



## DECISION

*Fair Work Act 2009*

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

**Australian Industry Group, The**  
(AM2013/15)

Building, metal and civil construction industries

SENIOR DEPUTY PRESIDENT DRAKE

SYDNEY, 2 JANUARY 2014

*Application to add shift loading after overtime, in paragraph 32.2(c).*

[1] This decision arises from an application pursuant to section 160 of the *Fair Work Act 2009* (the Act) lodged by the Australian Industry Group (AiG) and supported by the Master Builders Australia (MBA) and Australian Business Industrial (ABI). The AiG is an organisation entitled to bring the application. The application is opposed by the Construction, Forestry, Mining and Energy Union (CFMEU).

[2] Section 160 of the Act is set out below:

“ (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

(2) The FWC may make the determination:

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or

(c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

(d) if the modern award includes outworker terms—on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.”

[3] The AiG submitted that clause 32.2 (b) of the Joinery and Building Trades Award 2010 (the award), which was first issued on 3 April 2009, is ambiguous and uncertain. It proposed a variation to clause 32.2 (c) of the award to address this defect. Clauses 32.2 and 32.3 are extracted below.

“32.2 Payment for period of annual leave

**(a) Instead of the base rate of pay as referred to in s.90(1) of the Act, an employee under this award, before going on annual leave, must be paid the wages they would have received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period.**

**(b)** Subject to clause [32.2\(c\)](#), the wages to be paid must be worked out on the basis of what the employee would have been paid under this award for working ordinary hours during the period of annual leave, **including** applicable allowances, loadings and penalties paid for all purposes of the award, first aid allowance, if applicable, and any other wages payable under the employee’s contract of employment including any overaward payment.

**(c)** The employee is not entitled to payments in respect of overtime, special rates or any other payment which might have been payable to the employee as a reimbursement for expenses incurred.

### **32.3 Annual leave loading**

In addition to the payment prescribed in clause [32.2](#), during a period of annual leave an employee must be paid a loading of 17.5% calculated on the minimum wages, loadings and allowances prescribed by clauses [18—Classifications and minimum wages](#), [19—Apprentice minimum wages](#), [20—Adult apprentice minimum wages](#), [21—Trainee minimum wages](#), [22—Supported wage system](#) and clauses [24.1\(b\)](#), [\(c\)](#) and [\(d\)](#) as applicable and the leading hand rates prescribed by clause [24.1\(a\)](#) if applicable. An employee is also entitled to the 17.5% loading on any proportionate leave on termination.”

(my emphasis)

[4] The AiG submitted that, as no relevant shift rate is specifically referred to in clause 3.3 as being included in the calculation of minimum wages, loadings and allowances, unlike the entitlements in clauses 18, 19, 20, 21, 22 and 24, such shift loadings are not to be included in the calculation of “...the wages they would have received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period.” referred to in clause 32.2 (a).

[5] The question in dispute between the parties is whether or not the rate of pay on which annual leave is to be calculated includes a shift rate if such a rate is part of the calculation of the wages an employee would have received in respect of the ordinary hours he or she would have worked had they not been on leave during the relevant period. Alternatively, are the only wages, loadings and allowances to be taken into account those identified in clause 32.3 which wages, loadings and allowances do not include the shift rates which are found in clause 28 of the Award.

[6] The AiG also submitted that, as the Act defines a base rate of pay in s16(1) and that definition does not include loadings, the Commission should be cautious about including loadings when making determinations concerning awards.

### Conclusion

[7] I am not satisfied that there is, on an objective assessment of the words used in clause 32.2 and 32.3, any ambiguity or uncertainty. The words are clear. A worker employed pursuant to this award would understand from the ordinary English meaning of the words used in clause 32.2 that, if shift work constituted their ordinary hours of work as defined in clause 28 of the award, then the wages earned by them for those ordinary hours of work would be the basis of the calculation referred to in clause 32.2 (a). Had it been intended to exclude the shift rate from the calculation in clause 32.2 it would have been an easy matter to do so.

[8] Such worker would also understand that, in addition to the wages earned by them for their ordinary hours of work, they would be paid the wages, loadings and allowances referred to in clause 32.3.

[9] Clause 32.2 (a) sets out an entitlement **instead of** the base rate of pay. Any reference to the base rate of pay in the National Employment Standards is irrelevant.

[10] Clause 32.2 (b) defines what an employee would have been paid whilst working ordinary hours as **including applicable allowances, loadings and penalties** under the award as well as any other wages payable under the contract of employment, including over award payments. I am satisfied that shift rates are within this definition.

[11] I am not persuaded that clause 32.3 operates to limit the description of what is paid to an employee whilst working ordinary hours. Clause 32.3 refers to wages, loadings and allowances to be included in the calculation but it does not purport to limit the definition in clause 32.2(b). Had it been intended to use this subclause to limit what was included in the calculation of wages paid for ordinary hours it would have been easy to do so.

[12] I am not persuaded that clause 32.2 (b) is in any way uncertain or ambiguous, or that there is an arguable case for the interpretation of the clause argued for by the AiG. If the parties wish to do so, an application can be made for a review of this award in the proposed four yearly review. It is not appropriate to seek this change by way of an amendment based on any uncertainty or ambiguity.

[13] The application is dismissed.



SENIOR DEPUTY PRESIDENT

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