AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

# DECISION

*Workplace Relations Act 1996*
s.576H—Commission may vary modern awards

## Australasian Security Industry Association Ltd
(AM2009/11)

## SECURITY SERVICES INDUSTRY AWARD 2010
[MA000016]

JUSTICE GIUDICE, PRESIDENT
VICE PRESIDENT LAWLER
VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER SMITH MELBOURNE, 22 DECEMBER 2009

**[1]** This decision concerns an application by the Australasian Security Industry Association Ltd (ASIAL) to vary the *Security Services Industry Award 2010*[1] (Security Services Award).

**[2]** We set down a timetable for submissions. The only other party to make a submission was the Liquor, Hospitality and Miscellaneous Union (LHMU), the union with principal coverage of the security services industry.

**[3]** We will deal with the variations sought by ASIAL in the order in which they appear in ASIAL's application.

**Part-time employees (Clause 10.4 )**

**[4]** ASIAL proposes changes to cll.10.4 and 23(d) in relation to the requirements for engaging part-time employees and the basis on which time worked in excess of ordinary hours attracts overtime payments. The LHMU objects to the proposed changes and points to the remarks of the Full Bench that emphasise the importance of ensuring "the essential integrity of part-time employment which should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38".[2] We continue to regard this as important.

**[5]** Clauses 10.4(b) to (d) presently read as follows:

> "(b) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work either:

(i) specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day; or

(ii) specifying the roster that the employee will work (including the actual starting and finishing times for each shift) together with days or parts of days on which the employee will not be rostered.

(c) Any agreed variation to the regular pattern of work must be recorded in writing.

(d) All time worked in excess of the employee's agreed ordinary time hours will be overtime and paid for at the rates prescribed in clause 23—Overtime."

**[6]** ASIAL proposes the following changes:

"(b) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work either:

(i) specifying at least the hours worked each day, which days of the week the employee will work and the ~~actual~~ proposed starting and finishing times each day; or

(ii) specifying the roster that the employee will work (including the ~~actual~~ proposed starting and finishing times for each shift) together with days or parts of days on which the employee will not be rostered.

... …

(d) All time worked in excess of the employee's agreed ordinary time hours will be overtime and paid for at the rates prescribed in clause 23—Overtime. Provided that where the employer and the employee agree in writing overtime shall only apply where the employee works in excess of 10 hours in any day or an average 38 hours in any roster cycle."

**[7]** In our decision concerning the making of the Security Services Award we accepted submissions that the provisions in the exposure draft relating to part-time employment were unnecessarily limiting and we made various changes. Necessarily, the parties did not have an opportunity to comment on the precise terms of the changes that we made. We acknowledge, as ASIAL submits, that the security industry is an industry where client demands can and do change at short notice and that employers are expected to respond to those demands. We accept the substance of ASIAL's submission that in some respects those changes did not go far enough. We approach the matter on the basis that there should be a balance between ensuring that the provisions are not a disincentive to employment on a part-time basis and maintaining the nature of part-time employment.

**[8]** We are disinclined to change cl.10.4(b) in the manner suggested by ASIAL because the substitution of the word "proposed" for the word "actual" would imply that an employer could unilaterally change starting and finishing times for part-time day workers. This would be inconsistent with the preservation of the essential integrity of part-time work. We are

concerned also that the ASIAL proposal in relation to cl.10.4(d) could lead to a situation in which only employees who are available for 38 hours per week are offered part-time work.

**[9]** We shall provide some additional flexibility by amending cl.10.4(c) to make it clear that the ordinary hours of part-time employees may be altered by agreement at any time and by making consequent changes in cl.10.4(d) in relation to overtime. We point out finally that other arrangements are capable of being made under the award flexibility clause.

**[10]** Clauses 10.4 (c) and (d) will be varied to read as follows:

> "(c) Any agreed variation to the hours of work will be recorded in writing.
>
> (d) All time worked in excess of the hours as agreed under clause 10.4(b) or varied under clause 10.4(c) will be overtime and paid for at the rates prescribed in clause 23— Overtime."

**Change of contract (Clause 12)**

**[11]** ASIAL sought the addition of a new subclause in cl.12 as follows:

> "**12.5 Change of Contract**
>
> (a) This clause applies in addition to clause 8 of this award and Section 120(1)(b)(i) of the NES, and applies on the change of a security contract from one security contractor (the outgoing contractor) to another (the incoming contractor).
>
> (b) Section 119 of the NES 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, section 119 of the NES 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."

**[12]** ASIAL relies upon cl.33AAA of the award modernisation request made by the Minister for Employment and Workplace Relations (the Minister) (the consolidated request). Clause 33AAA was included in the consolidated request by a variation made on 2 May 2009. Clause 33AAA reads:

> "33AAA Where an industry has developed specific arrangements for termination and redundancy to reflect the way the industry operates, the Commission may specify in a modern award that s.119 of the NES does not apply in those circumstances."

**[13]** The relevant terms of the National Employment Standards have now been incorporated into the *Fair Work Act 2009* (Fair Work Act) and are contained in ss.119 to 122. The reference in cl.33AAA to s.119 of the NES is to s.119 of the Fair Work Act. In a covering letter advising of the 2 May 2009 variation to the consolidated request the Minister noted:

> "The Exclusion of the National Employment Standard – redundancy
> I am aware that some participants in award modernisation have questioned whether specific exemptions from redundancy pay which currently apply in particular industries, can continue under a modern award. The intention of award modernisation is where these specific exemptions currently apply, that these are permitted where the Commission considers this to be appropriate. For this reason, the FW Act was amended to allow a modern award to create an exception to the redundancy NES."[3]

**[14]** The LHMU noted that the change sought by ASIAL mirrors a change made in the *Cleaning Services Award 2010*.[4] It submitted, however, that the circumstances of the cleaning and security services industries differ and that ASIAL has not demonstrated that the security industry has "developed specific arrangements for termination and redundancy to reflect the way the industry operates."

**[15]** From our own knowledge of the security industry we are satisfied that a change of contract with the incoming contractor taking over some or all of the relevant staff of the outgoing contractor is a common occurrence in the security industry. We are not persuaded that, in this respect, the circumstances of the cleaning and security industries differ materially. The addition of paragraph 33AAA to the request after the making of the Security Services Award is a circumstance that makes it appropriate to revisit cl.12 of that award. We regard ASIAL's proposal as appropriate. We will vary the award to add a subclause to the same effect as that proposed by ASIAL. The subclause we will add is:

> "**12.5 Change of contractor**
>
> (a) This clause applies in addition to clause 8 of this award and Section 120(1)(b)(i) of the NES, 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 NES 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 NES 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."

**Crowd controllers definitions ( Clause 3)**

**[16]** ASIAL proposes the addition of definitions for "basic crowd controller" and "crowd controller" to clarify the distinction between Level 1 and Level 2 crowd control functions and thereby reduce the scope for confusion in this regard. ASIAL proposes to draw the distinction by reference to the employee's length of experience. An employee with less than 12 months experience as a security officer would be a "basic crowd controller". The LHMU implicitly accepts that the award is presently confusing and does not oppose the changes proposed by ASIAL save that it says that the period of experience should be 6 months rather than 12 months. We will vary the award to add the definitions as sought by ASIAL.

**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 Award and 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.

**Hours of work and related matters (Clause 21)**

**[18]** ASIAL proposes the changes to cl.21 that it submitted will clarify the operation of that clause and improve its interaction with the clauses dealing with rostering. The LHMU agrees that these changes clarify the operation of the award without altering its substance and does not oppose them. We will vary the Security Services Award as suggested by ASIAL.

**Leave and public holidays(Clause 24.4)**

**[19]** ASIAL proposes a substitute cl.24.4. The existing subclause requires that a 17.5% annual leave loading be paid to all employees on "the amount the employee would have earned for working their normal hours, exclusive of overtime, had they not been on leave". We accept ASIAL's submission that this does not reflect the standard prevailing in most of the industry. Relevant instruments generally provide that for a period of annual leave an employee should receive either the pay they would have earned for working ordinary hours or the ordinary time rate plus certain specified allowances and a loading of 17.5%, whichever is the greater. We will vary cl.24.4 to provide as follows:

**"24.4 Payment for annual leav**e

Before the start of the employee's annual leave the employer must pay the employee in respect of the period of such leave the greater of:

(a) the amount the employee would have earned during the period of leave for working their normal hours, exclusive of overtime, had they not been on leave; and

(b) the employee's ordinary time rate specified in clause 14 together with, where applicable, the supervision allowance, first aid allowance and relieving officer allowance prescribed in cll. 15.1(a), 15.4 and 15.7 respectively, plus a loading of 17.5%."

**Transitional provisions**

**[20]** We now turn to the transitional provisions that should be included in this award. In our decision of 2 September 2009 we dealt with the transitional provisions that were to be included in the priority and Stage 2 modern awards.[5] This award was made as part of the priority stage. At paragraph 95 we referred to the terms of an agreement that had previously been reached between ASIAL and the LHMU in relation to the phasing-in of wage rates and other non-wage provisions of the award. As the agreement had been reached prior to our publication of the model phasing schedule we indicated that the parties should consider the model schedule and whether it should be placed in this award or the transitional provisions agreed between ASIAL and LHMU.

**[21]** We received written submissions from ASIAL in which it indicated that its members preferred the model phasing schedule. The differences between it and the earlier agreed provisions are not great but ASIAL did emphasise the importance of being able to phase penalty rates as well as new minimum weekly rates. In fact the model schedule would now have the minimum weekly rates commence on I July 2010 instead of 1 January 2011 as had been the case under the previous agreement. ASIAL also submitted that some of its members were also covered by other modern awards and consistency with phasing provisions in those awards was desirable. We also note that Chubb Australasia had earlier proposed that increases in penalty rates as well as weekly rates should be able to be phased in. The Australian Federation of Employers and Industries also supported the model phasing schedule being inserted into this award. It too submitted that it was desirable that increases in penalty rates be phased-in and this would not be possible under the earlier provisions agreed between ASIAL and the LHMU.

**[22]** LHMU submitted that the earlier agreement between it and ASIAL should constitute the phasing arrangements for the award. We have weighed that with the submissions of the various employers in the industry. It is apparent there is no agreement now with ASIAL nor with any other employer or employer association. On balance we are persuaded by the employers' submissions that it is preferable for the model phasing schedule to be included in this award.

**[23]** In our decision of 2 September 2009 we also referred to an issue concerning certain allowances which the LHMU had identified were ones that should be retained either indefinitely in the main part of the award or in a transitional schedule operative until 31 December 2014. In relation to this matter we have already ruled that the identified

allowances should be contained in a special transitional schedule that would operate until 31 December 2014.

**[24]** Arrangements will be made to have the model phasing schedule inserted into this award as well as a schedule which will contain the additional allowances.

BY THE COMMISSION:

PRESIDENT

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[1] MA000016.

[2] [2008] AIRCFB 1000 at para 291.

[3] Minister's letter of 7 May 2009.

[4] MA000022 and see [2009] AIRCFB 933.

[5] [2009] AIRCFB 800.

Printed by authority of the Commonwealth Government Printer
<Price code C, PR991902>