[2015] FWCFB 620
FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

SECURITY SERVICES INDUSTRY AWARD 2010
(AM2014/89)

Security services

VICE PRESIDENT WATSON
DEPUTY PRESIDENT KOVACIC
COMMISSIONER ROE MELBOURNE, 2 MARCH 2015

Four yearly review of modern awards - Security Services Industry Award 2010 - Fair Work Act 2009, ss. 156, 138 and 134.

Introduction

[1] On 11 November 2014 the President issued a direction that this Full Bench hear and determine the substantive issues raised during the 2014 four yearly review of modern awards with respect of the Security Services Award 2010 (the Award). The award review is required to be conducted in accordance with s.156 of the *Fair Work Act 2009* (the Act) which states:

> **"156 4 yearly reviews of modern awards to be conducted**
>
> *Timing of 4 yearly reviews*
>
> (1) The FWC must conduct a ***4 yearly review of modern awards*** starting as soon as practicable after each 4th anniversary of the commencement of this Part.
>
> Note 1: The FWC must be constituted by a Full Bench to conduct 4 yearly reviews of modern awards, and to make determinations and modern awards in those reviews (see subsections 616(1), (2) and (3)).
>
> Note 2: The President may give directions about the conduct of 4 yearly reviews of modern awards (see section 582).
>
> *What has to be done in a 4 yearly review?*
>
> (2) In a 4 yearly review of modern awards, the FWC:
>
> (a) must review all modern awards; and

(b) may make:

(i) one or more determinations varying modern awards; and

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards; and

(c) must not review, or make a determination to vary, a default fund term of a modern award.

Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 2: For reviews of default fund terms of modern awards, see Division 4A.

Variation of modern award minimum wages must be justified by work value reasons

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

Each modern award to be reviewed in its own right

(5) A 4 yearly review of modern awards 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."

[2] It is also necessary to consider provisions of the Act dealing with modern awards. Section 138 of the Act provides:

"138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective."

[3] With respect to this section, a Full Bench of the Commission has said: [1]

"**[38]** Under s.157(1) the Commission must be satisfied that 'a determination varying a modern award ... is *necessary* to achieve the modern awards objective' (emphasis added). In *Shop, Distributive and Allied Employees*

Association v National Retail Association (No 2) (*SDA v NRA (No 2)*) [2] Tracey J considered the proper construction of s.157(1). His Honour held:

> "The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
> The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective . . .
> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary." [3]

[39] We are satisfied that s.138 is relevant to the Review. We also accept that the observations of Tracey J in *SDA v NRA (No.2)*, as to the distinction between that which is "necessary" and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138."

[4] The modern awards objective in s.134 of the Act provides:

"134 The modern awards objective

What is the modern awards objective?

> (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.

This is the ***modern awards objective***.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."

[5] In a preliminary decision concerning the 4 year review process a Full Bench said: [4]

"**[31]** The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions' *taking into account* the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. [5] The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process.[6] As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

"To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant." [7]

> **[32]** No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.
> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
> **[34]** Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective."

[6] The 4 year review represents the first full opportunity to consider the content of modern awards without the requirement in the award modernisation Ministerial request to avoid disadvantage to employees and increased costs for employers. A recent Full Bench summarised the approach at the time modern awards were made in the following terms: 8

> **"[5]** The award modernisation process was initiated by a request signed by the Minister for Employment and Workplace Relations on 28 March 2008, pursuant to s.576C(1) of the *Workplace Relations Act 1996* (**WR Act**).
>
> **[6]** To appreciate the background against which award modernisation took place, we set out in part the request 9 signed by the then Minister for Employment and Workplace Relations, the Hon. Julia Gillard.
>
> *(2) The creation of modern awards is not intended to:*
>
> *(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;*
>
> *(b) result in high-income employees being covered by modern awards;*
>
> *(c) disadvantage employees;*
>
> *(d) increase costs for employers;*
>
> *(e) result in the modification of enterprise awards. This does not preclude the creation of a modern award for an industry or occupation in which enterprise awards operate.*
>
> **[7]** The application of Clause 2(c) and (d) of the Request presented particular problems for the Commission in dealing with applications for modern awards. The modern award making process was not done in a vacuum and it had to take account of existing instruments. This was not a case of the parties having a clean slate and in

the name of award modernisation, seeking changes without presenting proper merit arguments. An example in the process then, and in the matter before us now, is hours of work. Historically changes to ordinary hours of work have been accompanied by extensive and reasoned argument as to why the Commission should alter its awards. This tension in not trying to disadvantage employees and increase costs for employers led to the Full Bench in the modern award process to adopt a process of identifying the critical mass of particular terms and/or conditions of employment across the various awards with which it dealt. This concept is evidenced by many Full Bench decisions but the following is illustrative:

> *In general terms we have considered the applications in line with our general approach in establishing the terms of modern awards. We have had particular regard to the terms of existing instruments. Where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit.*" 10

[7] The following general observation in a preliminary Full Bench decision about the Review is relevant to the relationship between the decision to create a modern award, the historical context and the Review: 11

> "**[60]** ... 3.The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made."

[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary

to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.

[9] The issues that we have been directed to determine are set out in Schedule B to the President's directions together with further matters subsequently added to the direction on 18 November 2014. The issues concern the coverage of the award, security licences, shift duration, broken shifts, long breaks, stand-by allowance, meal allowance, permanent night work, overtime rates for casuals, change of contract, consultation, a definition of "first response", amended classification description of Security Officer Level 3, insertion of new military allowance and increased hourly rate of Security Officer Legal 1. The changes are sought by a variety of employers, organisations and an employee with an interest in the operation of the Award. We propose to consider each of these matters in turn.

Coverage of the Award

[10] MSS Security seeks to convert the Award from an industry award to a vocational award by way of an extension to the scope of the Award in clause 4 to cover employers who engage security guards as an incidental part of their main business. Security classifications are contained in approximately 20 other industry awards. Examples include the Registered and Licensed Clubs Award 2010 and the Educational Services (Post-Secondary Education) Award 2010. MSS Security contends that for the equity of security contractors and their employees, the wage rates for employees of the various types of employers should be identical. Its application seeks to transfer coverage from the other awards with security classifications and provide additional coverage of any security employees employed in other industries. The change is supported in respect to current award free security employees by United Voice and opposed in its entirety by various employer groups including Australian Industry Group, Australian Business Industrial and New South Wales Business Chamber Ltd.

[11] As we have noted above, the award modernisation process conducted under s.576C of the *Workplace Relations Act 1996* was required to be conducted in accordance with a ministerial request. The request included the following provisions:

> 4. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along occupational lines as it considers appropriate.
>
> ....
>
> 9. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.

[12] When issuing the exposure draft of the Award the Full Bench said: 12

> "**[94]** A number of parties, including in particular the main employer party, argued in favour of an occupational award for security services. We remain to be persuaded that it is appropriate to make an occupational award covering security services. We are mindful of the desirability of minimising the number of awards applying to employers and are concerned at the impact of an occupational award on a large number of employers in unrelated industries who employ a small number of security staff. The exposure draft is for an industry award."

[13] In a subsequent decision the Full Bench said: 13

> "**[289]** We are still not persuaded that the award should have an occupational operation. We recognise that a number of the priority awards we have made contain classifications for security work and that a number of those classifications have wage rates lower than equivalent classifications in the award we have made for the security services industry. This disparity has existed in a number of states and territories for a long period. We note the submissions of the Minister, which other parties have supported, that where the Commission includes the same occupation in more than one industry award, it is desirable that, so far as practicable, the terms and conditions for that occupation are consistent across the relevant industry awards. We agree that this is desirable. On the other hand, we also think it undesirable to disturb established relativities within particular industries. On balance we are satisfied at this stage that the wage rates in the *Security Services Industry Award 2010* (the Security industry award) and for the security classifications in other priority awards are appropriate.
>
> **[290]** We will revisit the issue of whether the Security industry awardshould be given an occupational operation for employees performing jobs for which a security licence is required during Stage 4 at which time we will be in a better position to assess the nature and extent of classifications for security work across the modern award system."

[14] In December 2009 the Full Bench said: 14

> "**Coverage (Clause 4)**
>
> **[17]** ASIAL has consistently argued that any modern award for the security services industry should have an occupational operation. ASIAL makes the assertion that rates set in that award "will mean that private security contractors will be at a significant commercial disadvantage competing with those industries engaging security officers as direct employees." That assertion is not supported by any analysis or evidence. We rejected ASIAL's arguments for an occupational operation when we made the Security Services Awardand we are not persuaded on the basis of ASIAL's present assertion that we should take a different view. However, this is a matter that can be revisited at the first review, or earlier, if a case can be made that the rates attaching to security classifications in other modern awards are being utilised in a way that is diminishing the use of security contractors."

[15] Neither MSS Security nor United Voice called evidence of security officers being employed by employers in an industry that does not contain a security officer classification or where rates attaching to security classifications in other modern awards are being utilised in a way that is diminishing the use of security contractors. Rather, the arguments advanced in favour of the variation are more conceptual and allege a commercial disadvantage contractors have in competing with direct employees of their clients.

[16] The considerations that led to the conclusions of the Award Modernisation Full Bench remain relevant because they concern aspects of the modern awards objective, especially the objective of a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards. Requiring employers in a separate industry to comply with an additional award, for what will usually be a small proportion of its employees, conflicts with this objective.

[17] If there is a problem with different wage rates in awards, the wage rates themselves can be reviewed where there are work value reasons to vary the award rates and it is necessary to achieve the modern awards objective. Rates in different awards for classifications of the same work value are expected to be uniform as a result of the minimum rates adjustment process conducted in the late 1980s and early 1990s. Where it can be demonstrated that this is not the case, there may be a question whether the modern awards objective is being achieved.

[18] It has not been established that the proposed variation to the coverage clause is necessary to achieve the modern awards objective.

Security Licences

[19] ASIAL seeks to insert a proposed new sub-clause to clause 10.6 to clarify the rights and responsibilities of employees and employers where an employee is required, by law or regulation, to hold a current security licence in order to perform the job, and that licence has expired, been revoked, suspended, refused or not been renewed. ASIAL contends that one reading of the relevant clauses in the Award as they currently stand, is that an employer may have no alternative but to terminate the employee where any of the circumstances specified in the sub-clause exist. The proposed variation would permit the employer to stand the employee down without pay for a period of two weeks in order that the licensing issue may be resolved. A longer period of stand down is proposed to be permitted by agreement. The Australian Industry Group does not oppose the change. The change is supported by MSS Security, United Voice, Australian Business Industrial and New South Wales Business Chamber Ltd subject to minor amendments being made to the wording of the proposed clause.

[20] To the extent that the existing clause may create confusion, we agree that it is desirable, and consistent with the modern awards objective, that the issue raised by ASIAL be clarified. We are of the view that a new sub-clause (d) should be inserted in the following terms:

> “Where an employee’s security license has expired and not renewed, or been revoked, suspended or refused by the appropriate licensing authority and as a result the employee cannot carry out a security activity, the employer may stand the employee down from work without pay for a period of 2 weeks or such other period as may be agreed between the employer and the employee in order to resolve the licensing issue.”

Shift Duration

[21] Both ASIAL and MSS Security seek to replace the current “shift duration” clause 21.2 so that the maximum ordinary hours in a shift would be increased from 10 (with an ability for an employer and a majority of employees to agree to 12 hour shifts) to 12 ordinary hour shifts to be worked at the direction of the employer. They contend that 12 hour ordinary shifts have long been custom in the industry given the demands of clients and that the current clause is unnecessarily restrictive. The wording of the proposed clauses varies slightly. MSS Security’s proposed clause provides for representation and negotiation with respect to the implementation of 12 hour ordinary roster patterns and requires that any agreement reached must be reduced to writing. The change is neither supported nor opposed by various employer groups including Australian Industry Group and Australian Business Industrial and New South Wales Business Chamber Ltd. The change is opposed by United Voice on the grounds that it creates confusion and dissolves an existing facilitative provision.

[22] No evidentiary case has been advanced to support the proposed variations. Shift lengths of 12 hours duration are now common in industry. The Award currently provides for the introduction of 12 hour shifts provided a fair process is followed prior to their introduction that

allows for a consideration of all relevant implications. In the absence of an evidentiary case demonstrating actual problems with the operation of the current clause, we are not persuaded that the change is necessary to achieve the modern awards objective. This proposed variation should not be made.

Broken Shifts

[23] ASIAL seeks to amend the current "broken shifts" clause 21.7 to make reference to a combined maximum of 10 hours (or 12 hours in relevant workplaces) permitted to be rostered in the two work periods of a broken shift. It also seeks to provide that the minimum break between the two work periods is 60 minutes. The change is neither supported nor opposed by various employer groups including Australian Industry Group, Australian Business Industrial and New South Wales Business Chamber Ltd. Both MSS Security and United Voice propose alternative variations to the clause if there is found to be a need for clarity regarding the working of broken shifts.

[24] ASIAL has not advanced an evidentiary case demonstrating problems with the operation of the existing provision. We are not satisfied that the change is necessary to achieve the modern awards objective. The proposed variation should not be made.

Long Breaks

[25] United Voice seeks to amend the current "long breaks" clause 21.4 to clarify the break requirements for employees working a two week roster cycle as the clause in its current form only specifically provides for long breaks during roster cycles of three, four or eight weeks. It submits that two breaks of two days each should be expressly provided in line with an interpretation of the clause by the Federal Court. [15]

[26] The change is opposed by various employer groups including Australian Industry Group, Australian Business Industrial and New South Wales Business Chamber Ltd. The change is not opposed by MSS Security. The employers generally contend that the interpretation adopted by the Federal Court is incorrect, that the decision provides no basis for the variation, and that no case has been made out to vary the clause. Australian Business Industrial contends that if the Commission is of the view that the clause is ambiguous, a variation should be made to clarify that it only applies to the roster cycles mentioned in the clause.

[27] We agree that the interpretation by the Federal Court does not, in itself, provide justification for a variation. Further we are not of the view that the intention of the provision, in view of its history, was to imply an obligation for a certain number of long breaks for shift cycles not dealt with in the clause. In our view, the decision of the Federal Court has given rise to an ambiguity and that it is desirable for this to be remedied. Therefore a variation should be made, consistent with the history and intent of the clause, and in the absence of an evidentiary case justifying a variation, in line with the amendment sought by Australian Business Industrial. The preamble to sub clause 21.4(b) should be amended to read:

> "Regardless of the roster cycle, an employee on a roster cycle must not be required to work more than a total of 48 hours of ordinary time without a long break of at least 48 continuous hours."

Stand-by Allowance

[28] ASIAL seeks to insert a proposed new "stand-by allowance" in clause 15 to compensate employees with an allowance of 1.76% of the weekly standard rate per day where they are required to hold themselves in readiness to be available to work at short notice. The change

effectively entitles an employer to place an employee on stand-by and be paid the relevant amount of approximately $13.25 per day, and payment at the relevant hourly rate for any time worked.

[29] The Australian Industry Group and MSS Security do not oppose the change. The change is opposed by United Voice. The change is neither supported nor opposed by Australian Business Industrial and New South Wales Business Chamber Ltd.

[30] In our view, the variation seeks to do far more than provide for an additional payment that does not exist in the Award. It seeks to introduce a notion of stand-by and provide award legitimacy for a practice not currently provided for in the Award. It may be that in certain industries, a requirement to stand-by to be called in for unforeseen work requirements is reasonable, and that such a requirement should not attract an entitlement to full wages where no work is actually performed. However, the change is sought without evidence being led of the nature of the need, the type of demands that could be placed on employees, a consideration of safeguards about its operation, and a review of award provisions in other industries which may inform a fair approach to such a matter. In the absence of such a case being presented we have not been persuaded that the variation is necessary to achieve the modern awards objective and conclude that the variation should not be made.

Meal Allowance

[31] MSS Security seeks to amend the current "meal allowance" clause 15.3 regarding the trigger point for payment of a meal allowance when overtime is worked. Currently a meal allowance is payable when an employee is required to work more than an hour beyond the completion of their ordinary shift. The variation seeks to amend the trigger point to the nearest 15 minutes, so that overtime of 1 hour and 7 minutes would be rounded down to 1 hour and no meal allowance would be payable.

[32] The Australian Industry Group does not oppose the change. The change is opposed by United Voice. The change is neither supported nor opposed by Australian Business Industrial and New South Wales Business Chamber Ltd.

[33] In our view, the change is not supported by logic or fairness. Indeed it would be likely to add to confusion regarding the operation of the clause and may have the undesired effect of causing disputation. It is not necessary to achieve the modern awards objective. The variation should not be made.

Permanent Night Work

[34] MSS Security seeks to replace the current clause 22.2 regarding the definition of "permanent night work", which is subject to a 30% penalty payment under clause 22.3. The clause currently reads:

> "***Permanent night work*** means work performed during a night span over the whole period of a roster cycle in which more than two thirds of the employee's ordinary shifts include ordinary hours between 0000 hrs and 0600 hrs."

[35] The new wording sought by MSS Security is as follows:

> "***Permanent night work*** means work performed during a night span over the whole period of a roster cycle in which more than two thirds of the employee's ordinary shifts include ordinary hours between 0000 hrs and 0600 hrs; and where an average of at least one third of the ordinary hours per shift falls into this span."

[36] In its reply submissions MSS Security proposed an alternative clause as follows:

> "***Permanent night work*** means work performed during a night span over the whole period of a roster cycle in which more than one third of the employee's ordinary hours includes ordinary hours between 0000 hrs and 0600 hrs."

[37] The variation is opposed by United Voice. The change is neither supported nor opposed by Australian Business Industrial and New South Wales Business Chamber Ltd. The Australian Industry Group does not oppose the change.

[38] The effect of the clause is to add an additional condition for qualification of the higher shift penalty attaching to permanent night work. The condition relates to the extent to which shifts, on average, fall into the midnight to 6am span of hours. Work of less than two hours into the span; that is finishing before 2am or commencing after 4am would not be regarded as a night shift for the purposes of the calculation of the first qualifying condition of the clause.

[39] The context of the application is the early starts of many security officers. MSS Security contends that a 5am to 5pm 12 hour shift or a 5pm to 1am shift should not qualify as a night shift for the purposes of the higher permanent night shift allowance. MSS Security submits that the current wording is preventing rostering arrangements that might attract the higher penalty, even though they may be preferred by employees and better suit the needs of clients.

[40] In our view, a matter such as this should be considered in the light of other award provisions regarding permanent night shift penalties with appropriate adaptations for the nature of the industry. If an evidentiary case established that the current provisions were inappropriate and that the matter cannot be conveniently addressed by way of enterprise agreements or the award flexibility provision, then a case may exist for an appropriate award variation. However, the case presented fell well short of the detailed review of circumstances that might warrant a variation. In our view, the variation should not be made.

Overtime rates for casuals

[41] ASIAL seeks to add a sub-clause to the "overtime rates" clause 23.3 to avoid confusion in calculating rates for casuals and the payment of casual loading. The clause currently reads:

> Where an employee works overtime the employer must pay to the employee the ordinary time rate for the period of overtime together with a loading as follows:

For overtime worked on	Loading payable in addition to ordinary time rate %
Monday to Friday—first 2 hours	50
Monday to Friday—thereafter	100
Saturday—first 2 hours	50
Saturday—thereafter	100

Sunday	100
Public holiday	150

[42] The new wording sought by ASIAL is as follows:

23.3(a) To avoid doubt when calculating ordinary rate of pay for casuals for the purpose of overtime the ***casual loading is not included***.

23.3(b) Where an employee works overtime the employer must pay to the employee the ordinary time rate for the period of overtime together with a loading as follows:

For overtime worked on	**Loading payable in addition to ordinary time rate %**
Monday to Friday—first 2 hours	50
Monday to Friday—thereafter	100
Saturday—first 2 hours	50
Saturday—thereafter	100
Sunday	100
Public holiday	150

[43] MSS Security, Australian Business Industrial and New South Wales Business Chamber Ltd do not oppose the change. However, United Voice submits that the change is unnecessary as the proposed summary of hourly rates table to be inserted into a schedule to the Award would achieve the same purpose. We agree with the submission of United Voice and do not consider that the new sub-clause is necessary in the light of the proposed schedule and it is not necessary to achieve the modern awards objective.

Change of Contract

[44] MSS Security seeks to amend the current "change of contract" clause 12.5 so that s.119 of the Act does not apply where the employee of the outgoing contractor is offered other acceptable employment with the incoming contractor instead of the current provision that requires an employee to agree to other acceptable employment with the incoming contractor before the redundancy pay obligation in the Act is removed. The clause currently reads:

"(a) This clause applies in addition to clause 8—Consultation of this award and s.120(1)(b)(i) of the Act, and applies on the change to the contractor who provides security

services to a particular client from one security contractor (the outgoing contractor) to another (the incoming contractor).

(b) Section 119 of the Act does not apply to an employee of the outgoing contractor where:

(i) the employee of the outgoing contractor agrees to other acceptable employment with the incoming contractor; and

(ii) the outgoing contractor has paid to the employee all of the employee's accrued statutory and award entitlements on termination of the employee's employment.

(c) To avoid doubt, s.119 of the Act does apply to an employee of an outgoing contractor where the employee is not offered acceptable employment with either the outgoing contractor or the incoming contractor."

[45] The new wording sought by MSS Security is as follows:

"(a) This clause applies in addition to clause 8—Consultation regarding major workplace change of this award and s.120(1)(b)(i) of the Act, and applies on the change to the contractor who provides security services to a particular client from one security contractor (the outgoing contractor) to another (the incoming contractor).

(b) Section 119 of the Act does not apply to an employee of the outgoing contractor

where:

(i) the employee of the outgoing contractor is offered other acceptable employment with the incoming contractor; and

(ii) the outgoing contractor has paid to the employee all of the employee's accrued statutory and award entitlements on termination of the employee's employment.

(c) To avoid doubt, s.119 of the Act does apply to an employee of an outgoing contractor where the employee is not offered acceptable employment with either the outgoing contractor or the incoming contractor."

[46] MSS Security submits that the change is necessary to resolve a contradiction arising from the interaction of s.119 and clause 12.5 and that the clause retains the concept of acceptable alternative employment to ensure that an employee is not disadvantaged in other employment overall. It is intended to prevent an employee withholding agreement to an offer of acceptable alternative employment in order to claim redundancy pay. The Australian Industry Group does not oppose the change.

[47] United Voice opposes the variation. It submits that in an industry with repeated changes in contracts and invariable non-recognition of past service, the change would have the effect of denying a redundancy entitlement to an employee who rejects an offer because of the non-availability of leave based on prior service (other than annual leave).

[48] As noted by the parties, clause 12.5 operates in conjunction with the provisions of the Act regarding the payment of redundancy pay. A variety of circumstances are dealt with in the Act including an ability to make an application to this Commission under s.120 to have the

redundancy pay obligation reduced if the employer obtains acceptable alternative employment for the employee.

[49] The effect of the change sought by MSS Security would enable an employer of an employee who is offered employment with a future contractor to decline a redundancy payment based on the employer's view of whether the alternative employment was acceptable. The employer would have no need to make out a case under s.120 of the Act and have the circumstances considered by a tribunal. The only way an employee could contest the view of the employer would be to take enforcement proceedings under the Act.

[50] We see no reason to depart from the provisions of the Act regarding these matters. Clause 12.5 operates because the security services industry is effectively a contract industry. We consider that its operation should not be expanded when other avenues under the Act are available to an employer in line with the avenues that apply to employers in other industries. The change is not necessary to achieve the modern awards objective. We do not believe the variation should be made.

Consultation

[51] ASIAL seeks to replace the current "consultation" clause 8.2 regarding changes to rosters or hours of work to limit the operation of the clause to circumstances where the changes to rosters or hours of work have significant impact on the employees of the business. The clause currently reads:

> "(a) Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.
>
> (b) The employer must:
>
>> (i) provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary hours of work and when that change is proposed to commence);
>>
>> (ii) invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and
>>
>> (iii) give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.
>
> (c) The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.
>
> (d) These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements."

[52] The new wording sought by ASIAL is as follows:

> (a) Where an employer proposes changes to an employee's regular roster that will have, or have the potential to have significant effects on the employees in the

business or part of a business, the employer must consult with the employees affected and their representatives, if any, about the proposed change.

(b) The employer must:

(i) provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary hours of work and when that change is proposed to commence);

(ii) invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and

(iii) give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.

(c) In determining whether the changes proposed are reasonable or unreasonable the following must be taken into account:

(i) any substantial risk to employee's earnings from the proposed changes;

(ii) an employee's personal circumstances, including family responsibilities;

(iii) the needs of the workplace or business in which the employee is employed; and

(iv) the usual patterns of work in the industry, or the part of an industry, in which the employee works.

(d) The consultative process should be appropriate to the size and needs of the business.

[53] A revised proposal to much the same effect was proposed after the hearing of the matter. ASIAL submits that the existing clause is onerous for the small businesses in the industry because it limits the employers' ability to respond to demands of clients. It submits that since the Award was made in 2010 there have not been any matters brought before the Commission relating to changes of rosters under the Award. The Australian Business Industrial and the New South Wales Business Chamber Ltd do not oppose the change. United Voice supports the change and submits that the changes are sensible and consistent with the legislative requirement.

[54] The background to this clause is important. It was inserted into this Award, and all other awards, by a Full Bench in 2013 consequent upon the enactment of s.145A of the Act and the obligation on the Commission pursuant to a transitional provision in the amending Act requiring the Commission to make a determination varying certain modern awards by 31 December 2013, to include a term of the kind mentioned in s.145A. That section provides:

"145A Consultation about changes to rosters or hours of work

(1) Without limiting paragraph 139(1)(j), a modern award must include a term that:

(a) requires the employer to consult employees about a change to their regular roster or ordinary hours of work; and

(b) allows for the representation of those employees for the purposes of that consultation.

(2) The term must require the employer:

(a) to provide information to the employees about the change; and

(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views about the impact of the change that are given by the employees."

[55] In the course of its decision the Full Bench said: 16

> "**[66]** We are not persuaded that limiting the obligation to consult to permanent changes or in the manner proposed by the Aged and Community Services Association, the Australian Hotels Association and a number of other employer organisations would result in a term 'of the kind mentioned in s.145A'. The obligation to consult referred to in s.145A(1) attaches to 'a change' to an employee's 'regular roster or ordinary hours of work'. In this regard we note that the Revised Explanatory Memorandum to what became the 2013 *Amendment Act* states:
>
> > "regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement ..." [emphasis added]
>
> **[67]** There is no legislative warrant to limit the operation of the relevant term to changes of a particular character, a point conceded by a number of employer organisations. We also note that any such limitation would give rise to some definitional issues as to the meaning of the word 'permanent' in this context."

[56] The same considerations apply to the proposed change to clause 8.2(a). The legislation requires the Commission to insert consultation obligations of a particular type in particular circumstances. Modifying those circumstances would result in the Award not complying with the legislative requirement. We do not approve this change.

[57] We see no difficulty in the current operation of sub-clause (d) which is proposed to be deleted. We do not approve the deletion of this sub-clause.

[58] On one view, the proposed changes to sub-clauses (c) and (d) do not significantly alter the obligations under the clause or affect the conformity of the clause with s.145A. However, the clause in question is a standard award clause. Its subject matter is consultation. The obligations to consult are contained in sub-clauses (a) and (b). The proposed sub-clause (c) goes beyond the obligation to consult and deals with an evaluation of the proposed changes. The purpose of doing so is not clear and could create confusion in those seeking to apply the clause. We do not therefore consider that a sufficient case has been made out to approve the proposed variation.

First Response

[59] ASIAL seeks to insert a definition of "first response" into the definitions clause of the Award. The term is used in the classification definitions in Schedule C to the Award. The definition sought by ASIAL is as follows:

> "***First response*** means a security officer, who upon arriving early to a significant incident or matter, assumes immediate responsibility for managing the incident or matter until such time as the appropriate specialised personnel attend."

[60] Australian Industry Group, United Voice, Australian Business Industrial and New South Wales Business Chamber Ltd do not oppose the change. United Voice agrees that the definition, as drafted, is appropriate and assists in the operation of the definitions schedule. In our view, the clarification provided by the variation is consistent with a fair and relevant safety net and is necessary to achieve the modern awards objective. We approve this variation.

Classification Description

[61] Mr Christian Gavin, security officer, seeks to amend the current Schedule C - Classification C.3 Security Officer Level 3 by inserting the following task as being indicative of the tasks that an employee at Level 3 may be required to perform:

> "C.3.3 ... (f) control access to and exit from an airside security zone or landside security zone at an airport or control access to and exit from a Military base or Defence establishment."

[62] Mr Gavin submits that the proposed variation is necessary for the clarification of duties performed by security officers at military bases or defence establishments and that the parties to the award consultation process have overlooked the need to include officers working at such premises.

[63] The coverage of the Award in clause 4 is expressed in broad terms. It defines the employers bound by the award. The classification definitions in Schedule C to the Award identify the employees of those employers who are covered. These are also expressed in broad generic terms. In our view, it is unnecessary to specify types of establishment that may fall within the general descriptions. It has not been established that this variation is necessary to achieve the modern awards objective.

Military Allowance

[64] Mr Gavin seeks to amend the current "allowance rates" clause 15 so that a military allowance of 0.187% of standard rate per hour is payable to an employee who is performing security work at a military base or defence establishment. Mr Gavin submits that the proposed variation is necessary for the acknowledgment of the activities performed by officers at such premises and that it would provide for an allowance similar to the aviation allowance received by officers at aviation premises.

[65] A sufficient evidentiary or reasoned case has not been advanced to support a finding that this variation is necessary to achieve the modern awards objective.

Hourly Rate

[66] Mr Gavin seeks to amend the current Schedule C - Classification C.1 Security Officer Level 1 to increase the hourly rate to $20.53 per hour. This submission is made in response to MSS Security and ASIAL submissions that the maximum ordinary hours in a shift be increased from 10 to 12 hours. Mr Gavin submits that while 12 hour shifts may be customary, many

security officers working a 12 hour shift will receive 2 hours overtime pay and that to extend ordinary hours of work from 10 hours to 12 hours will financially penalise workers.

[67] We have not agreed to make the variation that gives rise to this application. A sufficient case has not been advanced to support this variation.

Conclusions

[68] The variations approved in this decision will be made by the Award Review Full Bench when finalising the revised Award in relation to non-contentious issues.

VICE PRESIDENT WATSON

Appearances:

Mr K. Scott for Australian Business Industrial, New South Wales Business Chamber Ltd and Business S.A.

Ms N. Street for Australian Industry Group.

Ms J. Light for Australian Federation of Employees and Industry.

Hearing details:

2014.

Melbourne - Video Conference Link to Sydney.

9 December.

1 [2014] FWCFB 1788.

2 (2012) 205 FCR 227.

3 Ibid at [35]-[37] and [46].

4 [2014] FWCFB 1788.

5 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35] per Tracey J.

6 *Friends of Hichinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836.

7 (1987) 16 FCR 167 at 184; cited with approval by Hely J in *Elias v Commissioner of Taxation* (2002) 123 FCR 499 at [62] and by Katzmann J in *CFMEU v FWA* (2011) 195 FCR 74 at [103].

8 [2015] FWCFB 616.

9 http://www.airc.gov.au/awardmod/download/award_modernisation_request.pdf

10 [2010] FWAFB 305 at [3].

11 [2014] FWCFB 1788.

12 [2008] AIRCFB 717 at [94].

13 [2008] AIRCFB 1000 at [289-290].

14 [2009] AIRCFB 963.

15 *Sydney Night Patrol and Inquiry Company Limited t/as SNP Security v Pulleine* [2014] FCA 385.

16 [2013] FWCFB 10165.

Printed by authority of the Commonwealth Government Printer

<Price code C, MA000016 PR560408 >