Shop Distributive and Allied Employees' Association

THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

AM2021/66 - General Retail Industry Award 2020

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I INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association ("SDA") refers to the above matter and the Statements of Commissioner Bissett dated 9 July 2021 and 10 August 2021.

2. The Commissioner poses four (4) questions for parties to respond to in her statement of 10 August 2021:

> (i) Does clause 11 (and cl 11.4 in particular) of the GRI Award contain any ambiguity or uncertainty or an error which may be resolved by a variation of the GRI Award pursuant to s.160 of the Fair Work Act 2009 (FW Act)?
>
> (ii) If clause 11 has changed from the provisions of the 2010 Award, how did the variation arise and was it intended?
>
> (iii) If the answer to (i) is yes, what is the ambiguity, uncertainty of error, how does it arise and how should the clause be varied to resolve the issue?
>
> (iv) Does the Australian Payroll Association have standing, in accordance with s.160(2) of the FW Act to make an application under s.160 of the FW Act. If not, should the Commission vary the GRI Award on its own motion?

II DOES CLAUSE 11 (AND CL 11.4 IN PARTICULAR) OF THE GRI AWARD CONTAIN ANY AMBIGUITY OR UNCERTAINTY OR AN ERROR WHICH MAY BE RESOLVED BY A VARIATION OF THE GRI AWARD PURSUANT TO S.160 OF THE FAIR WORK ACT 2009 (FW ACT)?

3. The relevant clause in question in the General Retail Industry Award 2020 reads:

> 11.4 An employer must pay a casual employee for a minimum of 3 hours' work, or 1.5 hours' work in the circumstances set out in clause 11.5, on each occasion on which the casual employee is rostered to attend work even if the employee works for a shorter time.

4. As noted by the deputy president in her Statement of 9 July 2021 the equivalent provision in the General Retail Industry Award 2010 stated:

> 13.4 The minimum daily engagement of a casual is three hours, provided that the minimum engagement period for an employee will be one hour and 30 minutes if all of the following circumstances apply:
> (a) the employee is a full-time secondary school student; and
> (b) the employee is engaged to work between the hours of 3.00 pm and 6.30 pm on a day which they are required to attend school; and
> (c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours; and
> (d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

5. Both provisions provide for a minimum engagement of three (3) hours. The 2010 Award provided for a lesser quantum of time, that is 1 hour and 30 minutes where all of the circumstances in 13.4 (a) to (c) were met.

6. Neither provision provided for a circumstance where an employee presented for work and had to leave at an earlier time. What was implicit in the 2010 Award is made explicit in the 2020 Award which now states "even if the employee works for a shorter time."

7. In interpreting these provisions, the Decision of the Full Bench in the Penalty Rates case is of assistance.

> [99] More recently, in Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Alcan) the High Court described the task of legislative interpretation in the following terms:
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> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.'[1]

8. While the provisions in consideration are not statutory, the principles enunciated by the Full Bench provide some assistance. In considering the text itself of both provisions there is nothing to displace the clear meaning of the text, that is the 3 hour minimum shift for a casual is an absolute. In fact, to take the ordinary meaning and considering the context and purpose of the plain language process, it is clear that the intention of the Commission was to provide clarity at 11.4 of the

[1] 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [96] – [99].

2020 Award.

9. As noted in the 9 July Statement of the Commissioner, no party took issue with the provision (namely the minimum payment for 3 hours), although the SDA made submissions about other aspects of the plain language drafting process.

10. That the Commission used such clear language and that this language has remained undisturbed since the making of the 2020 Award should be considered as persuasive as to the meaning of the provision.

11. As such, in response to question (i) as posed, it is submitted that the provision contains no ambiguity, uncertainty or error.

12. In response to question (ii) as posed, it is submitted that, as noted in 6 above, there was no substantive change to the provisions of the Award in its 2010 iteration. Rather, what was implied in the 2010 Award is made explicit in the 2020 Award.

III IF THE ANSWER TO (I) IS YES, WHAT IS THE AMBIGUITY, UNCERTAINTY OF ERROR, HOW DOES IT ARISE AND HOW SHOULD THE CLAUSE BE VARIED TO RESOLVE THE ISSUE?

13. Given the SDA's response to Questions (i) and (ii) above, it follows that the SDA's submits there is no need for the clause to be varied.

14. Nevertheless, for completeness the SDA addresses the variation sought.

15. At question 2.2 of the Form F46, the Applicant responded:

> I am writing in relation to clause 11.4 of the GRI Award in relation to paying casuals a minimum of 3 hours work. The change in the wording to the clause states that an employer must pay a casual a minimum of 3 hours work, which implies even if the employee goes home sick and works less than 3 hours then the employer must pay them 3 hours. I gather this was not the intention as an employee can then come in and after an hour say they are sick and they get paid 3 hours, so employers may be overpaying employees as a result of the change of the wording for this clause. Can you please investigate and ideally make it clearer again the Award?

16. The Australian Payroll Association bases its view on the following basis:

a. That the 2010 Award allowed for payment for less than the minimum shift of three (3) hours;
b. The 2010 Award clearly allowed for a payment for less than 3 hours for cases where an employee leaves work early due to sickness.

17. It is submitted for clarity that the Australian Payroll Association has erred in its understanding of the 2010 Award on both points.

18. Nothing in the text of the 2010 Award allows for the interpretation proffered by the Australian Payroll Association.

IV DOES THE AUSTRALIAN PAYROLL ASSOCIATION HAVE STANDING, IN ACCORDANCE WITH S.160(2) OF THE FW ACT TO MAKE AN APPLICATION UNDER S.160 OF THE FW ACT. IF NOT, SHOULD THE COMMISSION VARY THE GRI AWARD ON ITS OWN MOTION?

19. Commissioner Bissett at [24] of her 9 July Statement refers to the requirements of section 160(2) of the Act, namely

> (2) The FWC 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; or
> (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
> (d) if the modern award includes outworker terms--on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

20. Insofar as the Applicant in this matter is not a party listed under the Act, it would appear they lack the standing to make the Application. It is noted that the Commissioner made a similar provisional finding in her 9 July Statement at [25].

21. Nevertheless, it is noted that the Commission is able to consider the substance of the Application on its own initiative. However, it should make it clear that it does so on its own initiative and not because it wishes to grant de facto standing to the Australian Payroll Association in this matter.

22. In response to the last sentence of question (iv) as posed, it is submitted that while the Commission is able to consider the substance of the question posed, it should not vary the Award for the reasons identified above.