wording the Tribunal should apply the same principles as it did in relation to the New South Wales public holiday rates.

[26] In relation to the case of *Donnelly v Trevor and Kathy Lambert*, Ms Frenzel accepted that the Magistrate appears to have applied the award in the way the LMHU suggests. He did not engage in any examination of the provision, the history of how it had been applied and its operation in reaching this view. At best there is merely an observation by the magistrate involved.

[27] Further the award contains a maximum payment provision at clause 6.9, *'Extra rates in this award are not cumulative so as to exceed double time and a half ordinary rates'*. On the basis the calculation of the public holiday rates on the loaded casual rate would be contrary to clause 6.9.

[28] Business South Australia also made a written submission which drew attention to the provisions of clause 6.6 of the *Caretakers and Cleaners Award* and the way in which it sets out that penalties should be applied.

Conclusions

[29] The matter in dispute here relates to how transitional provisions in the *Cleaning Services Award 2010* should be applied to certain employees in South Australia who until 31 December 2009 were covered by the provisions of three South Australian NAPSAs, being the *Caretakers and Cleaners Award*, the *Private Contactors (Public Hospitals) Award* and the *Health Services Employees Award* (the Health Services Awards).

[30] It should be stated from the outset that the provisions of the modern award with respect to the payment of casual loading and penalties rates are not in dispute.

The Health Services Awards

[31] The clauses concerning wages for casual employees in the two awards are in almost identical terms. Clause 4.2.4.2. of the *Health Services Employees Award* refers to casuals being paid *'the hourly rate as defined for the work performed plus 20 per centum'*. This same wording is used in clause in C4(b) of the *Private Contractors (Public Hospitals) Award*.

[32] Clause 5.2 of the *Health Services Employees Award* states that, *'minimum wages to be paid to employees must be in accordance with the rates set out in Schedules 2, 3, 4 and 5'*. Similarly clause B2—Wages, of the *Private Contractors (Public Hospitals) Award* uses the same wording except that the reference is to *'Schedule 1'*. Both Schedule 2 (the relevant schedule in the *Health Services Employees Award*) and Schedule 1 of the *Private Contractors (Public Hospitals) Award* set out the minimum rates of pay. In the *Health Services Employees Award* this is referred to as *'in respect of the hours of work performed in ordinary time as prescribed by this Award'*.

[33] Clause 6.4 of the *Health Services Employees Award* (clause E4 of the *Private Contractors (Public Hospitals) Award*) refers to the appropriate rates of pay for shift work. This is variously described as *'an additional payment calculated at the rate of x percentage of the appropriate ordinary rate of pay'* or *'the ordinary rate of pay prescribed'*. In the *Private Contractors (Public Hospitals) Award* it is *'calculated at the rate of x per centum of the appropriate ordinary rate of pay prescribed by Clause B2 of this Award'*.

[34] Clause 6.5 of the *Health Services Employees Award* which deals with weekend penalties also refers to *'an additional payment calculated at the rate of x percent of the appropriate rate prescribed'*. The *Private Contractors (Private Hospitals) Award* in clause E2 uses the same wording with the addition of *'by clause B2 of the Award'*.

[35] Clause 6.6 of the *Health Services Employees Award* (and clause E3 of the *Private Contractors (Public Hospitals) Award*) deals specifically with what a casual employee who works a public holiday is to be paid. It is clear from the *Private Contractors (Public Hospitals) Award* that the 250% loading excludes the 20% casual loading.

[36] There was no evidence as to how these clauses have been applied and no case law on their interpretation. It is clear however that the penalty for shift work and weekend work is to be calculated on the rate set out in the relevant schedule of rates. In both these awards those schedules do not specify an ordinary hourly rate for a casual. This is dealt with elsewhere in the award where it is specified that a loading on the hourly rate as defined (by the schedule) is to be paid in addition to the hourly rate.

[37] There is in my view nothing in these awards to suggest that the *'ordinary rate of pay prescribed'* is the rate in the Schedule plus the loading set out in clause 4.2.4.2 or clause 4(b) as the case may be. I am therefore not satisfied that the transitional provisions of the *Cleaning Services Award 2010* should contain rates which reflect a payment based on the shift or afternoon penalty being calculated on the ordinary rate of pay plus 20%.

[38] The situation in relation to the *Caretakers and Cleaners Award* is slightly different. The clause in dispute here deals with weekend penalties and public holiday penalties.

[39] Clause 6.4 makes no reference to the rate of pay on which the penalty is to be calculated, with the exception of that part of the clause which deals with public holidays. Clause 6.4.1 refers to all time worked being paid *'at the rate of time and a quarter'* or *'at the rate of time and a half'*. Clause 6.4.3 refers to work being paid for *'at the rate of double time'*. Clause 6.4.4, which relates to public holidays, states that it *'shall be paid at the rate of two and one half times the rate ordinarily applicable'*.

[40] The LHMU argues that *'the rate ordinarily applicable'* is the rate of *'1/38th of the weekly rate plus 20 per centum'*. The difficulty with this in terms of the provisions of the award is that clause 6.9 states that, *'Extra rates in this Award are not cumulative so as to exceed double time and a half ordinary rates'*. If the casual public holiday penalty was paid on the cumulative rate of *'1/38th of the weekly rate plus 20 per centum'* it would exceed *'double time and a half ordinary rates'* if the term *'ordinary rates'* is taken to mean the *'ordinary hourly rate'* for a full–time employee.

[41] The LHMU's argument is however supported by methodology adopted by Cunningham IM in *Donnelly v Trevor and Kathy Lambert*. It does not appear from the decision that there was any dispute that this was the appropriate way to calculate the rate. It would also appear from the transcript of the matter before Dangerfield C that the parties viewed it as an *'unintended consequence'* of the conversion of the flat amounts in the shift allowance to percentages that the method of calculating such allowances no longer reflected the previous position where the shift loading was calculated on the ordinary hourly rate. This suggests that if the clause was silent on the issue the penalty would be payable on the loaded rate.

[42] While there are some contradictions in the wording of the award, the inclusion of the rate for casual employees in the wages schedule and the history of the application of this provision have convinced me that in relation to the weekend and public holiday penalties the transitional provisions in relation to employees engaged under the *Caretakers and Cleaners Award* as at 31 December 2009 should be based on the relevant penalty being calculated on the basis of 1/38th of the weekly rate plus 20 per centum.

[43] The parties are requested to provide a draft order reflecting this decision and the agreed variations by close of business on Thursday 20 May 2010.

COMMISSIONER

Appearances:

L. Harrison with *C. Pullen* for the Liquor, Hospitality and Miscellaneous Union.

R. Frenzel with *G. Marr* for the Building Services Contractors Association of Australia.

Hearing details:

2010.
Melbourne:
May 12.

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[1] *Cleaning Services Award 2010* [MA000022].

[2] *Caretakers and Cleaners Award* [AN150028].

[3] *Private Contractors (Public Hospitals) Award* [AN 150117].

[4] *Health Services Employees Award* [AN150064].

[5] *Donnelly v Trevor and Kathy Lambert t/a K & L Cleaning* [1998] SAIRC 21.

[6] *Re Clerks (Retail Industry) Award* (I.82/1996, 17 May 1996 per Stevens DP).

[7] *Metals (Casuals) Case* [AAIRC, Print T4991].

[8] *Manufacturing and Associated Industries and Occupations Award 2010* [MA000010].