[2010] FWA 4918

FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.158 - Application to vary or revoke a modern award

Gregory Easlea and Jennifer Easlea
(AM2010/70)

PASTORAL AWARD 2010
(ODN AM2008/14) [MA000035]

Agricultural industry

SENIOR DEPUTY PRESIDENT HARRISON — SYDNEY, 5 JULY 2010

Variation to modern award, ambiguity or uncertainty.

[1] This decision deals with an application made by Gregory and Jennifer Easlea who are employers located in the State of Queensland engaged in dairy farming. The application, made under s.158 of the Fair Work Act 2009 (the Act), is to vary the transitional provisions in Schedule A to the Pastoral Award 2010[1] (the Pastoral Award).

[2] The National Farmers' Federation (NFF) represents the applicants. It also appears in its own right as an intervener and on behalf of AgForce Queensland, Australian Dairy Farmers Limited and Cotton Australia Limited.

[3] The application is confined to employers who are not constitutional corporations, were award free and are in Queensland in the dairying and broadacre field crops sectors of the industry. Each of these sectors is defined in clause 4.2 of the Award.

[4] The application was filed on 31 May 2010. I conducted a conference on 10 June attended by the NFF and The Australian Workers' Union (AWU). As a result of matters discussed in that conference the scope of the application as originally filed was narrowed as has been the variation sought. The AWU opposes the variation. A hearing proceeded on 2 July 2010 and, due to the urgency of the matter, I announced my decision at the conclusion of

that hearing. I said I would make a determination largely along the lines of that sought by the NFF but indicated a number of concerns I had with the terms of the draft then being pressed. The determination I decided to make, which was published on 2 July 2010, is in the following terms:

"1. At the end of clause A.1.2(c) of Schedule A delete the word "or"

2. At the end of clause A.1.2(d) of Schedule A insert the word "or"

3. After A.1.2 (d) of Schedule A insert the following sub clause:

"(e) when an employer is within the class of employers described in clause A.9"

4. After A.8 of Schedule A insert a new clause as follows:

"**A.9 Non-constitutional corporation employers operating a dairy or broadacre field crop enterprise in Queensland**

A.9.1 The following transitional arrangements for minimum wages apply to an employer which, immediately prior to 1 January 2010:

(a) was a non-constitutional corporation who employed labour;

(b) operated a dairy and or broadacre field crop enterprise in Queensland;

(c) was not obliged to comply with a transitional minimum wage instrument or award-based transitional instrument; and

(d) was obliged to pay the Queensland Minimum Wage.

A.9.2 In this clause minimum wage includes

(a) a minimum wage for a junior employee, an employee to whom training arrangements apply and an employee with a disability; and

(b) any applicable industry allowance.

A.9.3 Prior to the first full pay period on or after 1 July 2010 the employer must pay no less than the Queensland Minimum Wage.

A.9.4 The difference between the minimum wage for the classification in this award and the Queensland Minimum Wage is referred to as the transitional amount.

A.9.5 From the following dates the employer must pay no less than the minimum wage for the classification in this award minus the specified proportion of the transitional amount or the National Minimum Wage as it applies at 1 July each year, whichever is the greater:

First full pay period on or after	
1 July 2010	80%
1 July 201 1	60%
1 July 2012	40%
1 July 2013	20%

A.9.6 The employer must apply any increase in minimum wages in this award resulting from an annual wage review.

A.9.7 These provisions cease to operate from the beginning of the first full pay period on or after 1 July 2014."

5. This order shall come into effect on 1 January 2010".

[5] I decided that the variation sought by the NFF was one that could be made under s.160 of the Act. For the reasons that follow, I was persuaded an ambiguity and uncertainty existed in the transitional provisions of the Pastoral Award and it should be removed by a variation to the terms of Schedule A. I should indicate that this application is one decided upon the peculiar factual circumstances relied upon by the NFF. The applicants, and other employers with similar attributes, unexpectedly find themselves in a position where, unlike all other employers covered by the Pastoral Award they are not currently entitled to phase in any wage increases that are a consequence of being covered by the award from 1 January 2010. It seems that these employers had assumed they would be able to phase in wage increases consistent with the provisions of Schedule A. That had been their understanding of the construction of the terms of the schedule and state referral legislation. However it is now acknowledged that the relevant terms of the transitional provisions concerning wages apply to employers obliged to comply with a transitional minimum wage instrument or an award-based transitional instrument. The reason for this application is that the applicants had no such obligations immediately prior to the Pastoral Award coming into operation.

[6] The applicants were not bound by the pre-reform award known as the Pastoral Industry Award 1998[2]. With some exceptions not here relevant, that award did not operate in the state of Queensland. No other pre-reform award was identified as being of possible relevance. Nor were the applicants bound by any award made by the Queensland Industrial

Relations Commission (QIRC). They were not covered by any APCS derived from any award. Prior to the Pastoral Award coming into operation the applicants were only required to observe the minimum wage order made by the QIRC. In these circumstances the current transitional provisions in Schedule A require the applicants, and employers with the same attributes, to now pay their employees the relevant wage for their classification level.

[7] I should record that this application relates solely to the minimum wages (which also include any relevant industry allowance) that are to be paid. Loadings and penalty rates are specifically dealt with in Clause A.7 in Schedule A. That clause relates to all employers who had no existing obligation to pay any loadings or penalties.

[8] In my opinion, and despite the AWU opposition, it was appropriate to allow these employers to phase in increase in wage rates in the same manner in which their constitutional corporation counterparts are able to. I decided that to allow the variation sought would be consistent with the reasons for decision of the Full Bench when it first published the model phasing schedule for priority and Stage 2 awards. The Pastoral Award was made as part of Stage 2 of the award modernisation process. In its decision dated 2 September 2009 the AIRC decided that any cost increases resulting from the introduction of modern awards should be spread over a lengthy period as contemplated by the then provisions of the *Workplace Relations Act 2009*.[3] It also said that it was desirable that all employers covered by a modern award should be bound by the same transitional provisions, have the same minimum obligations and that the same minimum entitlements should apply to their employees.[4]

[9] The Full Bench then dealt specifically with the various awards which had been made in the priority and Stage 2 process. About the Pastoral Award it said:

> "Pastoral Award 2010
>
> **[105]** The *Pastoral Award 2010*[34] substantially reflects the terms of the *Pastoral Industry Award 1998.*[35] Nonetheless, employer organisations representing employers to whom the modern award will apply sought transitional provisions to deal with the impact of the modern award upon them. The NFF and the Western Australian Farmers Federation Industrial Association (WAFFIA) raised particular issues in respect of the dairy and grain industries in Queensland and the grain industry in Western Australia, arising from the application of the modern award to formerly award free employers. WAFFIA also contended that employers of farmhands, currently bound by the *Western Australian Farm Employees' Award, 1985,*[36] would incur additional costs upon the application of the *Pastoral Award 2010*. The employer organisations

> submitted that the major award provisions requiring transitional provisions were a 5% increase in the casual loading, annual leave loading, wage increases as a result of the introduction of a classification structure and ordinary hours and overtime.
>
> **[106]** The NFF and WAFFIA sought a transitional provision which would permit absorption or offsetting of higher modern award obligations against existing rates and the postponement of new higher classifications (and rates) at the FLH 6 – 8 in cl.28.1 of the modern award until 1 January 2015.
>
> **[107]** The model commencement and transitional clause provides for the absorption of monetary increases arising from the making of the modern award into overaward payments. The model phasing schedule will also ameliorate the impact of any cost increases, including the impact of higher classification rates."

[10] It is to be noted that insofar as Queensland was concerned it was employers who were constitutional corporations which were being considered by the Full Bench. Subsequently, through a referral of powers in December 2009, jurisdiction was established for the coverage of modern awards to be extended.

[11] The variation sought is also consistent with comments made by the Full Bench in its decision of 3 December 2009[5] when it again dealt with the model transitional provisions in the context of awards that had been made as part of Stage 3 of the award modernisation process. It again confirmed its intention that increases in wages as a result of the coming into operation of a modern award should be able to be phased over a period ending 1 July 2014.

[12] It is important for me to here note that as this application needed to be dealt with expeditiously I accepted the assertions made by the NFF about the award free status of the applicants and other employers with like attributes. Time has not allowed me (and I assume the AWU) to consider all of the various state awards that have previously operated in Queensland and whether any part of the activities of the applicant's or their employees may have been covered by them. I have proceeded on the submissions of the NFF, and as supported by its witnesses, that these applicant's and others in a like position have been award free.

[13] I was persuaded to make the variation operate retrospectively. The facts outlined above leading to and justifying this application are, in my opinion, exceptional circumstances which, in accordance with s.165(2), warrant a 1 January 2010 operative date.

[14] In this respect I accept the following submissions made by the NFF:

"61. It is submitted that if retrospectivity is not granted, non-constitutional corporations in the dairy, grain and cotton industries in Queensland will be unreasonably disadvantaged compared to their neighbours who are constitutional corporations.

62. These employers have been under the misapprehension since 1 January 2010, due to initial advice received from various sources that the transitional provisions applied to them and they have relied upon the transitional provisions and not increased minimum wages accordingly.

63. It is submitted that it would be unfair to expect these employers to pay a significant amount in back pay for an anomaly, ambiguity and/or what may be characterised as an error in the award which has occurred due to no fault of theirs."

SENIOR DEPUTY PRESIDENT

Appearances:

D. Wawn for the Applicants and the National Farmers' Federation.

T. Costa and *A. Angus* for The Australian Workers' Union.

Hearing details:

2010.
Sydney:
June 10;
July 2.

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[1] MA000035
[2] AP792378
[3] [2009] AIRCFB800 @ para 17
[4] Ibid @ para 31
[5] [2009] AIRCFB 943