AM2019/20

Tuesday, 30 June 2020

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

Submitted by Garry Whackett
Matter Number AM2019/20
I wished to share my analysis of the arguments against my proposed amendment to the Standing By clause. These arguments have been offered by those opposed to and even those that apparently are supporting me in principal, but still feel a need to support the maintenance of the status quo.

This provides an opportunity for those opposed to my amendment to include their own critical analysis of my arguments in their forthcoming submissions.

The latest version of the MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2020 [MA000010] has provision to regulate the practice of having staff standing by within Clause 32.14 Standing by.

Clause **32.14 Standing by**
Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee's ordinary hourly rate for the time they are standing by.

FAIR WORK ACT 2009 - SECT 160
Variation of modern award to remove ambiguity or uncertainty or correct error
There is no doubt that the above Standing By clause is fatally flawed. My proposal is to delete the first eight words of that clause that gives rise to a universal exemption from paying the award rate.

From the Fairwork Ombudsman's document Page Reference No: K600586
This payment doesn't apply if there's a 'custom prevailing' at the workplace for employees to regularly be standing by.
'Custom prevailing' means that standing by is a routine, regular and expected part of the work.

The accepted interpretation of the Standing By clause 32.14 above is reflected in the Fairwork Ombudsman's document page reference K600586. This interpretation refers to the first eight words of Clause 32.14 and states that if standing by is a routine, **REGULAR** and expected part of my work **I do not get paid any extra**, but beyond the first eight words **if I'm REGULARLY required to hold myself in readiness to return to work I must be paid.**

Clearly the Standing By clause 32.14 has an obvious and undeniable contradiction based on the accepted interpretation as expressed within K600586.

Now that it has been established that **Clause 32.14 does contain ambiguity or uncertainty; it now becomes necessary to correct that error.**

It is my view that the ambiguity is **created by the accepted interpretation** of this provision and **NOT the wording** of this clause. This view is supported by evidence rather than an unsupported assertion.

When the ambiguity or error is corrected under S160, it is reasonable to expect the clause to read as written and intended by the author. This is quite easy to determine, as I stated above, the error does not come from the author's wording of the clause. It is the interpretation that has been applied to the clause that has caused this error. I can present a compelling case as to what the author intended.

There are only two rates of pay mentioned in clause 32.14. They are either "the employee must be paid standing by time at the employee's ordinary hourly rate for the time they are standing by" or the employee is not entitled to any payment for being on standby.

EVIDENCE TO SUPPORT MY APPLICATION

The first instance of employing an employee on standing by

Every enterprise that has a current practice of engaging employees on standby has had a FIRST OCCASION of engaging an employee on Standby under an award with the current form of the standing by provision. That is, "Subject to any custom prevailing at an enterprise". This provision has been around for about 90 years so most enterprises around today started trading within the last 90 years or there about.

This is a problem for those committed to the maintenance of the status quo for the interpretation of the standing by provision in the award.

No start up enterprise can claim to have any customs or practices on the first day of trading. NONE CAN EXIST....

The challenge for those opposed to my application is to explain how a start up enterprise with no customs or practices on start up, can then be eligible for an exemption, on the basis of meeting the criteria of having a custom prevailing when they come to pay that first employee they engaged on standby.

I was advised by a senior member of the legal profession that he thought it **might be possible** to create a custom prevailing in an enterprise on start up by including an "on call" requirement in a position description or duties statement.

That sounds like someone clutching at straws to maintain the status quo rather that the product of sound analysis.

For his suggestion to be plausible we have to accept that planning to do something, such as including an "on call" requirement in a position description, is just the same as actually having engaged someone on standby. There are very few situations under the law where, planning to do something is considered the same as having done it. I'd be quite confident this would **not** be one of those situations.

It has also been suggested that the term "enterprise" can be used more broadly. It was suggested that a custom in one enterprise may satisfy the custom prevailing criteria in another enterprise. Again, that sounds like someone clutching at straws to maintain the status quo rather that the product of sound analysis.

The term "enterprise" has a very narrow **unambiguous** meaning in the current industrial relations system. A single Enterprise Agreements applies to a single company or legal entity. If an Agreement is to apply to more than one legal entity, it then becomes a multi enterprise agreement. So when we consider the Otis Elevators appeal case, if we did accept that Otis have a custom prevailing, what relevance does that have to Jim Bobs tyre service down the road when he engages a tyre fitter to be on standby? None..

Logan vs. Otis Elevators Appeal Decision

Undoubtedly, those opposed to my proposed change will be relying on the Logan vs Otis Elevators appeal decision for support. It is my opinion that the interpretation that comes from or is reflected in the Logan vs Otis Elevators appeal decision is fatally flawed.

The vulnerability in the Logan appeal decision is that the Full Bench did not explore whether Otis's practice of not paying its employees' the standing by rate in the award, was legal or just a long standing breach of the award. Indeed in the Logan Appeal Decision, the Full Bench specifically rejected the submission that a "custom" must have existed "from time immemorial, or at least from a date before the insertion of the clause in the Award".

In adopting that position, the Full Bench could not establish if Otis was acting within the law or outside of it. The fact that a practice of not paying the award rate has existed throughout an enterprise's history means nothing, if that practice is not based on a lawful act.

This Full Bench decision either established or reflected the accepted interpretation which states if it is a normal part of your duties, your enterprise is exempt and you don't get paid any extra for being on standby. The logic says if the practice predates your employment then that is evidence enough that a custom does prevail.

Whilst that argument does seem compelling, it is flawed. While this may seem true as you go back for 5, 10 or even 15 employees, but when you get back to the first employee this argument falls apart. As stated earlier, every company that is engaging employees on standby today had a first day of engaging an employee under this award provision.

Unfortunately for those that support the maintenance of the status quo, **award compliance has to start with the first employee.**

From the Fairwork Ombudsman's definition of custom prevailing in K600586 taken from the Logan Appeal decision is *'Custom prevailing' means that standing by is a routine, regular and expected part of the work.*

On that first instant of engaging an employee on standby under this standing by provision, the enterprise had never engaged anybody on standby before. As such it would be fraudulent to claim to be exempt from paying the award rate on the basis of having a custom prevailing on that first instant. Perhaps you could claim that it is an expected part of the work, but on the first instant of engaging an employee on standby, clearly it would be a lie to claim that it is a routine or regular practice.

So when that first employee was engaged on standby, clearly there is no custom that predates his engagement on standby. **He was entitled to be paid the award rate and therefore so should every other employee that followed him.**

The Custom Prevailing Test

There is only one way in which an enterprise can satisfy the condition of having a standing by custom prevailing. That is by having a practice that predates the inclusion of this conditional standing by clause in the award.

1. **Every start up enterprise has no custom or practice** on its first occasion of engaging an employee on standby.

2. **If the first instant of employing an employee on standby is PRIOR to the inclusion of this standing by provision in the award**, no provision existed in the award at that time, so that enterprise was free to establish its own arrangements for engaging and remunerating its employees on standby. So when the standby provision was included in the award they could demonstrate they had a custom prevailing that meets the Fairwork Ombudsman's definition. They are therefore entitled to continue their existing local custom of payment for standing by in accordance with their local practice until a change of ownership.

   If the change of ownership results in a new legal entity now being the employer (a new enterprise) then that employer falls in with those enterprises **starting up after** this provision was included in the award as mentioned in paragraph 3 below.

3. **If an enterprises first instant of engaging an employee on standby is AFTER this standby provision was included in the award**, there is no custom present on start up, there is no exemption and the rate of pay is as stated in the award. The employee must be paid standing by time at the employee's ordinary hourly rate for the time they are standing by.

The vulnerability in the Full Benches decision in the Logan appeal decision is that they did not establish whether Otis's custom of not paying the award rate was actually based on a legal entitlement or just a long established breach of the award.

The vulnerability in my argument is that the commission may choose to accept these breaches of the award, as satisfying the criteria of "subject to ANY custom". Such a decision that accepts an award breach in this case as acceptable, would indicate that award provisions are conditional rather that absolute and set a precedent that on some occasions, breaching an award provision may be justified.

Even if the Commission was tempted to accept these award breaches as valid customs to avoid an inconvenient truth, we still have an issue that all new start up enterprises must face.

The Elephant in the Room or the Start up Enterprise Conundrum;

It is impossible for any new enterprise that has no customs or practices on start up, to be exempt from paying the award rate on that first instant of engaging an employee on standby on the basis of have a custom prevailing.

'Custom prevailing' means that standing by is a routine, regular and expected part of the work. It is impossible to establish a custom of having staff regularly and routinely on standby before actually engaging any employees on standby.

The Logan appeal decision looked at an established company with an established practice of not paying the award rate for standing by. The Logan appeal decision is a bit like someone has driven a square peg into a round hole. From a distance it looks OK, but when you look closely you can see it just doesn't fit.

It is plausible that **the Logan appeal decision could be true when you only look at mature companies with established practices**. The problem is, the criteria established for confirming a custom prevailing in an established enterprise, **DOES NOT** confirm the presence of a custom prevailing when you apply it to a new enterprise starting up under this awards provision.

The definition that has been accepted is *'Custom prevailing' means that standing by is a routine, regular and expected part of the work.* The start up enterprise doesn't have a standing by practice that is routine and regular so it can't meet the criteria that was relied upon to confirm that a custom does prevail in an established enterprise. It is therefore NOT exempt.

The start up enterprise cannot show the existence of a routine or regular practice of engaging staff on standby.

- A start up enterprise therefore, can't meet the requirements for an exemption that was established by the definition coming from the Logan appeal decision. Therefore the interpretation coming from Logan is not true in this example.
- If the accepted interpretation is not true in this example then that interpretation is just not true at all. All mature enterprises started off as start up enterprises at some time under this award provision. How did they become mature companies that don't pay the award rate without breaching the award?

Again, suggesting that the first instant an enterprise engages an employee on standby now represents a prevailing custom is also clutching at straws to maintain the status quo rather than a product of a reasonable analysis.

From the Cambridge Dictionary

Cambridge Dictionary

custom
noun
US
/ˈkʌs·təm/

custom *noun* (TRADITION)

[C/U]
a way of behaving or a belief that has been established for a long time among a group of people:

The Logan appeal decision has no answer as to how a start up company today, can justify an exemption, prior to engaging its first employee on standby. In addition, as I pointed out in my last submission, this interpretation gives rise to 5 anomalies when applied to the standing by provision in the current award.

When the above ***test for a custom prevailing*** is applied to **any start up enterprise or any mature enterprise**, no conflict is encountered within the current wording of the award and the presence or not of a custom prevailing is easily identified. When the actions indicated by the test are followed, those 5 anomalies created by the accepted interpretation disappear and the award is found to be complete and reasonable. The wording of the award is fine; it's just the interpretation that is flawed.

The clause in the current award reads "subject to any custom prevailing". It is my belief that every enterprise that has started up since this standing by provision was introduced into an award and now engaging staff on standby but not paying the hourly rate stated in the award, is in breach of the award. No custom could be present on that first instance of engaging an employee on standby. If no enterprise that starts up after the introduction of this award provision can meet the custom prevailing exemption, this demonstrates that this conditional provision was only intended to be a transitional arrangement. That is why my proposed

amendment does not need to make provision for any exemptions from paying the award rate.

My opinion is based on sound analysis of the facts. I have no particular motivation to have my opinion prevail for any other reason than it just makes sense. All those that plan to oppose my application to vary here, feel free to point out any errors in my logic. I encourage you to challenge my analysis, but please don't embarrass yourself and waste time by making unsupported assertions. Please back up your assertions with evidence that supports your point of view rather than relying on spin to get the job done. If you intend to rely on the Logan appeal decision, don't just insist that decision can't be wrong because of the authority of the Full Bench, demonstrate my analysis is wrong. In my world, unsupported assertions have as much substance as fairy floss.

This statement, although bold, is prompted by the number of practitioners of the law that have refused to concede the merit of my argument and have vigorously defended the maintenance of the status quo with unlikely explanations to support their long held beliefs. It seems the maintenance of the status quo is more important to them than the validity of my argument.

PART 2 of the proposed amendment - Fatigue Management

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.

I have been periodically rostered in a Standing By role for about 14 years and have become older and wiser and am now opposed to this extreme work practice. The practice of relying on people that have worked a full day in physically demanding work, gone to bed at a normal time, and then been awoken and expected to go to work with inadequate rest, should be a thing of the past. This is an outdated practice that is subsidised by employees via a flawed interpretation of Clause 32.14 that states that if you are regularly required to perform this task, you need not be paid for it.

From the AMWU's submission.
24. The AMWU appreciates the concerns of the Applicant that appear to have informed the second proposed amendment. However, it is worth noting that clauses 40.2, 40.4 and 40.10 each deal with overtime and fatigue in various ways, and that employers are required to comply with applicable work health and safety laws.
25. The AMWU therefore considers that the second proposed amendment is not necessary, and in any event there is likely a lack of jurisdiction, for the same reasons as expressed in relation to the first proposed variation paragraphs at [14]-[15] above.

My job is mobile; I drive to every job site when called out at night.

In my last submission I gave an example of one of my recent experiences of being rostered on Standby. I am an end user of the award and I can't easily find and understand my rights and obligations relating to fatigue manage when on call backs in the award. The award is written to cover work practices based on standard rostered hours. **The award provides little guidance for those of us that have worked a full day shift and then been recalled to work in an unpredictable and random manner for an unknown time span. I cannot plan to be able to rest uninterrupted for any time between rostered shifts.**

This was my experience.
When I got home on Friday evening I had dinner and watched TV until going to bed at 23:00 hrs. At midnight the phone rang with a customer requesting that I drive to their Rutherford address to replace a hose on a truck. Typically I write down the details of the address that I'm to go to and contact details etc. That normally helps me wake up. On this occasion I recognised the address that I had to attend, so I did not need to write it down. I closed my eyes and woke up an hour later. I tried to contact the business to ask did they still need me because they may have contacted someone else as I was late. I got no answer so I drove from Hillsborough to the business at Rutherford. I went via Branxton as it was pouring torrential rain and for whatever reason, but fatigue is a likely contributor, I missed the Maitland exit on the Hunter Expressway. I made a mistake, but luckily not a fatal one.

When I arrived at the business's yard about 02:00, only two drivers were on site and neither of them knew of any truck needing repairs. I looked at the parked trucks in the yard but there were none that had an obvious need for a hose to be replaced.

I left site and got back to bed at 03:15 Saturday morning. At 05:45 I received a phone call asking was I coming to fix the truck as it was due to go out. I returned to site and found the truck was parked in a shed. The hose was replaced and I left there about 07:30. I made my way home.

Mr Miller from the AMWU, supported by others, put forward the view that the current provisions in the award need no further clarification.

Perhaps Mr Miller would be kind enough to walk me through that example that I gave so that I may be better informed next time and in doing so, he can validate his opinion.

I concur with Mr Miller's statement that employers do have an obligation to comply with appropriate health and safety laws, yet we still have this expectation that those that are on standby will handle all problems that arise when we are on standby. We have no specific guidance that stops us being placed in a position where we are expected to do whatever is required; there is no Plan B or backup plan.

1. Is being rostered on Standby from the end of one day shift until starting day work the next morning with no time in which I can rest without being disturbed an acceptable practice? What legislation or clause are you relying on for your opinion? Is that from the award or an external source?

2. Should I be expected to get out of bed with one hours sleep to return to work after working a full dayshift and being awake for 17 hours prior to going to bed? What legislation or clause are you relying on for your opinion?

3. Should I be expected to drive to a customer's premises with 2 hours broken sleep after having worked a full dayshift and being a wake for 17 hours? What legislation or clause are you relying on for your opinion?

4. Should I be expected to get out of bed to drive to a customer's premises after 1 hours sleep plus 1 hours sleep plus 2.5 hours sleep after having been awake for 19.5 hours in the last 24 hours? What legislation or clause are you relying on for your opinion?

5. Am I entitled to any paid meal breaks or meal allowance in either the first or second call backs in my experiences above? What legislation or clause are you relying on for your opinion?

6. I left that job at 07:30 am on Saturday morning to travel 40 mins home. It was Saturday so I had no rostered work. I normally start dayshift at 07:30 am. If it had been a weekday would I have just had to start my normal day shift with 4.5 hours broken sleep and no further rest break? What legislation or clause are you relying on for your opinion?

7. If I felt fatigued and did not want to start work until say 10:00 am instead of 07:30 am, would I have to take personal leave to get paid? What legislation or clause are you relying on for your opinion?

8. Is my employer failing in their duty of care in expecting me to be able to respond to these situations if and when they do happen, without any back up? When I say no back up that is in practice true, but in reality an over simplification. There is no fallback position in place. If I was to feel I could not go to a job, my fallback position is call around to other staff in the middle of the night to see if one of them is available to do the job.

   That although an option, is unlikely to be well received by anybody. These staff are not on standby and not likely to be happy about being awoken. There's a feeling that you are on call so you should handle it. There is also the urgency of the situation. Whilst organising someone else to do the job, someone is waiting for me to come and solve their problem.

   As call backs are never planned, there is always an expectation that whatever does pop up we will cope with anyway. Management thinks if they don't know beforehand what you may be asked to respond to, they can't really be held accountable. If you needed help mate, you just had to put up your hand, is the standard defence. That's a reactive rather than proactive response. That response doesn't lend itself to anticipating problems and having strategies in place before they are needed. We are to manage the situation and get by when things do happen.

From MA0010

32.13 Call back This was Clause 40.5(e) previously

(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.*

According to this clause relating to call back, if I am called out for less than 3 hours on each occasion, such as I did above, those call backs have no impact on my stand down time. I am expected to start work at my normal time.

Mr Miller and supporters, are you really satisfied that the current provisions and guidance within this award addressing issues of fatigue management is adequate when Clause 32.13 (g) states that it is not necessary to consider overtime worked between the finish of one shift and starting of another shift when called back to work, if the duration of one or more of these call backs is less than 3 hours duration on each occasion? Do you really think that is reasonable? SURELY NOT....

We did have an incident when one of our guys was called out early one morning, I not sure of the exact circumstances, but the pertinent point is when Sam had not arrived for work 2 hours after his normal start time. The boss rang to see where Sam was. Sam said he was just about to come in as he had a late call out. The boss explained that stand down time is counted from the end of one shift until the start of the next shift. He said any call outs were not considered. Those of us that heard this thought **the boss was foolish to make such an outrageous statement**. Nobody was brave enough to point out to the boss that he was wrong. Sam did come to work and the boss did apologise and said it was a misunderstanding.

Weird eh, now when I read Clause 32.13 (g) that **outrageous** statement made by my boss, even if said in error, is indeed **correct** according to the award. This seems unreasonable and outrageous and must be in conflict with OH & S fatigue management legislation, but could you blame an employer for exploiting clause 32.13(g) when it is in the award and has the weight of law behind it?

Perhaps the Commission may like to evaluate the appropriateness of Clause 32.13 (g) and its compatibility with other legislation and take action of its own volition as a matter of urgency.

My part 2 amendment introduces no new obligations on any employer. **It only seeks to improve the clarity and understanding of an employer's obligations** in other legislation by providing a **simple non prescriptive statement** that illustrates that an employer can be held accountable for the practices they use to manage fatigue, particularly on call backs.

Perhaps including my part 2 amendment wording to replace the current wording in Clause 32.13 (g) would provide a more comprehensive and user friendly MA00010 award.

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.

This statement introduces no new obligations on an employer. It gives complete freedom as to how this existing obligation is met. It just provides a reminder that employers must provide a safe workplace even when an employee is on standby and out of sight and out of mind.

Does anybody object to reminding employers they have a duty of care to provide a safe work place?

Even if those of you that have an intimate knowledge of this award and other legislation don't think there is a need for this clarification, maybe end users, employers and employees will benefit from it.

Are you prepared to have someone risk their life unnecessarily when the inclusion of a benign little paragraph in this award may have an impact on an enterprises practice and therefore avoid an injury?

Before objecting to this change, please weight up the inconvenience of including a paragraph that you think is unnecessary, against the potential benefit if it helps avoid just one serious fatigue related injury.

Garry Whackett