[2011] FWA 5985

FAIR WORK AUSTRALIA

DECISION

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

Racing and Wagering Western Australia
(AM2011/28)

State and Territory government administration

COMMISSIONER WILLIAMS PERTH, 9 SEPTEMBER 2011

Application to vary clause 21 and 23 of the State Government Agencies Administration Award 2010.

[1] This decision concerns an application by Racing and Wagering Western Australia (RWWA) pursuant to s.160 of the *Fair Work Act 2009* (the Act) to vary clause 21 and 23 of the *State Government Agencies Administration Award 2010* [MA000121] (the Award).

[2] The relevant provisions currently in the Award are:

Part 5—Hours of Work and Related Matters

21. Ordinary hours of work and rostering

21.1 The ordinary hours of work must be 38 per week, to be worked over five days, Monday to Friday, between the spread of hours of 7.00 am to 6.30 pm

21.2 Actual starting and finishing times to be arranged by work rules at the workplace.

22. Breaks

22.1 A meal period of not less than 20 minutes must be taken between 12 noon and 2.00 pm provided that not more than five hours must elapse after the commencement of work and the taking of such meal period.

22.2 Where work on any day continues beyond the period of normal working hours, a second meal break of not less than 20 minutes must be taken if work continues for two hours or more.

22.3 An employer may stagger the time of taking a meal break to meet operational requirements.

23. Overtime and penalty rates

23.1 Where an employee is required to work outside ordinary hours of duty, the employee will be entitled to receive an allowance (or time off) as prescribed.

23.2 An employee in receipt of a salary in excess of that prescribed for the top of Administrative Officer Grade 6 will not be eligible to receive payment for overtime worked.

23.3 The hourly rate for overtime must not exceed that calculated on an annual salary appropriate to the salary prescribed for the top of Administrative Officer Grade 4.

23.4 The employer may, on the application of an employee, grant time off (on an hour for hour basis) in respect of overtime performed by that employee. No time off will be granted in respect of any work for which payment has been made.

23.5 Monday to Saturday

All time worked outside ordinary hours must be paid at the rate of time and a half for the first three hours and double time thereafter.

23.6 Sunday

All time worked on Sunday to be paid at the rate of double time.

23.7 Public holidays

Where an employee works overtime on a gazetted public holiday, the employee must be paid at the rate of double time and a half for time worked in excess of ordinary hours and at the rate of time and a half additional in respect of work performed during the normal daily hours.

23.8 Shiftwork

An employee rostered to work in accordance with a shift roster will be paid the following loadings in addition to their ordinary rate of pay:

(a) **Afternoon shift**, being an unbroken period of work finishing after 6.30 pm and at or before midnight—15%;

(b) **Night shift**, being a unbroken period of work finishing after midnight and at or before 8.00 am:

(i) for a rotating shift—15%; and

(ii) for a non-rotating shift—30%.

(c) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

[3] The Applicant seeks to have the Award varied in the following manner:

1. By inserting, in clause 21.1 after the words 'The ordinary hours of work', the words:

   'except for shiftworkers,'

2. By inserting, after current sub-clause 23.8, the following two new sub-clauses:

   '23.9 A shiftworker who is required to perform rostered time of ordinary duty on a Saturday or Sunday will be paid an allowance as follows:

   (a) When required to perform such duty on a Saturday (except a public holiday), an additional allowance at the rate of 50% of the appropriate hourly rate for each hour of duty; and

   (b) When required to perform such a duty on a Sunday (except a public holiday), an additional allowance at the rate of 100% of the appropriate hourly rate for each hour of duty.

   23.10 The penalty and overtime rates within this clause are not cumulative. If an employee is entitled to more than one overtime or shift or weekend penalty rate, he or she will be paid the highest single penalty rate applicable to the period of time worked.'

[4] It is not disputed that for the purposes of s.160(2) that the Applicant is an employer that is covered by the Award.

[5] All potential interested parties concerned with the Award have had an opportunity to respond to the application. The only party that has participated is the CPSU (the Respondent) and their submission is detailed below.

Background

[6] The factual background is largely agreed as follows.

[7] On 29 June 2009, the Australian Industrial Relations Commission (AIRC) stated its intention to make a State Government Agencies Administration Award as part of the Stage 4 Award Modernisation process: *Award Modernisation Decision* [2009] AIRCFB 641 (29 June 2009).

[8] On 24 July 2009, the Community and Public Sector Union - SPSF Group (CPSU) made submissions to the AIRC relating to a proposed modern award covering State government agencies administration. The CPSU included, in its submissions, a draft award. The draft award contained certain provisions covering shiftworkers.

[9] On 28 August 2009, Workforce Victoria made submissions to the AIRC relating to a proposed modern award covering State government agencies administration. The submissions included a draft award. The 'Overtime and Penalty Rates' clause (clause 23) in this draft was taken from the *Victorian State Agencies Award 2003* and is almost identical to clauses 23.1 to 23.7 of the modern award that was ultimately made — the *State Government Agencies Administration Award 2010*. The draft award submitted by Workforce Victoria did not include a provision relating to shiftworkers.

[10] On 22 September 2009, Workforce Victoria and the CPSU jointly lodged a revised draft award covering State government agencies administration. The 'Overtime and Penalty Rates' clause (clause 23) in this draft was taken from the previous draft submitted by Workforce Victoria and did not include a clause governing shiftwork. The 'Ordinary hours of work and rostering' clause (clause 21) was also taken from the previous draft submitted by Workforce Victoria (rather than the CPSU draft) and did not contemplate shiftworkers.

[11] On 25 September 2009, the AIRC determined not to make a modern award covering State government agencies administration: *Award Modernisation Decision* [2009] AIRCFB 865 (25 September 2009) at paragraphs 252 — 262.

[12] On 16 October 2009, the CPSU made further submissions to the AIRC requesting that a modern award be made to cover State government agencies administration. The CPSU listed Racing and Wagering Western Australia (RWWA) as a body that would be covered by such an award at paragraph 7.

[13] At a hearing on 29 October 2009, the Full Bench of the AIRC discussed the making of a State government agencies administration award. Justice Giudice noted (at paragraph 1871) that if the AIRC decided to make an award covering State government agencies administration, 'a draft...will have to be done fairly quickly'. Workforce Victoria submitted (at paragraph 1864) that 'there would be opportunity once the award is made for a variation to the award given the circumstances'.

[14] On 9 November 2009, the AIRC decided it was appropriate for a modern award covering State government agencies administration to be made: *Award Modernisation Decision* [2009] AIRCFB 917 (9 November 2009). Along with its reasons, the AIRC published an Award exposure draft which was expressly based on the joint draft submitted by the CPSU and Workforce Victoria. The clauses relating to Ordinary hours of work and rostering and Overtime and Penalty rates in the exposure draft were taken from the CPSU/Workforce Victoria draft and did not contemplate shiftworkers.

[15] On 27 November 2009, the CPSU made further submissions to the AIRC requesting various amendments to the Award exposure draft including amendments to clause 23 — Overtime and Penalty Rates. Specifically, the CPSU requested that the following changes should be made:

1. a further clause 23.8 be included setting down a maximum amount for hours per day worked;

2. a further clause 23.9 be included relating to shiftwork; and

3. a further clause 23.10 be included, with the clause stating as follows:

'The penalty and overtime rates within this clause are not cumulative. If an employee is entitled to more than one overtime or shift or weekend penalty rate, he or she will be paid the highest single penalty rate applicable to the period of time worked'.

[16] However, the CPSU did not request (and so the Full Bench did not consider) that:

1. clause 21 be amended to exclude shiftworkers; or

2. a further subclause be included in clause 23 governing loadings for shiftworkers whose ordinary hours of duty fall on Saturdays or Sundays.

[17] On 4 December 2009, the AIRC made the Award: *Award Modernisation Decision* [2009] AIRCFB 945 (4 December 2009). In its decision, the Full Bench stated that it had 'not been persuaded to include other proposals which did not form part of the original joint document'. However, an additional clause 23.8 Shiftwork was included in the Award.

Submissions of the Applicant

[18] Under section 160 clauses 21 Ordinary hours of work and rostering and 23 Overtime and penalty rates of the Award may be varied to remove an ambiguity or uncertainty or to correct an error.

[19] If provisions of an award are unclear in their application because of the overall drafting of the award, or because a literal application of the provisions would have a result that appears to be unintended, an ambiguity or uncertainty can arise.

[20] Clause 21 of the Award, when read with clauses 23.5 and 23.6, is ambiguous as it suggests that a shiftworker who works on a Saturday or Sunday or outside the hours of 7:00am to 6:30pm Monday to Friday is entitled to overtime, despite the fact that these hours may form part of that shiftworker's rostered ordinary hours.

[21] RWWA submits clause 23 of the Award is ambiguous or uncertain in the sense that it does not make it clear, where an employee is entitled to two different penalty or overtime rates, which rate applies to the employee, or whether or not the rates should be cumulative.

[22] Alternatively RWWA submits that the failure to include the proposed clause 23.10 from the CPSU's submissions of 27 November 2009 which expressly clarified that the overtime rates and penalty rates were not cumulative was an error by the Full Bench.

[23] The RWWA’s proposed variation is in line with the Awards objective set out in section 134(1) of the Act, in particular sections 134(1)(f) and 134(1)(g), because the Award as

it currently stands will have a significant impact on RWWA's business by increasing RWWA's labour costs by approximately 18-24%[1] and clauses 21 and 23 of the Award as they currently stand are not simple, easy to understand, stable or sustainable. This is evident from the different interpretations currently adopted by RWWA and the CPSU in relation to the meaning and effect of these clauses.

[24] The CPSU has submitted that clauses 21 and 23 of the Award are not individually ambiguous or uncertain. The effect of this is that a shiftworker who works on a weekend (as part of their ordinary shift) is entitled to both a shift loading and an overtime penalty.

[25] The Applicant submits this is too narrow an approach. If there was a mechanism in the Award that dealt with the interaction of the applicable loadings and penalties, as is the case in most other modern awards, there would be no ambiguity. However, unusually, the Award is silent on this issue.

[26] General industrial practice is that ordinary hours for shiftworkers are either separately defined, and/or there is a provision making clear that shift penalties only apply during ordinary hours (not during overtime hours). This is reflected in a number of modern awards covering work similar to the work the Applicant's employees undertake. See for example:

- *Clerks - Private Sector Award 2010* - clauses 27.1(a)(i) and 28.7;
- *General Retail Industry Award 2010* - clauses 29.2(a) and 30.3;
- *Contract Call Centres Award 2010* - clause 24.7(c).

[27] This is also reflected in the transitional award which previously applied to the Applicant, the *Government Officers Salaries, Allowances and Conditions Award 1989 (WA)*: see clauses 20(3)(b) and 21(2)(a) and (b).

[28] The Award is an industry award that 'covers State public sector employers...and their employees in the classifications listed in clause 14'. The exposure draft to the Award dated 9 November 2009 (Exposure Draft) and the joint submission by Workforce Victoria and the CPSU dated 22 September 2009 (which was largely based on an existing Victorian state award) did not include shift work provisions. This was presumably because workers in the Victorian public sector generally do not perform shiftwork.

[29] The evidence is that the Applicant, due to the nature of its business, requires a significant number of its employees to undertake shiftwork. The work undertaken is largely of an administrative nature, but regularly includes Saturday work associated with race meetings and also Sundays and public holidays. However, it does not operate the 'rotating shifts' common to the mining or manufacturing industries.[2]

[30] The Applicant submits the only way the application of the Award can be made clear and in line with general industrial practice, is for the Award to be amended so that first the hours that attract a shift penalty are identified and then a mechanism is included to deal with multiple applicable loadings and penalties. The variation sought by the Applicant achieves these objectives, whilst also ensuring employees are remunerated fairly for shiftwork performed on weekends.

[31] The Applicant also submits that a modern award may be varied where there has been a clerical error in the making of the award.[3] It may also be varied where a drafting oversight has an 'unintended consequence' for a party covered by that award. [4]

[32] The Applicant submits that the omission of a 'non-cumulative' clause in respect of the shiftwork provisions is an error.

[33] During the award modernisation process, the CPSU made a submission (27 November 2009) (CPSU Submissions) in respect of a number of clauses, including clause 23 of the Exposure Draft. Paragraph 18 of the CPSU Submissions reads:

> *'We also propose additional sub-clauses to Clause 23 as follows (using the present numbering in the exposure draft):*
>
> *23.8 A maximum of 10 hours may be worked in any one day, inclusive of a meal break, and an employee will not be recalled to duty until at least 10 hours have elapsed since the conclusion of his or her previous period of work;*
>
> *23.9 An employee rostered to work in accordance with a shift roster shall be paid the following loadings in addition to his or her ordinary rate of pay:*
>
> ***Day shift**, being an unbroken period of work commencing at or after 6.00 am and finishing at or before 6.00 pm — 0%.*
>
> ***Afternoon shift**, being an unbroken period of work finishing after 6.00 pm and at or before midnight —15%.*
>
> ***Night shift**, being an unbroken period of work finishing after midnight and at or before 8.00 am, where this is a rotating shift— 15%.*
>
> *Night shift, as defined above, where this is a non-rotating shift — 30%.*
>
> *23.10 The penalty and overtime rates within this clause are not cumulative. If an employee is entitled to more than one overtime or shift or weekend penalty rate, he or she will be paid the highest single penalty rate applicable to the period of time worked.'*

[34] The CPSU Submissions were the only submissions made that dealt with this clause during the post Exposure Draft consultation period.

[35] On 4 December 2009, the AIRC published the *State Government Agencies Administration Award: Award Modernisation Decision* [2009] AIRCFB 945. In its decision, the AIRC stated that it had 'not been persuaded to include other proposals which did not form part of the original joint document'. However, Clause 23 – Overtime and penalty provisions had in fact been amended. This clause was still largely identical to the Exposure Draft but with clause 23.8 added as follows:

> ***'23.8 Shiftwork***

An employee rostered to work in accordance with a shift roster will be paid the following loadings in addition to their ordinary rate of pay:

(a) ***Afternoon shift****, being an unbroken period of work finishing after 6.30 pm and at or before midnight-15%;*

(b) ***Night shift****, being an unbroken period of work finishing after midnight and at or before 8.00 am:*

for a rotating shift-15%; and

for a non-rotating shift-30%.

(c) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.'

[36] The AIRC did not provide any reasons as to why this additional clause was adopted. Nor was a reason provided for not excluding shiftworkers from the application of clause 21.

[37] These changes largely adopted those amendments proposed in the CPSU Submissions. However, there were two significant differences:

- The proposed clause 23.10 of the CPSU Submissions making the penalty rates non-cumulative was not included; and

- 23.8(c) was included, despite not having been included in any submissions or any of the draft awards.

[38] The submission that a drafting error has occurred in clause 23.8 is supported by the inclusion of clause 23.8(c). This is an annualised salary clause which was not included in any submissions or any of the draft awards. Indeed, clause 23.8(c) repeats the exact wording of the annualised salary clause found in clause 17.1(b) of the *Clerks – Private Sector Award 2010*. It has no relevance to Part 5 of the Award and should probably have been included in Part 4.

[39] The Applicant therefore submits that the failure to include proposed clause 23.10 from the CPSU submissions dated 27 November 2009 in the Award was an error and that FWA should vary the Award to correct that error.

Intention of the Parties

[40] It is clear from the CPSU Submissions that a cumulative application of penalty rates was certainly not within the reasonable expectation of the CPSU at the time the Award was made. It is disingenuous for the CPSU to now suggest otherwise.

[41] In light of the approach taken in other modern awards and the submissions that were before the AIRC at the time the Award was made, the Applicant submits it is unlikely the intention of the AIRC was for loadings and penalty rates in the Award to apply cumulatively.

[42] It was however the intention of the AIRC that because the Award was being made in haste, it could be varied once it had been made, if required (see transcripts from AIRC Full Bench hearing into award modernisation process dated 29 October 2009 at paragraphs 1864 and 1865). In light of this, the Applicant submits it would be unjust and inequitable for the Applicant to have to wait until the modern award is formally reviewed before the issue of loadings and penalties for shiftworkers is addressed.

[43] Clauses 21 and 23 of the Award need to be clarified to enable employees and employers to readily ascertain their respective rights and obligations.

[44] The Applicant submits that it would be fair and equitable for FWA to vary the Award in the manner set out in the application.

Submissions of the Respondent

[45] A submission opposing the application was made by the Community and Public Sector Union, State Public Sector Federation Group - SPSF Group and the associated bodies of the SPSF Group: the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales, the Civil Service Association of Western Australia, the Public Service Association of South Australia Incorporated and the Community & Public Sector Union Inc Tasmania (collectively referred to as the "State Associated Bodies"). I will refer to this grouping as the "CPSU".

[46] The CPSU submits that the nature of applications under s.160 is such that variations are only permissible to remove an ambiguity or uncertainty or to correct an error. The jurisdiction of the Tribunal to remove defects of this character can only be exercised if there is "an error", "ambiguity" or "uncertainty" in the Modern Award.

[47] The fact the AIRC did not include a provision sought by the CPSU in its further submissions dated 27 November 2009 (referred to in paragraph (i) of the RWWA application to vary) does not indicate an "error" in the final version of the Award.

[48] The award modernisation process under the *Workplace Relations Act 1996* was inquisitorial in character. The award modernisation process which led to the making of the Award was not a proceeding at the initiation of the parties and no interested party had a right of appearance in the making of a Modern Award.

[49] In those circumstances the failure of the AIRC to take account of the submissions of the CPSU or to place a provision in an award sought by the CPSU cannot be described as an "error".

[50] There is no "ambiguity and uncertainty" on the face of the relevant provisions of the Award.

[51] The terms of the provisions of the Award which RWWA complains are "ambiguous or uncertain" do not have that character.

[52] Further, given the terms "ambiguous" and "uncertain" are used in s.160 the common law interpretation of those words can inform the meaning of those phrases for a determination whether these conditions exist in a Modern Award.

[53] Language is said to be "ambiguous" if it is uncertain or doubtful, has a double meaning, or is capable of bearing more than one ordinary meaning.[5]

[54] Language is said to be "uncertain" where there is such internal inconsistency or omission that the Court is unable to attribute to it a sufficiently clear and precise meaning in order to identify the scope of the rights and obligation to which the parties agreed.[6]

[55] In order for a provision to be considered "uncertain" requires more than the terms are ambiguous; they must be incapable of sensible meaning.[7]

[56] The terms complained of by RWWA in its application are neither "ambiguous" nor "uncertain". On the contrary the provisions are clear.

[57] RWWA complains that the terms of clause 21 "when 23.5 and 23.6 read with clauses is ambiguous".

[58] On the face of these provisions the different penalties are to be applied cumulatively, including the application of the penalties to shiftworkers.

[59] The shiftwork provisions in the Award are contained in 23.8 and are not ambiguous or uncertain. On the plain reading of the provisions these provisions can be read together and the effect of provisions within clause 21 and 23 are that they are to be applied cumulatively.

[60] The absence of a provision that requires the different penalties not to be applied cumulatively does not provide an argument that the existing provisions are "uncertain" or "ambiguous". Rather it supports the opposite proposition - that on a plain reading of the provisions they are to be applied cumulatively.

[61] This interpretation is supported by the long standing history of penalty rates and overtime clauses of this of this nature i.e. the penalty rates for work outside of ordinary working hours and for Saturday and Sunday work. The penalties for each address separate disabilities for the particular difficulties of workers being required to work on the weekend or outside of ordinary hours. The application of the terms of clause 23 can be readily applied to the circumstances of shift workers who work on the afternoon or night shift in accordance with clause 23.8

[62] The fact that other Modern Awards provide that penalty rates and overtime are not cumulative is not demonstrative of error in the making of the Award. Nor is it indicative of uncertainty or ambiguity in this award.

[63] The existence of these provisions in other Modern Awards support an argument that, in the absence of these provisions, the penalties and over time rates of shiftworkers under the Award should be regarded as cumulative.

[64] The gravamen of the complaint of the Applicant is that it does not wish to apply the overtime and penalty rates cumulatively. That falls short of the threshold of error, ambiguity or uncertainty required of s.160.

[65] It is clear the Tribunal has discretion to correct an "ambiguity", "uncertainty" or "error" under s.160.

[66] One of the matters the Tribunal should take into account in those circumstances is that RWWA was named as an entity covered by the Award in the submissions made by the CPSU that led to the making of the Award. RWWA made no submissions on any matter during the lengthy process that lead to the making of the Award.

[67] In the circumstances where the Award reveals no ambiguity, uncertainty or error, an alternative disposition to the matters complained of by the RWWA in this application should be dealt with in the bi-annual review which is established under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ("TCPA") Schedule 6(1) which provides for a review of all modern awards "as soon as practical after the second anniversary of the Fair Work (safety net) provisions commencement day" which is 1 January 2012.

[68] It follows that provisions complained of by RWWA in this application do not exhibit any error, uncertainty or ambiguity and therefore the variation should not be made.

Consideration

[69] Modern Awards may be varied to remove an ambiguity or uncertainty or to correct an error under s.160 below:

160 Variation of modern award to remove ambiguity or uncertainty or correct error

> (1) FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
>
> (2) FWA may make the determination:
>
> > (a) on its own initiative; or
> >
> > (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award.

[70] In this matter the Applicant says that clause 21 Ordinary hours of work and rostering, is ambiguous or uncertain which is demonstrated by the fact that the Applicant has been in dispute with the Respondent because the Respondent argues the clause means an employee working in accordance with a shift roster under clause 23.8 Shiftwork and receiving either a 15% or a 30% shift loading in addition to their ordinary rate of pay will in some circumstances also be entitled to receive payment at the rate of time and a half or double time

because clauses 23.5 Monday to Saturday and 23.6 Sunday are also applicable to that employee. The Applicant says this is not the correct interpretation.

[71] The Respondent argues this interpretation, that there is a cumulative application of overtime rates and shift loadings is simply the correct interpretation of the Award and there is no ambiguity or uncertainty nor was there any error made when the Award was made in these terms.

[72] Firstly I do accept that Part 5—Hours of Work and Related Matters of the Award can be interpreted to operate as the Respondent says it does and so arguably requires the cumulative application of overtime rates and shift loadings. This however is as the Applicant submits a surprising outcome. Historically awards of this Tribunal, the Australian Industrial Relations Commission and State Industrial Commissions have commonly expressly excluded this type of outcome where it may arise. It is far from normal for an award to provide for the cumulative application of overtime rates and shift loadings.

[73] The history of the making of this Award does not disclose that any party put to the Tribunal submissions in support of the cumulative application of overtime rates and shift loadings. In fact the submissions of the Respondent to the Tribunal expressly supported what the Applicant seeks by this application, that the clause expressly state that the penalty and overtime rates within these clauses are not cumulative and that where an employee is entitled to more than one overtime, shift or weekend penalty they are paid only the highest single penalty rate applicable.

[74] When the Award was made there was no comment by the Tribunal that would support the view that the Tribunal positively intended to incorporate this unusual cumulative application of overtime rates and shift loadings in this Award.

[75] Having reviewed the history of the making of this Award and the Awards terms my conclusion is that it was not intentional that the Award was to require the cumulative application of overtime rates and shift loadings. The interpretation of clause 21 and 23 is uncertain in that it is doubtful that it is to be interpreted as the Respondent submits.

[76] Interpreting the Award is made more difficult by the fact that in clause 23.1 the Award says that where an employee is required to work outside ordinary hours of duty the employee will be entitled to receive '... *an allowance (or time off) as prescribed*.' However where additional payments are prescribed at clause 23.5 Monday to Saturday, 23.6 Sunday and 23.7 Public holidays the words used are that employees must be paid at '...*the rate of*...' either time and a half or double time depending upon the circumstances whilst the words used when referring to additional payments in clause 23.8 Shiftwork is that employees will be paid the following '... *loadings*...' being either 15% or 30% depending upon the circumstances. There is no further reference in the clauses to allowances at all. It could then be argued that the "loadings" in 23.8 Shiftwork are not "allowances" and so are not payable under 23.1 to an employee working outside their ordinary hours of duty. There is then some lack of clarity here.

[77] Given all of the above I do except as the Applicant submits that there is significant doubt as to the correct meaning of these clauses read together and in particular it is uncertain

as to whether or not there is to be the cumulative application of overtime rates and shift loadings under the terms of Part 5—Hours of Work and Related Matters.

[78] Whilst it is difficult to know with absolute certainty because detailed reasons for decision are not provided when modern awards are made, the sequence of events leading to the making of the Award and the various proposals put to the Tribunal when compared with the Award made strongly suggests an error was made in not including a provision, as was proposed by the Respondent during those proceedings, that the Award expressly exclude the cumulative payment of overtime rates and shift loadings. That such an error occurred in the final drafting is reinforced by the inexplicable inclusion of clause 23.8(c) (which deals with requirements for employers to advise employees in writing regarding the detail of annual salaries) at the end of a clause that is headed Shiftwork. Put simply 23.8(c) has no relevance to shiftwork at all and the Award drafting with this provision included at this place in Part 5—Hours of Work and Related Matters is anomalous.

[79] I conclude then that there was also an error in the drafting of this clause, as the Applicant has submitted, in omitting a provision that excludes the accumulation of overtime penalty rates and shift loadings.

[80] I am satisfied that the uncertainty and error in the Award should be remedied. The Applicant has made out a case for its application to be granted broadly in the terms it has sought.

[81] I am however concerned that the particulars of the amendment proposed by the Applicant, such that clause 21 Ordinary hours of work and rostering would expressly not apply to shiftworkers, would mean there is no statement within Part 5—Hours of Work and Related Matters as to what the ordinary hours of work for shiftworkers are.

[82] Consequently I propose to allow the parties a period of time in which to settle the terms of a draft determination that would amend these clauses consistent with the application that has been made but which also properly addresses the question of the ordinary hours of work for shiftworkers. Any amendment should also address the inconsistency in language mentioned in para [76] above. If no agreement can be reached on the terms of such a determination within four weeks of the date of this decision I shall issue a determination amending as I see appropriate.

COMMISSIONER

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[1] see Statutory Declaration of Matthew Thomas paras 32 - 37.

[2] see Statutory Declaration of Matthew Thomas paras 13 - 18.

[3] Re *Hair and Beauty Award 2010* [2011] FWA 370.

[4] *Williams re Social, Community, Home Care and Disability Services Industry Award 2010* [2010] FWA 6354 (19 August 2010).

[5] Re *Jackson* [1933] 2 Ch 237.

[6] *Meehan v. Jones* (1982) 149 CLR 57 at 589.

[7] *Upper Hunter District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436.