2014 Modern Award Review Manufacturing and Associated Industries and Occupations Award 2010

AM2014/75

Applicable Hourly Rate

15 November 2016

COVER SHEET

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1. INTRODUCTION

1. The AMWU makes this submission in response to the Fair Work Commission's Directions of 9 September, 2016 (the Directions). The Directions relate to the inclusion of the term "applicable hourly rate" determined by the Commission's 23 October 2015 decision[1] (the Decision). The term was included to overcome the unintended consequences of reduced employee entitlements arising from the redrafting of the Manufacturing and Associated Industries and Occupations Award 2010 (the Manufacturing Award) to include the term "ordinary hourly rate" and related definition.

2. The AMWU's submission is in response to the 28 October, 2016 submission (AIG October submission) of the Australian Industry Group (AIG) and 1 November 2016 correspondence of Australian Business Lawyers & Advisors (ABL)on behalf of f Australian Business Industrial (ABI) and the New South Wales Business Chamber Ltd (NSWBC).

REPLY TO AIG

3. The AMWU disagrees with the characterisation of the issue advanced at paragraph 2 of the AIG submission. In proposing the term "applicable rate of pay" the Commission did not "inadvertently open(ed) up numerous arguments "[2] between the AIG and MTFU. The primary cause of the long running issue between the parties was the refusal of the AIG to concede that the use of the term "ordinary hourly rate" led to a diminution of entitlements in specified provisions of the exposure draft prepared for the Manufacturing and Associated Industries and Occupations Award 2010. The Commission's inclusion of the term "applicable rate of pay" remedied the clear loss of entitlement identified by the AMWU in our submissions on drafting and technical issues.

4. Notwithstanding the history of the issue between the parties the AMWU agrees that it is pleasing to have eventually reached an accommodation on the majority of issues in dispute.

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[1] [2015] FWCFB 7236 commencing @ paragraph 95

[2] AIG October submission, paragraph 2

The AMWU submission of 31 October, 2016 identified the 2 remaining issues as Clause 34.5(a)(i) Rostered Day Off falling on a Public Holiday (RDO) and Clause 39.3-Transfer to Lower Paid Duties on redundancy.

RDO falling on a Public Holiday

5. The AIG provide no evidence supporting their claim that using the term ordinary hourly rate at 34.5(a)(i) reflects widespread industry practise[3]. The AIG submission transverses the history of the provision identifying that the clause had its genesis regarding seven day or continuous shiftworkers and that the relevant phrase in the historical and current version of the clause ,for the purpose of the current dispute, is "the ordinary rate".[4] The AIG then attempt to establish the meaning of "ordinary rate" in the RDO clause by reference to the phrase "ordinary rate" in the Shift Work provisions of the various versions of the Award.[5]

6. This approach must fail as the AIG has sought to establish the meaning of the phrase by relying on a reference in the *Shift Work Allowance* provisions of the Award rather than considering the phrase in the context of Clause 34.5(a). As we argued in our submission of 31 October, 2016 the term "ordinary time rate" has no one fixed meaning within the context of both the current and *earlier* versions of the Award. This fact we submitted is evidenced by the expression "ordinary rates" encompassing shift allowances within some provisions, such as working through meal breaks.[6] The different meaning ascribed to the term "ordinary rate" in the current Manufacturing Award is also present in earlier iterations of the Award.

7. In the 1971 version of the Award Clause 20(c) states:

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[3] AIG October submission @ 12.

[4] Ibid @ 15,17

[5] Ibid @ 17-19, 21-24.

[6] AMWU submission 31 October 2016 @ 9-10

(c) Subject to the provisions of sub-clause (a) hereof an employee employed as a regular maintenance man shall work during meal breaks at the *ordinary rates* herein prescribed whenever instructed to do so. ……….”[7](emphasis added)

Clearly if the “maintenance man” was a shiftworker, he or she would not have dropped back to a rate excluding their shift or weekend allowance when working through their meal break pursuant to Clause 20(c). This is also the meaning agreed by the parties in the context of the Exposure Draft.[8]

8. Similarly within the *Overtime* clause of the 1971 Award, the Crib Break provisions at Clause 21(g) [9] include the phrase “ordinary rates” which, where applied to a shift worker, would include their shift rate.

“(g) ……

Unless the period of overtime is less than one and a half hours an employee before starting overtime after working ordinary hours shall be allowed a meal break of twenty minutes which shall be paid at *ordinary rates*…..” (emphasis added)

9. The parties have agreed that the exposure draft formulation of the former *Crib Time* provision as it applies to shift workers or workers working ordinary time on the weekend, includes the relevant shift or weekend loading[10].

10. In the 1971 version of the Award, as identified in the AIG submission at paragraph 16, the employer could at their discretion pay the shift worker whose rostered day off fell on a public holiday “at the ordinary rate or have an additional day added to his annual leave”. Within the 1971 Award, as in the current award and exposure draft, where the employer at

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[7] Metal Industry Award 1971, Clause 20(c); (1975) 164 CAR 320 @ 363

[8] AMWU submission 31 October 2016, Annexure A, Item 2

[9] Metal Industry Award 1971, Clause 21(g); (1975) 164 CAR 320 @ 364

[10] AMWU submission 31 October 2016, Annexure A, Item 8

their discretion chooses to add an annual leave day to the employee's leave, that day would attract the higher of a leave loading of 17.5% or the employee's shift or weekend loading[11].

11. We argued in our October submission that the award phrase "ordinary rates" should be interpreted in context and in a way which avoided inconvenience or injustice.[12] We referred to the other 2 options available to an employer at Clause 34.5(a) which if chosen by the employer result in the employee's compensation including their shift or an annual leave loading[13]. It would be both inconvenient and unjust to accept as AIG urge that the employer has the discretion to choose a payment option resulting in a lower entitlement. In the context of Clause 22(k) of the 1971 Award as in the context of Clause 34.5(a) of the exposure draft, the phrase "ordinary rate" must be understood to include applicable shift or weekend loadings.

12. The arguments above are equally relevant to later versions (1984, 1998) of the Award which did not disturb the substance of the award provisions referred to above.

Payment for Public Holidays - workers with non-standard arrangements

13. As submitted previously, the Union's position regarding application of the term "ordinary rate' in the context of Clause 33.5(a) is entirely consistent with earlier decisions of the Commission regarding workers with non-standard arrangements. In the mid 1990's the Commission made a suite of decisions regarding public holidays for workers who regularly work a 5 day Monday-Friday week (standard arrangements).The Commission recognised that additional arrangements would be required for workers working non-standard (for example persons regularly working ordinary hours on the weekend, workers with variable

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[11] Metal Industry Award 1971, Loading on Annual Leave, Clause 25(k)(ii); (1975) 164 CAR 320 @ 370

[12] AMWU submission 31 October, 2016 @ 8-10

[13] AMWU 31 October , 2016 submission @ 14-17

rosters, continuous shift workers). The Commission's decision[14] of March 1995 determined principles to be applied for non-standard workers.

14. The Commission determined that when a prescribed public holiday fell upon a day when the employee would not be working "Fairness requires that the worker would not be disadvantaged by that fact"[15]. The Commission determined[16] that the appropriate compensation as:

a. An alternative "day off"; or

b. An addition of one day annual leave; or

c. An additional day's wages

15. The Commission noted that "such compensation is already provided in many awards".[17] The Commission's March 1995 decision "articulated principles "which were seen as being generally appropriate and which "members of the Commissions will be expected to apply"[18]. In this context and applying the Commission's principles the exposure draft's reference to "ordinary rate" must equal the determination of "an additional day's wages" referred at 13(c) above. An additional day's wages relates to the employee and includes any shift or weekend allowance applicable to the employee.

16. Support for this proposition is found in the March 1995 decision where the Commission determined that a non standard worker whose ordinary hours included a weekend day on which a public holiday fell and was not required to work on the actual day, received the

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[14] Print L9178

[15] Ibid, section 2, paragraph 2

[16] Ibid

[17] Ibid

[18] Ibid, section 1, paragraph 7

payment “which he or she would ordinarily receive for working on that day”[19] and would not receive a substitute day.

17. The employee who was required to work on the actual day received the weekend penalty rate and received a substitute day off. Compelling in the circumstances of the current matter is that the Commission determined that where the substitute day was a non-working day for the employee they received “the payment which he or she would ordinarily receive for working on that day”[20]. This is the applicable context and outcomes to be applied to the current issue in dispute.

18. The AIG argue[21] that the ordinary hourly rate formula is more consistent with s.116 of the Fair Work Act. This is misleading as s.116 clearly references standard workers and does not apply to workers whose ordinary rostered hours do not fall on the public holiday. This is clear from the note at s.116 which excludes employees not having ordinary hours of work on the public holiday from payment for the public holiday. The modern awards’ implementation of the March 1995 decision clearly “ supplements” the NES in this regard pursuant to s.55(4)(b).

19. The ABL submission raises no new matters requiring response.

Conclusion

20. For the reasons argued above we submit the Clause 34.5(a)(i) be reworded as pressed in our October submission at paragraph 18 . In response to the Commission’s Direction regarding the necessity for a hearing or otherwise we submit the matter may be determined on the papers.

END

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[19] ibidsection 2 paragraph3 dot points one and two

[20] Ibid, section 2 paragraph3 dot points one and two

[21] AIG October submission, paragraph 40