



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.158 - Application to vary or revoke a modern award

Shop, Distributive and Allied Employees Association (AM2010/33)

Retail industry

VICE PRESIDENT WATSON

SYDNEY, 28 APRIL 2010

Application to vary the General Retail Industry Award 2010– whether minimum rate fairly set – Fair Work Act 2009 ss 134, 157, 158, 284 .

Introduction

[1] This decision concerns an application by the Shop, Distributive and Allied Employees Association (SDA) pursuant to s 158 of the *Fair Work Act 2009* (the Act) to vary the *General Retail Industry Award 2010* (the Award) by increasing the wage rate payable to a Retail Employee Level 1 in clause 17.

[2] Directions were issued concerning the service of the application on a number of organisations and associations and the filing of written material in advance of the hearing of the matter. Submissions were filed by the SDA and Master Grocers Australia Limited (MGA). No other parties filed submissions. At the hearing of this matter on 13 April 2010, Ms Burnley appeared for the SDA and Mr Issa appeared for the MGA. At the conclusion of the hearing of the matter I reserved my decision. On 19 April 2010 the National Retailers Association (NRA) filed a submission in the matter. As the submission was outside the time for filing material and the NRA did not appear in the hearings or seek any extension of time I have not considered its submission.

Background

[3] The application seeks to increase the minimum rate for a Level 1 employee in the Award from \$600.00 to \$602.88. The Award was made by the Australian Industrial Relations Commission (AIRC) during stage one of the award modernisation process conducted under Part 10A of the *Workplace Relations Act 1996*.

[4] The exposure draft of this award had wider application than the present scope. The minimum classification rate in the exposure draft was \$600.00 per week. A number of parties made submissions about the provisions of the Award including the level of rates of pay and other monetary obligations. The final award retained the minimum figure of \$600.00.

[5] The Award commenced operation on 1 January 2010 but the transitional provisions in Schedule A of the Award provide that the minimum wage in a relevant transitional instrument apply until 1 July 2010 and thereafter any differential between that rate and the modern award rate is phased out over the ensuing four years.

[6] Any reduction in take home pay to any employee can be subject to an application for take home pay orders under Schedule 5, Part 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act).

Submissions of the Parties

[7] The SDA submits that the \$600.00 figure does not correspond with any other minimum rate in the retail industry. It submits that the rates for Australian pay scales range from \$601.92 to \$603.44 and that higher minimum rates previously applied under state instruments for persons not employed by constitutional corporations. It submits that its application complies with s 157 of the Act, is consistent with the modern awards objective and the minimum awards objective and that the reduction in the minimum rate is directly impacting on the living standards of base grade shop assistants. It asserts that granting the application will not detract from any performance or competitiveness of the national economy.

[8] The MGA submits that the application is not justified on work value grounds and the application does not meet the requirements of the modern awards objective or s 157(2).

Relevant Legislation

[9] Section 157(2) states:

“(2) FWA may make a determination varying modern award minimum wages if FWA is satisfied that:

(a) the variation of modern award minimum wages is justified by work value reasons; and

(b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note: As FWA is varying modern award minimum wages, the minimum wages objective also applies (see section 284).”

[10] The modern awards objective is contained in s 134 of the Act. It provides:

134 The modern awards objective

“*What is the modern awards objective?*”

(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.”

[11] The minimum wages objective is contained in s 284 of the Act. It is in the following terms:

“284 The minimum wages objective

What is the minimum wages objective?

(1) FWA must establish and maintain a safety net of fair minimum wages, taking into account:

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and

- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the *minimum wages objective*.

When does the minimum wages objective apply?

(2) The minimum wages objective applies to the performance or exercise of:

- (a) FWA's functions or powers under this Part; and
- (b) FWA's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

Note: FWA must also take into account the objects of this Act and any other applicable provisions. For example, if FWA is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134)."

Conclusions

[12] In my view the SDA has not demonstrated that the variation is necessary to achieve the modern awards objective.

[13] The scheme of the Act is that the terms of modern awards are generally not able to be varied outside the four yearly reviews (or the two yearly review in 2012 pursuant to item 6 of Schedule 5 of the Transitional Act). Exceptions to this general rule need to satisfy the relevant statutory test – in this case s 157(2) of the Act. The requirement that the variation is necessary to achieve the modern awards objective involves more than a finding that the variation is consistent with the objective. In my view it must, in effect, be demonstrated that the objective is not able to be achieved unless the variation is made.

[14] In my view the context of the Award and the circumstances of its making are highly relevant. The rates in this award were set after lengthy and exhaustive processes before a Full Bench of the AIRC during the award modernisation process. The Full Bench carried out the process in accordance with the award modernisation request issued by the Minister. Parties with an interest in the Award had every opportunity to address issues of concern and they did so.

[15] The resultant award took into account a wide range of disparate provisions from a large number of instruments. It involved striking a balance in consideration of the overall terms of the Award. The Full Bench inserted transitional provisions to limit the impact of the changes. In its various decisions it explained that particular regard was paid to pre-existing instruments but there was no standard formula adopted for the determination of the terms of the awards.

[16] The specific circumstances are also very relevant. The terms and conditions previously applying to operations now covered by the Award were widely divergent. Many compromises were involved in determining the terms and conditions. The variation sought by the SDA is small and is subject to the transitional provisions.

[17] In all of these circumstances I am not satisfied that the variation is necessary to achieve the modern awards objective. The application is dismissed.

VICE PRESIDENT WATSON

Appearances:

Ms S Burnley for the Shop, Distributive and Allied Employees Association

Mr C Issa for the Master Grocers Australia Limited

Hearing details:

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April 13

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