FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.158 - Application to vary or revoke a modern award
s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
(AM2010/68)

Australian Industry Group
(AM2010/72)

MANUFACTURING AND ASSOCIATED INDUSTRIES AWARD 2010
[MA000010]

Manufacturing and associated industries

VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER HARRISON SYDNEY, 25 JUNE 2010

Application to vary clause A.4 of Schedule A - whether overtime within 'other penalty' - whether overtime excluded from phasing provisions of modern awards - application to vary standard clause 2.2 of modern awards - absorption of award monetary obligations into overaward payments - Fair Work Act 2009 ss 158, 160, 615.

Introduction

[1] This decision concerns two applications to vary the transitional provisions of the *Manufacturing and Associated Industries Award 2010*[1] (the Award). The first application, by the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) deals with the treatment of overtime. The second application, by the Australian Industry Group (AIG), deals with the issue of absorption.

[2] Both applications seek changes to the standard modern award transitional provisions and hence have implications for other modern awards. Pursuant to directions under s 615 of the *Fair Work Act 2009* (the Act) the matters were referred to this Bench for determination.

[3] The matter was heard on 16 June 2010. At the hearing Mr B Briggs represented Australian Business Industrial (ABI), Mr J Fetter represented the Australian Council of Trade Unions (ACTU), Mr A Doyle represented the Australian Federation of Employers and

Industries (AFEI), Mr S Smith represented the AIG, Ms C Estoesta and Mr G Noble represented the AMWU, Mr J Ridley represented the Chamber of Commerce and Industry of Western Australia (CCIWA), Mr A Kentish represented the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), Mr S Maxwell represented the Construction, Forestry, Mining and Energy Union (CFMEU) and Ms S Burnley represented the Shop, Distributive and Allied Employees' Association (SDA).

[4] We will deal with each matter in turn.

Overtime

[5] Clause A.4 of Schedule A to the Award provides as follows:

> **"A.4 Loadings and penalty rates**
>
> For the purposes of this schedule loading or penalty means a:
>
> - casual or part-time loading;
> - Saturday, Sunday, public holiday, evening or other penalty;
> - shift allowance/penalty."

[6] The variation sought by the AMWU is to insert the words "including overtime" at the conclusion of the second dot point. The AMWU asserts that the application is necessary to remove ambiguity and confusion regarding the operation of clause A.4 and the phasing provisions in clauses A.5, A.6 and A.7. It asserts that overtime falls within the description of "other penalty" and is therefore subject to the transitional arrangements, but that an ambiguity has arisen from a Guidance Note issued by the Fair Work Ombudsman.[2] The Guidance Note states that overtime is not an "other penalty" for the purposes of this clause and is therefore not subject to the transitional arrangements.

[7] The application is generally supported by the ACTU and the other unions represented in the proceedings. It is opposed by the AIG, ABI and the AFEI. All parties expressed the desirability of further clarity on the issue in the light of alternative interpretations that have been adopted. Concern was also expressed by the AIG that a change to the position now, when few employers would regard overtime as subject to phasing, would be costly and disruptive.

[8] In an award modernisation decision of the Australian Industrial Relations Commission (AIRC) of 2 September 2009, the Full Bench said:

> "**Model phasing schedule**
>
> **[23]** We now deal with the provisions for phasing-in changes in entitlements resulting from the making of modern awards. We received many proposals in relation to the scope of such provisions. At one extreme it was suggested that every condition in every award-based transitional instrument should be identified and preserved or

phased out in some way. That approach would lead to many pages of schedules to each award and would place an intolerable compliance burden on employers. We regard it as important to balance the need for phasing provisions against the desirability of confining the regulatory burden as much as possible. Unless the provisions are capable of being understood and applied without too much difficulty the modern award objective might be frustrated. We have decided to limit the number of matters which are governed by phasing provisions to the main matters affecting pay. Phasing provisions will necessarily be complex. By limiting the number of matters we hope to minimise complexity and reduce the scope for confusion.

[24] The matters we have decided to include in the model provisions relating to phasing are: minimum wages, including wages for junior employees, employees to whom training arrangements apply and employees with a disability, casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances. A number of parties suggested that we should include transitional provisions relating to hours of work provisions. Proposals were advanced dealing with changes in the spread of ordinary hours, starting and finishing times and the number of hours of overtime required to be worked at certain rates. While these matters are capable of affecting the pay employees receive and the costs to employers, we have decided not to include phasing provisions in relation to them. There are three reasons. The first is that an employer normally has award rights to alter starting and finishing times and other elements of ordinary hours by giving notice to the employee concerned. Changes of this nature can obviously affect overtime and shift payments. Where such rights are exercised it would be difficult to quantify the effect of the modern award in that respect. Secondly, the award flexibility provision might be too difficult to apply if matters other than those we have chosen were to be subject to transitional arrangements. Thirdly, as we have already pointed out, the greater the number of matters which are subject to transitional provisions the greater the scope for complexity and confusion in the application of the provisions.

[25] It follows from our decision to limit transitional provisions relating to phasing to the main matters affecting pay that we have rejected various proposals to adopt an overall or aggregate approach to cost or to employee disadvantage. Those proposals would leave a wide field of discretion to employers and employees to ascertain the impact of the provision in particular cases. For that reason their operation would be uncertain and the obligations would be difficult to identify and enforce."[3]

[9] In our view the clear intent of this decision was to exclude hours of work and overtime provisions from the phasing provisions. Payments for working overtime are not penalty payments falling within the second dot point of clause A.4. The application in this matter would reverse that position and must therefore be rejected. To the extent that some confusion has arisen in relation to this matter, that confusion is resolved by the AIRC decision of 2 September 2009 and this decision. We note that the Guidance Note issued by the Fair Work Ombudsman confirms that position.

Absorption

[10] AIG seeks amendments to clause 2.2 of the Award. That clause is part of the model transitional provisions which were inserted into the majority of modern awards. Those model

transitional provisions include the model commencement and transitional clause and the model phasing schedule.[4] Clause 2.2 is in these terms:

> "**2.2** The monetary obligations imposed on employers by this award may be absorbed into overaward payments. Nothing in this award requires an employer to maintain or increase any overaward payment."

[11] It seeks to substitute the following clause in all modern awards:

> "**2.2** An employer has the right to absorb any monetary obligation imposed on the employer by this award into any over-award payment/s. Nothing in this award requires an employer to maintain or increase any over-award payment."

[12] The AIG submitted that:

- Given the extent of the changes involved in the award modernisation exercise it is fair and reasonable to allow employers to absorb changed monetary obligations arising from the implementation of modern awards into overaward payments.
- So long as an employer is paying its employees at least the total amount that they are entitled to be paid under the relevant modern award, it would be unfair to require the employer to pay any more as a result of changed employer obligations and employee entitlements arising from the replacement of pre-modern instruments with modern awards.
- Unfortunately the Office of the Fair Work Ombudsman believes that the intent of the clause is unclear and, given the uncertainty which it believes exists, the Fair Work Ombudsman has decided to interpret the provision as only allowing absorption where the relevant employee agrees.
- Given the Fair Work Ombudsman's view that the absorption clause is ambiguous and/or uncertain, the AIG submits that clause 2.2 should be varied to clarify the intent.
- Modern award entitlements operate in the context of the absorption clause for the period during which the clause remains in the award (i.e. the transitional period).
- Unless the employer and the relevant individual employee have agreed in their contract of employment that an overaward payment will be maintained regardless of the terms of the relevant award (and do not change their agreement) then the absorption clause enables the employer to meet the modern award obligations by absorbing monetary entitlements into overaward payments.
- The principles in the court authorities operate subject to the absorption clause in modern awards during the transitional period.

[13] The submissions were generally supported by other employer groups. The application is opposed by the ACTU and the unions represented in the proceedings. The ACTU raised jurisdictional objections to the application and opposed the application on merit grounds. It submitted that the applicant had not established a sound jurisdictional basis for the clause it seeks to be substituted and that the contractual position that exists with various employees and their employers should not be lightly interfered with by an award provision.

[14] The AIG relied on the summary of relevant principles concerning set-off contained in a decision of the Western Australian Industrial Appeal Court in *James Turner Roofing Pty Ltd v Peters*.[5] In that case Justice Anderson summarised those principles as follows:

> "1. If no more appears than that (a) work was done; (b) the work was covered by an award; (c) a wage was paid for that work; then the whole of the amount paid can be credited against the award entitlement for the work whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary entitlement under the award.
>
> 2. However, if the whole or any part of the payment is appropriated by the employer to a particular incident of employment the employer cannot later claim to have that payment applied in satisfaction of his obligation arising under some other incident of the employment. So a payment made specifically for ordinary time worked cannot be applied in satisfaction of an obligation to make a payment in respect to some other incident of employment such as overtime, holiday pay, clothing or the like even if the payment made for ordinary time was more than the amount due under the award in respect of that ordinary time.
>
> 3. Appropriation of a money payment to a particular incident of employment may be express or implied and may be by unilateral act of the employer debtor or by agreement express or implied.
>
> 4. A periodic sum paid to an employee as wages is *prima facie* an appropriation by the employer to all of the wages due for the period whether for ordinary time, overtime, weekend penalty rates or any other monetary entitlement in respect of the time worked. The sum is not deemed to be referable only to ordinary time worked unless specifically allocated to other obligations arising within the employer/employee relationship.
>
> 5. Each case depends on its own facts and is to be resolved according to general principles relating to contracts and to debtors and creditors."[6]

[15] The different interpretations adopted by employers, unions and the Fair Work Ombudsman in relation to the interpretation of clause 2.2 establish that an ambiguity exists as to its meaning and effect. It is desirable that this ambiguity be resolved so that employers, employees, their representatives and regulatory authorities can readily ascertain the nature of award entitlements and obligations.

[16] In its decision of 2 September 2009, the AIRC said:

> "**[19]** We deal first with the issue of absorption. There was a range of views on the issue. Most employer representatives took the view that any increases resulting from a modern award should be capable of absorption into existing overaward payments. The Australian Council of Trade Unions (ACTU) and most unions took a contrary view. They argued that overaward payments should be maintained in all circumstances. Modern awards are concerned with minimum wages and conditions and not with overaward payments. It would not be appropriate, even on a transitional basis, to

> require an employer to maintain overaward payments. We have decided to provide for absorption. Of course the payments specifically regulated in the transitional provisions are not to be regarded as overaward payments. Those payments are referable to pre-modernisation obligations in award- or agreement-based transitional instruments. The model provisions will include the following:
>
> > "The monetary obligations imposed on employers by this award may be absorbed into overaward payments. Nothing in this award requires an employer to maintain or increase any overaward payment.""

[17] In our view the intent of the AIRC was clear. In clause 2.2, the monetary obligations imposed on an employer by a modern award are the monetary increases payable to an employee arising from the modern award. The overaward payments are those applying immediately prior to the implementation of the relevant clauses of the modern award. Clause 2.2 permits the absorption of the monetary increases arising from the modern award into such overaward payments when an employer is not otherwise obliged to maintain the overaward payments.

[18] The wording adopted by the AIRC is consistent with wording it previously adopted in relation to the absorption of National Wage and Safety Net wage increases. The clause is not intended to modify the principles regarding set-off established by the Courts and summarised in paragraph [14] of this decision.

[19] The intent of the clause is that where monetary obligations increase as a result of the implementation of modern awards, employers should be able to absorb those increases into existing overaward payments. Nevertheless, the award clause adopted to reflect this intent is confined to the treatment of award obligations themselves, and does not extend to regulating any additional matters in contracts of employment. There may be some examples of contractual entitlements to overaward payments irrespective of the nature and extent of award obligations. However in the vast majority of cases, it is likely no such entitlement will exist. The wording of the clause is permissive, not mandatory, and does not modify the effect of any ongoing entitlement to overaward payments. Further, the clause is a transitional clause. It does not have application beyond the transitional period.

[20] Having expressed our views as to the operation of clause 2.2, we believe that its meaning and effect is beyond doubt. We therefore do not believe that any variation to clause 2.2 in its current form is necessary or appropriate. The application by the AIG is dismissed.

Conclusions

[21] For the reasons above both applications are dismissed.

VICE PRESIDENT

Appearances:

B Briggs for Australian Business Industrial

J Fetter for the Australian Council of Trade Unions

A Doyle for the Australian Federation of Employers and Industries

S Smith with *L Davies* for the Australian Industry Group

C Estoesta with *G Noble* for the Australian Manufacturing Workers' Union

J Ridley for the Chamber of Commerce and Industry of Western Australia

A Kentish for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

S Maxwell for the Construction, Forestry, Mining and Energy Union

S Burnley for the Shop, Distributive and Allied Employees' Association

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[1] MA000010.

[2] Fair Work Ombudsman, GN7 - Transitional arrangements in modern awards, 31 May 2010.

[3] [2009] AIRCFB 800.

[4] [2009] AIRCFB 800 at [18]; [2009] AIRCFB 943 at [3].

[5] [2003] WASCA 28.

[6] Ibid at [21].