

FAIR WORK COMMISSION

4 yearly review of modern awards – Transport Industry Awards

Matter No. AM2018/15

RE *Airline Operations-Ground Staff Award 2010*

SUBMISSIONS IN REPLY FOR THE TRANSPORT WORKERS' UNION OF AUSTRALIA

INTRODUCTION

1. The Transport Workers' Union of Australia ("the TWU") makes these submissions in reply to submissions filed by the Ai Group¹ and on behalf of the Qantas Group² in relation to the variation sought by the TWU to the *Airline Operations – Ground Staff Award 2010* ("the Award").

EFFECT OF THE VARIATION SOUGHT

2. As is made clear in the union's initial submissions, the TWU seeks a variation to clause 32.1 of the Award in order to address the disparity in overtime rates between continuous and non-continuous shiftworkers and to avoid the potential anomaly between overtime and ordinary rates for Sunday work. That is the only intended effect of the variation sought.
3. The Ai Group, but not the Qantas Group, assert that the variation proposed by the TWU would have additional consequences in addition to correcting the disparity in overtime rates between continuous and non-continuous shift workers, namely: (1) it would create a new entitlement to the payment at double time where a shiftworker has had less than 48 hours' notice of the shift; and (2) it would "potentially" re-characterise ordinary hours of work performed by shiftworkers as a result of a change to their roster where they have not been given at least two days' notice of the change as overtime.³

¹ Ai Group Submissions dated 1 March 2019.

² Qantas Group Submissions dated 26 February 2019.

³ Ai Group Submissions, para 22(b) and (c).

4. The variation sought by the TWU is not intended to and does not have any of the additional consequences raised. It appears Ai Group's submission fixes on the proposed insertion in clause 32.1(c) of reference to the ordinary hours of shiftworkers being "fixed in accordance with clauses ... 28.3 and 30.2 for a shiftworker." This insertion is obviously appropriate. At present, despite the fact that clause 32.1 applies on its plain terms to shiftworkers, "ordinary hours" is defined in clause 32.1(b) solely by reference to clause 28.2(c). Clause 28.2(c) addresses ordinary hours of work for a day worker.
5. The additional text proposed for by the TWU merely reflects the fact that the ordinary hours for shiftworkers are fixed by the combined operation of clause 28.3 (containing general provisions for the quantum of ordinary hours) and 30.2 (containing specific provisions for rostering of shiftworkers). The definition for the purposes of clause 32.1 would not create a new entitlement to payment at double time when a shiftworker is given less than 48 hours' notice of shift change. Clause 30.2(c) already provides as follows:

(c) Where an employee is required to change their shift, the employee must be given at least two days' notice of the change. If this notice is not given, the shiftworker must be paid for the shifts worked during the two-day period at the rate of double time.
6. A shiftworker is required to be paid at double time for shifts worked in circumstances in which less than two days' notice has been given of a change in shift by clause 30.2(c) as it exists. The proposed reference to clause 28.3 and 30.2 would not create some new entitlement to payment at double time as apparently feared by the Ai Group.

APPROACH TO THE REVIEW

7. The Ai Group submissions refer at some length to the principles set out by the Full Bench in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788. In particular, Ai Group rely upon three statements, namely:
 - (a) The statement (at [23]) that "*where a significant change is proposed it must be supported by a submission which addresses the relevant*

- legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation”;*
- (b) The statement (at [24]) that *“in the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made”*; and
 - (c) The statement (at [36]) that *“the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.”*
8. The principles stated by the Full Bench were intended to provide general guidance to the award review process mandated by s 156 of the Act. Obviously, the type of evidence and justification that will be required to warrant a particular variation to a modern award will depend upon the nature and significance of the variation sought and the history of the relevant provision and its treatment in the award modernisation process.
9. The application of the principles stated by the Full Bench in the present matter must be undertaken in the following context:
- (a) The variation sought, whilst it is accepted goes beyond a mere “clarification” of the provisions, is not a significant change to the award provisions. The effect of the variation is merely to align the overtime rates for continuous and non-continuous shiftworkers as had been the case prior to the award modernisation process.
 - (b) All parties appear to accept that there is at least some difficulty with the present provisions of the Award to the extent that a conflict arises between the overtime provision and payment for Sunday work in clause 30.7 in that, on a strict reading of clause 32.1(a), the overtime rate may be lower than the ordinary time rate on Sundays.⁴
 - (c) No industrial party has put forward any evidence that the proposed variation would cause any adverse effect on business, employment or industry. The sole suggestion by Qantas involves speculation that the variation may have an impact on the application of the BOOT to a Jetstar

⁴ Qantas Group Submissions, para 80.

- enterprise agreement without Qantas disclosing the pattern of work or payments made to Jetstar employees.
- (d) No party has advanced a principled basis upon which, in the context of this Award, a distinction should be made with respect to the overtime rates for continuous and non-continuous shiftworkers. At best, it is suggested that there may be additional demands on employees as a result of continuous shiftwork as such. Those submissions do not engage with why those demands should result in a different overtime rate for the first two hours.
 - (e) None of the materials produced in relation to the award modernisation process disclose any actual consideration was given or explanation provided in relation to changing the overtime rates from a position where all shiftworkers were paid overtime at double time to introduce a distinction between the rates payable to continuous and non-continuous shiftworkers.
10. In those circumstances, the Full Bench would not adopt an approach which erects an insurmountable barrier to a variation being made to the Award as is effectively urged by the Ai Group.

AWARD MODERNISATION PROCESS

11. The submissions of the Ai Group and the Qantas Group refer at length to the award modernisation process in relation to the Award.⁵ The submissions notably do not identify any consideration or justification being given to inserting different overtime rates for continuous as opposed to non-continuous shiftworkers either by the industrial parties or the Commission. The submissions support the proposition that the change was not intended.
12. The Ai Group submits that the TWU, and the other unions, seek to rely on provisions in only two pre-reform awards to justify the variation sought.⁶ The submission is incorrect. As described in the Statement of Ms Walton, each of the relevant pre-reform awards provided for the payment of overtime at a rate of double time for all shiftworkers.⁷ The fact that the *Airline Operations (Transport*

⁵ Ai Group Submissions, para 42-53; Qantas Group Submissions, para 14-68.

⁶ Ai Group Submissions, para 38-41.

⁷ Statement of Therese Walton dated 29 January 2019, para 12-17.

Workers' Award 1998 and the *Overseas Airlines (Interim) Award 1999* otherwise provided some different conditions as between continuous and non-continuous shift workers⁸ underlines that a common rate of overtime of double time for all shiftworkers was the industry standard across all relevant awards.

13. The manner in which the reference to payment of all overtime at double time for “continuous shiftworkers” only was inserted into the Award during the award modernisation process very strongly supports the conclusion that it was not intended. As noted by Qantas, the draft award initially proposed by Qantas (supported by the Ai Group) replicated the provision of the *Airline Operations (Transport Workers' Award 1998* and provided for payment of overtime rates at double time for all shiftworkers and not only continuous shiftworkers.⁹ The reference to “continuous shiftworkers” arose from the ACTU submissions and draft award filed on 18 March 2009.
14. The Qantas Group and Ai Group subsequently adopted the form of the clause in a draft award filed on 1 April 2009. The draft award prepared by Qantas included various drafting notes on the clause without commenting at all on the insertion of a reference to “continuous shiftworker” only being entitled to all overtime at double time.¹⁰ The fact that the limitation on entitlement to all overtime at double time arose from the submissions of the ACTU and other unions and not employer groups and occurred without apparent explanation or justification is a persuasive indication that the change from the pre-reform awards was not an intended or conscious change in the drafting of the Award.
15. The Qantas Group and Ai Group submissions in relation to the award modernisation process ultimately rest on the proposition that it was a thorough process during which industrial parties had the opportunity to make submissions in relation to the proposed draft awards and Exposure Draft. In addition, the submissions note that the award modernisation process involved an attempt to “strike a balance” in relation to the conditions contained in pre-reform instruments and inevitably involved a degree of “swings and roundabouts”. It is submitted that the TWU, and the other unions, are endeavouring to “cherry pick” a beneficial condition from the primary pre-reform awards without taking into account that

⁸ See *Airline Operations (Transport Workers' Award 1998*, cl 30.2.1 (meal breaks) and *Overseas Airlines (Interim) Award 1999*, cl 20.2 (meal breaks).

⁹ Set out at Qantas Group Submissions, para 19.

¹⁰ Qantas Group Submissions, para 32.

various conditions were inserted into the Award involving compromise between the positions of the parties.¹¹

16. Those submissions may have some force if there was evidence that the change to the overtime rate for non-continuous shiftworkers was drawn from a particular pre-reform award, was suggested by any employer group or stakeholder or was part of a compromise involving a change to some other provision of the Award. In the absence of any suggestion that a relevant pre-reform award distinguished between overtime rates for continuous and non-continuous shiftworkers, there is no basis to suggest that the change was part of a “swings and roundabouts” approach. It may be correct to say, as Qantas does, that the modern award was “never intended to simply be a collation of the most beneficial terms of a primary pre-reform (non-enterprise) awards”.¹² The fact is, however, that no identified pre-reform award contained the distinction between overtime rates for continuous and non-continuous shiftworkers.
17. The TWU, and the other unions, are not seeking to “cherry pick” a particular condition which was dealt with as part of the award modernisation process on the basis of contending submissions or evidence as to the appropriate condition. The TWU has identified that a particular provision, which is ambiguous in its terms and does not sit well with other provisions of the Award, which appears to have been introduced without any historical precedent and without explanation or justification.

MODERN AWARDS OBJECTIVE

18. The Ai Group submissions address at length the modern awards objective by reference to the subparagraphs of s 134(1) of the Act.¹³ As is well known, the modern awards objective requires the Commission to ensure that the modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions of employment taking into account the various considerations listed in s 134(1). The history and justification (if any) of a provision in a modern award is clearly relevant in assessing whether the award,

¹¹ Ai Group Submissions, para 46-47; Qantas Group Submissions, para 53-58.

¹² Qantas Group Submissions, para 57.

¹³ Ai Group Submissions, para 54-108.

containing that provision, ensures a fair and relevant safety net of terms and conditions of employment.

19. The fact that the distinction between the overtime rates for continuous and non-continuous shiftworkers had no historical precedent in the relevant industry and appears to have been introduced without any explanation is relevant in assessing whether the provision ensures a fair safety net for the purposes of the modern awards objective. Similarly, it is relevant in assessing whether the Award provides a fair safety net of conditions to note that neither the Ai Group nor Qantas attempt to justify the distinction in overtime rates for continuous or non-continuous shiftworkers on any principled or practical basis associated with the nature of the work undertaken by continuous shiftworkers.
20. To the extent it is submitted that continuous shiftworkers suffer greater disability or disruption to personal life as a result of working a roster pattern that, potentially at least, involves work carried on with consecutive shifts of employees throughout the 24 hours of each of at least six consecutive days,¹⁴ the submissions do not assist. The submissions do not attempt to identify any additional disability involved in working overtime for a continuous as opposed to a non-continuous shiftworker. Any additional disability involved in working within a business operating continuous shifts is presumably compensated for by other provisions of the Award irrespective of whether the continuous shiftworker is required to work overtime, for example, by the provision of additional leave.
21. It is appropriate to comment briefly on the submissions of the Ai Group in relation to some of the subparagraphs of s 134(1) of the Act. Firstly, s134(1)(b) refers to the need to encourage collective bargaining. The Ai Group's submissions complain about an asserted "continuing rise to the minimum floor of entitlements."¹⁵ The complaint appears to be directed at other variations made to the Award or other modern awards rather than the variation currently at issue. It could not be suggested that aligning the overtime rates for continuous and non-continuous shiftworkers would have a meaningful impact on the incentives to engage in collective bargaining.
22. Secondly, s 134(1)(da) requires the Commission to take into account the need to provide additional remuneration for working overtime, unsocial, irregular or

¹⁴ Ai Group Submissions, para 93-94; Qantas Group Submissions, para 74.

¹⁵ Ai Group Submissions, para 78-79.

unpredictable hours, weekends or public holidays or shifts. It is accepted that s 134(1)(da) does not necessarily require additional remuneration be contained in a modern award. However, the subsection supports award provisions which provide for additional remuneration for overtime. The subsection also requires consideration not only as to whether some additional remuneration is provided for but also as to whether the rate of additional remuneration provided for in the award is adequate or appropriate: see, for example, *Re 4 Yearly Review of Modern Awards — Penalty Rates* [2017] FWCFB 1001 at [202].

23. Thirdly, s 134(1)(f) requires the Commission to take into account the likely impact on business, including productivity, employment costs and the regulatory burden. In this respect, it is notable no evidence has been advanced by any employer or employer group identifying the variation sought would have a significant impact on business. Whilst an award review proceeding may not involve conventional concepts of onus, the Full Bench is able to take into account the absence of any evidence at all of an adverse impact on business which would result from the variation. Qantas accepts that generally the enterprise agreements which cover its employees provide for double time overtime for shift workers whilst noting the exception of an agreement applying to Jetstar.¹⁶ Even that agreement does not, however, distinguish between continuous and non-continuous shift workers for the purposes of overtime entitlements.
24. Fourthly, s 134(1)(g) requires that the Commission take into account the need to ensure a simple, easy to understand, stable and sustainable modern award system. In this respect, it is noted that Qantas accepts that the interaction between clause 32.1 and 30.7 is unclear and may lead to the undesirable result that overtime hours on a Sunday are paid at a rate which is less than the substantive portion of a regular Sunday shift.¹⁷ It is clear that some variation must be made to the Award to address at least that difficulty in the drafting of the award provisions.
25. For the reasons set out in the TWU's earlier submissions, the variation sought would satisfy the modern awards objective by correcting an apparently unintended and unexplained distinction between the overtime rates for continuous and non-continuous shift workers.

¹⁶ Qantas Group Submissions, para 70.

¹⁷ Qantas Group Submissions, para 80.

Transport Workers' Union of Australia

Dated: 11 June 2019