DECISION

Fair Work Act 2009
s.739—Dispute resolution

Thelma Stewart
v
Spotless Facility Services Pty Ltd T/A Spotless Integrated Facilities Services
(C2022/5211)

DEPUTY PRESIDENT MILLHOUSE — MELBOURNE, 7 FEBRUARY 2023

Alleged dispute about any matters arising under the enterprise agreement

[1] This decision concerns an application by Ms Thelma Stewart under s 739 of the *Fair Work Act 2009* (Cth) (Act) for the Commission to deal with a dispute in accordance with the dispute settlement procedure at clause 12 of the *Spotless Public Hospitals (Victoria) Enterprise Agreement 2017* (Agreement).

[2] Ms Stewart is employed by Spotless Facility Services Pty Ltd T/A Spotless Integrated Facilities Services (Spotless) as a Ward Support Staff Member at the Alfred Hospital. The dispute concerns whether clause 45.6.2 of the Agreement entitles Ms Stewart to payment on a public holiday that falls on a day on which Ms Stewart is not ordinarily required to work.

Jurisdiction and the issue for determination

[3] Following two attempts at conciliation, there was no resolution to the dispute. The parties agreed that the Commission should determine the following question in resolution of the application:

> *Does clause 45.6.2 of the Spotless Public Hospitals (Victoria) Enterprise Agreement 2017 entitle Thelma Stewart to payment on a public holiday that falls on a day on which she is not ordinarily required to work?*

[4] I am satisfied the pre-requisites to the Commission's jurisdiction have been followed. Accordingly, the Commission is empowered to resolve the dispute by determination of the agreed question in accordance with the dispute settling procedures at clause 12 of the Agreement and s 739 of the Act.

The Agreement

[5] The Agreement commenced operation on 8 June 2018 and passed its nominal expiry date on 30 September 2020. The Agreement is expressed to cover "*all matters pertaining to the*

employment relationship and expressly excludes and displaces the operation of all prior Agreements and superseded Awards that may otherwise apply."[1]

[6] The Agreement covers and is binding upon Spotless, its employees employed pursuant to clause 4.2 and the Health Workers Union as a bargaining representative pursuant to s 183 of the Act.[2] Ms Stewart is represented in this dispute by the Health Workers Union (HWU).

[7] Part 6 of the Agreement concerns leave of absence and public holidays. Clause 45 deals specifically with public holidays. The parties acknowledge that disputed clause 45.6.2 appears within clause 45.3 of the Agreement and that the numbering system is not accurate.[3] Clause 45.3 provides as follows:

> **45.3 Payment for work on public holiday**
>
> 45.6.1 Employees shall be paid double time and one half for all time worked on a public holiday; or
>
> 45.6.2 If the public holidays falls on the employee's rostered day off, he or she shall be entitled to one and one half times the payment for his or her ordinary day or, if the employer and employee so agree:
>
> (a) the employee may take one day and one half off in lieu within four weeks of the public holiday; or
>
> (b) have one and one half days added to his or her annual leave.

Background

[8] Ms Stewart has been employed by Spotless in the position of a Ward Support Staff Member at the Alfred Hospital[4] for approximately two decades. Ms Stewart is a delegate of the HWU, elected to the union's National Council and a health and safety representative at Spotless.[5]

[9] Pursuant to clause 31.5.1, Ms Stewart is rostered to work ordinary hours of work of eight hours per day over five days per week.[6] In accordance with this arrangement, Ms Stewart's non-working days each week are Monday and Tuesday.

[10] The dispute concerns the period from 27 December 2021 to the present date. Prior to 27 December 2021, Ms Stewart received a payment at the rate of 150% of the ordinary rate of pay in respect of any public holiday that fell on either one of her two non-working days, being Monday and Tuesday. In December 2021, Spotless ceased making a payment to Ms Stewart in

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[1] Agreement, clause 5.1

[2] Agreement, clause 4.1

[3] Agreed statement of facts (ASOF) at [9]

[4] Ibid at [2a]

[5] Court Book (CB) 40 at [11]

[6] ASOF at [6]

respect of public holidays that fell on non-working days[7] on the basis that it identified that the payment was being made erroneously and on account of a payroll oversight.

Contentions

Ms Stewart's submissions

[11] Ms Stewart's position is that the question for arbitration should be answered in the affirmative. That is, that clause 45.6.2 of the Agreement entitles Ms Stewart to payment on a public holiday that falls on a day on which she is not ordinarily required to work. Ms Stewart refers to the payment that clause 45.6.2 provides as a "*rostered off benefit*."

[12] In summary, Ms Stewart contends that in properly constructing clause 45.6.2, it is necessary to consider the correct meaning of the term "*rostered day off*" as that term is used in the clause. Ms Stewart submits that this term means a day on which, by virtue of the roster, she is not ordinarily required to work. Ms Stewart considers Monday and Tuesday to be her rostered days off under her roster pattern.

[13] Ms Stewart submits that the correct interpretation of clause 45.6.2 is that the entitlement arises when a public holiday occurs on the same day that an employee is on a rostered day off, being a day the employee is not ordinarily required to work; *and* and when clause 45.8.1 does not apply to have the effect of making the employee ineligible to receive the rostered off benefit in clause 45.6.2. As a result of clause 45.8.1, the rostered off benefit applies to full-time employees, and part-time employees who work a rotating roster where the requirement in clause 45.8.2 is satisfied (that they have worked 50% or more of the days on which a particular public holiday falls over the preceding six months.)

[14] It follows that Ms Stewart holds the view that she is entitled to the rostered off benefit on each occasion that a public holiday falls on a Monday or Tuesday under her current roster pattern. Clause 45.8.1 does not apply to Ms Stewart because she is not a part time employee.

Spotless submissions

[15] Spotless' position is that clause 45.6.2 of the Agreement does not entitle Ms Stewart to payment on a public holiday that falls on a day on which she is not ordinarily required to work.

[16] In summary, Spotless submits that the Agreement comprehensively describes how work is permitted to be arranged. For employees such as Ms Stewart who are engaged on a full-time basis, Spotless says that the arrangement of work broadly falls into one of two categories:

(a) fixed work patterns where the days and times of the week where work is performed and not performed does not vary from week to week; and

(b) rotating roster patterns where the days and times of the week where work is performed and not performed by an employee varies and must be determined by reference to a roster (which must be set in accordance with the Agreement).

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[7] ASOF at [3]

[17] Spotless submits that clause 45.6.2 is applicable only where employees are "*rostered*" on one of the shift arrangements contemplated by clauses 31.5.2 to 31.5.4 of the Agreement. Under these arrangements, the days of the week upon which an employee is required to work will vary depending on the terms of the roster – the employees are "*rostered on*" to work or "*rostered off*." If an employee's "*rostered day off*" falls on a public holiday then the employee is entitled to payment at the rate of 150% in respect of that day, or to one of the compensatory benefits contemplated by clause 45.6.2(a) and (b).

[18] Contrary to these working arrangements, Spotless' position is that Ms Stewart performs work in accordance with a fixed work pattern consistent with [16](a) above. It says that Ms Stewart's name does not even appear on the roster on the days on which she is not required to work. Accordingly, Spotless submits that under the Agreement an employee who works according to a variable roster described above at [16](b) is in a materially different position to Ms Stewart, whose non-working days in any given week are fixed.

[19] Spotless submits that it would be industrially absurd if a person whose pattern of work did not vary were regarded as working to a roster or being "*rostered on*" or "*rostered off*" on their non-working days. To illustrate its point, Spotless refers to an office-based employee who works Monday to Friday. Spotless submits that such employee could not sensibly be said to be "*rostered off*" on weekends: they are simply absent from work and have no entitlement to payment for a public holiday that falls on the weekend (for example, ANZAC Day where it falls on a Sunday.)

[20] It follows from Spotless' construction of clauses 45.6.1 and 45.6.2 that if an employee covered by the Agreement works on a public holiday on which they would not normally be rostered to work then they would be entitled to be paid at the rate of 250% in accordance with clause 45.6.1. Conversely, if the employee does not work on a day on which they are not normally rostered to work then they are not entitled to be paid in respect of that day.

[21] Spotless further submits that its construction is consistent with s 116 of the Act, being a provision of the National Employment Standards (NES). Section 116 provides that if an employee is absent from his or her employment on a day or part-day that is a public holiday then "*the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day*." For Spotless, the entitlement is conditioned on the employee being "*absent*" from work which means that the employee would otherwise be, and be required to be, at work on public holiday. Therefore, Spotless considers its construction to be supported by the legislative context of then Act.

Ms Stewart's responsive submissions

[22] Ms Stewart rejects Spotless' contention that the "*rostered off benefit*" was only intended to apply to employees on rotating rosters. Ms Stewart submits that there is no provision in the Agreement providing such a restriction. Ms Stewart relies upon clause 45.8 as demonstrating that the drafters of the Agreement turned their mind to the concept of rotating versus non-rotating rosters, and yet "*made the choice to only include a term restricting the benefit to rotating rosters that covered part-time employees*."[8]

[8] CB 41 at [14]

[23] With respect to Spotless' submission that its interpretation of clause 45.6.2 is consistent with s 116 of the Act, Ms Stewart submits that the Agreement supplements the NES by providing a greater entitlement to employees. Ms Stewart submits that there should be no expectation that clause 45.6.2 mirrors s 116 of the Act, and the clause ought not be read down merely because it provides a more favourable benefit to employees than the NES.

Principles of interpretation

[24] The approach to the construction of enterprise agreements was recently summarised by the Full Court of the Federal Court in *James Cook University v Ridd:*[9]

> (i) The starting point is the ordinary meaning of the words, read as a whole and in context (City of Wanneroo v Holmes [1989] FCA 553; 30 IR 362 at 378 (City of Wanneroo v Holmes); City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813; 153 IR 426 at [53] (City of Wanneroo v AMACSU); WorkPac Pty Ltd v Skene [2018] FCAFC 131; 264 FCR 536 at [197] (WorkPac v Skene)).
>
> (ii) A purposive approach is preferred to a narrow or pedantic approach — the framers of such documents were likely to be of a "practical bent of mind" (Kucks v CSR Limited [1996] 66 IR 182 at 184 (Kucks v CSR); Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd [2011] FCAFC 67 at [16]; WorkPac v Skene at [197]). The interpretation "turns upon the language of the particular agreement, understood in the light of its industrial context and purpose" (Amcor Limited v Construction, Forestry, Mining and Energy Union [2005] HCA 10; 222 CLR 241 at [2]).
>
> (iii) Context is not confined to the words of the instrument surrounding the expression to be construed (City of Wanneroo v AMACSU at [53]). It may extend to " … the entire document of which it is a part, or to other documents with which there is an association" (Short v FW Hercus Pty Ltd [1993] FCA 51; 40 FCR 511 at 518 (Short v FW Hercus); Australian Municipal, Administrative, Clerical and Services Union v Treasurer of the Commonwealth of Australia [1998] FCA 249; 82 FCR 175 at 178).
>
> (iv) Context may include " … ideas that gave rise to an expression in a document from which it has been taken" (Short v FW Hercus at 518).
>
> (v) Recourse may be had to the history of a particular clause "Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form … " (Short v FW Hercus at 518).
>
> (vi) A generous construction is preferred over a strictly literal approach (Geo A Bond and Co Ltd (in liq) v McKenzie [1929] AR 499 at 503-504; City of Wanneroo v AMACSU at [57]), but "Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties" (City of Wanneroo v Holmes at 380).

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[9] [2020] FCAFC 123 at [65]; see further *AMWU v Berri* (2017) 268 IR 25 at [114]

(vii) Words are not to be interpreted in a vacuum divorced from industrial realities but in the light of the customs and working conditions of the particular industry (City of Wanneroo v Holmes at 378-379; WorkPac v Skene at [197]).

Consideration

[25] I commence by first considering Ms Stewart's employment arrangements pursuant to the Agreement.

[26] By clause 31.5.1 of the Agreement, Ms Stewart is rostered to work ordinary hours of work of eight hours per day over five days per week.[10] The working week commences at the beginning of the first morning shift on a Wednesday.[11] In accordance with this arrangement, Ms Stewart's non-working days each week are Monday and Tuesday. It is agreed that Ms Stewart is never rostered to work on a Monday or Tuesday.[12]

[27] Ms Stewart works 40 ordinary hours per week and receives an accrued day off once every four weeks.[13] Accrued days off are generally "*to be taken as single days on a rostered basis*" (that is, one accrued day off in each 28·day cycle), as agreed between the employee and Spotless.[14] Ms Stewart is rostered to take her accrued day off every fourth Wednesday.

[28] Employee rosters are dealt with under clause 61 of the Agreement. The rosters set out an employee's daily ordinary hours of work, start times, finish times and meal intervals.[15] An employee may apply in writing to have their roster fixed, by agreement.[16] It is not in dispute that Ms Stewart has been performing work pursuant to a fixed roster between Wednesday and Sunday, since 2019.

[29] In light of these matters, it is apparent that Ms Stewart meets the definition of a "*shift worker*" performing "*shift work*" under the Agreement. A shift worker is defined under the Agreement as an employee whose "*ordinary hours of work are performed in accordance with a roster that includes Saturdays and/or Sundays*."[17] The term "*shift work*" means "*ordinary weekly hours of work performed in accordance with a roster that includes Saturday and/or Sunday*."[18]

[30] Employees who perform shift work are entitled to the payment of a shift allowance in accordance with the provisions of clause 38. The parties did not take me to clause 38 in their

[10] ASOF at [6]

[11] Agreement, clause 31.3

[12] ASOF at [7]

[13] Agreement, clause 32.1

[14] Agreement, clause 32.3

[15] Agreement, clause 61.2

[16] Agreement, clause 61.5-61.6

[17] Agreement, clause 9.23

[18] Agreement, clause 9.22

written or oral submissions and Ms Stewart's specific start and finish times are not before the Commission.

Clause 45 of the Agreement

[31] Clause 45 of the Agreement concerns public holidays. Clause 45.2.1 makes clear that public holidays for the purposes of the Agreement are provided for in the NES.

[32] Disputed clause 45.6.2 of the Agreement appears under the heading "*Payment for work on public holiday*." It is observed at the outset that contrary to the heading of this provision, the dispute before the Commission concerns the payment for time *not* worked on a public holiday.

[33] It is not in contest that clause 45.6.1, which immediately precedes the disputed clause, provides employees with an entitlement to payment at double time and one half for all time worked on a public holiday. This entitlement is delineated from clause 45.6.2 by the word "*or*," which the parties agree makes clear that clause 45.6.2 applies in the alternative to clause 45.6.1.

[34] Clause 45.6.2 provides:

> 45.6.2 If the public holidays falls on the employee's rostered day off, he or she shall be entitled to one and one half times the payment for his or her ordinary day or, if the employer and employee so agree:
>
> (a) the employee may take one day and one half off in lieu within four weeks of the public holiday; or
>
> (b) have one and one half days added to his or her annual leave.

[35] In order to receive the entitlement provided by clause 45.6.2 to a payment at 150% (or a day in lieu to be taken as otherwise agreed pursuant to 45.6.2(a) or (b)), an employee needs to be observing a "*rostered day off*," on a day which is a public holiday as provided for in the NES.

[36] Ms Stewart submits that there is nothing in the text of clause 45.6.2 which limits its application to employees observing a particular roster. However, the position of Spotless is that the use of the term "*rostered day off*" demonstrates that the provision applies only to employees who perform work pursuant to a *rotating* roster.

[37] The Agreement does not define the term "*rostered day off*." The term is used only once in the Agreement, in disputed clause 45.6.2. The parties agree that it has a different meaning to the term "*accrued day off*."[19]

[38] While clause 45.7 of the Agreement contains specific rules in circumstances where a public holiday fall on an accrued day off, I accept, having regard to the operation of clause 32 of the Agreement, that such rules have no application to the present dispute.

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[19] Agreement, clause 32.1

[39] Spotless submits that the term "*rostered day off*" is used in the ordinary or colloquial sense in the Agreement, rather than as a term of art. Ms Stewart submits that during her lengthy tenure with Spotless, she has understood the term as meaning a day on which she is not ordinarily required to work by virtue of the roster.

[40] Further, Ms Stewart submits that the term "*rostered day off*" in the context of clause 45.6.2 can be understood by having regard to the history of the provision. The following analysis is therefore conducted for the purpose of ascertaining the contextual meaning of this term.

[41] The *Shift Workers Case 1972*[20] considered the treatment of rostered days off falling on a public holiday and held as follows:

> "When any shift worker whose ordinary working time includes public holidays is rostered off on a public holiday and he does not work on that holiday he should have a day's pay added to his annual leave or he should receive a day's pay."

[42] Subsequent to this, the Australian Industrial Relations Commission in *Health Services Union of Australia v The Queen in right of the State of Victoria*[21] accepted that substitution arrangements were necessary in respect of public holidays for employees who perform work pursuant to "*non-standard arrangements*," such as those who are regularly rostered to work on weekends.[22] In this respect, the Commission observed:[23]

> "2 – FULL-TIME WORKERS
>
> We refer here to full-time workers who do not regularly work a five-day, Monday - Friday week. Such workers include persons who work regularly on Saturday or Sunday, workers with variable rosters, continuous shift workers and employees who work for nine days per fortnight or 19 days in each four weeks. This list is not intended to be exhaustive.
> It may happen that a prescribed holiday falls upon a day when the employee would not be working in any event. Fairness requires that the worker be not disadvantaged by that fact. The appropriate compensation, we think, is
>
> · an alternative "day off"; or
> · an addition of one day to annual leave; or
> · an additional day's wages.
>
> We understand that such compensation is already provided in many awards."

[43] The Commission relevantly concluded:[24]

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[20] (1972) AR 633

[21] Print L9178, 20 March 1995, C No. 31467 of 1992

[22] Ibid at 1

[23] Ibid at 2

[24] Ibid at 8

> "In summary, we commend the following principles:
>
> (1) that full-time workers who do not work on Monday - Friday of each week should be assured of the benefit of prescribed holidays. They should not forfeit that benefit because a prescribed holiday falls on a non-working day…"

[44] The following principles can be drawn from the above decisions. *First,* full-time employees who work, *inter alia*, regularly on Saturday or Sunday should not be disadvantaged by their working arrangements in respect of public holidays that fall on a day when the employee "*would not be working in any event*." *Second,* employees who perform full-time work pursuant to a fixed roster are not excluded from such entitlement.

[45] The antecedent enterprise agreement, the *Spotless Public Hospitals (Victoria) Enterprise Agreement 2010*[25] (2010 Agreement) provides relevant background. Clause 45.6.2 appeared in identical terms in the 2010 Agreement. Clause 5 addressed the relationship of the 2010 Agreement to previous awards and agreements, and provided as follows:

> "5. RELATIONSHIP TO PREVIOUS AWARDS AND AGREEMENTS
>
> 5.1. This is a comprehensive agreement that is largely based on provisions of the following Awards and Agreements:
>
> 5.1.1 Health and Allied Services - Public Sector - Victoria Consolidated Award 1998;
> 5.1.2 Health Services Union of Australia - Health and Allied Services - Spotless Services Australia Limited Certified Agreement 2002 – 2006;
> 5.1.3 Health Services Union of Australia - Health and Allied Services - Spotless Services Australia Limited Certified Agreement 2006 – 2009.
>
> 5.2. The terms of the Awards and Agreements referred to in clause 5.1 that are maintained have been expressly specifically set out in this Agreement and accordingly, this Agreement expressly excludes and displaces the operation of all prior Agreements and Awards that may otherwise apply."

[46] Consistent with clause 5.1 of the 2010 Agreement, the *Health Services Union of Australia - Health and Allied Services - Spotless Services Australia Limited Certified Agreement 2002-2006*[26] specified that it was to be "*read in conjunction with the Health and Allied Services - Public Sector - Victoria Consolidated Award 1998*."[27]

[47] The *Health and Allied Services - Public Sector - Victoria Consolidated Award 1998* does not define a "*rostered day off*." However, it contained the following provision dealing with the payment for rostered days off falling on a public holiday, which is in substantially identical terms to clause 45.6.2 of the Agreement:[28]

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[25] [2011] FWAA 9132; AE890452

[26] AG831544; PR942680

[27] Ibid at clause 6.1

[28] *Health and Allied Services - Public Sector - Victoria Consolidated Award 1998,* clause 38.5

"38.5 If an employee works on a public holiday he or she shall be paid double time and a half for the time worked. If a public holiday occurs on his or her rostered day off he or she shall be entitled to one and a half times the payment for his or her ordinary day; or where there is mutual consent within four weeks following the date on which such holiday occurred an employee may take a day and a half off in lieu or have one and one half days added to his or her annual leave. Provided that employees rostered to work on public holidays and who fail to do so shall not be entitled to holiday pay for the said holiday."

[48] Against this background, I turn now to consider the agreed question for determination, which is restated here for convenience:

Q. Does clause 45.6.2 of the Spotless Public Hospitals (Victoria) Enterprise Agreement 2017 entitle Thelma Stewart to payment on a public holiday that falls on a day on which she is not ordinarily required to work?

[49] Spotless submits that Ms Stewart is not observing a "*rostered day off*" on Mondays and Tuesdays and, consequently, she is not eligible for the entitlement provided by clause 45.6.2. For the reasons that follow, I consider this to be an incorrect construction.

[50] As a matter of principle, the language of the Agreement is to be read as a whole and in context.[29] While the term "*rostered day off*" as used in clause 45.6.2 is not defined in the Agreement, its meaning must be understood in the context of the rostering arrangements under the Agreement.

[51] As earlier stated, clause 61 of the Agreement concerns rosters. It provides that an employee may work pursuant to a roster of "at *least 14 days' duration*," or alternatively an employee may apply to have their roster "*fixed*."

[52] The Agreement draws a distinction between fixed rosters or rotating rosters in only two identifiable ways.

[53] *First,* clause 45.8 concerns public holidays and payment for part-time employees. Clause 45.8.1 limits the entitlement to payment on a public holiday for "*regular part time employee*[s]" where the employee is not ordinarily required to work on the day on which the public holiday is observed. Given clause 45.8.2, clause 45.8.1 will practically apply to all part time employees who are not on a rotating roster. For part time employees on a rotating roster, clause 45.8.2 will apply.

[54] Clause 45.8.2 establishes the circumstances in which a part-time employee who works a "*rotating roster*" is entitled to receive the "*rostered off benefit*" for a public holiday not worked. It provides:

45.8.2 in determining whether a part-time employee who works a rotating roster is entitled to receive the 'rostered off' Agreement benefits for a particular public

[29] See, *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362 at [43] citing *Australian Timber Workers Union v W Angliss & Co Pty Ltd* (1924) 19 CAR 172

holiday not worked, the employer shall review the roster pattern of the individual over the preceding six months, if the rosters show that the employee has worked 50% or more of the days on which a particular public holiday falls, the employee shall be entitled to receive the 'rostered off benefit for that public holiday.

[55] Spotless submits that the application of clause 45.8 is entirely consistent with its construction of clause 45.6.2 as the pivotal conditions in both 45.8.1 and 45.8.2 require an employee to work, or to typically work, on the day on which a public holiday is observed.

[56] I do not consider that clause 45.8 is to be understood as a contextual indicator in the construction of clause 45.6.2 in the manner contended for by Spotless. Relevantly, Spotless' contention does not cavil with the fact that clause 45.8 is limited in its application to part time employees. In the context of the entitlement to payment for absence on public holidays, part time employees have historically been treated in a different manner to the various "*full-time*" employees as extracted above at [42]. The Commission in *Health Services Union of Australia v The Queen in right of the State of Victoria*[30] noted significant disagreement between the parties as to any rule or principle to be applied to part-time employees. The Commission determined that it was inappropriate to impose any rule or principle as to the treatment of part time employees in this respect. I consider that the Agreement reflects the history of the entitlement in that part time employees and full-time employees are treated differently. Accordingly, I reject Spotless' submission that clause 45.8 and 45.6.2 should be read in a manner which consistently treats both categories of employees. I reject Spotless' contention on this basis.

[57] *Second,* the fixed nature of an employee's roster will be relevant in the application of the overtime provisions of the Agreement,[31] where an employee works beyond their fixed hours of work. This matter does not relevantly bear upon the construction issue before me, and nor did the parties contend otherwise.

[58] It is apparent that an employee performing fixed hours of work remains subject to a "*roster*" notwithstanding they have exercised the right under clause 61.5 to fix the roster by agreement. Relevant to Ms Stewart, the definitions of *shift work*" and "*shift worker*" make it clear that a shift worker will perform work "*in accordance with a roster,*"[32] and that such work is performed "*in accordance with a roster.*"[33]

[59] The arrangements by which Ms Stewart accesses her accrued day off are consistent with Ms Stewart being rostered "*on*" and "*off*." By clause 32.3, accrued days off are taken on a rostered basis. The parties may agree to "*defer a rostered ADO*" in exceptional circumstances. As earlier stated, Ms Stewart accesses her accrued day off on every fourth Wednesday pursuant to the roster; Ms Stewart is, as a matter of practical consequence, rostered "*off*" every fourth Wednesday.

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[30] Print L9178, 20 March 1995, C No. 31467 of 1992 at 4

[31] Agreement, clause 35.3.1

[32] Agreement, clause 9.23

[33] Agreement, clause 9.22

[60] Clause 38 "*shift work*" does not distinguish between fixed rosters or rotating rosters. Rather, shift workers are paid an applicable shift allowance having regard to the performance of "*rostered hours of ordinary duty*" and a "*rostered period of duty*."

[61] It follows that Ms Stewart performs shift work pursuant to a roster which sets out (a) the days and hours in respect of which Ms Stewart is rostered to perform ordinary hours of duty, and (b) the days in which Ms Stewart is not rostered to perform ordinary hours of duty, including in respect of days Ms Stewart is accessing her accrued day off.

[62] Spotless advances its position on the basis that employees such as Ms Stewart who work pursuant to a fixed roster do not observe a "*rostered day off"* under the Agreement. However, there is no contextual or other support for this proposition in the Agreement. Rather, having regard to the context of the Agreement as a whole, I consider that the term "*rostered day off*" in clause 45.6.2 means a day on which Ms Stewart is not ordinarily required to work pursuant to the roster.

[63] Against my findings at [58]-[61], I reject Spotless' contention that it would be industrially absurd to regard Ms Stewart as being rostered off on her non-working days. Spotless seeks to compare Ms Stewart's position to an office-based employee working Monday to Friday who observes weekends off. I disagree that this comparison is appropriate. Spotless operates the part of its business in which Ms Stewart works seven days a week.[34] In my view, there is no basis to distinguish between an employee's roster where days off are on Saturday and Sunday, or Monday and Tuesday.

[64] Spotless' position is also undermined upon consideration of the history of clause 45.6.2, including the predecessor enterprise agreements and underpinning historical award.[35] The relevant clause of the Agreement is a product of its history. The clause replicates the terms of the pre-reform award, which was drafted having regard to the matters identified at [41]-[43] above.

[65] Finally, I reject Spotless' contention that clause 45.6.2 mirrors s 116 of the Act, or that the clause in the Agreement ought to be read down because it provides a more favourable benefit to employees than the NES. I do not consider s 116 to be comparable to clause 45.6.2 in this way. Section 116 of the Act is an entitlement to payment for absence on public holidays. Clause 45.6.2 is an entitlement to be paid an amount, or receive time in lieu or leave, when a public holiday falls on the employee's rostered day off. To read clause 45.6.2 in the manner contended for by Spotless would be to ignore the "*rostered day off*" condition entirely, instead providing an entitlement to be paid for being absent on a public holiday when rostered on.

[66] It follows that where Ms Stewart's "*rostered day off,*" being a Monday or a Tuesday in accordance with her current roster, falls on a public holiday then Ms Stewart is entitled to payment at the rate of 150% in respect of that day pursuant to clause 45.6.2 of the Agreement, or to one of the compensatory benefits contemplated by clause 45.6.2(a) and (b).

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[34] Agreement, clause 33

[35] *Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511 at 518

Conclusion

[67] For the foregoing reasons, the answer to the agreed question is “*yes*.” On a proper construction of the Agreement, clause 45.6.2 entitles Ms Stewart to payment on a public holiday that falls on a day on which she is not ordinarily required to work.

DEPUTY PRESIDENT

Appearances:

Mr C Granger for the applicant
Mr A Lynch for the respondent

Hearing details:

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