



DECISION

Fair Work Act 2009

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Baking Manufacturers Industry Association of Australia
(AM2010/117)

FOOD, BEVERAGE AND TOBACCO MANUFACTURING AWARD 2010

VICE PRESIDENT WATSON

SYDNEY, 18 OCTOBER 2010

Application to vary clause 31.3(c) of the Food, Beverage and Tobacco Manufacturing Award 2010 to remove an ambiguity or uncertainty - Fair Work Act 2009 s 160.

[1] This decision concerns an application by the Baking Manufacturers' Industry Association of Australia (BMIAA) to vary clause 31.3(c) of the *Food, Beverage and Tobacco Manufacturing Award 2010*¹ (the Award) pursuant to s 160 of the *Fair Work Act 2009* (the Act) to remove an ambiguity or uncertainty.

[2] At the hearing of the matter on 17 September 2010 Mr A Duc represented the BMIAA, Mr D Story represented the Australian Federation of Employers and Industries (AFEI), Ms C Estoesta represented the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) and Mr M Toner represented the National Union of Workers (NUW).

[3] The BMIAA seeks to exclude casual employees from the penalty payment for non continuous shift work provided by clause 31.3(c) of the Award. It contends that the clause is ambiguous in that it results in a significant cost increase to employers and no such clause has previously applied to the baking industry.

[4] The parties addressed the question of whether an ambiguity exists, the process leading to the making of the contested terms of the Award and the provisions of pre-existing instruments.

The relevant clause of the Award

[5] Clause 31.3 needs to be considered in its entirety. It provides:

"31.3 Shift allowances

- (a) An employee who works on early morning shift must be paid 12.5% extra for such shift;

- (b) An employee who works on afternoon or night shift must be paid 15% extra for such shift.
- (c) An employee who works on an afternoon or night shift which does not continue:
 - (i) for at least five successive afternoon or night shifts or six successive afternoon or night shifts in a six day workshop (where no more than eight ordinary hours are worked on each shift); or
 - (ii) for at least 38 ordinary hours (where more than eight ordinary hours are worked on each shift and the shift arrangement is in accordance with clauses 30.3 or 30.4),

must be paid for each shift 50% extra for the first three hours and 100% extra for the remaining hours.

- (d) An employee who:
 - (i) during a period of engagement on shift, works night shift only; or
 - (ii) remains on night shift for a longer period than four consecutive weeks; or
 - (iii) works on a night shift which does not rotate or alternate with another shift or with day work so as to give the employee at least one third of their working time off night shift in each shift cycle,

must, during such engagement, period or cycle, be paid 30% extra for all time worked during ordinary working hours on such night shift.”

[6] The clause is allegedly ambiguous in relation to casual employees, whose employment is governed by clause 13 of the Award. This clause provides:

“13. Casual employment

- 13.1** 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 1/38th of the minimum weekly wage prescribed in clause 20.1(a) for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee’s all purpose rate.
- 13.2** On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours’ work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement for less than the minimum of four hours.

13.3 An employer when engaging a casual must inform the employee that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required.
...”

Is there an ambiguity?

[7] The BMIAA submits that the clause is ambiguous because baking employers in the industry do not know what to pay casual employees who work occasional afternoon and night shifts. It submitted two affidavits in support of its application and contended that the affidavits support the argument that the clause is ambiguous.

[8] Mr Martin Sauer, a Director of Sauer’s Bakehouse Pty Ltd deposed that if he employed a casual or part-time employee for one or two nights he has to pay them time and a half for the first three hours and then double time on that shift. He said that this will involve a substantial cost increase and he is uncertain what to pay employees on transition because the clause in the Award is unclear.

[9] Mr Martin MacLennan of Bagel Boys Bakery Pty Ltd said that if he employs a casual employee he has to pay that employee the casual rate plus the shift loading. If he hires the casual employee for one or two nights he has to pay the employee time and a half for the first three hours and then double time on that shift. He also says that this will provide a substantial cost increase and he is uncertain what to pay them on transition because the Award is unclear.

[10] The application is supported by the AFEI. It contends that an ambiguity arises in relation to casual employees from the reference to successive shifts. On one interpretation this is a reference to the shifts worked on a daily basis at the workplace. A casual employee who works intermittently in a week will never work five successive afternoon or night shifts.

[11] AFEI submits that an alternative interpretation is that the mention of successive shifts is a reference to the shifts worked by the employee. If a casual employee works afternoon or night shifts for five successive engagements, even though those shifts take place intermittently over a period of weeks, the entitlement to the higher shift penalty under clause 31.3(c) does not arise.

[12] The application is opposed by the AMWU and NUW. They submit that there is no ambiguity and that it is clear that the clause applies to all employees. The AMWU submits that the identical clause is contained in the *Manufacturing and Associated Industries and Occupations Award 2010*² (the Manufacturing Award) and the absence of any allegation of ambiguity in relation to that award suggests that there is no actual ambiguity and all employees are entitled to the higher allowance unless they work five successive shifts. The unions submit that there is no basis for suggesting that the reference to employees or any other aspect of the clause does not apply to casual employees.

[13] In my view the applicant has not established that an ambiguity exists in relation to this provision. The clause adopts the wording of the Manufacturing Award in the circumstances where there were a range of alternative provisions in the award-based transitional instruments. The wording has a long history in the predecessors to the Manufacturing Award and other

awards such as the *Confectioners Award 2002*.³ The clause does not use ambiguous terms. There is no basis to suggest that casual employees are not covered by it.

[14] The argument suggested by AFEI as a basis for limiting application of the higher shift allowance to casuals who work on an intermittent basis is a tenuous one. Certainly casual employees will be impacted differently by shift work if they work intermittent shifts. However it is difficult to envisage that the drafters of this provision intended that the disabilities of working a small number of shifts would be compensated differently between full-time and casual employees in the absence of the adoption of clear words to achieve such a result. The same alleged difficulty in interpretation as for casual employees also logically applies to part-time employees. There can be no suggestion that the wording of the clause is ambiguous in relation to its application to part-time employees.

Conclusion

[15] I am not satisfied that an ambiguity exists as to the application of clause 31.3 of the Award to casual employees. The basis for the application has not been made out. The application is therefore dismissed.

[16] As the basis for dismissing the application is a failure to establish the jurisdictional basis for an application outside the reviews of modern awards this decision does not preclude the matter being raised during any future award review.

VICE PRESIDENT WATSON

Appearances:

A Duc for the Baking Manufacturers' Industry Association of Australia

D Story for the Australian Federation of Employers and Industries

C Estoesta for Australian Manufacturing Workers' Union

M Toner for the National Union of Workers

Hearing details:

2010.

Sydney.

17 September.

Printed by authority of the Commonwealth Government Printer

<Price code A, MA000073 PR502068 >

¹ MA000073

² MA000010

³ AP818086