DECISION

Fair Work Act 2009
s.217—Enterprise agreement

Health Services Union
(AG2020/1179)

VICTORIAN DISABILITY SERVICE (NGO) AGREEMENT 2019

Social, community, home care and disability services

DEPUTY PRESIDENT BOOTH SYDNEY, 26 MAY 2020

Application for variation of the Victorian Disability Service (NGO) Agreement 2019 to remove ambiguity or uncertainty – ambiguity or uncertainty found – agreement varied – Order issued in PR719591.

[1] The Health Services Union (HSU) has made an application to the Fair Work Commission (Commission) in accordance with s.217 of the *Fair Work Act 2009* (Act) to vary the *Victorian Disability Service (NGO) Agreement 2019* (Agreement) to remove an ambiguity or uncertainty.

[2] The Agreement was recently made and this application to vary the agreement is supported by Michael Pegg Consulting and Jobs Australia, the appointed bargaining representatives for the 27 employers covered by the Agreement, as well as the Australian Education Union.

[3] The matter was listed for in-Chambers Hearing for approval on Friday 15 May 2020. No party sought to be heard.

[4] The application seeks to vary subclauses 22.2 (Saturday and Sunday Work), 25.5 (Shiftwork) and 31.2 (b) (Payment for working on a public holiday) to remove an ambiguity or uncertainty inadvertently created during the drafting of the Agreement.

[5] Subclause 22.2 of the Agreement currently provides:

> 22.2 The rates in clause 22.1 will be in substitution for and not cumulative upon the shift premiums prescribed in clause 25—Shiftwork, and are not applicable to overtime worked on a Saturday or a Sunday.

[6] The application seeks replacement of that subclause with the following wording:

> 22.2 The rates in clause 22.1 will be

(a) In addition to the shift premiums prescribed in clause 25.3 (b) (i) and (ii) (Preservation of existing shiftwork entitlements),

(b) In substitution for and not cumulative upon the shift premiums prescribed in clause 25.4 (Shiftwork entitlements for all other employees), and

(c) Not applicable to overtime worked on a Saturday or a Sunday.

[7] Subclause 25.5 of the Agreement currently provides:

25.5 Shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover.

[8] The application seeks replacement of that subclause with the following wording:

25.5 Shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover, provided that in relation to shifts associated with sleepover:

(a) for shifts worked in accordance with clause 25.3—(Preservation of existing shiftwork entitlements), each part of a shift before and after a period of sleepover will be treated as separate shifts for the purpose of determining the shift penalty rate, and the sleepover will be treated as a break between shifts as provided by clause 21.4(b).

(b) for shifts worked in accordance with clause 25.4—(Shiftwork entitlements for all other employees), the finishing time of the final part of a shift after a period of sleepover will determine the applicable shift penalty for the periods of work both before and after the period of sleepover, and the length of the shift will be determined by adding together the periods of work immediately before and after the sleepover.

[9] Subclause 31.2 of the Agreement currently provides:

31.2 Payment for working on a public holiday

(b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday

[10] The application seeks replacement of that subclause with the following wording:

31.2 (b) Payments under this clause are

(i) in addition to the shift premiums prescribed in clause 25.3 (b) (i) and (ii) (Preservation of existing shiftwork entitlements),

(ii) instead of any shift premiums prescribed in clause 25.4 (Shiftwork entitlements for all other employees), which would otherwise be payable had the shift not been a public holiday, and

(iii) instead of any additional rate for weekend work as prescribed by clause 22.1 and which would otherwise be payable had the weekend work not been a public holiday.

Legislative provisions

[11] The Act provides:

217 Variation of an enterprise agreement to remove an ambiguity or uncertainty

(1) FWA may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:

(a) one or more of the employers covered by the agreement;

(b) an employee covered by the agreement;

(c) an employee organisation covered by the agreement.

(2) If FWA varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement.

Legal precedent

[12] The approach to be taken in considering an application under s.217 of the Act has been outlined in a number of cases.

[13] In *Fosterville Gold Mine Pty Ltd,*[1] Lewin C conveniently summarised the approach as:

a. The Tribunal should approach the matter by way of two stages. Firstly, as a jurisdictional pre-requisite, identify whether there is an uncertainty or ambiguity. Secondly, if an ambiguity or uncertainty has been identified, FWA has discretion whether or not to vary the agreement.[2]

b. The first part of the process (ie identifying ambiguity or uncertainty) involves an objective assessment of the words used in the provisions under examination. The words used are construed having regard to their context.[3]

c. The Tribunal will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and arguable case is made out for more than one contention.[4]

d. However, the Tribunal must make a positive finding that the agreement is uncertain or ambiguous. Being satisfied of ambiguity or uncertainty on a prima facie basis is not sufficient.[5]

e. It is not sufficient that there are rival contentions as to the proper construction of the terms of the agreement. Such contentions may be self serving. The Tribunal's task is to mark an objective judgment as to whether the wording of a provision is susceptible to more than one meaning.[6]

> f. In terms of the second stage of the process, once an ambiguity or uncertainty has been identified, in exercising the discretion of the Tribunal whether or not to vary the agreement, the Tribunal is to have regard to the mutual intention of the parties at the time the agreement was made.[7]

[14] Section 217 of the Act is in the same form as s.170MD(6) of the *Workplace Relations Act 1996* (the WR Act). Section 170MD(6) was considered by the Full Bench of the Australian Industrial Relations Commission (AIRC) in *Re Tenix Defence Systems Pty Ltd Certified Agreement 2001-2004*[8] (Tenix) where it said:

> [35] In the context of s.170MD(6)(a) the Commission must *first* identify the existence of an ambiguity or uncertainty *before* exercising its discretion to vary the agreement. We agree with the Full Bench in *Re: CFMEU Appeal* which described the existence of an ambiguity or uncertainty as *"a necessary statutory prerequisite to any variation being made."*
>
> [footnote omitted]

[15] The Full Bench in *Tenix* described the approach to be taken to an application to vary an agreement to remove ambiguity or uncertainty as follows:

> [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.
>
> [29] The first part of the process – identifying an ambiguity or uncertainty – involved an objective assessment of the words used in the provision under examination. The words used 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*:
>
> > "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 to 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.

[footnotes omitted]

[16] As was observed in *Tenix*, the correct approach to identifying an ambiguity or uncertainty requires the making of an objective judgment as to whether, on the proper construction of the relevant provision of an agreement, the wording of that provision is susceptible to more than one meaning.

Is there ambiguity or uncertainty in the Agreement?

[17] The ambiguity or uncertainty in the Agreement is explained by the parties as follows:[9]

"In negotiating this agreement, it was the intention of the parties to maintain the status quo around shift work entitlements for workers engaged in the provision of Supported Independent Living (SIL) supports in shared residences and who have been on long term stable rosters.

For all other workers, the intention was to align the agreement provisions with those of the Social, Community, Home Care and Disability Services Industry Award 2010 (SCHADS).

Clause 25.3 reproduces and preserves the provisions that applied under predecessor enterprise agreements that covered existing SIL workers. This clause sets out the relevant penalty rates and span of hours for this class of workers.

The effect of clause 25.3 is to provide higher weekend penalty rates and a more favourable span of hours during the week.

Clause 25.4 deals with the shift work entitlements of all other workers, aligned with the SCHADS award.

The predecessor agreements for SIL workers did not treat sleepover as a continuous shift – the evening and morning periods of work were treated separately, and each paid in accordance with the spans of hours as shown in 25.3.

The predecessor agreements did not substitute weekend or public holiday rates for shift rates. This is reflected in the definitions for 25.3 which says those shifts are Monday- Sunday, whereas the equivalent shifts in 25.4 (based on the SCHADS award for all other workers) are Monday-Friday.

The intention of the parties is reinforced by the explanatory material provided by employers to employees, and the F17s which all referred to the preservation of existing shift work entitlements for SIL workers.

However, an ambiguity or uncertainty appears to arise through the interaction of other clauses in the agreement which have been incorporated to reflect the underlying award provisions from SCHADS, and which did not exist in the predecessor agreements for SIL workers.

The relevant clauses are clause 22 (Saturday and Sunday Work), clause 25.5 (Shiftwork), and clause 31.2 (b) (Payment for working on a public holiday).

In relation to shiftwork performed by existing SIL workers on a weekend:

- while Clause 25.3 (a) (i) and (ii) defines afternoon and evening shifts for Monday to Sunday, with penalty rates for those shifts including Saturday and Sunday being set by clause 25.3 (b) and without specifying that there is any substitution of other penalty rates or loadings

- clause 22 deals with work on Saturday and Sunday and substitutes weekend rates for shift penalties, and

- the effect is that it is ambiguous or uncertain as to what shift penalty entitlements apply in the case of relevant work performed on a weekend under clauses 22 and 25.3.

- the ambiguity or uncertainty regarding the applicable loadings is summarised in this table

	Clause 22	Clause 25.3
Sat Afternoon shift	50%	60%
Sat night shift	50%	62%
Sun afternoon shift	100%	110%
Sun night shift	100%	112%

In relation to shiftwork performed by existing SIL workers on a public holiday:

- while Clause 25.3 (a) (i) and (ii) defines afternoon and evening shifts for Monday to Sunday, with penalty rates for those shifts being set by clause 25.3 (b) and without specifying that there is any substitution of other penalty rates or loadings

- clause 31.2 (b) deals with payment for shiftwork on a public holiday and substitutes pubic holiday rates for shift penalties, and

- the effect is that it is ambiguous or uncertain as to what shift penalty entitlements apply in the case of relevant work performed on a public holiday under clauses 31.2 (b) and 25.3.

- The ambiguity or uncertainty regarding the applicable loadings is summarised in this table:

	Clause 31.2	Clause 25.3

Public holiday Afternoon shift	150%	160%
Public holiday night shift	150%	162%

In relation to the duration of a shift, clause 25.5 replicates a clause from the SCHADS award which has the effect of making all work performed before and after a sleepover part of a single continuous shift. Under the SCHADS award this has the result that shift penalties are determined by the morning finishing time of the continuous sleepover shift.

The intent of the parties was to preserve the arrangements under the predecessor agreements covering SIL work, which treated the evening and morning components of a sleepover as separate shifts for the purpose of determining shift penalty rates – with different penalties potentially applying to the evening and morning periods of work.

The intent of the parties for existing SIL workers is reflected in clause 21.4 (b) which treats the periods of work before and after a sleepover as separate shifts, rather than as parts of a continuous shift referred to in clause 25.5, thus creating an ambiguity or uncertainty about the treatment of the work (referred to as shifts in clause 21.4(b)) before and after a sleepover.

In relation to work associated with a sleepover for an existing SIL worker, the ambiguity or uncertainty regarding the applicable loadings can be summarised in this table:

	Clause 25.5	Clause 25.3
Work immediately before a sleepover (Mon-Fri)	10%	10%
Work immediately after a sleepover (Mon-Fri)	10%	12%, 10% or zero depending on the start and finish times

The tables above demonstrate that the application of two different clauses in the agreement leads to two different outcomes which creates an uncertainty about which clause ought to be applied. The proposed variations resolve the ambiguities and/or uncertainties we have identified to reflect the intent of the parties and make clear what entitlements applies."

[18] I am satisfied that the clauses in the Agreement set out are contradictory and that this gives rise to ambiguity or uncertainty.

[19] I am satisfied that the mutual intention of the parties in entering into the Agreement was to apply the Agreement as sought by the variation.

Conclusion

[20] Having found that there is ambiguity or uncertainty in the Agreement I am satisfied that my discretion to vary the Agreement is enlivened.

[21] I consider that it is appropriate to exercise that discretion and vary the Agreement to remove that ambiguity or uncertainty.

[22] I am satisfied that to do so would clarify the application of the Agreement and achieve the mutual intention of the parties in entering into the Agreement.

[23] The Agreement will be varied as sought. The variation will operate retrospectively from the date of operation of the Agreement, being 2 March 2020. An Order will issue accordingly.

DEPUTY PRESIDENT

Hearing details:

2020.

In Chambers.

15 May.

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[1] [2011] FWA 316.

[2] *Re Tenix Defence Systems Pty Ltd Certified Agreement 2001-2004* (Full Bench, 9 May 2002, PR917548) at [28, [32] & [35].

[3] Ibid at [29].

[4] Ibid at [31].

[5] See *Colnvest Ltd v Visionstream Pty Ltd* (2004) 134 IR 43 at [57].

[6] See *Re Civil Construction Corporation Enterprise Agreement* (Ross VP, 13 October 2002, PR939346); *SJ Higgins v CFMEU* (Williams SDP, 2 May 2001, PR903843); *RE CFMEU Appeal* (Full Bench, 25 February 1999, Print R2431).

[7] See *Re Tenix* at [32].

[8] *Tenix Defence Systems Pty Ltd Certified Agreement 2001 - 2004* (Full Bench, 9 May 2002, PR917548).

[9] Form F1 application dated 27 April 2020.