

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

Australian Municipal, Administrative, Clerical and Services Union

and

Linfox Armaguard Pty Ltd
(C2003/6052)

**MAYNE LOGISTICS ARMAGUARD VICTORIAN BRANCHES CLERICAL
CERTIFIED AGREEMENT 2002**
[ODN AG2002/4619]
[AG818857 PR923365]

Clerical industry

COMMISSIONER EAMES

MELBOURNE, 3 MARCH 2004

Wages and conditions.

DECISION

[1] The Australian Municipal, Administrative, Clerical and Services Union (ASU) lodged an application pursuant to s.99 of the *Workplace Relations Act 1996* (the Act) on 16 June 2003 concerning three issues, namely:

1. *The application of the Shift Work provisions contained at clause 25 of the Clerical and Administrative Employees (Victoria) Award 1999.*
2. *The relationship of the above mentioned clause with the Span of Hours provisions contained at Clause 11 of the Armaguard Victoria Clerical Certified Agreement 2002.*
3. *The payment of the 15% Afternoon Shift penalty in relation to items 1 and 2 above.*

[2] The employer Respondent to the application was Linfox Armaguard Pty Ltd (Armaguard). Awards binding on the parties to the dispute are: The Clerical and Administrative Employees (Victoria) Award 1999 (the Award) and the Armaguard Victoria Clerical Certified Agreement 2002 (the Agreement).

[3] The matter came before His Honour Senior Deputy President Watson on 8 July 2003, and following a brief hearing the matter was adjourned into a private conference.

[4] Subsequently, on 23 October 2003, the ASU lodged a further application pursuant to s.170LW of the Act, indicating the above matter had not been resolved, and having followed the disputes settling procedure contained in the Agreement, the matter was referred to the Commission seeking its assistance.

[5] Again His Honour Senior Deputy President Watson called on the matter on 28 October 2003, to hear submissions from the parties, and on 31 October 2003 issued a statement and directions, which, inter alia, stated:

1. *The ASU filed a s.170LW application concerning the Mayne Logistics Armaguard Victoria Clerical Certified Agreement 2002 [AG818857]. The dispute concerns matters raised earlier in a s.99 dispute notification in C2003/4062 and is with Linfox Armaguard Pty Ltd, which was taken over Mayne Logistics' interest in the company party to the agreement.*
2. *The s.170LW application was listed for conference today. Arising from the conference, and my participation in conciliation concerning the earlier s.99 notification, I am satisfied that the issue in dispute will not be resolved by agreement through further conciliation. Accordingly, the application will be listed for arbitration, subject to a program set out below. I have reallocated the matter to Eames C for arbitration.*

[6] The matter then came before the Commission as currently constituted on 25 February 2004, for arbitration.

[7] Mr Leydon appeared for the ASU and Mr D'Abaco of counsel, appeared by leave for Armaguard.

[8] Mr Leydon called Ms F Parker an ASU shop steward, and currently employed as a part-time cash room employee, at the Armaguard Altona Branch. Prior to her part-time employment which began in mid 2003, Ms Parker had worked as a casual employee at Armaguard, in similar employment for more than 20 years.

[9] Her evidence was, inter alia:

[10] Until recent years (pre 2002) her employment as a casual worker was subject to a regular roster that saw her working steady hours on a weekly basis. Such hours varied slightly depending on what time of the year it was as obviously some periods such as Christmas are busier than others.

[11] All such hours worked prior to 2002 were always normal daytime hours.

[12] Ms Parker was aware that the 1998 enterprise agreement covering cash room employees made changes to the span of hours clause contained therein.

[13] Such changes included an alteration of the span of hours to a 4.00 a.m. - 9.00 p.m. span.

[14] Throughout the 1998 enterprise bargaining negotiations employees at the Footscray branch received regular updates on the state of the discussions from a number of sources including the union organiser, the union shop steward and the branch manager.

[15] The basis on which the initial discussions to the change to the span of hours was described by her representatives and her manager was that it was not envisaged that the span of hours would ever change from previous practice.

[16] It was also mentioned by the above mentioned representatives that the proposed change to the wording of the enterprise agreement in relation to the span of hours was to be used only as a tool for tendering for future contracts with current and prospective customers in light of the increasing competitiveness of the cash transport industry.

[17] Based on the reports received from the aforementioned management and union representatives Ms Parker believed that when she voted for acceptance of the 1998 EBA she was voting for an agreement that included in it a span of hours that would never be utilised by Armaguard management. Her understanding was clearly that such wording would be used as a tendering device for securing the business of current and prospective new customers for Armaguard.

[18] Ms Parker also confirmed that during 2003 Armaguard management altered her employment from casual status to that of a Permanent Part Time employee.

[19] Upon enquiring from Armaguard management what loadings she would receive as a part time employee working in the evenings she was told that there was no such loadings applicable. The reason given for this was that the EBA covering her terms and conditions of employment contains a spread of hours clause which provides for a span of hours between 4.00 a.m. and 9.00 p.m..

[20] Mr D'Abaco called two witnesses and tendered a witness statement from a Mr R Boeck, Armaguard's Cash Management Project Manager.

[21] Mr D Butt, Armaguard's National Operations Manager gave evidence which inter alia stated:

[22] Clause 11 of the 2002 Agreement provides that the ordinary hours of work for Cash Processing Employees are from 4.00 a.m. to 9.00 p.m. Mondays to Fridays. The span of hours contained in clause 11 extended the ordinary hours of work for day workers of 7.00 a.m. to 6.30 p.m. Monday to Friday as contained in clause 21.1.2 of the Award. The extended span of ordinary hours first appeared in the *Armaguard Victorian Branches Clerical Certified Agreement Number 2 1998* (1998 Agreement) and also appeared in the *Armaguard (Vic) Clerical Certified Agreement 2000* (2000 Agreement).

[23] The rationale for extending the spread of ordinary hours of work was to enhance the operating flexibility of the business. This was in the context of a change by the Reserve Bank of Australia (RBA) in 1998 to its daily lodgement times. Prior to the changes in 1998, cash collected on any given day was able to be deposited at the RBA by 11.00 a.m. the following morning. After the change, cash was required to be deposited by 3.00 p.m. the following day.

[24] In approximately October 2001, the RBA lodgement times changed again, and cash had to be processed and lodged into bank pools by 4.00 a.m. the following morning. Extending the span of ordinary hours meant that Armaguard could move the cash processing work to the morning or evening of the day (or day after) the cash was collected without incurring penalty rates. The span of ordinary hours was extended with the inclusion of clause 11 in the 1998 Agreement.

[25] He was involved in negotiating the 1998 Agreement along with Tino Scodello, North Melbourne Branch Manager and Kaye Fox, State Administration Manager (Victoria).

[26] He recalls discussing in an initial meeting with David Leydon, the ASU representative who conducted the negotiations for the 1998 Agreement on behalf of the ASU's members, the rationale for the change to the span of ordinary hours as outlined above. He didn't recall that the extension of the span of ordinary hours was a contentious issue. The major issue at the negotiation was the issue of guaranteed minimum hours for casual employees.

[27] At no stage during the negotiation of the 1998 Agreement did he (or to his knowledge, any other Armaguard management employee) say to David Leydon or to employees that clause 11 of the 1998 Agreement was merely a tool for tendering for future contracts, or that it would not be utilised in future rostering practices.

[28] He was involved in negotiating the 2000 Agreement. He didn't recall clause 11 (the extended span or ordinary hours provision) being raised as an issue by any employee or the ASU during those negotiations. It has only been since the move to convert casual Cash Processing Employees to permanent part-time status that this issue has been raised by the ASU.

[29] Ms J Vennix, Armaguard's Funds Supervisor and a previous delegate of the ASU at the time of the negotiations around the 1998 Agreement, gave evidence on behalf of Armaguard, which inter alia stated:

While she was a delegate of the ASU at the Altona Branch, she was involved in the negotiations for the 1998 Agreement.

Danny Butt, the Armaguard State Manager (Victoria) at the time, negotiated the agreement for Armaguard along with Tino Scodella, Manager of the North Melbourne branch, and Kaye Fox, State Administration Manager (Victoria).

During the course of the negotiations, the company indicated that it wished to increase the spread of ordinary hours for day workers to 4.00 a.m. to 9.00 p.m., in exchange for a pay increase. The issue of the shift allowance for afternoon shift employees was never discussed.

[30] Ms Vennix took the company's proposal back to the clerical employees at the Altona Branch. She explained that in order to get the salary increase, they would have to agree to the extended spread of ordinary hours. She told them that she personally would not agree to it as this would mean the company could roster ordinary hours at any time during that spread of hours. She was concerned about family and lifestyle issues which would arise for the members if this change was agreed. However, the employees said they would vote in favour of the agreement as they wished to access the pay increase, which they ultimately did.

[31] Ms Vennix did not recall anyone from management (including the managers who negotiated the 1998 Agreement) saying that the extended spread of hours was merely a device for tendering or that it wouldn't be used in the future. However, she did recall some employees saying that they would agree to it because they didn't believe that the company would use it in the future. She told them at the time that they were wrong and that the company would use it in the future, and that it wouldn't be included in the agreement if the company didn't intend to use it.

[32] Mr D'Abaco's primary submission was that the Commission does not have jurisdiction to consider the application in that jurisdiction is founded upon section s.170LW of the Act which provides:

s.170LW Procedures in a certified agreement for preventing and settling disputes between the employer and employees whose employment will be subject to the agreement may, if the Commission so approves, empower the Commission to do either or both of the following:

- (a) to settle disputes over the application of the agreement;*
- (b) to appoint a board of reference as described in section 131 for the purpose of settling such disputes.*

[33] It was put that by virtue of the wording in s.170LW the power can only be to settle disputes regarding the application of the agreement. (my emphasis)

[34] It was argued in this case, the dispute agitated by the ASU is Armaguard's refusal to pay the relevant Employees an afternoon shift allowance, in accordance with what (the ASU alleges) are Armaguard's obligations pursuant to clause 25 of the Award.

[35] The dispute is not about the application of the 2002 Agreement. It is, in truth, a dispute about Armaguard's alleged failure to observe clause 25 of the Award.

[36] The fact that Armaguard may invoke terms of the 2002 Agreement to deny any liability to pay the afternoon shift allowance to the Employees does not change the essential character of the dispute, that is, Armaguard's alleged non-observance of the Award.

[37] The ASU is seeking to utilise the dispute resolution procedure contained in clause 8 of the 2002 Agreement to enforce obligations contained in the Award. This is evident from the relief sought by the ASU in its Outline of Submissions dated 28 January 2004, where under the heading "Outcome", the ASU states:

"The ASU seeks the immediate application of clause 25 of the Parent Award for all cash room employees who are engaged in hours after 6.00 p.m.."

[38] Mr D'Abaco submitted that the Commission is being asked to make a binding determination as to legal rights and liabilities arising under the Award, which of its nature is a judicial power. The Commission cannot exercise (apart from where it is properly seized of a dispute under section 170LW) judicial powers.

[39] Mr Leydon argued that the application was within jurisdiction as in the first instance, sub clause 8.6 of the Agreement at stage 5 of the Dispute Avoidance and Settlement Procedures states:

"The matter if unresolved, may be referred by either party to the AIRC both parties, will agree to the AIRC decisions as final, subject to any appeal process, which may be instituted by either party."

[40] It was also argued that the dispute relates to the span of hours prescribed in the EBA and the direct relationship between those hours and the underpinning Parent Award.

[41] As Armaguard do not agree with the ASU interpretation of the Agreement and it's relationship with the parent award, with regards to shift work, it is clear, put Mr Leydon, that a dispute about the application of the agreement has arisen between the parties.

Conclusion on Jurisdiction

[42] I agree with the submission of Mr Leydon on behalf of the ASU.

[43] There has been a historic link between the Award and at least 3 Agreements between the parties.

[44] The 2002 Agreement, currently in place makes reference at clause 4 to the relationship with the Parent Award, in the following terms:

“This Agreement shall be read in conjunction with the Clerical and Administrative Employees (Victorian) Award 1999 as varied from time to time. Where the provisions of the Award are inconsistent with the terms of this Agreement, the Agreement will prevail to the extent of the inconsistency.”

[45] Clause 13 of the EBA, dealing with Permanent Part-Time Hours states, inter alia, at paragraph 4, relevantly in terms of this case:

“Rostering for permanent part-time employees will be administered as per award provisions.”

[46] So one must read the two instruments together to determine the applicable penalties, if they apply, to part-time employees.

[47] Also in the Agreement at clause 11 is the reference to Spread of Hours which reads:

“The Spread of ordinary hours will be extended to 4.00 a.m. to 9.00 p.m. Monday to Friday.”

[48] In the outline of submissions prepared by Armaguard's legal advisors at points 18 and 19 reference was made to the 'interaction' of both the Agreement and the Award. In that sense the two instruments are one vehicle covering the terms and conditions of the relevant employees.

[49] This dispute is over the application of the Agreement and is accordingly within jurisdiction.

Merit

[50] I do not intend to cover all of the submissions and evidence in relation to this dispute and the merits of the ASU argument for the payment of a shift allowance to those employees, employed as part-time employees, whose hours extend beyond 9.00 p.m.. Although I have reviewed the transcript of the proceedings.

[51] It is very significant that the Agreement provides that where an inconsistency emerges between the Agreement and the Award, the Agreement will prevail to the extent of that inconsistency.

[52] At least, as part of a trade off for a wage increase in the 1998 Agreement negotiations, a new clause was inserted into the Agreement. (current clause 11 - Spread of Hours)

[53] From that time, ordinary hours of work affecting the cash room employees, subject to this application, extended from 4.00 a.m. until 9.00 p.m..

[54] There is no reference to shift work in the Agreement, so one has to look to the underpinning Award to see if the shift payment claimed by the ASU has merit.

[55] Sub-clause 25.1.1 reads “*Afternoon shift means any shift finishing after 6.00 p.m. and at or before midnight.*”

[56] Sub-clause 25.4.3 reads “*A shift worker employed on an afternoon shift or a night shift shall for work done during the ordinary hours of any such shift, be paid ordinary rates plus an additional 15% for afternoon or night shift, or an additional 30% for a permanent night shift.*”

[57] The ASU argues that clause 25 of the Award applies to all cash room employees who are engaged in hours after 6.00 p.m., because where an Agreement is silent the Award must prevail.

[58] I do not agree.

[59] Clause 13 indicates that the “normal” (or ordinary) span of hours are as per clause 11, from 4.00 a.m. to 9.00 p.m.. Penalties (such as shift allowances) are not applicable for hours worked within the normal span of hours (4.00 a.m. to 9.00 p.m.), which is reinforced by the second paragraph of clause 13.

[60] Clause 11 is not ambiguous.

[61] The evidence of Mr Butt indicates (inter alia) that clause 11 first appeared in an agreement between Armaguard and the ASU certified in 1998, the *Armaguard Victorian Branches Clerical Certified Agreement Number 2 1998* (1998 Agreement), and also appeared in the subsequent *Armaguard (Vic) Clerical Certified Agreement 2000* (2000 Agreement). At the time clause 11 was introduced into the 1998 Agreement:

- Armaguard wished to enhance its operational flexibility;
- The daily lodgement times of the Reserve Bank for cash had been changed, underlining the importance of Armaguard having operational flexibility;
- When the Reserve Bank changed its lodgement times in 1998, cash processing work could be performed in the early morning during “ordinary hours”. When the lodgement times changed again in 2001, cash processing work could be performed in the evening, again during “ordinary hours”; and
- By extending the span of ordinary hours, employees who worked up until 9.00 p.m. would still be “day workers”, not “afternoon shift” workers, and would not be entitled to the payment of any afternoon shift allowance under the Award.

[62] I agree with the contention of Mr D'Abaco that the effect of clause 11 of the 2002 Agreement is that it extends the span of ordinary hours for day workers and overrides clause 21.1.2 of the Award. In those circumstances, the Employees whose shifts finish after 6.00 p.m. and before 9.00 p.m. are "day workers" and not entitled to the payment of an afternoon shift allowance under clause 25 of the Award.

[63] Accordingly the application of the ASU in this matter is refused, and the matter is dismissed.

ORDER

[64] That the application be dismissed.

BY THE COMMISSION:

COMMISSIONER

Appearances:

D. Leydon for the Australian Municipal, Administrative, Clerical and Services Union.

J. D'Abaco of counsel for Linfox Armaguard Pty Ltd.

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