AM2019/20

Monday, 13 July 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 thank the AUSTRALIAN BUSINESS INDUSTRIAL and THE NSW BUSINESS CHAMBER LTD for their contribution.

I invite them to provide an additional submission to address the one question I raised in my submission document dated 11/7/20. The quality of the outcome of these proceedings will be enhanced by their further comment.

When I read MA00010 Clause 32.14 and interpret it with the definition for custom prevailing used by the fair work ombudsman in K600586 the clause has only one criterion to determine who is entitled to be paid the award rate. That criterion states that only those that are required to be on standby regular are entitled to be paid, yet that same group, those that are required to be on standby regularly don't get any additional payment by the exception in those first eight words.

In this clause we have one criterion yet when that criterion is satisfied we have two different outcomes. Are we to argue the semantics that an obvious contradiction does not meet the test of being uncertain or ambiguous? Silly me, I guess we are.

In your explanation in your response 5.3 (b) you noted that a class of employees in the second part of the clause were entitled to payment per the award and in 5.3 (c) you stated that "The first subclause provides for an exception to the entitlement referred to in the operative portion of the clause."

Can you define any class of employees from the group referred to in 5.3 (b) that enlivened the standing by clause for payment that does not have that entitlement taken away by the subclause mentioned in 5.3(c). Where is the sub group? 100% of those that qualify to be paid then have that extinguished by the subclause. That is an obvious contradiction, same criterion, different outcome. It's not just ambiguity or uncertainty, which could be expressed as shades of grey about the meaning; this is a blatant black and white difference of outcome.

Sorry for getting on a roll there. That was not to be the focus of this document.

My reason for this document was to invite AIG and NSWBC to submit their understanding of how a start up enterprise under the current award can qualify for an exemption from paying the award rate for standing by, on that first instant of engaging an employee on standby.

My assertion is that the current interpretation creates uncertainty and ambiguity in the award. Those opposed say the current interpretation is fine and needs no amendment. The test of the truth of your argument will be demonstrated in how you explain this question. If you can't supply a plausible and likely explanation, then the interpretation you are relying on is fatally flawed. It can't be a reliable explanation and interpretation of the clause if it only works on some occasions.

For your objection to my amendment to be successful and the status quo to remain, you must be able to show that even a start up company under this award provision can meet the requirements for having a custom prevailing on the first instant of engaging an employee on standby.

Every company currently employing staff on standby under this award provision was at some stage a start up enterprise under this exemption stipulation. If no new start up company can meet the requirement for an exemption, there is no need for an exemption in the Standby clause 32.14. It just creates uncertainty and ambiguity. Remove the exemption, remove the ambiguity.

The currently accepted definition of Custom Prevailing from the Fair Work Ombudsman's document page reference K600586 'Custom prevailing' means that standing by IS a routine, regular and expected part of the work.

Please explain how any new starting up enterprise under the current award can meet the Fair Work Ombudsman's requirement of having a standing by practice that IS a routine and regular part of work on the first instance of engaging an employee on standby.

Planning to make standby a routine and regular part of work does not actually qualify as having a standing by practice that IS a routine and regular part of work. But, if you can justify an exemption for all start up enterprises, we still have an award Clause 32.14 that says, if I am regularly required to be on standby, I'm NOT entitled to any payment, yet if I'm regularly required to be on standby I MUST be paid per the award rate. Therefore change is still necessary to remove uncertainty and ambiguity.

I'm saying it is the interpretation that creates the ambiguity and uncertainty, but if you can show that a start up enterprise can qualify for an exemption, it then becomes the wording of the clause that causes the ambiguity and uncertainty. Does it really matter?

You are free to choose to ignore this request, but it will definitely create a major credibility issue with your objection if this question is ignored.

For the accepted interpretation to be valid, it must be able to explain how a start up enterprise can qualify for being exempt from paying the award.

In my analysis, this can only be achieved by having a standing by practice that predates the inclusion of this exemption criterion in the first award in which it appeared.

Sincerely

Garry Whackett