



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

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

ISS Facility Services Australia Limited

(AM2010/99)

DEPUTY PRESIDENT IVES

MELBOURNE, 23 JULY 2010

[1] This decision relates to an application made on 6 July 2010 by ISS Facility Services Australia Limited (ISS) to vary provisions of the *Cleaning Services Award 2010*¹ (the Award) pursuant to s.160(1) of the *Fair Work Act 2009*—Variation of modern award to remove ambiguity or uncertainty or correct error.

[2] I granted the application² and indicated I would provide full written reasons within a short timeframe. These are those written reasons.

[3] The application seeks variations to Schedule B—Transitional Provisions – other than shopping trolley collection contractors, in particular, the provisions relating to employees previously employed under the *Caretakers and Cleaners Award*,³ a Notional Agreement Preserving a State Award (NAPSA) having application in South Australia.

[4] During the course of proceedings a number of issues were able to be resolved between ISS and the Liquor, Hospitality and Miscellaneous Union (LHMU) relating to Schedule A — Savings Provisions.

[5] The issue that remains and is the subject of this application arises with respect to decisions of this Tribunal incorporating transitional arrangements covering employees previously employed as part-time employees undertaking shift work Monday to Friday under the *Caretakers and Cleaners Award*. These arrangements have been the subject of variations by the Tribunal on 14 December 2009,⁴ 26 March 2010,⁵ 21 May 2010,⁶ and 29 June 2010.⁷

[6] The application seeks to correct an error in the operation of Schedule B to reflect principles agreed to by the parties in relation to the transitioning of these rates.

Relevant Provisions of the Act

[7] The provision of the Act under which the application is made is as follows:

“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.”

[8] The relevant provision in the *Caretakers and Cleaners Award* is as follows:

“Clause 6.6 Afternoon and night shift work for cleaners

6.6.1 For all time worked between 5.30 pm and 7.30 am (on the following day), the ordinary hourly rates as prescribed in S1.4 of Schedule 1 shall be increased by an amount equivalent to 30% of the full-time ordinary hourly rate.

6.6.2 Provided that, for work which is regularly rostered to be performed between 5.30 pm and 10.00 pm and which is regularly rostered to be completed not later than 10.00 pm, in lieu of the rate set out in 6.6.1, the ordinary hourly rates as prescribed in S1.4 of Schedule 1 shall be increased by an amount equivalent to 15% of the fulltime ordinary hourly rate.

For example, if the full-time hourly rate is \$10 per hour (or \$12.00 per hour for casual employees) the increased rate in 6.6.1 would be \$13.00 for full-time and part time employees and \$15 per hour for casual employees. Alternatively, the increased rate in 6.6.2 would be \$11.50 for full-time employees and part-time employees and \$13.50 for casual employees.

6.6.3 The rates referred to in 6.6.1 and 6.6.2 are to be disregarded in calculating overtime, Saturday and Sunday rates, and personal leave.”

[9] Ms Frenzel for ISS Facility Services Australia Limited submits that the operation of clause 6.6 is intended to provide that a shift penalty of 30% for the ordinary hourly rate should apply for shift work performed between 5.30 pm and 7.30 am Monday to Friday and that an express exclusion should apply with respect to shift work which is regularly rostered between 5.30 pm and finishes at or before 10.00 pm. Instead, a 15% shift penalty is provided for employers undertaking this work.

[10] Ms Frenzel stated that the interpretive issues regarding the transitional provisions of Schedule B were settled in a conference between the parties held at the Tribunal on 24 June 2010. The result of the conference was that a variation was granted that inserted a clause into the Award at B.4.4—Method for determining the transitional amount. This clause is a statement of principle providing calculation methods to assist parties to the Award with calculating transitional rates and application of minimum wage adjustments to transitional rates.⁸

[11] Clause B.4.4 provides:

“B.4.4 Method of determining the transitional amount

Transitional amounts are determined by calculating the difference between the amount payable under the relevant transitional minimum wage instrument and/or award-based transitional instrument for the work performed and the classification concerned as at 31 December 2009 and the rate for the work performed and the relevant classification in this award.

...

Where a transitional amount is less than \$2:

For transitional amounts less than \$2.00, the amount is phased by 40 cents per year until the full transitional amount has been applied.

...

Where a transitional amount is greater than \$2:

For amounts greater than \$2.00, the transitional amount is divided by 5.

The transitional amount will be added to the relevant hourly rate at 1 January each year.

Transitional rate + transitional amount per annum = updated transitional rate

...

How a minimum rates adjustment is calculated and applied

When a minimum rates adjustment is made, the rate payable as per the table contained at Schedule B will be adjusted by adding the relevant minimum rates adjustment.

Where necessary, this amount will include any penalty or applicable loading.

Method of increasing transitional rate that comprehends a penalty or loading

Where the modern award prescribes a penalty or loading, that penalty or loading will be included in the additional amount added to the transitional rate in addition to the cents per hour increase described in the minimum wage adjustment. The additional amount added, where a penalty or loading applies under this award, will be the minimum rates adjustment in cents per hour plus the penalty or loading prescribed:

Transitional rate + (minimum rates adjustment penalty/loading) = updated transitional rate

...

The transitional amount will be adjusted at 1 January each year to include the transitional amount per annum and 1 July each year to include the relevant minimum rates adjustment amount as follows:

\$19.17 (transitional rate) + (\$0.69 x 1.5 to comprehend 150% loading at clause 27.2(a) of this award) + transitional amount (\$0.77) = \$20.97”

[12] In light of the operation of this clause, Ms Frenzel submitted that sub-clause B.8.5 of the Award was not complicit with the new principle.

[13] Ms Frenzel claimed that unintended errors were made with regard to Schedule—B, sub-clause B.8.5, classifications SA 2.5, SA 2.6, SA 2.7, SA 2.18, SA 2.19, SA 2.20, SA 2.32, SA 2.33 and SA 2.34.

[14] There had previously been agreement between the Award parties that, as a result of the introduction of the part time allowance in South Australia of 15% for all ordinary hours worked by part time employees, the shift penalty of 15% would be phased over the full five year transitional period. The rates currently in the award do not reflect the intention of the parties.

[15] In her submissions, Ms Frenzel indicated that the only difference between the rates currently in the award and the rates put forward in the application is “*the correct application of the transitional amount and the correct transitioning of that amount taking into account that you cannot phase the part-time allowance.*”

[16] Mr Trindade for Spotless Group supported granting the application to correct the errors and stated that he agreed with the principle expressed but had not undertaken the exercise of checking the calculations in the application. Ms Harrison for the LHMU consented to the views expressed by Ms Frenzel for ISS.

Determination

[17] It is clearly the case that Schedule B of the Award is unique in both its size and operation, and in considering the submissions put by ISS Facility Services Australia, I regard granting the variation necessary to correct the errors that have been established.

[18] Following the insertion into the Award of principles governing the method for calculating transitional amounts at B.4.4, I consider the rates at sub-clause B.8.5 for classifications SA 2.5, SA 2.6, SA 2.7, SA 2.18, SA 2.19, SA 2.20, SA 2.32, SA 2.33 and SA 2.34 need to be adjusted.

[19] I note the submissions in favour of granting the application by Ms Frenzel and support of the application from Spotless Group and the LHMU.

[20] It follows that I grant the determination pursuant to s.160(1) of the Act.

DEPUTY PRESIDENT

Appearances:

R Frenzel for ISS Facility Services Australia Limited

D Trindade for Spotless Group

L Harrison for the Liquor, Hospitality and Miscellaneous Union

Hearing details:

2010.
Melbourne:
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¹ *Cleaning Services Award 2010* [MA000022]

² PR999164

³ *Caretakers and Cleaners Award* [AN150028]

⁴ PR991646

⁵ PR995393

⁶ PR997366

⁷ PR998746

⁸ *ibid.*