DECISION

Fair Work Act 2009
s.160—Variation of modern award

EPI Capital Pty Ltd
(AM2022/8)

CLERKS—PRIVATE SECTOR AWARD 2020

Clerical industry

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 12 APRIL 2023

Application to vary the Clerks—Private Sector Award 2020 to remove ambiguity or uncertainty or to correct an error

[1] EPI Capital Pty Ltd (EPI) is an employer covered by the *Clerks—Private Sector Award 2020* (Award) and has applied under s 160 of the *Fair Work Act 2009* (Act) for a determination varying the Award to remove an ambiguity or uncertainty. The ambiguity or uncertainty is said to arise from the overtime provisions of the Award.

[2] Clause 21.1 of the Award deals with overtime for employees who are not shift workers. It relevantly provides that "[a]n employer must pay an employee at the overtime rate for any hours worked at the direction of the employer:

> (a) in excess of the ordinary weekly hours; or
>
> (b) in excess of 10 ordinary hours on any one day, excluding unpaid meal breaks;
>
> . . .".

[3] Clause 28.1 of the Award deals with overtime for shift workers and relevantly provides that "[a]n employer must pay an employee on shiftwork overtime rates at the relevant percentage specified in column 2 for full-time and part time shiftworkers and column 3 for casual shiftworkers of table 6 -Overtime rates for shiftwork (depending on when the overtime was worked as specified in column 1) . . .".

[4] Column 1 of table 6 provides for three circumstances when overtime is payable as follows:

> "Column 1
> For all time worked:
>
> In excess of the ordinary weekly hours fixed in clause 26.1

. . .

In excess of ordinary daily hours on an ordinary shift

. . .

Saturday, Sunday or public holiday that is not an ordinary working day

. . .".

[5] EPI contends the Award is objectively ambiguous or uncertain in two respects:

- whether any of an employee's period of leave or absence are "hours worked" and/or "time worked" for the purposes of weekly and daily overtime clauses; and

- whether any of an employee's period of leave or absence are "hours worked" and/or "time worked" for the purposes of weekly and daily overtime clauses if taken after the maximum ordinary hours in those clauses are reached.

[6] Each of Australian Business Industrial (ABI) and NSW Business Chamber Ltd (NSWBC), the Australian Council of Trade Unions and Australian Municipal, Administrative, Clerical and Services Union (collectively "the Unions"), the Australian Chamber of Commerce and Industry (ACCI) and Ai Group oppose the application but for different reasons, to which I will return.

[7] It is necessary first to deal with a contention by the Unions that the application should be dismissed pursuant to s 587 of the Act on the basis that it is an abuse of process. The Unions contend that the application should be 'properly regarded as seeking to invoke the jurisdiction of the Commission under s 160 for an illegitimate or improper purpose'. They contend that s 160 is directed to resolving an ambiguity or uncertainty which has or will have practical impacts on the persons bound to comply with the Award and argue that EPI has produced no evidence to show how the application will assist it in ensuring that it complies with its obligations under the Award. The Unions contend that, as an individual employer, EPI's views about the Award are only valuable so far as they relate to its experience as an award-covered employer and say that EPI has not provided any evidence to demonstrate that as an employer it has experienced any uncertainty or ambiguity in applying the relevant clauses of the Award to its employees.

[8] Section 587 vests in the Commission a discretionary power to dismiss an application if the application is not made in accordance with the Act, is frivolous or vexatious, or has no reasonable prospects of success. It is to be doubted whether any of these bases for dismissal encompasses the notion of an abuse of process. But in any event, it is not necessary for a person applying under s 160, to show there is some interpretive problem in the award affecting the person in a particular way before an application may be made. Relevantly, standing to apply is determined in this case by reference to whether EPI is an employer that is covered by the Award, and there is no real dispute, and I accept that it is so covered. To invoke the jurisdiction, EPI will need to establish objectively that there is some ambiguity or uncertainty in the Award provisions the subject of its application. It need not show that it has a particular problem as an employer covered by the Award in applying the provisions nor need it express a preference for how the Award should be varied to remove an ambiguity or uncertainty if one is found to exist.

Therefore, even if there was power under s 587 to dismiss an application as an abuse of process, EPI's application is not one that meets that description.

[9] Returning then to the substance of the application, in respect to the two areas of ambiguity or uncertainty for which EPI contends, it advances that which may be described as two competing contentions for each area. As to the first, EPI contends that clauses 21.1 and 28.1 of the Award may be construed as providing that an employee's period of leave or absence *are not* "hours worked" and/or "time worked" for the purposes of the weekly and daily overtime clauses. EPI describes this as the "Excluding Leave Interpretation". The second is said to be that such leave or absence is "hours worked" and/or "time worked" for the purposes of the weekly and daily overtime clauses. EPI describes this as the "Included Leave Interpretation".

[10] As will later become clear, the competing constructions proceed upon a misconceived premise because the words "hours worked" and "time worked" used in clauses 21.1 and 28.1 of the Award are concerned with the hours or time spent working overtime, not ordinary hours. In substance that which is said to be ambiguous or uncertain is whether, in respect of the qualifying hours in clause 21.1(a) (in excess of ordinary weekly hours) and clause 21.1(a) (b) (in excess of 10 ordinary hours on any day) an employee must first work the number of hours specified before any further hour or time worked may be regarded as in excess of the identified ordinary hours. Put another way, if an employee takes a period of leave or absence that is authorised, during hours that would have been the employee's ordinary hours of work, does the leave or absence during those hours count to calculate the qualifying hours described in clauses 21.1(a) and (b). In the context of clause 28.1, the qualifying hours are described in column 1 of table 6.

[11] The second area of ambiguity is said to arise only if the Commission concludes there is no ambiguity or uncertainty because the Included Leave Interpretation is the only available construction or that having found ambiguity or uncertainty, a determination is made to vary the Award consistent with the Included Leave Interpretation.[1] In this respect EPI advance the following competing constructions. First, for the purposes of clauses 21.1 and 28.1 of the Award an employee's period of leave or absence *can* be "hours worked" and/or "time worked" if taken after the maximum ordinary hours in those clauses are reached. This EPI describes as the "Overtime Interpretation". Second, for the purposes of clauses 21.1 and 28.1 of the Award an employee's period of leave or absence *cannot* be "hours worked" and/or "time worked" if taken after the maximum ordinary hours in those clauses are reached, which EPI describes as the "Ordinary Hours Interpretation".

[12] As I earlier noted, the Unions and the employer associations which have made submissions each oppose the application but for different reasons.

[13] Briefly, ABI and NSWBC oppose the variations on the basis there is no ambiguity or uncertainty in the relevant Award provisions because the plain and ordinary meaning of the clauses makes clear that the Excluding Leave Interpretation is the only viable interpretation as a period of leave (or authorised absence) cannot constitute "hours worked" or "time worked" under the Award. Consequently, the Included Leave Interpretation is not viable (or arguable). ACCI submits that the Award is neither ambiguous or uncertain because the treatment of periods of leave for the purposes of overtime is 'clear on the plain and ordinary meaning of its terms' and does not constitute hours/time worked for the purposes of clauses 21 and 28. It contends in effect that the Excluding Leave Interpretation is the only available construction.

[14] The Ai Group contends there is no ambiguity or uncertainty in the relevant sense and that the Excluding Leave Interpretation is not arguable. This is because clause 21 of the Award requires the payment of overtime rates in relation to "*hours worked"* and does not dictate the number of ordinary hours that must be "*worked*" before overtime entitlements become payable. The Ai Group submit that the use of the word *'worked'* in clause 21.1 does not so much as suggest that an employee's "ordinary weekly hours", as referenced by clause 21.1(a), or the '*10 hours in a day*' mentioned in clause 21.1(b) of the Award must in fact have been worked. Ai Group makes similar observations in relation to clause 28.1. Put another way, Ai Group contends that the Award proceeds on the basis that an employee's ordinary hours of work will be fixed by their employer. By virtue of clauses 21.1 and 28.1 of the Award, an employee is entitled to be paid at overtime rates for work performed outside or in excess of those hours, even if those hours included a period of absence. It will not generally (if ever) be necessary to determine whether a period of leave should be counted as time worked for the purposes of clause 21.1 or 28.1 as hours worked outside "weekly hours" will attract overtime rates.

[15] The Unions contend in substance that there is no ambiguity or uncertainty in the operative Award provisions. The Unions contend that none of the threshold requirements (which I have earlier described as the qualifying hours) described in clauses 21.1(a) and (b), and in clause 28.1, column 1 of table 6, use the words "work", "worked" or any variation thereof. They contend the chapeau to clause 21.1 and the first cell in table 6 use the expressions "hours worked" and "time worked" merely to signify that the relevant overtime rate will apply to the quantity of time that is worked as overtime, provided the threshold condition is met. That threshold condition is that the overtime hours or time that is worked is in excess of the qualifying hours described; the condition is not that the overtime hours or time that is worked is in excess of the qualifying hours already worked. Put another way, the Unions contend that the Award provisions do not set the threshold requirement on the basis that the ordinary hours described in clauses 21.1(a) and (b), and in clause 28.1, column 1 of table 6 must have been worked, rather it fixes the threshold requirement on the basis of ordinary hours described in clauses 21.1(a) and (b), and in clause 28.1, column 1 of table 6 as existing.

[16] For the reasons which follow I am not persuaded that there is any ambiguity or uncertainty in the Award as contended by EPI. Both the Including and Excluding Leave Interpretations proceed upon a misconceived premise. The reference in clauses 21.1 and 28.1 to "hours worked" and "time worked" is to the actual performance of work which is overtime because it is undertaken "in excess of", "outside", "on" or at a trigger point identified by those clauses. It is not a reference to hours or time that is ordinary hours of work. Overtime rates, unlike ordinary time rates (which may be paid during some leave or absences), are only payable upon the working of overtime. Leave or an authorised absence is from time that would be ordinary hours of work which may be paid or unpaid depending on the nature of the leave or absence. But an absence from overtime is never paid because as clauses 21.1 and 28.1 make clear, the prescribed overtime rates are payable by the employer relevant for all hours or time worked that is overtime.

Consideration

[17] Section 160 of the Act allows the Commission to make a determination varying a modern award to remove ambiguity, uncertainty or to correct an error. It provides as follows:

> *(1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.*

(2) The FWC may make the determination:

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or

(c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

(d) if the modern award includes outworker terms—on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

[18] Section 165 provides:

Determinations come into operation on specified day

(1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

(2) The specified day must not be earlier than the day on which the determination is made, unless:

(a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

(b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

[19] The modern awards objective is set out in s.134(1) of the Act as follows:

(1) 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:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(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.

[20] Section 134(2) of the Act provides that the modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are, relevantly the Commission's functions or powers under Part 2-3 of the Act, in which s 160 is found.

[21] The principles applicable to the exercise of the Commission's jurisdiction under s 160 (and similarly s 217) are well established. In *Bradnam's Windows and Doors Pty Ltd*[2] I summarised these, and with some minor modifications I adopt the summary as follows:

- The Commission should approach an application in two stages. First, as a jurisdictional pre-requisite, it should identify whether there is an uncertainty or ambiguity. Secondly, if an ambiguity or uncertainty is identified, it should consider whether to exercise its discretion to vary the agreement the subject of the application;[3]

- The process of identifying ambiguity or uncertainty involves making an objective assessment of the words used in the provisions under examination. The words used are construed having regard to their context;[4]

- 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;[5]

- However, the Commission must make a positive finding that an instrument the subject of an application is ambiguous or uncertain. Prima facie satisfaction of ambiguity or uncertainty is not sufficient;[6]

- The mere existence of rival contentions as to the proper construction of the terms of an instrument will also be an insufficient basis to conclude the existence of ambiguity or uncertainty. Such contentions may be self-serving. The task is to make an objective judgment as to whether the wording of a provision is susceptible to more than one meaning;[7] and

- Relevant to a variation of an enterprise agreement, once an ambiguity or uncertainty has been identified, in exercising the discretion whether to vary the agreement, the Commission is to have regard to the mutual intention of the parties at the time the agreement was made.[8]

[22] To this must be added two matters identified by the Full Court of the Federal Court of Australia in *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union*.**[9]** *First*, that the task of the Commission is not to interpret the instrument definitively – the identification of the true meaning of a provision is distinct from the question of whether it is ambiguous or uncertain.[10] *Second*, the words "ambiguity" and "uncertainty" are not synonymous. There may be uncertainty in an instrument even when its terms are not ambiguous. The uncertainty may arise from the application of the unambiguous terms to a given set of circumstances.[11]

[23] Returning then to the provisions of the Award, Part 3 of which (clauses 13-15) deals with hours of work. Clause 13 applies to employees other than shiftworkers (clause 13.1). The notes in clause 13.1 provide that ordinary hours of work per week for a full-time employee are as set out in clause 9; for a part-time employee are as agreed under clause 10; and for shiftworkers as set out in Part 6.

[24] Thus, under the Award, a full time employee is engaged to work 38 ordinary hours per week (or the number of hours considered full time at a workplace by the employer (clause 9.1). A part time employee is engaged to work for fewer ordinary hours than 38 per week (or the number considered full time) on a reasonably predictable basis (clause 10.1). When a part time employee is engaged, the employer and employee must agree in writing on the number of hours to be worked each day; the days of the week on which the employee will work; and the times at which the employee will start and finish work each day. The maximum number of ordinary hours that can be worked on any day is 10 hours (clause 13.7) and ordinary hours must be worked continuously (clause 13.6).

[25] Clause 31.2 sets out the maximum average number of hours (38 hours) that may be worked by an employee in a week over an averaging period. Clauses 13.3 and 13.4 set out the spread of hours between which ordinary hours may be worked and rules for altering the spread.

[26] Clause 13.5 deals with the capacity of the employer to direct work outside the spread of ordinary hours prescribed by the Award in particular circumstances. Clause 13.8 allows an employer and an employee to agree that the employee may take time off during ordinary hours and make up that time by working at another time during ordinary hours.

[27] Clause 14 deals with rostering arrangements which would entail the accrual of a rostered day off and related matters. Clause 15 deals with rest and meal breaks.

[28] Part 5 of the Award deals with overtime and penalty rates for employees other than shift workers. Clause 21.4 contains the applicable overtime rates and clause 21.1 sets out the circumstances in which the rates must be paid. Clause 21.1 provides:

> 21.1 An employer must pay an employee at the overtime rate for any hours worked at the direction of the employer:
>
> (a) in excess of the ordinary weekly hours; or
>
> (b) in excess of 10 ordinary hours on any one day, excluding unpaid meal breaks; or
>
> (c) outside the spread of ordinary hours; or
>
> (d) for overtime worked on a rostered day off that is not substituted or banked; or
>
> (e) for part-time employees, in excess of the number of ordinary hours that the employee has agreed to work under clause 10.2 or as varied under clause 10.3 (Part-time employment).

[29] Clause 21.2 provides that "[f]or the purposes of clause 21, ordinary weekly hours means the hours of work fixed in a workplace in accordance with clause 13—Ordinary hours of work (employees other than shiftworkers) and clause 14—Rostering arrangements (employees other than shiftworkers) or as varied in accordance with the relevant clauses of" the Award.

[30] Reference should also be made to clause 10.6 which provides in respect of part time employees that "[a[ll time worked in excess of the number of ordinary hours agreed under clause 10.2 or as varied under clause 10.3 is overtime and must be paid at the overtime rate in accordance with clause 21—Overtime (employees other than shiftworkers)".

[31] It may readily be observed that clause 21.1 is not concerned with the working of ordinary hours. It is concerned with the payment of overtime rates "for any hours worked at the direction of the employer", relevantly "in excess of the ordinary weekly hours", or "in excess of 10 ordinary hours on any one day" or "in excess of the number of ordinary hours that the employee has agreed to work under clause 10.2 or as varied under clause 10.3". The conditions in paragraphs 21.1(a) – (e) are triggering points. Relevantly, overtime rates must be paid when at the direction of the employer an employee works any hours "in excess of" the triggering points in (a), (b) or (e), "outside" the trigger point in (c) or "on" the trigger point in (d). The reference

to “any hours worked” is to hours worked “in excess of”, “outside” or “on” the relevant trigger point. That is, it is a reference to the working of overtime hours not ordinary hours.

[32] Similarly, the reference in clause 10.6 to “all time worked” is a reference to the time worked which is in excess of the trigger point.

[33] Part 6 of the Award deals with shift work. Clause 26.1 provides that the number of ordinary hours that can be worked in a week is an average of 38 hours over a 4 week period or over a roster period, not exceeding 12 months, as agreed between an employer and the majority of employees concerned.

[34] The maximum number of ordinary hours that can be worked in any day is 10 hours (clause 26.2). A maximum of 6 shifts can be worked over the period of a week (clause 26.3) and changes to the times at which the employee will start and finish a shift may be made by the employer giving the employee at least 7 days’ notice of the change or at any time by the employer and employee by agreement (clause 26.4). The employer and an employee may agree that the employee may take a period of ordinary hours as time off and make up that time off by working at another time during which the employee may work ordinary hours (clause 26.5).

[35] Clause 28 deals with overtime for shift work and provides:

> 28.1 An employer must pay an employee on shiftwork overtime rates at the relevant percentage specified in column 2 for full-time and part-time shiftworkers and column 3 for casual shiftworkers of **Table 6—Overtime rates for shiftwork** (depending on when the overtime was worked as specified in column 1) as follows:
>
> **Table 6—Overtime rates for shiftwork**

COLUMN 1 FOR ALL TIME WORKED:	**Column 2 Overtime rate Full-time and part-time employees**	**Column 3 Overtime rate Casual employees**
	% of minimum hourly rate	**% of minimum hourly rate**
In excess of the ordinary weekly hours fixed in clause 26.1		
first 3 hours	150	175
after 3 hours	200	225
In excess of ordinary daily hours on an ordinary shift		
first 2 hours	150	175
after 2 hours	200	225
Saturday, Sunday or public holiday that is not an ordinary working day	200	225

> NOTE 1: Schedule B – Summary of Hourly Rates of Pay sets out the hourly overtime rate for all employee classifications according to when overtime is worked.

NOTE 2: The overtime rates for casual employees have been calculated by adding the casual loading prescribed by clause 11.1 to the overtime rates for full-time and part-time employees prescribed by clause 28.1.

28.2 Penalty rates for shiftwork are not cumulative on overtime rates.

28.3 An employer must pay an employee for a minimum of 4 hours at the overtime rate specified in clause 28.1 if:

(a) the employee is required to work overtime on a Saturday, a Sunday or a public holiday (as prescribed in Division 10 of Part 2.2 of the Act); and

(b) the employee would not have been ordinarily rostered to work that day; and

(c) the work is not continuous with the start or finish of the employee's ordinary shift.

[36] As with clause 21, clause 28 is concerned with working of and payment for, overtime, not ordinary hours. Like clause 21, clause 28 contains triggering points "in excess of" or at which, work undertaken is overtime. The reference in column 1 of Table 6 to "[f]or all time worked" is a reference to the time worked at or in excess of the triggering points. It is not a reference to time worked as ordinary hours.

[37] Clause 21.1 of the Award helpfully points out that "ordinary weekly hours" means the hours of work fixed in a workplace in accordance with clause 13 and clause 14. How these hours are fixed are earlier set out. This relates to the trigger points in clause 21.1(a). Clause 28 also defines the term because its first trigger point is for time worked in excess of "the ordinary weekly hours" fixed in clause 26.1.

[38] Thus, for non-shift work employees, ordinary weekly hours are fixed for a full time employee at 38 ordinary hours (or an average thereof over 4 weeks or other period) per week (or the number of hours considered full time at a workplace by the employer. For a part time employee, ordinary hours are fewer than 38 per week (or the number considered full time) and the employer and employee have to agree on engagement in writing (or as subsequently varied) the number of hours to be worked each day; the days of the week on which the employee will work; and the times at which the employee will start and finish work each day (clause 13 and 14, taking into account clauses 9 and 10 to which the notes in 13.1 direct attention).

[39] For a shift work employee, the ordinary weekly hours are a maximum of an average of 38 hours over a 4 week period or over a roster period, not exceeding 12 months, as agreed between an employer and the majority of employees concerned.

[40] In each case in any given workplace where ordinary hours are fixed in accordance with the various provisions of the Award discussed above, ordinary weekly hours are known. Similarly, the daily maximum number of ordinary hours (10 hours) (clause 21.1(b)) and the ordinary daily hours on an ordinary shift (clause 28.1), in respect of a workplace are or will be known.

[41] There is nothing in clauses 21.1 or 28.1 which suggests the ordinary hours trigger points must have all been worked, before additional hours worked become overtime. Indeed, it is in

my view patently obvious that periods of leave or authorised absences from ordinary hours of duty under the Award are part of the ordinary weekly hours and the maximum daily ordinary hours constituting the relevant trigger points in clause 21.1 and 28.1. There are also contextual indicators which support this view. The leave provisions of the Award are found in Part 7. Each form of leave therein mentioned provides that that form of leave is as provided for in the National Employment Standards (NES) (clauses 32.1 – Annual Leave; 33.1 - Personal/carer's leave and compassionate leave; 34 - Parental leave; 35 - Community service leave; 36 - Family and domestic violence leave; and 37- Public holidays). Some of these clauses provide for additional benefits. Each period of allowable leave under the NES, whether paid or unpaid, is taken from or during periods when ordinary hours or the maximum number of weekly hours for which s 62 of the Act provides would have been worked. That this is so, is made clear by s 62(4).

[42] In so far as leave taken pursuant to the NES is paid leave, the NES provides that:

- if an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period (s 90(2));

- if an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period (s 99);

- if an employee takes a period of compassionate leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period (s 106);

- if an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day (s 116)

[43] The additional annual leave benefit in clause 32.3 of the Award dealing with annual leave loading, also countenances the calculation of the additional benefit by reference to the employee's ordinary hours of work in the period during which the leave is taken.

[44] Thus, under the Award an employee's ordinary hours are pre-determined or fixed in accordance with clauses 13 and 14 of the Award and an employee's leave or authorised absence from ordinary hours is part of that employee's ordinary hours in a day or a week during the period of leave of absence. Under the Award, an employer and employee may agree that an employee may take time off during ordinary hours and make up that time by working at another time during ordinary hours (clauses 13.8 and 26.5). But for the reasons explained above, any other form of leave or authorised absence is taken as part of an employee's ordinary hours of work. But this is no more than an agreement to move the time at which some ordinary hours will be worked by the employee. An employee's ordinary hours are fixed in accordance with the provisions of the Award discussed above. These fixed ordinary hours (and maximum ordinary hours) are known and so the triggers for overtime are also known. Put simply, and by way of example, if an employee's ordinary hours are fixed at 38 hours worked on Monday to Wednesday for 10 hours each day and on Thursday for 8 hours, and the employee works in a

given week at the direction of the employer for 4 hours on the Friday, the 4 hours are plainly in excess of the employee's weekly ordinary hours fixed in accordance with clauses 13 and 14 of the Award. What difference does it make that in the week the employee works on the Friday, that the employee was absent on annual leave on the Wednesday? The answer is of course none. The leave is part of the employees weekly ordinary hours fixed in accordance with clauses 13 and 14.

[45] The same result would pertain if on a given Wednesday the employee took 4 hours of personal leave to attend a medical appointment and then returned to work the remaining 6 hours of ordinary time on that day but worked an additional hour at the direction of the employer. The 4 hours of leave and the 6 hours worked together constitute 10 ordinary hours on that day. The additional hour is an hour worked in excess of the daily maximum and so the overtime payment obligation arises. There is a difference between the ordinary hours that are fixed in accordance with the Award, and a requirement that those hours be worked as a condition to payment for overtime for certain hours worked. The Award clearly adopts the first formulation. For the purposes of the overtime obligations under the Award, what must be worked is the overtime hours or time. The ordinary hours amounting to the trigger points may, but need not, all be worked.

[46] But neither of EPI's alternative constructions are arguable because they both precede on a patently misconceived premise – that the words "hours worked" and "time worked" are referable to ordinary time. The reference in the alternative constructions advanced to "hours worked" and/or "time worked" for the purposes of weekly and daily overtime clauses" is a reference to the trigger points in clause 21.1(a) and (b) and clause 28.1 in column 1 of the table. So much is clear from the reference to the following in each construction advanced by EPI: "for the purposes of weekly and daily overtime clauses". Clause 21.1(a) and (b) and column 1 of table 6 in clause 28.1 are concerned with ordinary weekly hours and maximum ordinary daily hours. But the phrases which precede them - "hours worked" and "time worked" - are referable to hours which must actually be worked, and which are in excess of the relevant trigger points. Understood in this way, the question - whether a period of leave or absence is included or excluded from "hours worked" and/or "time worked" - self-evidently does not arise because those "hours" or "time" relate to overtime hours which must be worked if the entitlement to the overtime rates for which clauses 21 and 28 provide, is engaged.

[47] The competing constructions advanced by EPI are not arguable for the reasons outlined. Nor is the issue - whether there is ambiguity or uncertainty - advanced simply because the Unions and the employer associations have advanced a case for one or another of the competing constructions advanced by EPI. The real issue of contended ambiguity or uncertainty, which I have endeavoured to capture at [10] above, does not yield a result that the Award is ambiguous or uncertain. The alternative notion or construction that leave or an authorised absence is not part of an employee's daily or weekly ordinary hours fixed in accordance with the Award is not arguable.

[48] The second area of ambiguity or uncertainty for which EPI contends - whether any of an employee's period of leave or absence are 'hours worked' and/or 'time worked' for the purposes of weekly and daily overtime clauses if taken after the maximum ordinary hours in those clauses are reached – is similarly misconceived because the phrases in parentheses are concerned with actual hours or time worked as overtime. An employee who is absent during a period, which if worked would be overtime under the Award, self-evidently does not work the period and so the period plainly would not count as hours or time worked.

[49] Finally, I have in this decision, as have the parties in their respective submissions, used the words "ambiguity" and "uncertainty" together. As I have earlier noted, the words are not synonymous. There may be uncertainty in an instrument even when its terms are not ambiguous. I do not consider the words of the Award to be ambiguous. Nor do I consider the relevant provisions of the Award to be uncertain either in expression or in operation. There has otherwise been no contention advanced that some uncertainty arises from the application of the terms of the Award to a given set of circumstances, and certainly no evidence about any such circumstances has been led.

Conclusion

[50] For the foregoing reasons I am not persuaded there is any ambiguity or uncertainty as contended by EPI. The application will be dismissed.

Order

[51] The application in AM2022/8 is dismissed.

DEPUTY PRESIDENT

Determined on the papers.

Written submissions:

EPI Capital Pty Ltd, 27 June 2022, 1 August 2022 and 13 October 2022

Ai Group, 26 September 2022 and 18 November 2022

Australian Business Industrial and NSW Business Chamber Ltd, 2 September 2022 and 18 November 2022

Australian Chamber of Commerce and Industry, 2 September 2022 and 18 November 2022

Australian Council of Trade Unions and Australian Services Union, 2 September 2022

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[1] EPI submissions dated 27 June 2022 at [22]

[2] [2019] FWCA 979

[3] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001 - 2004* (PR917548) at [28], [32] and [35]

[4] Ibid at [29]

[5] Ibid at [31]

[6] *CoInvest Ltd v Visionstream Pty Ltd* (2004) 134 IR 43 at [57]

[7] *Re Civil Construction Corporation Enterprise Agreement* (PR939346); *SJ Higgins Pty Ltd and Others v CFMEU* (PR903843); *Re CFMEU Appeal* (Print R2431)

[8] *Re Tenix Defence Systems Pty Ltd Certified Agreement 2001 - 2004* (PR917548) at [32]

[9] [2020] FCAFC 50

[10] Ibid at [66]-[72]

[11] Ibid at [73] to [83]