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AM2019/20 Application by Whackett

Introduction

1. These submissions are made in accordance with the Directions issued by Commissioner Bissett on 27 March 2020.

2. The AMWU's position with respect to the application the subject of these proceedings is that while it supports the application in principle, it has some concerns with the drafting of the amendment sought, and submits that the application would more properly be made under s.157 of the Fair Work Act **(FW Act).**

Background

3. On 22 September 2019, Mr Garry John Whackett **(the Applicant)** made an application to vary the Manufacturing and Associated Industries and Occupations Award 2010 **(Manufacturing Award)** to remove the words "*Subject to any custom prevailing at an enterprise"* from the first sentence of clause 40.6.[1]

4. On 13 January 2020, the Applicant submitted that by his application he also intended to introduce a new paragraph at clause 40.6 as follows:

> *"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".*[2]

Relevant Legislative Provisions

5. This application is made pursuant to s.160 of the FW Act.[3] Section 160(1) provides:

[1] Form F46 – Application to vary a modern award file by Mr Gary John Whackett 22 September 2019.
[2] Submission filed by Mr Whackett 13 January 2020.
[3] Correspondence from chambers of Commissioner Bissett to the parties dated 18 March 2020.

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"The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error."[4]

6. Section 134 sets out the 'modern awards objective' and is also relevant to this application because the modern awards objective applies to all of the Commission's modern award powers[5] including, necessarily, the power to vary an award to remove an ambiguity or uncertainty.

7. Section 134(1) provides in full as follows:

> *"The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
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> *(a) relative living standards and the needs of the low paid; and*
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> *(b) the need to encourage collective bargaining; and*
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> *(c) the need to promote social inclusion through increased workforce participation; and*
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> *(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
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> *(da) the need to provide additional remuneration for:*
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> *(i) employees working overtime; or*
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> *(ii) employees working unsocial, irregular or unpredictable hours; or*
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> *(iii) employees working on weekends or public holidays*
>
> *(iv) employees working shifts; and*
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> *(e) the principle of equal remuneration for work of equal or comparable value; and*
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> *(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
>
> *(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
>
> *(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*
>
> *This is the **modern awards objective**."*[6]

The Application

8. The Application relates to clause 40.6 of the Manufacturing Award. As it currently stands, clause 40.6 states as follows:

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[4] *Fair Work Act 2009* (Cth) s.160.
[5] Ibid s.134(2).
[6] Ibid s.134(1).

"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 time rate for the time they are standing by"[7]

9. The Applicant seeks to vary the clause as follows:

~~Subject to any custom prevailing at an enterprise, w~~ 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 time rate for the time they are standing by.

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.

10. As the AMWU understands it, the intent of the proposed variations is 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).**

FIRST PROPOSED VARIATION

11. In principle, the AMWU is not opposed to the first proposed variation. The AMWU has considerable sympathy for the Applicant, and his reasons for pursuing this variation.

12. However, the AMWU:

    - Suggests that the Commission likely does not have the appropriate jurisdiction to vary the award as proposed, because the AMWU does not consider that the current clause is ambiguous or uncertain; and

    - Has some concerns with respect to the way the first proposed variation is expressed; and

[7] Manufacturing and Associated Industries and Occupations Award 2010 clause 40.6.

13. Section 160 has been considered by Full Benches of the Fair Work Commission in *Australian Nursing Federation and others* [2010] FWAFB 9290 and in *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037. Both decisions refer with approval to the principles enunciated by the Australian Industrial Relations Commission in *RE Tenix Defence Pty Limited* **(Tenix)**.

14. In Tenix, a Full Bench of the Australian Industrial Relations Commission stated that:

> *'[28] Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.*
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> *[29] The first part of the process - identifying an ambiguity or uncertainty - involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in Re Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997:*
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> *"The identification of whether or not a provision in an instrument can be said to contain an 'ambiguity' requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the 'parent' award with which a complimentary provision is to be read."*
>
> *[30] We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.*
>
> *[31] The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention.*
>
> *[32] Once an ambiguity or uncertainty has been identified it is a matter of discretion as to whether or not the agreement should be varied to remove the ambiguity or uncertainty. In exercising such a discretion the Commission is to have regard to the mutual intention of the parties at the time the agreement was made.'*[8]

15. While the AMWU supports the first proposed variation in principle (as stated above) it is difficult to see how there is an existing ambiguity or uncertainty in clause 40.6, as is required to enliven the jurisdiction in s.160.

16. The current clause 40.6 is in substantially the same terms as the clause that was

[8] *RE Tenix Defence Pty Limited* PR913098 [28]-[32].

considered by the Full Court in *Logan v Otis Elevator Company Pty Ltd* (**Logan)**.[9]In that case the Full Court of the Industrial Relations Court stated:

> *"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. The sub-clause is to operate on an ad hoc basis, as and when stand by instructions are given by an employer.*
>
> *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. 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 Otis' local representatives."*[10]

17. There is no apparent basis to depart from the interpretation expressed by the Full Court above. It follows that there is no ambiguity or uncertainty of the kind contemplated in *Tenix*, that would enliven the s.160 jurisdiction.

18. Notwithstanding the above, the AMWU accepts that there are legitimate concerns with the exclusion in clause 40.6 from a fairness perspective.

19. This is because the clause appears to be intended to compensate for the significant disutility that attaches to not being able to properly enjoy 'non-working' time, i.e. by enjoying an alcoholic beverage, travelling, or otherwise engaging in social and recreational activities and that this disutility subsists irrespective of whether there is a custom in a workplace for employees to be regularly required to be on 'standing by'.

20. Prima facie it is incongruous that eligibility for an entitlement specifically directed to a particular disutility should be dependent on whether there is a custom in the workplace to

[9] *Logan v Otis Elevator Co Pty Ltd* [1999] IRCA 4.
[10] Ibid [21]-[21].

regularly be subjected to such a disability. On this basis, the AMWU questions the extent to which such a broad, (and apparently arbitrary) exclusion, such as that found in clause 40.6 could properly be said to be consistent with a fair and relevant safety net.

21. However, the AMWU accepts that a significant evidentiary case would be required to be prove that that is so and that a consequent variation to clause 40.6 is necessary to achieve the modern awards objective. Therefore, the above submissions concerning clause 40.6 should not be construed as an application by the AMWU to vary clause 40.6. The AMWU reserves its rights to bring such a case in the future.

22. Finally, and as stated above, the AMWU is somewhat concerned by the expression of the first proposed variation. By removing the words "subject to any custom prevailing at a workplace" but retaining the words "where regularly required" as the Applicant proposes, the resulting clause would be susceptible to an interpretation that excluded workers other than those that are "regularly required" to be on stand by.

23. The AMWU therefore respectfully requests an opportunity to make further submission on the form of any final determinations, in the event the FWC decides to grant the Applicant's claim.

SECOND PROPOSED AMENDMENT

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.

END

GABRIEL MILLER

AMWU National Research Officer

8 May 2020