[2013] FWCFB 1228

FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.604—Appeal of decision

Australian Municipal, Administrative, Clerical and Services Union
(C2012/6219)

Clerical industry

SENIOR DEPUTY PRESIDENT ACTON
DEPUTY PRESIDENT SMITH
COMMISSIONER RYAN

MELBOURNE, 5 MARCH 2013

Appeal against decision [[2012] FWA 9731] of Senior Deputy President Kaufman in matter number AM2012/95 - appeal in relation to application to vary modern award - modern awards review - Clerks–Private Sector Award 2010 - consideration of modern awards objective - Fair Work (Transitional Provisions and Consequential) Amendments Act 2009 - Item 6 of Schedule 5.

Introduction

[1] This decision deals with an appeal by the Australian Municipal, Administrative, Clerical and Services Union (ASU) against part of a decision[1] of Senior Deputy President Kaufman of 14 November 2012. The part of the decision which is the subject of the appeal concerns an application by the ASU to vary the *Clerks—Private Sector Award 2010*[2] (Clerks Award) so as to delete the "Annualised salaries" clause[3] of the Clerks Award. The application was made as part of the two-year review of modern awards pursuant to Schedule 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Transitional Act). On 1 January 2013 Fair Work Australia (FWA) was renamed the Fair Work Commission (FWC).

Schedule 5, Item 6

[2] Schedule 5, Item 6 of the Transitional Act is as follows:

"**6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years**

(1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, the FWC must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.

Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that the FWC is required to conduct under the FW Act.

(2) In the review, the FWC must consider whether the modern awards:

(a) achieve the modern awards objective; and

(b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

(2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

(3) The FWC may make a determination varying any of the modern awards in any way that the FWC considers appropriate to remedy any issues identified in the review.

Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).

(4) The modern awards objective applies to the FWC making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.

(5) The FWC may advise persons or bodies about the review in any way the FWC considers appropriate.

(6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of the FWC) has effect as if subsection (2) of that section included a reference to the FWC's powers under subitem (5)."

"Annualised salaries" clause

[3] The "Annualised salaries" clause of the Clerks Award is as follows:

"**Annualised salaries**

17.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) clause 16—Minimum weekly wages;

(ii) clause 19—Allowances;

(iii) clauses 27 and 28—Overtime and penalty rates; and

(iv) clause 29.3—Annual leave loading

.

(b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

17.2 Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

17.3 Base rate of pay for employees on annual salary arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 16—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties."

The Senior Deputy President's decisions

[4] His Honour's decision in respect of the ASU's application to delete the "Annualised salaries" clause in the Clerks Award is as follows:

"**ANNUALISED SALARIES**

[67] The ASU seeks to remove clause 17, the annualised salaries provision, of the Award. This variation is opposed by all parties that have made an application in relation to the review of the Award, as well as the AFEI. The ACTU filed submissions in support of this variation.

[68] In pursuing this variation, the ASU tendered a survey to support the removal of clause 17. The ASU submitted that this survey indicated that a majority of employees surveyed were not given a choice as to whether or not to be paid on this basis, considered that the conditions pertaining to the arrangement had been adequately explained, had never reviewed the arrangement to compare it with award entitlements and would not, given the choice, prefer to be paid in accordance with award conditions.

[69] The ASU further submitted that the survey results showed that just under 5% of those responding believed that their annualised salary arrangement compensate them for entitlements they would otherwise have received under the Award. Approximately one third were unsure.

[70] It is worth noting that the survey tendered was based on the responses of approximately 63 people, which in reality, is a miniscule proportion of those covered by the Award

[71] On 22 October 2012 I declined to delete an annualised salaries clause in the *Contract Call Centres Award 2010* (the CCC Award) in the Review of that award. The ASU had sought the deletion of that clause on similar grounds to those it propounds in this application.

[72] In my reasons for decision I traced the history of the making of the CCC Award, an analysis that required an examination of the history of the insertion of the annualised salaries clause into this Award. Although there are differences in the wording of the clauses in the

CCC Award and the Award, their genesis is similar, as is their effect, albeit the clause in the Award applies to all employees covered by it.

[73] The number of award clauses against which an annualised salary can be offset is not the same between the two awards. Nevertheless, for the purposes of the Review, the differences between the two awards are not of such a nature as would lead to a different conclusion.

[74] Apart from the insufficient size of the sample surveyed, the answers given would not persuade me that there is any need to remove the annualised salaries clause from the Award.

[75] In refusing to remove the annualised salaries clause in the Award, I adopt my reasoning in the review of the *Contract Call Centres Award 2010*."[4] [Footnotes omitted]

[5] The reasoning in the review of the *Contract Call Centres Award 2010*[5] (CCC Award) to which his Honour refers concerned an ASU application to delete the annualised salaries clause in the CCC Award pursuant to Schedule 5, Item 6 of the Transitional Act.

[6] The annualised salaries clause in the CCC Award is as follows:

"**18.5 Annual salary arrangements for higher classifications**

(a) The provisions of clause 18.5(b) will apply to the following classifications:

- Customer contact stream—Principal Customer Contact Leader;
- Clerical and administration stream—Clerical and Administration Employee-Level 5; and
- Contract Call Centre Industry Technical Associate

(b) Employees on annual salary arrangements will be compensated for any payments arising from the following award provisions in accordance with the provisions of clause 18.5(c):

- Clause 18.4—Higher duties;
- Clause 20—Allowances;
- Clause 22—Payment of wages;
- Clause 24—Ordinary hours of work, rostering and penalty rates;
- Clause 25—Breaks;
- Clause 26—Overtime;
- Clause 27.4—Annual leave loading;
- Clause 30.4—Payment for time worked on a public holiday.

(c) The following obligations apply to employers in relation to the higher classifications set out in clause 18.5(a):

(i) The ordinary hours of work of employees in those classifications set out in clause 18.5(a) should not exceed the ordinary hours of duty in the particular industry or sector of industry in which the employee is employed. Employers will compensate for:

- time worked regularly in excess of ordinary hours of duty;
- time worked on public holidays;
- time spent standing by in readiness for a call back;
- time spent carrying out duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or
- time worked on afternoon, night or weekend shifts;

(ii) either by:

- taking this factor into account in the fixation of annual remuneration;
- granting special additional remuneration;
- granting a special allowance or loading; or
- granting other compensation such as special additional leave.

(d) An employee must be advised in writing upon engagement, or in any other case upon a request being made in writing to the employer, of the method of compensation being used and the normal starting and finishing times in the relevant establishment. The methods of compensation are set out in clause 18.5(c)(ii). The provisions of clauses 18.5(c)(i) and (ii) are to be used as the basis for the calculation of the annual salary. If the employer is compensating the employee by a method identified in clause 18.5(c)(ii), the employer must identify the special additional remuneration, allowance or loading which is being paid.

(e) Salary review

An employee's salary will be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the factors in clause 18.5(c)(i).

(f) Transfers

Where an employee is transferred permanently from day work to shiftwork or from shiftwork to day work, such employee should receive at least one month's notice. However, the employer and the employee may agree on a lesser period of notice.

(g) Reasonable time in excess of ordinary hours

(i) Subject to clause 18.5(g)(ii) an employer may require an employee to work a reasonable amount of time in excess of ordinary hours of duty. The method of compensation must be in accordance with clause 18.5(c)(ii).

(ii) An employee may refuse to work time in excess of ordinary hours of duty in circumstances where the working of such additional time would result in the employee working hours which are unreasonable having regard to:

- any risk to the employee's health and safety;
- the employee's personal circumstances including family responsibilities;
- the needs of the workplace or enterprise;
- the notice (if any) given by the employer of the additional time which is required to be worked and by the employee of their intention to refuse it;
- the employee's compensation; and
- any other relevant matter.

(h) Payment of wages

(i) At the election of the employer, wages may be paid weekly or fortnightly or in accordance with existing practices.

(ii) Where agreement is reached with an individual employee, wages may be paid four-weekly or monthly. This agreement may be reached at the time when the employee commences employment, but is not limited to such time.

(i) Annual leave loading

In addition to the annual leave payments specified in the NES, employees must be paid an annual leave loading of 17.5%. However, where an employer, in determining the total remuneration of an employee can demonstrate that it has taken into account that an annual leave loading will not be paid to the employee because the total remuneration has been fixed having regard to this fact or because other benefits related to annual leave of equal value have been granted by the employer, an entitlement to the annual leave loading will not accrue."

[7] His Honour's decision in respect of the CCC Award and the ASU's application seeking the deletion of the annualised salaries clause of the CCC Award is as follows:

"**[21]** I will treat the ASU submission as being that the variation sought should be made because the inclusion of the annualised salary arrangements clause in the CCC Award prevents it from meeting the modern awards objective in that it 'does not provide a "fair and relevant minimum safety net of terms and conditions" with respect to the minimum rates for employees' in the three classifications to which the clause applies, taking account of:

- the need to encourage collective bargaining [s 134(1)(b)];
- the need to promote social inclusion though increased workforce participation [s 134(1)(c)]; and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards [s 134(1)(g)].

[22] The ASU further submits that the Award does not meet item 6(2)(b) of Schedule 5 of the Transitional Act in that, whilst it contains both an annualised salary arrangements provision and an Award Flexibility provision, the Award does not operate effectively without anomalies or technical problems arising from the Part 10A award modernisation process.

[23] As to the need to encourage collective ('enterprise' is the word used by the ASU) bargaining, the ASU submits that the employees in the three classifications the subject of cl 18.5 have no ability to bargain about the award provisions for which the annualised salary arrangements clause is required to compensate them.

[24] This submission cannot be correct. The mere fact that an annualised salary, with the various award entitlements absorbed into it, is paid does not prevent bargaining about whether an enterprise agreement should contain an annualised salary arrangements clause. Nor does it prevent bargaining about what entitlements of the nature of those set out in cl 18.5(b) should be included in any enterprise agreement, the quantum of any such allowances or which of them should be the subject of any annualised salary arrangements clause.

[25] As to the need to promote social inclusion through increased workforce participation the ASU submits:

> In the paper Social Inclusion: Outlining economic implications of social *inclusion/exclusion*, the Department of Education, Employment and Workplace Relations (DEEWAR) broadly defines social inclusion as focus on social relations and 'the extent to which people are able to participate in social affairs and attain power to influence decisions that affect them.' This includes participation in the labour market. There is no opportunity for employees in the higher classifications to participate in the determination of essential award conditions. The greater majority of employees covered by the award are female and non-unionised and are therefore already under-represented in the labour market in regard to both participation and the ability to have a say in the terms and conditions of their work.
>
> [Reference deleted]

[26] This submission is untenable. Whether or not there is an 'opportunity for employees in the higher classifications to participate in the determination of award conditions' says nothing about participation in the labour market, has no demonstrated connection with the fact that there is an annualised salary arrangements clause in the Award and ignores the fact that it is the ASU that represented clerical employees in the making of the Award. Further, those employees are not excluded from the coverage of the Award.

[27] Further, I do not consider that the annualised salary arrangements clause is relevant to the need to promote social inclusion, which is one of the matters to be taken into account in ensuring that modern awards provide a fair and relevant minimum safety net of terms and conditions (the modern awards objective).

[28] As to the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards, the ASU submits:

> Individual flexibility clauses are included by statute in all modern awards and are intended to provide the appropriate safeguards for an employer and employee to negotiate and genuinely agree to a salary arrangement that will benefit both parties. An annualised salary clause circumvents this process and can create confusion about whether the award flexibility clause or the annualised salary provision should apply.

[29] Clause 7 of the Award deals with award flexibility and applies to all employees covered by the Award. Clause 18.5 only applies to the three highest classifications in the Award. The existence of cl 18.5 does not circumvent the ability of any employee to vary the application of the terms referred to in cl 7. Arguably, in the case of the three highest classifications, the entitlements for which those of them on annual salary arrangements are compensated for by the salary arrangements clauses, 20, 24 and 27.4, could nonetheless be the subject of an individual flexibility agreement. I do not accept the ASU's submission that these employees are implicitly denied access to the individual flexibility clause, or that they are denied the right to negotiate arrangements to meet their individual needs around when work is performed, overtime rates, penalty rates, allowances and leave loading. No evidence was adduced to the effect that the coexistence of clauses 7 and 18.5 creates 'confusion about whether the award flexibility clause or the annualised salary provision should apply.' Each has separate work to do and they are not inconsistent with each other.

[30] Even if I am wrong about ability of the employees in the three highest classifications to negotiate such arrangements, that does not go to the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards. Section 134(1)(g) speaks of unnecessary overlap of modern awards, not of terms within a modern award.

[31] As to the ASU's submission that whilst the Award contains both an annualised salary arrangements provision and an award flexibility provision, the Award does not operate effectively without anomalies or technical problems arising from the Part 10A award modernisation process, the ASU largely makes the same argument that it does in relation to s 134(1)(g). There is no evidence to support the ASU's assertions.

[32] As well as submitting that the Award, whilst containing cl 18.5 does not meet the modern awards objective, the ASU submits that there are cogent reasons for its removal and that the provision was not adequately considered by the Australian Industrial Relations Commission 'when compared to the consideration given to the Award Flexibility provision.' The cogent reasons for its removal are said to be 'based on the principles of equity, fairness and changed circumstances', which are that the provision is:

- Inherently inequitable and discriminatory as it applies only to employees in the higher classification levels;

- Inherently unfair as no employee agreement is required;

- No longer necessary for employers now that all modern awards have compulsory award flexibility provisions; and

- More appropriate in Enterprise Agreements where actual pay rates apply and annualised pay arrangements can be agreed, monitored and more reliably reviewed by employees.

[33] In my view, none of these matters is made out, let alone is [sic] has the ASU demonstrated that there is a cogent reason for the removal of the clause. By its nature it is more appropriately applied to employees in the higher classifications. It is not unfair merely because no employee agreement is required. Most award clauses apply absent employee or employer agreement. The award flexibility clause does not do the same work as that done by cl 18.5. I do not accept that such a clause is more appropriate in an enterprise agreement, and whether or not it is, is probably irrelevant to the review.

[34] In opposing the ASU's application to vary the Award by removing cl 18.5 AiG submits that insofar as the ASU submits that cl 18.5 is not necessary for the Award to achieve the modern awards objective, the submission is misconceived.

[35] AiG further contends that:

- Removal of the clause is not necessary to achieve the modern awards objective;

- It is necessary for the industry to remain globally competitive and that the clause assists in the achievement of that aspiration;

- The flexibility term is not an appropriate vehicle to deal with the issue of wages and salaries as an alternative to the annualised salaries provision; and

- The Award is operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process and that therefore the ASU has not demonstrated a cogent reason for the removal of the clause;

- The application is an attempt by the ASU to revisit an issue that was considered under the Part 10A process and the ASU has not established any cogent reasons for departing from the 2009 Full Bench Award Decision;

- There is no cogent reason or basis to vary the Award having regard to the matters which Fair Work Australia is required to consider, namely the achievement of the modern awards objective or the effective operation of the Award. The mere fact that the 'variation sought...might be allowable, or not unlawful, is not a sufficient basis for the Tribunal to make the variation'…

[37] In submitting that the proposed variation is not necessary to achieve the modern awards objective and, implicitly, that the Award, containing cl 18.5 achieves it, AiG referred to the history of a similar provision in the *Clerks - Private Sector Award 2010*…

[38] I have set out paragraph [85] of the June decision and its observation that there is an implicit legislative acceptance that the terms of existing modern awards, albeit made under the WR Act, are consistent with the modern awards objective. Accordingly, where the subject matter of the variation sought has already been dealt with in the Part 10A process it is necessary to show that there are cogent reasons for departing from the previous Full Bench decision. The ASU has failed to demonstrate any cogent reasons for doing so.

[39] In the 2012 Review Fair Work Australia must consider whether the Award achieves the modern awards objective. If the Award fails to do so in any respect, then Fair Work Australia must consider whether the proposed variation would render the Award such that it does achieve that objective. In my view the ASU has not established that the Award, because it contains the annualised salaries clause, is not consistent with the modern awards objective. It follows that the deletion of the clause will not achieve, or better achieve, that objective.

[40] It is manifestly undesirable that an Award that resulted from the agreed adoption of the Contract Call Centres Award 2003, which itself was made by consent after lengthy negotiations involving not only the ASU and AiG, but with other unions as well as the ACTU, should not [sic] be disturbed in the 2012 Review without, Fair Work Australia being provided with very strong cogent reasons for so doing. This, the ASU has failed to do.

[41] Not only was the Award based on the Contract Call Centre's consent award, but that award largely replicated another consent award to which the ASU was also a party - the *Telecommunications Services Industry Award 2002*.

[42] On 5 October 2012, I issued a statement seeking further submissions on the interaction between the common law in relation to offsetting payments against award provisions and the annualised salaries clause.

[43] At a further hearing on 19 October 2012, the ASU maintained its position that the clause should be deleted, as did the employers that it should be retained.

[44] Having heard the parties, I am further confirmed in my view that the clause should not be deleted. Whatever be the position at common law, the current clause provides the parties with certainty as to what may be offset if an annual salary is paid, what procedures must be followed, as well as providing certain safeguards to employees.

[45] In my view the deletion of clause 18 would cause confusion, particularly as to what, if anything, can be offset and as to whether employees could be paid by way of an annual salary at all. Its deletion would also, in my view, disadvantage the employees affected because, as a matter of law, they could be remunerated by way of annualised salaries without any of the protections provided by the clause.

[46] For the above reasons the application is dismissed."[6]

Grounds of appeal

[8] The ASU submitted that his Honour's decision in respect of the ASU application to vary the "Annualised salaries" clause of the Clerks Award pursuant to Schedule 5, Item 6 of the Transitional Act is affected by jurisdictional error as well as by failures in the exercise of his discretion. In this regard the ASU submitted, in essence, that his Honour:

(a) does not address the requirements in Schedule 5, Item 6 of the Transitional Act, in particular the need to consider whether or not the Clerks Award is operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process;

(b) errs in applying his reasoning in respect of the CCC Award in his determination of the ASU application, as the matters peculiar to the CCC Award do not operate in respect of the Clerks Award;

(c) errs by not considering the evidence in respect of the Clerks Award presented for the ASU, particularly that of Ingrid Stitt at paragraphs 26-28 of Exhibit ASU 1, Julie Bignell at paragraphs 20-21 of Exhibit ASU 2 and Terry O'Loughlin at paragraphs 7-11 and 13 of Exhibit ASU 4.

[9] The ASU also submitted permission to appeal should be granted in the public interest having regard to the matters involved in the appeal, the fact it is an appeal against a single member in an application to vary a major modern award covering a large number of employees, and the type of error contended by the ASU.

[10] The Australian Council of Trade Unions (ACTU) supported the submissions of the ASU. The ACTU added that there is a disconnect between the "Annualised salaries" clause in the Clerks Award and the reasons for decision of the Full Bench of the Australian Industrial Relations Commission (AIRC) that included the clause in the Clerks Award. Such a disconnect, they said, is an anomaly "arising from the Part 10A award modernisation process".

[11] In this regard the ACTU pointed out that on 16 November 2009, in considering an application by the ASU to vary the Clerks Award to delete an "Exemption rate" clause from the Clerks Award, the award modernisation Full Bench of the AIRC said:

> "**[25]** In all of the circumstances we consider that the exemption provision should be removed but that flexible working arrangements should be available with respect to clerical employment and that these should be subject to appropriate safeguards and processes to ensure that employees clearly understand and agree to any arrangements which may differ from base award entitlements. We propose to delete the exemption provision in cl.17. However, we propose to insert an annualised salaries clause. The wording of the clause is in line with clauses in some other modern awards. It provides for an alternative way to remunerate employees, safeguards against disadvantage and a formal process to establish and maintain the annualised salary arrangement."[7] [Underlining added]

[12] The ACTU said that notwithstanding this statement by the Full Bench when including the "Annualised salaries" clause in the Clerks Award, the "Annualised salary" clause in the Clerks Award does not contain any requirement that employees agree to an annualised salary and has the effect of exempting employees from a complete and comprehensive safety net.

[13] The ACTU further submitted there were other cogent reasons for revisiting the matter of "Annualised salaries" in the Clerks Award. These other cogent reasons related to the incompatibility between the current clause and the statutory scheme established by the *Fair Work Act 2009* (Cth) (FW Act), the modern awards objective, and the interaction between the Clerks Award and the common law.

[14] In this regard the ACTU submitted that as the "Annualised salary" clause in the Clerks Award provides for an annualised salary without the consent of the employee it is inconsistent with the clear intent in the FW Act that the safety net of terms and conditions provided by modern awards and the National Employment Standards only be varied by agreement. In addition, the ACTU submitted the "Annualised salaries" clause in the Clerks Award is likely to undermine the safety net contrary to the modern awards objective, as the survey material attached to the ASU submissions to the Senior Deputy President evinces.

[15] Finally, the ACTU submitted that when the non-monetary entitlements for an employee in the Clerks Award are considered, such as its clause 23 regarding the time for payment of wages, an employee would not be disadvantaged by the deletion of the annualised salary clause in the Clerks Award and the operation of a common law annualised salary arrangement which was not in contravention of the FW Act and the Clerks Award.

[16] The grant of permission to appeal was opposed by The Australian Industry Group (AIG), Australian Business Industrial (ABI), Australian Federation of Employers and Industry (AFEI), Victorian Employers' Chamber of Commerce and Industry (VECCI) and Business SA.

Consideration of the appeal

[17] We are not persuaded his Honour's decision in respect of the ASU application to delete the "Annualised salaries" clause from the Clerks Award is affected by appealable error.

[18] In his decision his Honour says that "[i]n refusing to remove the annualised salaries clause in the Award, I adopt my reasoning in the review of the *Contract Call Centres Award 2010*."[8] His Honour's reasoning in the review of the CCC Award deals with the submissions made to him, as part of his review of the CCC Award, about whether the annualised salaries clause in the CCC Award is achieving the modern awards objective and operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process. Properly read, we think it is apparent his Honour's reasoning is essentially generic, consistent with the manner in which the matter was argued before him. His Honour's reasoning as to why he considers the annualised salaries clause in the CCC Award is not preventing the CCC Award achieving the modern awards objective is not, in essence, dependent on the differences in the annualised salaries clauses in the CCC Award and the Clerks Award. Similarly, his Honour's reasoning for rejecting the submissions put to him that the annualised salaries clause in the CCC Award is preventing the CCC Award operating effectively without anomalies or technical problems arising from the Part 10A award modernisation process is not, in essence, dependent on the differences in the annualised salaries clauses in the CCC Award and the Clerks Award.

[19] In the circumstances, we do not think it can be maintained his Honour erred in adopting such reasoning in respect of the "Annualised salaries" clause in the Clerks Award or failed to address the requirements in Schedule 5, Item 6 of the Transitional Act in respect of the Clerks Award and its "Annualised salaries" clause. The adopted reasoning is essentially generic, consistent with the manner in which the matter in respect of the Clerks Award was argued before him, and that reasoning deals with the requirements in Schedule 5, Item 6 of the Transitional Act. When paragraph 38 of his Honour's adopted reasoning is read in context,

we are not persuaded the use of the term "subject matter" in that paragraph is indicative of his Honour having applied the wrong test in respect of the application before him.

[20] We add that as part of his reasoning in respect of the annualised salaries clause in the CCC Award, his Honour referred to there being an absence of evidence to support the ASU's submissions. There was also an absence of evidence supporting the ASU's submissions in respect of the "Annualised salaries" clause in the Clerks Award. His Honour's decision in respect of the Clerks Award specifically, and in our view correctly, deals with the inadequacy of the survey data presented by the ASU. As to the evidence of Ingrid Stitt, Julie Bignell and Terry O'Loughlin in respect of the Clerks Award to which the ASU has referred, we think it is too generalised and speculative to be of probative value in respect of the matter in issue.

[21] His Honour's decision in respect of the ASU application concerning the Clerks Award properly recognises there are differences between the annualised salaries clauses in the CCC Award and the Clerks Award but, also properly, concludes the differences between the two awards are not such as to warrant a different outcome.

[22] With respect to the ACTU's submissions, we point out that the "Annualised salaries" clause in the Clerks Award is a base award entitlement, and part of the safety net of terms and conditions provided by the Clerks Award. The safety net in the FW Act being the minimum terms and conditions in the National Employment Standards, modern awards and national minimum wage orders.[9]

[23] We also point out the FW Act does not require that the annualised wage arrangements in modern awards provide for the parties' agreement to such arrangements. We do not think there is any warrant for regarding the words "arrangements" or "alternative" in s.139(1)(f) of the FW Act as incorporating the concept of "agreement".

[24] Further, we point out that subsequent to the Full Bench decision that included the "Annualised salaries" clause in the Clerks Award, a Full Bench of FWA specifically dealt with an ASU application to vary that "Annualised salaries" clause so as to require the parties' agreement to an annual salary. The Full Bench of FWA dismissed the ASU application, saying:

> "**[8]** Awards operate in conjunction with contracts of employment. It is generally accepted that clerical employees are commonly remunerated by way of annualised salaries whether the relevant award expressly provides for such arrangements or not. It is also generally accepted that if the salary is expressly paid in compensation of all award entitlements and the amount paid exceeds the amount due under the award then the arrangement is not inconsistent with the award. The intention of the ASU in making its application is that the only arrangements which can legally be entered into are those expressly provided for in the award.

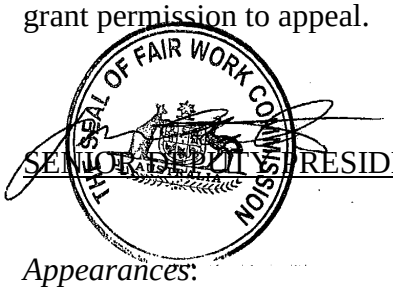
> **[9]** It is apparent that the terms of the relevant awards and NAPSAs were taken into account in formulating the annualised salaries clause in the Commission's decision of 16 November 2009. We believe that the safeguards in the modern award are appropriate in the circumstances of clerical employment. Further, we are concerned that the variation sought by the ASU may reduce existing flexibility and require changes in practices which have operated for many years. The ASU has not made a case for imposing a limitation on existing arrangements."[10] [Endnote deleted]

[25] Finally, contrary to the submission of the ACTU, we do not think there is any error in his Honour's adopted reasoning in respect of the common law and the "Annualised salaries" clause. It is consistent with the aforementioned Full Bench decision regarding the ASU application to vary the clause so as to require the parties' agreement to an annual salary and properly recognises the deletion of the clause would disadvantage employees in so far as it resulted in the loss of the safeguards provided by the clause.

[26] We apprehend no other error in his Honour's decision in so far as it concerned the "Annualised salary" clause of the Clerks Award.

Conclusion

[27] We refuse the ASU permission to appeal against the decision of Senior Deputy President Kaufman of 14 November 2012. Appealable error on the part of the Senior Deputy President has not been established. Further, there is no right to permission to appeal in respect of a single member decision concerning a major modern award covering a large number of employees, and the matters involved in the appeal are not novel or of such a nature as to attract the public interest. We are not satisfied it is in the public interest or otherwise to grant permission to appeal.



SENIOR DEPUTY PRESIDENT

Appearances:

E. White, of counsel, with *J. Nucifora* for the Australian Municipal, Administrative, Clerical and Services Union.

T. Vernier for Australian Business Industrial.

T. Clarke for the Australian Council of Trade Unions.

S. Forster for the Australian Federation of Employers and Industry.

B. Ferguson with *G. Vaccaro* for The Australian Industry Group.

H. Wallgren with *S. West* for Business SA.

N. Barkatsas for the Victorian Employers' Chamber of Commerce and Industry.

Hearing details:

2013.
Melbourne:
January 29.

Final written submissions:

The Australian Industry Group, 5 February 2013.
Australian Council of Trade Unions, 12 February 2013.
Australian Municipal, Administrative, Clerical and Services Union, 13 February 2013.

Endnotes:

[1] *Motor Traders' Association of New South Wales and others*, [2012] FWA 9731.

[2] MA000002.

[3] Ibid, clause 17.

[4] *Motor Traders' Association of New South Wales and others*, [2012] FWA 9731.

[5] MA000023.

[6] *Re Contract Call Centres Award 2010*, [2012] FWA 9025.

[7] *Re Clerks–Private Sector Award 2010*, [2009] AIRCFB 922.

[8] *Motor Traders' Association of New South Wales and others*, [2012] FWA 9731at [75].

[9] *Fair Work Act 2009* (Cth), s.139(1)(b).

[10] *Re Clerks–Private Sector Award 2010*, [2010] FWAFB 969.

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