DECISION

Fair Work Act 2009
s.739—Dispute resolution

Aaron Carroll
v
Barrier Social Democratic Club Ltd T/A Demo Club Broken Hill
(C2023/1511)

DEPUTY PRESIDENT BOYCE SYDNEY, 6 JUNE 2024

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)] – dispute as to annual leave loading payments under clause 30 of the Barrier Social Democratic Club Limited – Enterprise Agreement 2011.

[1] An application has been made by Mr Aaron Carroll (**Applicant**) for the Commission to resolve a dispute under the *Barrier Social Democratic Club Limited – Enterprise Agreement 2011* (**Agreement**).[1] The Applicant is represented by Ms *Rosslyn Ferry*, Secretary, of the Broken Hill Town Employee's Union.

[2] The Respondent to the dispute is the Barrier Social Democratic Club Ltd (**Respondent**). The Respondent is represented by Ms *Nicola Shaw*, Senior Legal Counsel, Clubs NSW.

[3] There is no dispute that the Agreement covers and applies to the Applicant in his employment with the Respondent.

[4] The Applicant has been employed by the Respondent for around 21 years, initially on a casual basis, and then on a permanent part-time basis. He works in the role of Lead Security Guard, and works afternoon shifts each week, from Fridays to Tuesdays. The performance of rostered shifts on Saturdays and Sundays are part of the Applicant's ordinary hours of work each week.

[5] The parties are in dispute as to the meaning of clause 30 of the Agreement in respect of annual leave loading (**ALL**). Both parties agree that when the Applicant takes annual leave he receives a 17.5% ALL on payments made to him in respect of such annual leave. However, the Applicant submits that the 17.5% ALL is calculated upon his ordinary time weekly wage, which includes any shift penalties that would be ordinarily payable to him for working on weekend days (i.e. Saturdays and/or Sundays). Conversely, the Respondent submits that the 17.5% ALL is calculated only upon his ordinary time weekly wage, which excludes any shift penalty rates that would be ordinarily payable to him for working on weekend days.

[1] AE891617, [2012] FWAA 1259, 14 February 2012.

[6] There is no contest between the parties as to the jurisdiction of the Commission to resolve this dispute, being a matter arising under the Agreement, by way of arbitration in accordance with clause 36 of the Agreement, and s.739 of the *Fair Work Act 2009* (**Act**). I equally make this finding.

[7] The Applicant relies upon his witness statement evidence, the statutory declaration of Ms *Ferry*, the Applicant's Submissions in-chief, and in-reply. The Respondent only relies upon written submissions. This matter has been determined on the papers, at the request of the parties, and following compliance by each party with relevant Directions.

Interpretation of enterprise agreements

[8] My determination in this matter applies the principles set out in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union v Berri Pty Ltd*.[2] Such principles were neatly and helpfully summarised by Deputy President Gostencnik in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union v Paper Australia Pty Ltd*[3]:

> "In short compass, much like the approach to construing a statute, the construction of a provision in an enterprise agreement begins with a consideration of the ordinary meaning of the words used, having regard to the context and evident purpose of the provision or expression being construed. Context may be found in the provisions of the agreement taken as a whole, or in their arrangement and place in the agreement being considered. The statutory framework under which the agreement is made may also provide context, as might an antecedent instrument or instruments from which a particular provision or provisions might have been derived. The industrial context in making an enterprise agreement and in which it operates is also relevant."[4]

Terms of the Agreement

[9] The following terms of the Agreement are relevant to this dispute:

a) The Agreement excludes all other industrial instruments (including a modern award/s) that would, but for the operation of the Agreement, apply to relevant employees. Its terms represent a "total agreement" in respect of terms and conditions that apply to relevant employees (including the Applicant).[5]

b) Hourly rates of pay (for full time, part-time and casual employees) are determined based upon an assigned classification level by reference to the relevant pay schedule.[6] The rates of pay in the pay schedules do not include any Saturday or

[2] [2017] FWCFB 3005, at [114]. See also *James Cook University v Ridd* [2020] FCAFC 123; (2020) 278 FCR 566, at [65].
[3] [2020] FWC 2130.
[4] Ibid, at [8].
[5] *Barrier Social Democratic Club Limited – Enterprise Agreement 2011, clauses 7 and 9, see also clause 10 (No Extra Claims).*
[6] *Barrier Social Democratic Club Limited – Enterprise Agreement 2011*, at clause 15.

Sunday penalty rates. There is no dispute as to the Applicant's classification level, or rate of pay, under the Agreement.

c) Employees (full time and part-time) who work on a Saturday and/or Sunday receive a payment at 175% of their ordinary rate (i.e. 175% of the applicable rate of pay in the applicable pay schedule).[7]

d) The ordinary hours of work for a part-time employee are between 48 and 148 each four week period. There is no limitation on the days of the week that ordinary hours may be rostered or worked.[8]

e) Annual leave is dealt with under clause 29 of the Agreement. It accrues on the basis of the ordinary hours of work set by the Agreement. Annual leave is paid in accordance with the National Employment Standards (**NES**).[9]

f) ALL loading is not contained in the NES. It is an additional entitlement under the Agreement. Clause 30 (titled, Annual Leave Loading) of the Agreement reads:

"30. Annual Leave Loading

30.1 This Clause shall apply to full-time and part-time Employees only.

30.2 Full-time and part-time Employees shall be entitled to seventeen-and-a-half percent (17.5%) annual leave loading which shall be calculated by reference to the ordinary time weekly wage, including the penalty rate prescribed by Clause 16 (if applicable), payable for purposes of annual leave.

30.3 The entitlement to annual leave loading shall be paid on any accrued leave taken by the Employees."

[10] The resolution of this dispute turns upon the meaning of the text under clause 30.2 of the Agreement. In my view, such text is clear.

[11] Case law identifies that the orthodox meaning of words such as "includes" or "including" is to enlarge the ordinary meaning of the word, phrase, or term, that precedes it.[10] In this case "ordinary time weekly wage" is enlarged to also be inclusive of (as opposed to exclusive of, or excluding) penalty rates prescribed by clause 16 of the Agreement (being Saturday and/or Sunday penalty rates), if applicable. In the case of the Applicant, such penalty rates are applicable.

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[7] Ibid, at clause 16.1.

[8] Ibid, at clauses 22 and 28. See also definitions of "Employees", "Ordinary Hours" and "Roster" under clause 5 of the Agreement, none of which assist in resolving this dispute.

[9] *Barrier Social Democratic Club Limited – Enterprise Agreement 2011*, at clause 29.

[10] *Sherritt Gordon Mines Ltd v Federal Commissioner of Taxation* [1977] VR 342, at 353; *Douglas v Tickner* (1994) 49 FCR 509, at 519; *Gardener v R* [2003] NSWCCA 199; *Owen v Menzies* [2012] QCA 170, at [106]; *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013] WASC 219, at [79]; *Transport Accident Commission v Hogan* [2013] VSCA 335, at [47].

[12] There is no dispute in these proceedings that the Applicant is rostered to, and does, work Saturdays and Sundays as part of his ordinary part-time hours each week. It follows that I find that when the Applicant is paid for one week of annual leave, he is to receive payment at the following percentages:

- Friday, Monday and Tuesday - ordinary weekly rate of pay (100%), plus 17.5% ALL; and

- Saturday and Sunday – weekend rate of pay (175%), plus 17.5% ALL.

[13] The foregoing interpretation of clause 30.2 of the Agreement is equally consistent with the meaning of the words set out in two previous industrial instruments applying to the workplace (as referred to at paragraphs [21]-[23] of the Applicant's submissions in-chief). It is unnecessary that issues of custom and practice, under contract or the Agreement, be considered. Again, the words of clause 30.2 of the Agreement are clear.

[14] Having resolved this dispute (see paragraph [12] of this decision above), the file in this matter will now be closed. The Applicant should of course receive any entitlements to annual leave loading that he has not received in accordance with paragraph [12] of this decision.

DEPUTY PRESIDENT

Ms *Rosslyn Ferry*, Secretary, of the Broken Hill Town Employee's Union, represented the Applicant.

Ms *Nicola Shaw*, Senior Legal Counsel, Clubs NSW, represented the Respondent.

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