

[2010] FWA 8243

The attached document replaces the document issued on 26 October 2010.

Typographical errors contained in paragraph [13] and Footnote 11 have been corrected.

Lisa Powell
Associate to Senior Deputy President Acton



DECISION

Fair Work Act 2009

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

Construction, Forestry, Mining and Energy Union

MOBILE CRANE HIRING AWARD 2010

[MA000032]

(AM2010/125)

CONCRETE PRODUCTS AWARD 2010

[MA000056]

(AM2010/126)

JOINERY AND BUILDING TRADES AWARD 2010

[MA000029]

(AM2010/127)

SENIOR DEPUTY PRESIDENT ACTON

MELBOURNE, 26 OCTOBER 2010

Variation to modern awards.

Introduction

[1] Applications AM2010/125, AM2010/126 and AM2010/127 are applications by the Construction, Forestry, Mining and Energy Union (CFMEU) made under s.158 of the *Fair Work Act 2009* (the FW Act) to vary modern awards.

[2] Application AM2010/125 seeks to vary the *Mobile Crane Hiring Award 2010*¹ to provide for dispute resolution procedure training leave and to clarify the rate for the all-purpose industry allowance.

[3] Application AM2010/126 seeks to vary the *Concrete Products Award 2010*² to include the superannuation fund Cbus in the superannuation clause.

[4] Application AM2010/127 seeks to vary the *Joinery and Building Trades Award 2010*³ to provide for dispute resolution procedure training leave.

[5] The CFMEU made submissions in respect of each of the applications and The Australian Industry Group (AiG) and Master Builders Australia Ltd (MBA) made submissions in respect of applications AM2010/125 and AM2010/127.

[6] I will deal with each of the variations sought by subject matter.

Superannuation

[7] I am satisfied I should vary the *Concrete Products Award 2010* to include Cbus as a named fund in the award. Such variation was not opposed and the variation would be consistent with the FW Act.

All-purpose industry allowance

[8] I am also satisfied I should clarify the rate of the weekly all-purpose industry allowance in clause 13.2 of the *Mobile Crane Hiring Award 2010* by changing the rate from 5.7% to 216.6% of the standard rate. The standard rate in the award is an hourly rate. The current wording of the clause is ambiguous and not easy to understand. Neither AiG or MBA opposed the clarification of clause 13.2, although AiG submitted the variation should operate prospectively.

[9] AiG proposed that the current wording of the clause which is as follows:

“13.2 All employees will be paid an all-purpose industry allowance of 5.7% of the standard rate per week in addition to the minimum classification rates set out in clause 13.”

be varied to the following

“13.2 All employees will be paid an all-purpose industry allowance per week of 216.6% of the standard rate in addition to the minimum classification rates set out in clause 13.”

[10] I will vary the wording of clause 13.2 as proposed by AiG. I am satisfied the variation should operate from the first full pay period on or after 1 January 2010, having regard to s.165 of the FW Act and the operative date for allowances in the modern award. The variation removes the ambiguity in the current wording of the clause and makes clear the intended operation of the clause. Further, I am satisfied there are exceptional circumstances for such retrospectivity. A conclusion that clause 13.2 as previously worded only intended to provide for an all-purpose industry allowance of \$1.00 per week was not reasonable.

Dispute resolution procedure training leave

[11] The CFMEU seeks the following dispute resolution procedure training leave clause be included in the *Mobile Crane Hiring Award 2010* and the *Joinery and Building Trades Award 2010*:

“9.7 Dispute resolution procedure training leave

- (a) For the purpose of this clause, an eligible employee representative is an employee who is a shop steward, a delegate, or an employee representative duly elected or appointed by the employees in an enterprise or workplace or part of an enterprise or workplace for the purpose of representing those employees in the dispute resolution procedure.

- (b) An eligible employee representative will be entitled to up to five days' paid leave per year to undertake training that will assist them in their settlement of disputes role. The time of taking such leave will be agreed between them and their employer so as to minimize any adverse effect on the employer's operations."

[12] In support of the variations, the CFMEU submitted that dispute resolution training leave was contained in the *Mobile Crane Hiring Award 2002*,⁴ the *National Joinery and Building Trades Products Award 2002*,⁵ the *Building and Construction Industry (ACT) Award 2002*⁶ and the *Glass Industry Award (Qld) 1998*⁷ and the exclusion of such a provision from the modern awards was an error. Further, such a provision was included in the *Building and Construction General On-Site Award 2010*,⁸ having been a term of the *National Building and Construction Industry Award 2000*.⁹ In addition, a Full Bench of Fair Work Australia (FWA) in FWA matter AM2009/162 declined to remove the provision from or limit it in its application in the *Building and Construction General On-Site Award 2010*.

[13] Moreover, in respect of the variation to the *Joinery and Building Trades Award 2010*, the CFMEU submitted trade union training leave was provided for in the:

- *Joiners (State) Award (NSW)*;¹⁰
- *Building Employees Mixed Industries (State) Award (NSW)*;¹¹
- *Building Products, Manufacture and Minor Maintenance Award - State 2003 (Qld)*;¹²
- *Blastcoaters Offsite Award – State 2002 (Qld)*¹³; and
- *Carpenters & Joiners (General) Award 1993 (SA)*.¹⁴

[14] In opposing the variations, AiG and MBA submitted:

- the *Joinery and Building Trades Award 2010* covers employees who were previously covered by a large number of pre-modern awards and Notional Agreements Preserving State Awards (NAPSAs) and while some of these instruments included dispute resolution training leave or trade union training leave provisions, others of these instruments, including many of those in the glazing industry, did not include such leave.
- mobile crane hiring operators work in a myriad of industries in addition to the building and construction industry and there is no evidence that dispute resolution training leave is a prevailing industry standard in these other industries.
- from 27 March 2006, dispute resolution training leave and trade union training leave were not allowable award matters.
- the exposure draft of the *Joinery and Building Products Award 2010* did not include dispute resolution training leave, in submissions in respect of the exposure draft the CFMEU sought the inclusion of such leave while employer representatives opposed the inclusion of such a provision, and the Full Bench of the Australian Industrial Relations Commission (the Commission) decided not to include the provision in the modern award.

- in its decision on the making of the *Mobile Crane Hiring Award 2010*, the Full Bench of the Commission said:

“[115] We have utilised the dispute resolution clause which appears in modern awards generally in place of the clause from the [*Mobile Crane Hiring Award 2002*].”¹⁵

- there was no error in the omission of such leave from the modern awards in question and no case has been made out that the variation is necessary to achieve the modern awards objective.

[15] MBA proposed an alternative dispute resolution training leave clause if FWA was minded to include such a clause in the modern awards.

[16] I am not persuaded either modern award should be varied to include dispute resolution training leave.

[17] A large number of pre-modern awards and NAPSAs covered the types of employees and employers covered by the *Joinery and Building Trades Award 2010*. Consideration of the pre-modern awards and NAPSAs relevant to that modern award indicates that dispute resolution training leave was not a prevailing standard.

[18] The dispute resolution clause in the *Mobile Crane Hiring Award 2002* was as follows:

“8. SETTLEMENT OF DISPUTES

The following procedure will be observed :-

8.1 Where a dispute, grievance or other question arises, the employee(s) concerned shall raise the matter with the Supervisor or other nominated representative of the employer. At the employee's option, a duly appointed union representative may also be present.

For the purposes of this award "duly appointed union representative" shall mean the union member appointed as a job steward/delegate by the union members employed at each company or depot and accredited by the union. Such job steward/delegate shall be allowed the necessary time during working hours to interview the employee(s), the employer or nominated employer representative, and duly accredited Officials of the Union on the matters in dispute.

Provided that the foregoing does not relieve the job steward/delegate of the obligation imposed by the employer.

8.2 If not satisfactorily settled, or in cases where the matter is of such a nature as to warrant the omission of the step detailed in sub-clause 8.1 hereof, the duly appointed union representative and the employee(s) concerned shall discuss the matter with the nominated representative of the employer.

8.3 If still not resolved the duly appointed union representative shall refer the matter to an appropriate Official of the Union, who shall discuss the matter with the nominated representative of the employer.

8.4 If the matter is not resolved at the State level, it shall be referred to the Federal Office of the Union and a senior officer of the employer or employer organisation who shall endeavour to resolve the matter.

8.5 Throughout the foregoing procedure, normal work shall continue. No party shall be prejudiced as to final settlement by the continuance of work in accordance with this clause.

8.6 This procedure shall be followed in good faith and without unreasonable delay by any party.

8.7 This procedure shall not apply in the event of any genuine issue involving safety.

8.8 At any stage of this procedure, either party may refer the matter to the Australian Industrial Relations Commission for determination.

8.9 Each duly appointed union representative shall be granted up to five days paid leave per year to undertake training that will assist them in their settlement of disputes role. The time of taking such leave shall be agreed with the union so as to minimise any adverse affect on the employers' operations.”

[19] It is apparent clause 8 of the *Mobile Crane Hiring Award 2002* provided for dispute resolution training leave. In its submission to the Commission prior to the making of the *Mobile Crane Hiring Award 2010*, the CFMEU sought dispute resolution training leave as part of their proposed dispute resolution clause for that modern award. AiG opposed the CFMEU’s proposed dispute resolution clause. In making the *Building and Construction General On-Site Award 2010*, the Full Bench of the Commission included dispute resolution training leave as part of the dispute resolution clause of the modern award.¹⁶ However, in making the *Mobile Crane Hiring Award 2010* the Full Bench of the Commission clearly stated that it had utilised the dispute resolution clause appearing in modern awards generally in place of the dispute resolution clause from the *Mobile Crane Hiring Award 2002*. The dispute resolution clause generally appearing in modern awards does not include dispute resolution training leave.

[20] In the circumstances, it cannot be maintained the exclusion of a dispute resolution training leave clause from the *Joinery and Building Trades Award 2010* or the *Mobile Crane Hiring Award 2010* was an error. Nor is the inclusion of such a clause in those modern awards necessary to achieve the modern awards objective.

[21] The CFMEU applications for variation of the *Joinery and Building Trades Award 2010* and the *Mobile Crane Hiring Award 2010* in respect of dispute resolution training leave are dismissed.

SENIOR DEPUTY PRESIDENT

Appearances:

A. Borg for the Construction, Forestry, Mining and Energy Union.

R. Calver for Master Builders Australia Ltd.

L. Davies for The Australian Industry Group.

Hearing details:

2010.

Melbourne:

October, 11.

Final written submissions:

2010.

Melbourne:

October, 12.

Endnotes:

¹ MA000032.

² MA000056.

³ MA000029.

⁴ AP816842 CRV.

⁵ AP817265 CRV.

⁶ AP817145 CRV.

⁷ AP782248.

⁸ MA000020.

⁹ AP790741 CRV.

¹⁰ AN120280.

¹¹ AN120091.

¹² AN140045.

¹³ AN140029.

¹⁴ AN150029.

¹⁵ *Re Award Modernisation*, [2009] AIRCFB 345.

¹⁶ *Building and Construction General On-Site Award 2010* [AM000020] at clause 9.7.

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