industrial relations : human resources : employment matters : training

CIRCULAR:	178.NAT.178.23
DATE:	4 May 2023
SUBJECT:	Recent Case: Definition of 'Shiftworker' – Annual Leave
ATTENTION:	Chief Executive Officer

Many clients engage workers under a modern award or enterprise agreement who may meet the definition of 'shiftworker' for purposes of accruing an additional week of annual leave. In many industrial instruments, the question of who is, and who is not, a shiftworker for such purposes may not be clear cut.

In a recent matter (decision dated 2 May 2023 – [2023] FWCFB 81), the Health Services Union (**HSU**) in NSW successfully appealed the decision of Commissioner McKinnon in a dispute matter between the HSU and Opal Aged Care. The dispute concerned the definition of 'shiftworker' under the *Opal Aged Care (NSW) Enterprise Agreement 2016* (**the Agreement**) – being the definition relevant for determining when an employee would accrue additional annual leave under the Agreement.

As stated by the Full Bench, the clauses of the Agreement requiring construction in the application relevantly read as follows:

> *Cl 34 – Annual Leave*
>
> > *Cl. 34.1(b) "a shiftworker is an employee who is not a day worker as defined in clause 23(a) Span of Hours"*
>
> And
>
> *Cl 23 – Span of Hours*
>
> > *Cl. 23(a) "the ordinary hours of work for a day worker will be between 6.00am and 6.00pm Monday to Friday"*

The HSU argued that a shiftworker was anyone who worked any of their ordinary hours outside of 6:00am to 6:00pm Monday to Friday, while Opal argued that an employee would need to work a certain proportion of their ordinary hours outside of this span. Opal's argument was advanced by a broader reading of the Agreement, including specifically clause 23(b) – '*A shiftworker is an employee who is regularly rostered to work their ordinary hours of work outside the ordinary hours of work of a day worker as defined in clause 23(a).*'

In first instance, Commissioner McKinnon preferred an interpretation that was advanced by neither party, finding that a 'shiftworker' was an employee who had *at least one* shift in each roster cycle that is *wholly outside* of the hours of 6:00am to 6:00pm Monday to Friday.

On appeal, the Full Bench found that Commissioner McKinnon's decision was inconsistent with the text of the Agreement and therefore in breach of section 739(5) of the FW Act, which provides that '*the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.*'

Ultimately, the Full Bench answered the dispute as follows:

> *Question: When is an employee a "shiftworker" for the purposes of the entitlement to an additional week's annual leave in clause 34.1(b) of the Agreement?*
>
> *Answer: An employee is a shiftworker within the meaning of clause 34.1(b) of the Agreement if their ordinary roster requires any part of their ordinary hours of work outside the day work span of hours in clause 23(a). An employee's annual leave entitlement accrues progressively during a year of service according to the employee's ordinary hours of work.*

In dismissing Opal's argument, the Full Bench said that the Agreement had two definitions of 'shiftworker' and that each applied for a specific purpose. Relevantly, however, the definition of shiftworker for the purposes of the additional annual leave was contained in clause 34.1(b) and the interpretation of this term did not require regard to clause 23(b).

As such, the Full Bench resolved the dispute in favour of the HSU.

While this decision was a matter of private arbitration, and will therefore hold limited precedential weight, it is timely for clients to review their arrangements with respect to 'shiftworker' / additional annual leave by reference to the applicable modern award or enterprise agreement and to seek advice where clarification is required.

If you have any questions or if you require further information, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 (SIAG HR) / 1300 742 447.

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