



DECISION

Fair Work Act 2009

s.158—Application to vary or revoke a modern award

Application by Craig Allen Mallett

(AM2023/7)

ROAD TRANSPORT AND DISTRIBUTION AWARD 2020

[\[MA000038\]](#)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATANZARITI
VICE PRESIDENT ASBURY

SYDNEY, 30 MAY 2023

Application to vary clause 13.6 of the Road Transport and Distribution Award 2020.

Introduction and background

[1] On 21 March 2023, Craig Mallett lodged an application to vary clause 13.6 of the *Road Transport and Distribution Award 2020*¹ (Award) as it relates to employees who are required to start work between 12:01 am and 6:00 am. In his application Mr Mallett contends that a variation is needed to make the Award easier to understand.

[2] Clause 13.6 currently provides:

13.6 Spread of hours

- (a) The ordinary hours of work are to be worked between 5.30 am and 6.30 pm.
- (b) The spread of ordinary hours may be altered in any depot, yard or garage by one hour at each end by agreement between the employer and the majority of employees concerned or between the employer and an individual employee.
- (c) The times within which ordinary hours of work may be performed will not apply to:
 - (i) newspaper deliveries, where for the sole purpose of transport and delivery of daily newspapers;
 - (ii) meat deliveries, where for the sole purpose of loading, transport and delivery of butcher's meat from abattoirs or meat works and where such meat is to be used for human consumption;

- (iii) live poultry, where for the sole purpose of loading, transport and delivery of live poultry from poultry farms to poultry processing plants; or
- (iv) a driver employed at a fish, fruit or vegetable store.

Provided that instead of the times in clauses 13.6(a) and 13.6(b), an employer may require an employee to commence ordinary hours of work between 12.01 am and 6.00 am (Monday to Friday inclusive) but not otherwise and, in which case, the weekly rate of the employee must be increased by 30% of the ordinary hourly rate for each ordinary hour worked.

[3] Mr Mallett states in his application that he is a delivery driver covered by the Award. He performs work delivering freshly-made sandwiches to service stations and supermarkets, and he and his co-workers commence work between 1:00 am and 4:00 am. His application appears to have arisen out of a dispute as to whether he and his co-workers are entitled to the 30% loading referred to in the last sentence of clause 13.6. He contends in his application that clause 13.6(c), as currently drafted, is ambiguous because it is not clear whether the text at the foot of clause 13.6(c) (commencing ‘Provided that...’) applies to all employees who start work between 12:01 am and 6:00 am, or only those performing the categories of work identified in paragraphs (i)-(iv) of clause 13.6(c).

[4] Mr Mallett’s preferred interpretation is that, because there is a full stop at the end of clause 13.6(c)(iv), this concludes clause 13.6(c), and the text at the foot of clause 13.6(c) is therefore to be read as a separate provision applying to any employee under the Award commencing work between 12:01 am and 6:00 am. In his application, Mr Mallett proposes that the Award be clarified in accordance with this interpretation by moving this text up to beneath clause 13.6(b).

[5] In the alternative, Mr Mallett contends that, if his preferred interpretation is not correct, the text at the foot of clause 13.6(c) should be amended to include specific reference to clause 13.6(c), and that delivery of freshly-made foods such as sandwiches to service stations and supermarkets should be added as paragraph (v) to the categories of work to which clause 13.6(c) applies. Further in the alternative, Mr Mallett proposes that paragraphs (i)-(iv) of clause 13.6(c) be removed altogether ‘as it is unfair to other drivers that are required to start early why are they any different to the drivers in the list’ [sic].

[6] The presiding member held a directions hearing in respect of Mr Mallett’s application on 11 April 2023. During this hearing, Mr Mallett confirmed that he would consider the ambiguity in clause 13.6(c) to be resolved if the words ‘listed in paragraphs (i) to (iv)’ were included immediately after ‘an employer may require an employee’ in the text at the foot of clause 13.6(c). Representatives from the Transport Workers’ Union of Australia (TWU) and the Australian Industry Group (Ai Group) indicated they would not oppose such a variation being made since it would be consistent with the proper interpretation of the provision.

[7] On 19 April 2023, the Commission published a draft determination in the terms consistent with that discussed at the directions hearing on its website, and requested interested parties to comment on it by 4:00 pm on Wednesday, 3 May 2023. The draft determination proposed replacing the existing clause 13.6(c) with clauses 13.6(c) and (d) as follow:

- (c) Clause 13.6(d) applies to employees engaged in any of the following:
 - (i) newspaper deliveries, where for the sole purpose of transport and delivery of daily newspapers;
 - (ii) meat deliveries, where for the sole purpose of loading, transport and delivery of butcher's meat from abattoirs or meat works and where such meat is to be used for human consumption;
 - (iii) live poultry, where for the sole purpose of loading, transport and delivery of live poultry from poultry farms to poultry processing plants; or
 - (iv) a driver employed at a fish, fruit or vegetable store.
- (d) An employer may require an employee mentioned in clause 13.6(c) to commence ordinary hours of work between 12.01 am and 6.00 am (Monday to Friday inclusive), in which case:
 - (i) the ordinary hours of work in clauses 13.6(a) and 13.6(b) will not apply to the employee; and
 - (ii) the weekly rate of the employee must be increased by **30%** of the ordinary hourly rate for each ordinary hour worked.

[8] The TWU filed a response on 3 May 2023.² This was the only response received. In its response, the TWU confirmed it supported the proposed variation but submitted that the words 'but not otherwise' should be included in new clause 13.6(d). This, it said, would ensure that the clause would only apply where employers require employees to start work between 12:01 am and 6:00 am on every occasion they work, and avoid the potential for the employer to vary an employee's start time such that their shift will commence outside of this window. The TWU contended that this retained the effect of the current clause 13.6(c). The TWU proposal would amend the new clause 13.6(d) as follows:

- (d) An employer may require an employee mentioned in clause 13.6(c) to commence ordinary hours of work between 12.01 am and 6.00 am (Monday to Friday inclusive) **but not otherwise**, in which case:
 - (i) the ordinary hours of work in clauses 13.6(a) and 13.6(b) will not apply to the employee; and
 - (ii) the weekly rate of the employee must be increased by 30% of the ordinary hourly rate for each ordinary hour worked.

[9] The presiding member held a further directions hearing in this matter on 4 May 2023. Representatives from the TWU and the Ai Group attended. Mr Mallett failed to attend this hearing, notwithstanding a number of attempts by Commission staff to contact him. The Ai Group confirmed that it did not oppose the variation to the Award as amended by the TWU.

Consideration

[10] Although it may be accepted that the drafting of the current clause 13.6(c) is somewhat clumsy, we consider its meaning is clear considered in the context of the clause as a whole. Clause 13.6(a) establishes a standard spread of ordinary hours of 5:30 am – 6:30 pm. Clause 13.6(b) is a facilitative provision which allows the standard spread to be altered by one hour at each end at a workplace by agreement with a majority of employees or with an individual employee. Clause 13.6(c) provides that clauses 13.6(a) and (b) do not apply to work falling within any of the categories in paragraphs (i)-(iv) to the extent that the employer may require an employee to commence ordinary hours between 12:01 am and 6:00 am Monday to Friday and not otherwise. If this requirement applies, the employee is entitled to a loading of 30% on the ordinary hourly rate of pay for each hour worked.

[11] Mr Mallett’s preferred interpretation rests on the proposition that because paragraph (iv) of clause 13.6(c) ends with a full stop, what follows is a stand-alone provision which is not confined in its operation to the categories of work in paragraphs (i)-(iv). This is incorrect: the following text is plainly part of clause 13.6(c) and must be read on that basis.

[12] The draft determination, with the amendment proposed by the TWU, expresses the meaning of existing clause 13.6(c) in clearer and more ‘user-friendly’ terms.

[13] No merits case has been made out for a substantive variation to clause 13.6(c) which would render it applicable to a new category of work, namely the delivery of freshly-made foods such as sandwiches to service stations and supermarkets. Mr Mallett’s application appears to assume that delivery drivers performing this work suffer an unfair comparative disadvantage because they do not receive the 30% loading in the current clause 13.6(c). However, such drivers are entitled, under clause 21.1 of the Award, to overtime penalty rates for hours worked prior to the spread of ordinary hours (i.e. before 5:30 am pursuant to clause 13.6(a) or before 4:30 am if adjusted pursuant to clause 13.6(b)) in addition to the minimum rates prescribed by clause 17.1(a).

[14] The Award will be varied in accordance with the draft determination, with the amendment proposed by the TWU. We make the variation pursuant to s 160 of the *Fair Work Act 2009* since we consider that the current drafting of clause 13.6(c) gives rise to uncertainty, as the background circumstances to Mr Mallett’s application demonstrate. The variation will take effect on 15 June 2023. The determination giving effect to this decision is published together with the decision.



PRESIDENT

<PR762620>

¹ MA000038.

² [Correspondence - Comment on draft determination](#)