[2008] AIRC 255 AG840467 PR981224

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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.170LW application for settlement of dispute

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union

and

Honda Australia Pty Ltd
(C2007/3021)

HONDA AUSTRALIA PTY LTD ENTERPRISE BARGAINING AGREEMENT 2005
(AG2005/4226)
[AG840467 PR958660]

Vehicle industry

COMMISSIONER GAY MELBOURNE, 20 MARCH 2008

Operation of the Agreement.

DECISION

[1] The Commission is asked to determine a dispute over the application of the *Honda Australia Pty Ltd Enterprise Bargaining Agreement 2005* (the Agreement) as a consequence of the operation of the Dispute Resolution Procedure found at clause 15 of the Agreement. The parties bound are given as Honda Australia Pty Ltd (Honda, the company), employees who are union and non-union members engaged in warehouse operations covered by the *Vehicle Industry - Repair, Services and Retail - Award 2002* [AP824308CAV] (the award) as at 1 January 2005 and the Victorian Vehicle Division of the Australian Manufacturing Workers Union, registered as the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the union, the AMWU).

[2] Clause 15 sets out the preliminary steps to be taken by the parties and, at 15.3.4, provides that, *"If the grievance still exists the matter may be referred to the Australian Industrial Relations Commission (or other appropriate body provided by legislation) for decision which shall be final subject to any appeal in accordance with the Act."*.

[3] Following attempted conciliation of the issues giving rise to the dispute a jurisdictional objection was made by Honda. After further dealings this objection to jurisdiction was withdrawn and, when agreement continued to elude the parties, Directions issued for filing and the matter came on for hearing on 1 November 2007 when Mr A Sachinidis appeared for the union and Mr S Wood of counsel by leave for Honda.

The Issue in Dispute

[4] Although rendered in slightly varying fashions the issue in dispute, shortly stated, is whether the company's institution during the term of the Agreement of an 11.00 am - 7.30 pm shift is available to the company, given the proper operation of the Agreement. The Commission is requested to first decide that issue following which it was common ground that any remedy that may then be relevant would be further considered by the parties, with leave to apply.

The Union's Submissions

[5] The union maintains that the company does not have the capacity by the operation of the Agreement to institute the 11.00 am to 7.30 pm work.

[6] The thrust of the union's argument was that by the parties' express design the terms of the Agreement set out the capacity for hours to be worked. Clause 47, Hours of Work, is in the following terms:

> *"47. HOURS OF WORK*
>
> *47.1 The Hours of Work are as follows"*
>
> *47.2 9.00am to 5.30pm with ½ hour for lunch and two 15 minute tea breaks which includes walking time.*
>
> *47.3 Wash up time to be 3 minutes prior to the end of normal shift hours as detailed in 47.2 above."*

[7] The union also relied on clause 26 Introduction of Shifts which is in the following terms:

> *"26. INTRODUCTION OF SHIFTS*
>
> *26.1 In order to meet the changing demands of customers the company may require the introduction of an afternoon or night shift in the future.*
>
> *26.2 The following procedure and principles shall be observed if an afternoon or night shift is*

required.

26.3 The Company shall notify the Regional Secretary of the Vehicle Division at least 14 days prior to the commencement of the shift, the notice shall include the expected length of the shift (2 weeks minimum).

26.4 In the event an individual or individuals are required to change shifts then a minimum of 2 weeks notice shall be provided.

26.5 In recognition of the enormous social obstacles shiftwork can impose on employees, the shift(s) will be staffed by volunteers where possible.

26.6 In the event volunteers cannot be found a compulsory selection procedure will occur, employees selected through this process will have the right to put forward the reasons for not working the shift through the grievance procedure, and where found legitimate reasons exist shall be excluded from working that shift.

26.7 All prospective employees from the commencement of this agreement will have the potential requirement of shift work bought to their attention, and shall be required to work any shift as per the arrangements under this clause.

26.8 Employees who are engaged on afternoon or night shifts will be paid the following in addition to their ordinary rate:

Night Shift	*30 per cent*
Afternoon Shift	*18 per cent"*

[8] The AMWU argued that:

- by the terms of the Agreement the company had three shift options available to it, namely, day work between 9.00 am and 5.30 pm, afternoon shift and night shift;
- this was so because clause 47 specified the hours that are going to be worked under the Agreement rather than, as is often the case in awards and agreements, provide a span of hours within which work was able to be rostered and performed;
- in setting out what the hours of work are, the application of the Agreement's relevant clause was *"not capable of being varied in the way in which the company has sought to vary it"* [Mr Sachinidis, TPN 144];
- the company were not able to rely on clause 8 'Aims' of the Agreement where, as one of a series of aims, the achievement of which the Agreement was intended to ensure, sub-clause

8.1.3. provided, *"To continue to enhance job security through improved quality, productivity and increased competitiveness,"* and similarly, at 8.1.4., *"To maintain and improve the on-going viability of the company and assist in providing more fulfilling jobs and greater security for employees in relation to income and employment."*. These provisions were said to not be a grant of power or provide a capacity permitting the company to vary hours of work or institute an hours regime at odds with clause 47.;

- Clause 18(c)(i) of the award was said to be unavailable to the company in permitting a variation by two hours of daily hours. The award was said not to apply in this area, hours of work, because the Agreement's provision at clause 47 served to exclude the application of award clause 18 in its entirety;

- As an alternative to the award clause 18 exclusion argument in the point immediately preceding, that the award clause, were it to apply, does not operate to permit a new roster but, rather, provides flexibility within a shift once fixed.

[9] In a general response to an argument proposed by the company, the union urged the Commission to not accept that a contract of employment for employees at the company who are engaged in work within the scope of the award and the Agreement, which contract of employment contains an obligation to work the disputed hours, could override the terms of the Agreement. It was put that clause 47 in specifying the hours of work in the terms it employed does not permit of alternate day shift rostering.

The Company's Submissions

[10] The Honda argument stressed that it was important to read the Agreement having regard for its purposes. Mr Wood referred to the words of the High Court in *Amcor Limited v CFMEU* (2005) 222 CLR 246 at paragraph 2, where it was said by Gleeson CJ and McHugh J, *"the resolution of the issue turns upon the language of the particular agreement understood in the light of its industrial context and purpose and the nature of the particular reorganisation."*.

[11] With this in mind the Agreement's aims were said to be particularly relevant. Clause 8 is in the following terms:

"8. AIMS OF AGREEMENT

8.1 This Agreement is intended to ensure the following aims are achieved:

8.1.1. To continue to provide opportunities for all employees to achieve better job satisfaction through job rotation and development of individual skills.

8.1.2. To maintain a payment system fairly rewarding the above productivity aims as they are

achieved.

8.1.3. To continue to enhance job security through improved quality, productivity and increased competitiveness.

8.1.4 To maintain and improve the on-going viability of the Company and assist in providing more fulfilling jobs and greater security for employees in relation to income and employment.

8.1.5 To focus on employee participation activities on changes required to significantly improve productivity to match and better overseas competitors.

[12] Acknowledging that the words used must be given their meaning the company argued that there was no 'unstated implication' to be found in clause 47 by which *"… one cannot work outside of those hours"* and further *"… that the point we make is having regard for the purpose of the agreement it is possible to construe the hours of work clause in two ways."* [TPN 247].

[13] The construction favoured by the company and said to be normative was that *"… it simply sets out the normal or ordinary hours of work and some other instrument, or some other clause, or some other custom and practice then operates to provide some payment or benefit for the hours worked outside those normal hours."* [TPN 248].

[14] As clause 8 is said to be relevant, clauses 9, Extra Claims and 26, Introduction of Shifts were said to not bear upon the question that is before the Commission. This was because there was not an extra claim and as to clause 26, that it was not a question of the operation of clause 26 because the shift in question was not an afternoon shift [TPN 249].

[15] In directing attention to clause 47 the Honda contention was that *"… one has to form the view as to whether that clause prohibits work after 5.30 or not … It's not that work can continue past 5.30 to 7.30 and a penalty is payable or overtime rates are payable, but that work must cease."* [TPN 253-54].

[16] It was said that:

- the company was entitled to require or to ask and have an employee accept work after 5.30;
- where a contract of employment is to be given effect its terms will apply subject to ascertaining whether a relevant award or agreement *"limits or interferes with or otherwise alters the obligations created by the contract? If there is then of course the award or EBA obligations must prevail…"* [TPN 361];
- that the 1989 National Wage Case treatment encouraging less prescription and greater award flexibility points to an interpretative approach where less rigidity is a more likely purpose

when the Commission is considering the aims of the Agreement and its purpose [Print H8200 and Print H9100]. That case was said to provide *"… a context that you can't interpret these agreements in a vacuum"* and the relevant interpretative context *"… is the context whereby these types of provisions have been loosened in the last two decades."* [Mr Wood, TPN 366]. It was said that, as a consequence, of the several competing constructions it was much more likely that the Agreement means what the company says and not what the union says.

- In summary the Honda contention is of the available constructions:

- that clause 47 is no more than a statement of fact - declaring that these are currently the hours of work;

- that clause 47 should be read as *"the hours of work, the ordinary normal customary hours of work are as follows and then other clauses operate in relation to other hours which are worked…"* [TPN 374] in preference to the view contended for by the AMWU that;

- 'the hours of work are as follows with the exception only of afternoon shift and night shift and subject to clause 26'.

[17] It was noteworthy that the Honda case did not extend to declaring that there was not some penalty, in a monetary sense, to be paid for work performed outside the clause 47, Hours of Work and, rather, it was put that there may be such a penalty [TPN 384, 386 and 482]. This proposition was developed in the following submission, *"And we would say a fair construction of the clauses, including clause 46, means that you can be required to do additional work beyond 5.30. It's just a question of how much the employer has to pay for that."* [TPN 436].

[18] Mr Wood argued further that:

- because the 11.00 am - 7.30 pm shift is not expressly contemplated by the Agreement it does not follow that such a shift contravenes the Agreement;

- because the Agreement does not expressly provide an additional payment for hours additional to 9.00 to 5.30 hours it does not necessarily follow that there is a prohibition on working those hours;

- in construing agreements of this type one does more than engage in a literal, semantic exercise or plumb the subjective intentions of the parties and that somewhere in-between one construes the instrument having regard for the practical operation of the Agreement;

- the desire of Honda to roster employees on the hours the subject of objection in this case cannot constitute the making of a further claim in breach of the no extra claims clause.

The Union Reply

[19] In reply Mr Sachinidis submitted that:

- contracts of employment entered into by the company with employees could not amount to contracting out of the award or the Agreement;
- clause 47, while *"lean in its wording … is specific and express."* as it provides the specific hours of the 9.00 am to 5.30 pm shift [TPN 647];
- clause 47 reflects the parties' express agreement of the hours and arrangements for day workers - other than for the clause 26 flexibility available to the parties;
- there can be no other configuration for a day shift other than that set out at clause 47;
- as to a capacity for employees working 9.00 am to 5.30 pm to work additional hours on a day - that overtime was available pursuant to clause 46 Overtime. It was emphasised that the union did not contend that the Agreement meant all work must cease at 5.30 pm as had been suggested by Honda;
- it should be understood that the disputed hours presently being worked after 5.30 pm are being paid at ordinary time rates, not at overtime rates.

Consideration

[20] In reviewing all that has been put and the detailed provisions of the Agreement, it is significant, in my view, that the parties have provided in considerable domestic detail for the performance of work under the Agreement. Thus clause 22, 'Breaks', stipulates that the morning and afternoon breaks are of 10 minute duration and that there will be an additional five minutes walking time, which, *"requires all employees to remain in their work areas until the first bell sounds and to return to their work area prior to the second bell sounding."* [Clause 22.2].

[21] With similar detail the parties can be seen to have considered and reached agreement as to the fashion in which a company desire in the future to introduce an afternoon or night shift would be accommodated. The Agreement does this by setting out a series of obligatory consultative steps to be followed, but also sets out 'principles' to be observed. The parties' acknowledgement, at clause 26.5, that shift work can impose *"enormous social obstacles"* on employees, is reflected in the initially voluntarist approach which follows at clause 26.2 limited by a company capacity to draft, subject to an appeal arrangement with rights, in turn, through the grievance procedure.

[22] The clause 26.5 value judgement as to the social affect of shift work is likely also to inform part of the principled approach envisaged by clause 26.2 and which, in turn, is evident in the agreement providing at 26.7 that, from the commencement of the agreement, 'prospective employees' must *"have the potential requirement of shiftwork brought to their attention and shall be required to work any shift as per the arrangements under this clause."* The clause goes on to set out the premiums that

will apply to afternoon and night shift.

[23] I have taken these clauses as reflecting the parties' particularity of approach to the performance of duty under the Agreement and that the parties in coming to their agreement sought in several detailed ways to focus on and legislate for the potential for non shift work duty and for shift work.

[24] Clause 47, Hours of Work, whatever else is said about its construction, (and much was said) is similarly detailed in its prescriptiveness. It regulates work within the hours 9.00 am to 5.30 pm by setting a luncheon break, two 15 minute tea breaks into which are melded the walking time referred to above, the bell ringing with its associated geographic obligations and also specifies a three minutes wash up time to be included in work time. This is indeed close regulation, but in the context of agreement making.

[25] It is in the context of the Agreement as a whole, including naturally the aims of the Agreement, that one must construe clause 47 to assist resolving the dispute over the application of the Agreement.

[26] In my view the Agreement, in setting out at clause 47.1 that *"The Hours of Work are as follows"* does, with a telling exactitude employed by the parties, describe the way in which ordinary time working hours will be actually scheduled and confined at Honda during the term of the Agreement. Other than the possibility of afternoon and night shifts and the acknowledgement and regulation of overtime, the Agreement's clear meaning, in my view, is that day work will conform to the detailed schema described above and found in the Agreement at clause 47.

[27] I do not consider there to be uncertainty attaching to the Hours of Work clause and I am unable to agree that properly understood and applied there is a capacity, consistent with the Agreement's express terms, for Honda to engage employees in warehouse operations as provided for in clause 3.1.2. on other patterns of work inconsistent with clause 47.2 and 47.3.

[28] Additional to the reasons given I have also had regard for the following considerations. The first is that, drawing on the views set out above, this construction is that suggested by the natural and ordinary meaning of the words used. Had the parties wished to provide for a broader, open-ended construction, such as to permit the engagement of employees upon any manner of alternate day work, or configurations other than those provided, they could have done so. Had such a meaning been open, where other patterns of work could be instituted by right, it is not easy to see why the subjunctive operation of clause 26 (conferring its important facilitative ability upon Honda) was not expanded to reflect that such a capacity or right inhered in the company. The specificity of clause 47 and the constraints imposed by clause 26 incline one from such a construction. It is not easy to see how a clause declarative, with such precision, of what *"The Hours of Work are …"* could be taken to permit other hours of engagement (at employer election), other than Afternoon and Night Shifts.

[29] It follows from coming to this view that I am unable to accept the submission that it is necessary to, or that one can or should, read clause 47 as 'really' meaning, *"the ordinary, normal or customary*

hours of work and then other clauses operate in relation to other hours which are worked…" [TPN 374]. There is no need or warrant to adopt such a meaning or to import these extra words or notions and to do so demonstrably varies the ordinary and natural meaning of the provision as drafted by the parties. Were the Commission to do so would materially alter the meaning of the clause. I would not do so. To provide for hours in the broader fashion contended for by Honda was readily open to the parties had they chosen to do so and had that been their agreement.

[30] As anticipated during the presentation of the case the parties will now confer, in the light of this decision, with a view to dealing with the reality of the hours that have been worked by the employees in question for such a considerable period. I would urge the parties to adopt a practical approach such as to see this issue put to rest, mindful of the company's view set out at paragraph 18 above. The Commission will, of course, be available to assist the parties should that be necessary.

BY THE COMMISSION:

COMMISSIONER

Appearances:

A Sachinidis for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union.

S Wood, of counsel, by leave, for Honda Australia Pty Ltd.

Hearing details:

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