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AM2019/20 Application by Whackett

Introduction

1. These submissions are made by the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union **(AMWU)** in accordance with the amended directions made by Commissioner Bissett on 13 July 2020.

Background

2. On 22 September 2019 Mr Garry Whackett **(the Applicant)** made application to vary clause 40.6 of the *Manufacturing and Associated Industries and Occupations Award 2010* **(the 2010 Award)** to:

    a. allow all employees who are required to 'stand by' to avail themselves of the standing by payment in clause 40.6 **(first proposed variation)** and

    b. to place an obligation on employers to ensure that employees are properly rested after a call back **(second proposed variation).**

3. On 8 May 2020 the AMWU made submission to the Fair Work Commission **(FWC)** in response to the Application.

4. On 29 May 2020 the *Manufacturing and Associated Industries and Occupations Award 2020* **(2020 Award)** replaced the 2010 award in accordance with a decision[1] and determination[2] made by a Full Bench of the Fair Work Commission as part of the *4-Yearly Review of Modern Awards.*

[1] [2020] FWCFB 1814.
[2] PR718704

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5. Clause 32.14 of the 2020 Award deals with 'standing by' and is the equivalent to clause 40.6 in the 2010 Award.

6. On 2 July 2020 the Applicant made submissions in reply to the AMWU's submissions.

7. On 13 July 2020 Australian Business Industrial and the NSW Business Chamber **(ABI)** made submissions in reply to the Applicant and the AMWU.

8. On 17 July 2020 the Australian Industry Group **(AiG)** made submissions in response to the Applicant and the AMWU.

9. These submissions will reply to the submissions of the Applicant (dated 2 July 2020) and ABI and AiG **(**referred to collectively as **the Employers).**

10. The AMWU notes that the Employers refer to the 2020 award in their submissions, and the AMWU will do the same.

Reply to Applicant

11. On 2 July 2020 the Applicant made submissions in response to comments made by the AMWU in its submission of 8 May 2020 regarding the Applicant's second proposed amendment.

12. The AMWU makes no comment in response to those submissions other than to state that it appreciates and understands the Applicant's concerns that appear to have informed this element of the application. The AMWU otherwise repeats and relies on its submissions of 8 May 2020.

13. If the FWC considers that it would be assisted by a more detailed response to the Applicant's submissions of 2 July 2020, the AMWU stands ready to assist.

Reply to Employers

14. The AMWU places on record its disagreement with one element of the Employers construction of clause.

15. ABI contend that:

> *"It provides that an employee who is "regularly" required to hold themselves in readiness to work after ordinary hours (i.e. to stand by) must be paid for that time at the employee's ordinary hourly rate."*

16. AiG contend that:

> *"Clause 32.14 requires that an employee be paid at the employee's ordinary hourly rate for the time that they are standing by <u>if the employee is required regularly to hold themselves in readiness to work after ordinary hours,</u> subject to any custom prevailing at the enterprise. If such a custom is prevailing at an enterprise, the clause does not apply and accordingly, an employee required to hold themselves in readiness to work after ordinary hours at that enterprise is not entitled to payment pursuant to the clause."*

17. The AMWU does not agree that the entitlement to be paid for a period of standing by only arises in respect of an employee that is 'regularly required' to do so. The AMWU's construction is as set out in its submissions of 8 May 2020.[3] That is, the entitlement to be paid ordinary time rates during a period of standing by arises where an employee is required to stand by. The AMWU concedes that this this entitlement is subject to an exception that arises where there is a custom prevailing at the workplace to regularly stand by.

18. Put another way, the words 'regularly required' in clause 32.14 attach to the exception related to the 'custom prevailing' rather than to the eligibility for the standing by payment.

19. The AMWU contends that its construction of clause 32.14 is supported by the decision of the Full Court of the Industrial Relations Court of Australia in *Logan v Otis Elevator Co Pty* **(Logan v Otis)** as is evidenced by the following excerpt:

> *"…It seems to us that the purpose of cl 14(g) is to provide compensation to employees for being placed on a specific alert. The sub-clause operates where an employee is ''required to hold himself in readiness to work after ordinary hours''. The employee shall ''until released'' be paid standing by time at ordinary rates ''from the time which he is to hold himself in readiness''. The sub-clause envisages both a requirement by the employer that the employee hold himself in readiness to work on a specific occasion and a release from readiness. Standing by payments apply during the period between those notifications. <u>The sub-clause is to operate on an ad hoc basis, as and when stand by instructions are given by an employer.</u>*
>
> *<u>It seems to us the opening words of the sub-clause do no more than emphasise this interpretation; the sub-clause does not apply where there is a ''custom'' under which the employee is regularly required to hold himself in readiness for a call back</u>. In this context the word ''custom'' means no more than a prevailing and accepted practice. Moore J held there was such a practice in relation to*

[3] Submissions of the AMWU 8 May 2020 [22].

Otis' local representatives…"[4] (emphasis added).

20. It is true that in *Logan v Otis* the Full Court were construing the equivalent clause in an antecedent of the 2020 Award, and clause 32.14 of the 2020 Award does not contain precisely the same wording.

21. Nonetheless there is no evidence of any decision by the relevant parties with an interest in this award to intentionally change the well understood meaning of the standing by clause as it was outlined in *Logan v Otis.* Nor is this contended by any party.

22. The AMWU further notes that its interpretation is supported by the decision of Commissioner Gregory in *RE Cummins South Pacific Laverton Enterprise Agreement 2018* in which the Commissioner confirmed that *Logan v Otis* was relevant to the interpretation of the standing by clause in the 2010 Award.[5]

23. The AMWU's construction is also consistent with the interpretation of the Fair Work Ombudsman as outlined in the AiG submissions at [30].

Conclusion

24. Despite the above submissions the AMWU does not contend that there is a need for the competing constructions put by the AMWU and the Employers to be resolved as part of a resolution of the present matter.

25. In making these submissions, and the submissions filed on 8 May 2020 the AMWU has sought to assist the FWC in the exercise of its statutory duties and functions. Beyond the matters raised in its submissions, the AMWU makes no further recommendation as to how the present application should be resolved.

END

Gabriel Miller

AMWU Research Officer

31 July 2020

[4] *Logan v Otis Elevator Co Pty Ltd* [1999] IRCA 4 [20]-[21].
[5] *RE Cummins South Pacific Laverton Enterprise Agreement 2018* [2019] FWCA 1245 [15].