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Sent: Thursday, 8 October 2020 3:47 PM
To: Chambers - Bissett C <Chambers.Bissett.c@fwc.gov.au>
Cc: AMOD <AMOD@fwc.gov.au>
Subject: AM2019/20 Matters arising from transcript of hearing of 22/9/20

Good Afternoon,

Attached is correspondence that expands on comments made within the hearing and a minor suggested correction of the transcript that at PN402 that attributes a comment to me that I think was Mr Miller.

Thank You

Garry Whackett

Proposed Variation under section 160 of the Fair Work Act 2009 to:
Manufacturing and Associated Industries and Occupations Award 2010 - Clause 32.14 and Clause 32.13

Submitted by Garry Whackett: 08/10/2020
Matter Number AM2019/20

Clarification of issues arising from the transcript of the hearing of 22/9/2020 for AM2019/20

I wish to provide this further information to clarify some aspects arising from the transcript of the hearing of 22/9/20. I trust that this can be accommodated within the Commissions protocols.

In the hearing of 22/9/2020, I put forward the view that Clause 32.13 (g) was in conflict with other legislation and therefore that created ambiguity or uncertainty within the award. The Commissioner stated that under a Section 160 application to amend the award, the Commission's power was limited to only acting if the source of the ambiguity or uncertainty came from within the award.

By my reading of Section 160 of the Act I found no such limitation that the ambiguity or uncertainty must come from within the award.

Perhaps there may be reference to the ambiguity, uncertainty or error only coming from within the award elsewhere in the Act but that restriction does not seem to come from within section 160.

EXTERNALLY CREATED UNCERTAINTY

I put forward the opinion that if clause 32.13 (g) of award MA00010 is inconsistent with guidelines such as WHS regulations which impose an obligation on an employer to provide a safe place of work then that can create confusion for a reader of the award if Clause 32.13 (g) states that a different behaviour is acceptable. It was then put that nothing in Clause 32.13 (g) prevents an employer from complying with WHS requirements. It then becomes the reader's obligation to recognise that strictly following the practice allowed within Clause 32.13 (g) would make the employer vulnerable to breaching WHS regulations.

The [model Work Health and Safety \(WHS\) laws](#) require you to take care of the health, safety and welfare of your workers, including yourself and other staff, contractors and volunteers, and others (clients, customers, visitors) at your workplace.

This includes:

- providing and maintaining a work environment that is without risk to health and safety
- providing adequate and accessible facilities for the welfare of workers to carry out their work, and
- monitoring the health of workers and the conditions of the workplace for the purpose of preventing illness or injury.

The [model WHS laws](#) have been implemented in all jurisdictions except Victoria and Western Australia.

Every employer must provide a safe workplace. There is no exception to this requirement.

INTERNALLY CREATED UNCERTAINTY OR AMBIGUITY WITHIN THE AWARD (Extract from MA00010)

32.12 Rest period after overtime

- (a) Clause 32.12 does not apply to vehicle manufacturing employees covered by clause 4.8(a)(xi). The rest period after overtime provisions for these employees are prescribed in clause 56.5 of Part 9—Vehicle manufacturing employees of this award.
- (b) When overtime work is necessary it must, wherever reasonably practicable, be arranged so that an employee has at least 10 consecutive hours off duty between the work of successive working days.
- (c) An employee, other than a casual employee, who works so much overtime between the termination of their ordinary hours on one day and the commencement of their ordinary hours on the next day that the employee has not had at least 10 consecutive hours off duty between those times must, subject to the other provisions of clause 32.12, be released after completion of the overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary hours occurring during the absence.
- (d) If, on the instructions of the employer, an employee resumes or continues work without having had 10 consecutive hours off duty the employee must be paid at 200% of the ordinary hourly rate until the employee is released from duty. The employee is then entitled to be absent until the employee has had 10 consecutive hours off duty without loss of pay for ordinary hours occurring during the absence.
- (e) By agreement between the employer and individual employee, the 10 hour break provided for in clause 32.12 may be reduced to a period of no less than 8 hours.

32.13 Call back

- (g) Overtime worked in the circumstances specified in clause 32.13 is not to be regarded as overtime for the purposes of clause 32.12 concerning rest periods after overtime, when the actual time worked is less than 3 hours on the call back or on each call back.

Please consider this situation covered by this award. The actual application of the award will often make it easier to understand than just an abstract analysis.

- I am on Standby. I have worked my normal dayshift from 7:30 am to 4:00 pm which includes 24 minutes compulsory overtime.
- From home I am called back to work to attend a customer at 11:30 pm. I return home at 2:00 am.
- Clause 32.13 (g) refers to rest breaks after working overtime whilst Clause 32.12 (d) refers to rest breaks before being recalled to work.
- Clause 32.12 (d) makes no reference to the term overtime; it does reference the accepted normal practice of a 10 hour rest break before being recalled to work. The criterion to enliven 32.12 (d) is based on **time since leaving work** and as such Clause 32.13 (g) which provides an exemption from rest break requirements after working overtime has no impact on Clause 32.12 (d).
- Clause 32.12 (d) is a standalone provision. In my case Clause 32.12 (d) would apply for any call backs between 4:00 pm when I leave work, until I have been away from work for 10 consecutive hours, which would be 2:00 am.
- Clause 32.12 (d) states that as I had not had 10 hours off duty when called back at 11:30 pm, I must be paid at 200% of the ordinary hourly rate until released from duty. Further Clause

32.12 (d) states that I'm entitled to be absent until I've had 10 consecutive hours off duty without loss of pay, therefore I am **not required at work until midday**.

- Clause 32.13 (g) says any call backs of less than 3 hours are not to be considered overtime when considering rest breaks after overtime. According to this Clause the overtime I worked between 11:30 pm and 2:00 am is not to be considered to determine my entitlement to a rest break after this overtime hence **I'm required to start work at 7:30 am as normal**.

Clause 32.13 (g) says I am expected at work at 7:30 am whilst Clause 32.12 (d) says my start time would be 12 midday without loss of pay. This example identifies conflict between Clauses 32.12 (d) and 32.13 (g) and results in ambiguity or uncertainty which validates a section 160 amendment to remove the confusion.

I submit that my suggested amendment to substitute these words for the existing Clause 32.13 (g) will effectively remove any ambiguity and be in harmony with WHS legislation. *"Any employer, recalling an employee to work after their ordinary hours have finished, must have a system of work in place to ensure any recalled employee has had the opportunity to be properly rested and free of fatigue"*.

Implication of Clause 32.12 (d) on the practice of Standby

When I am on standby I am engaged on standby for a 7 day period for every hour that I'm not rostered on my normal Monday to Friday dayshift roster. In that time, the employer places restriction on my activities when on call so that I may be available when the need arises for a return to work, it could be argued that I am never off duty. When on call, I am still on duty. If I never have 10 consecutive hours off duty as stated in Clause 32.12 (d) the pay rate of 200% may well currently apply to all hours I work on days 2, 3, 4 and 5 following the first night on standby when I have been on standby (on duty) all night until starting the next day shift. This payment has never been the practice of my employer. Apparently everybody knows this is not how the Clause was intended to be used, even if that's what the words say.

The impact of half truths and lies

It is interesting in life when one tells a lie, life becomes complicated as that lie is inconsistent with what actually happen and further lies have to be told to cover the inconsistencies created by the lie.

In my opinion Clause 32.13 (g) is inconsistent with community values and accepted practices even within the award. I crudely express that inconsistency as being analogous to a lie.

Because 32.13(g) is inconsistent with other values within the award, it throws up other anomalies and inconsistencies that then have to be explained away with more elaborate and obscure interpretations to maintain and explain those inconsistencies. That's somewhat similar to the interpretation of the exception condition in 32.14.

In the interest of correctness it appears a comment by Mr Miller was attributed to me in PN 402.

Sincerely

Garry Whackett