



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Australian Municipal, Administrative, Clerical and Services Union
(AM2010/38)

LOCAL GOVERNMENT INDUSTRY AWARD 2010
[MA000112]

Local government administration

VICE PRESIDENT LAWLER
SENIOR DEPUTY PRESIDENT WATSON
COMMISSIONER SMITH

MELBOURNE, 29 JUNE 2010

[1] This is an application by the Australian Services Union (**ASU**) pursuant to s.157 and s.160 of the *Fair Work Act 2009 (FW Act)* to vary the *Local Government Industry Award 2010 (local government modern award)*. The application seeks variations to the local government modern award to:

- (a) supplement the National Employment Standards (NES) entitlement in relation to:
 - (i) personal/carer's leave; and
 - (ii) jury service make-up pay; and
- (b) include a transitional provision preserving employees' prior award entitlements to annual leave and compassionate/bereavement leave.

[2] The application was opposed by the various local government associations.

[3] Section 156 of the FW Act makes provision for a four yearly review of all modern awards. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* provides for an initial review of modern awards in 2012.

[4] Section 157 makes provision for the variation of modern awards between such reviews but only on a limited basis, namely, that Fair Work Australia (**FWA**) "is satisfied that making the determination or modern award outside the system of four yearly reviews of modern awards is necessary to achieve the modern awards objective."¹ The modern awards' objective is set out in s.134(1) of the FW Act.

[5] There is a long history of industrial tribunals in Australia declining to re-open awards during their currency unless there were matters not known at the time the award was made which would lead to an injustice if the award was not varied, or circumstances have changed so dramatically so as to warrant a revisiting of the conclusions reached. The discretionary considerations which were applied in the resolution of industrial disputes should be seen as having been generally captured by the discretion in s.157 of the FW Act.

[6] Section 160 of the FW Act empowers FWA to “make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.” The modern awards’ objective applies to an exercise of the power conferred by s.160.²

Supplementing the NES in relation to Personal/Carer’s leave and Jury Service make-up pay

[7] A Full Bench of the Australian Industrial Relations Commission (AIRC) consisting at various stages of 6 and 7 members³ conducted the award modernisation process provided for in Part 10A of the *Workplace Relations Act 1996*. That process saw the various industries and occupations, the subject of award modernisation, considered in four stages and led to the making of some 122 modern awards that commenced on 1 January 2010. The local government modern award was made as part of stage 3.

[8] In its decision of 4 December 2009 on the stage 4 modern industries and occupations⁴ (**Stage 4 Decision**) the Full Bench noted in relation to local government:

“[144] In relation to personal/carers’ leave and community service leave we have not accepted some of the agreed changes to those clauses. For reasons that we have explained elsewhere we now do not regard it as appropriate to supplement personal/carers’ leave or to provide for entitlements in relation to jury service that exceed those in the NES unless there are special circumstances.”

[9] The Full Bench referred to reasons “explained elsewhere”. In its decision of 19 December 2008, in relation to the making of the priority modern awards as part of stage 1⁵, the Full Bench addressed community service leave including jury service make-up pay:

“[103] We have given further consideration to whether modern awards should supplement the NES in relation to the amount of jury service leave to which an employee is entitled. The NES provides that jury service leave should be limited to 10 days. So far as we know jury service leave provisions in awards and NAPSAs are not subject to any cap at all. If we were to maintain an unlimited entitlement it would be necessary to supplement the NES in every modern award. Such a course would be inconsistent with the NES and tend to undermine it.

[104] A similar consideration arises in relation to the rate of pay while on jury service leave. For similar reasons we shall not make general provision for a rate of pay other than the base rate as defined in the NES. It follows that the standard community service leave clause will simply refer to the NES.”

[10] In its decision of 3 April 2009 in relation to the making of stage 2 awards⁶ the Full Bench rejected submissions from the ACTU that it had taken too restrictive a view of proper supplementation of the National Employment Standards:

“[48] Turning to another matter, the ACTU submitted that the Commission has so far taken a view of its power to supplement the terms of the NES which is too restrictive. It referred in particular to passages in the 19 December 2008 decision relating to concurrent parental leave, community service leave and public holidays. We adhere to those views. We think that we should give proper weight to the Parliament’s decision to regulate minimum standards in relation to the matters covered by the NES. It cannot have been Parliament’s intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case.”

[11] The decision of the Full Bench not to include in the local government modern award terms supplementing the NES entitlements in relation to personal/carer’s leave and jury service make-up pay was an express and considered decision. We can see no proper basis for allowing a variation application that seeks a different outcome. The Full Bench was aware that the provisions sought by the ASU were agreed with the local government associations but nevertheless did not regard it as appropriate to include those provisions. The ASU does not point to any error on the part of the Full Bench or changed circumstances that would make it appropriate for this Full Bench to alter the determination of the Full Bench that made the local government modern award. The ASU’s application for a variation that supplements the NES in relation to personal/carer’s leave and jury service make-up pay is refused.

Additional transitional provisions - annual leave, compassionate/bereavement leave and jury service make-up pay

[12] The Full Bench of the AIRC delivered a separate decision in relation to transitional provisions to be included in modern awards made as part of the award modernisation process conduct under Part 10A of the WR Act⁷ (**Transitional Decision**). That decision determined the transitional provisions to be included in awards made as part of the priority stage and stage 2. It also informed the inclusion of transitional provisions in the modern awards made as part of stages 3 and 4.

[13] The only transitional provision in the local government modern award dealing with leave entitlements is sub-clause 25.7:

“25.7 Transitional provision—personal/carer’s leave and compassionate leave

- (a) An employee who is entitled to personal or sick leave in accordance with the terms of a notional agreement preserving a State award or a federal award applying in only one State or Territory:
 - (i) that would have applied to the employee immediately prior to 1 January 2010, if the employee had at that time been in their current circumstances of employment and no agreement-based transitional instrument or no agreement made under the Act had applied to the employee; and

- (ii) that would have entitled the employee to personal or sick leave in excess of the employee's entitlement to such leave under this award or the NES,

is entitled to the amount of sick or personal leave which exceeds the employee's entitlement to such leave under this award or the NES.

- (b) This clause ceases to operate on 31 December 2014."

[14] The ASU correctly points out that:

- clause 25, the clause in which sub-clause 25.7 appears, is entitled "Annual Leave" and otherwise deals with annual leave and yet sub-clause 25.7 does not deal with annual leave;
- while the heading to sub-clause 25.7 refers to compassionate leave as well as personal/carer's leave, there is no reference to compassionate leave within the body of sub-clause 25.7; and that
- the local government award contains no other provision dealing with personal leave in circumstances where other modern awards that do not supplement the NES entitlement to personal leave nevertheless contain a provision noting that personal leave is provided for in the NES.

[15] We accept that these matters suggest oversight and/or other error having occurred in relation to the inclusion of sub-clause 25.7 in the terms in which it appears. Neither the Statement accompanying the publication of the exposure drafts for the stage 4 industries nor the Stage 4 Decision that deals *inter alia* with the making of the local government award, in so far as they address local government, make any reference to annual leave or compassionate/bereavement leave, either in relation to substantive entitlements or as a transitional matter. This is an appropriate case for this Full Bench to reconsider, pursuant to s.160 of the FW Act, the transitional provisions in relation to leave that ought be included in the local government award.

[16] The Transitional Decision does not contain any general statement suggesting that it is inappropriate to preserve superior annual leave or compassionate/bereavement leave entitlements on a transitional basis.

[17] The Full Bench included a transitional provision preserving superior prior leave entitlements in the *Black Coal Mining Industry Award 2010* but that award should be seen as a special case. It was made as part of the priority stage (that is, before a number of approaches by the Full Bench of the AIRC had become settled) and the Full Bench adopted a substantial position agreed between all major employers and the relevant unions.

[18] In making the *Rail Professional Officers Award 2010* the Full Bench of the AIRC declined to include a transitional provision preserving superior prior sick leave and bereavement leave entitlements. The Full Bench noted:⁸

“[88] In its submission APESMA concedes that it is unlikely any professional employee in the rail industry is award dependent or likely to be adversely impacted by the modern award coming into operation. However, it submitted that it may be prudent to put in a transitional clause preserving certain employee entitlements currently in the Rail Professional Officers Award 2002, (the Professional Officers Award), a pre-reform award. These related to sick and bereavement leave, overtime and an emergency work allowance.

[89] We have not generally included provisions supplementing NES entitlements in the way sought by APESMA and are not persuaded to do so by way of any transitional provisions in this award. We are also not persuaded there is a need to insert any special transitional provision in respect to the overtime provisions that are in the Professional Officers Award. It is highly unlikely that the making of the modern award will have any practical impact on these employees. Finally, the emergency allowance applies only in New South Wales and provisions in the modern award will compensate an employee called out in comparable circumstances.”

[19] It is clear from these paragraphs that:

- while noting that “[w]e have not generally included provisions supplementing NES entitlements in the way sought by APESMA”, the Full Bench was confining its consideration to the appropriateness of the inclusion of a transitional provision preserving superior prior leave entitlements within the particular modern award and was not purporting to state a position of general application; and
- the Full Bench placed emphasis on APESMA’s concession and noted that it was “highly unlikely” that the making of the modern award (without the proposed transitional provision) would have “any practical impact” on the employees who would be covered by that modern award.

[20] The making of the *Nurses Award 2010* saw the prior award annual leave entitlement increase for some employees who became covered by that modern award and decrease for others. The Full Bench of FWA dealt with an application to introduce a transitional provision to phase-in increases in the annual leave entitlement occurring as a result of the making of that modern award. The Full Bench rejected that application noting:⁹

“[24] Taking into account the submissions in both the main case and this later application, we are of the view that we should not make any special provision for phasing-in the increase in annual leave. As the unions pointed out, in the case of some employees covered by the modern award, annual leave entitlements will be reduced. If we were to revisit our earlier conclusions for employers, we would be obliged to do so for employees also. The outcomes may not be perfect but they have been arrived at after lengthy and appropriate consideration.

[25] An additional important matter is that if we were to make special transitional provisions relating to an increase in annual leave in this case, interested parties would be entitled to seek phasing-in of increases and decreases in annual leave whenever they occur as a result of the operation of the NES and modern awards. This would have the potential to lead to a general reappraisal of transitional provisions, to

introduce further complexity and to undermine the approach that has been adopted in relation to transitional provisions generally [see [2009] AIRCFB 800 especially at paras.18, 23 and 24]. Under that approach, changes in annual leave are generally not the subject of transitional provisions. While there may be cases in which changes in annual leave entitlements are so significant as to lead us to depart from the approach, this case is not one of them. The application is rejected.”

[21] The Full Bench of FWA also dealt with an application by the LHMU to vary the *Aged Care Award 2010* that included an application to preserve superior annual leave entitlements on a transitional basis which application was acceded to:¹⁰

“[45] We turn now to a consideration of whether there should be any transitional provisions to alleviate the effect of changes in the annual leave entitlements for employees covered by the modern award in Western Australia. We have already set out a passage from the decision of a Full Bench of the Commission on 2 September 2009 in which the Full Bench decided to limit the number of matters which should be the subject of transitional provisions. We adhere to that approach for the reasons then given by the Full Bench. There have been a number of applications to make transitional provisions relating to annual leave. Generally we have rejected those applications. We consider, however, that there are exceptional circumstances in this case which make it desirable to make some special transitional arrangements. The base annual leave entitlement of employees in Western Australia will reduce from 6 weeks to 4 weeks to meet the standard in the NES. It is also relevant that over the transitional period the penalty for working on public holidays will increase from 50% to 150% in 5 instalments. This increase will to some extent counter-balance the reduction in annual leave although the value of leave cannot be directly equated with pay in all cases. Despite this the reduction in annual leave remains very significant.

[46] There may also be some change in the incidence of the extra week of annual leave to which shiftworkers are entitled. The change in the definition of shift work will have an effect. It is likely that some employees who did not previously qualify for the additional week of leave will do so under the modern award and that some employees who previously qualified will not now do so. This is also a relevant consideration.

[47] We have decided that in this unique combination of circumstances the modern award should provide an additional week of annual leave for employees in Western Australia for the whole of the transitional period. We shall vary cl.28 to provide that, until 31 December 2014, employees in Western Australia will be entitled to one week’s annual leave in addition to the leave provided for in s. 87(1)(a) of the Act.”

[22] A similar transitional provision was allowed in relation to the *Health Professionals and Support Services Award 2010*.¹¹

[23] We proceed on the basis that generally changes in leave entitlements should not be the subject of transitional provisions but that a transitional provision preserving superior leave entitlements for the transitional period may be appropriate if the particular circumstances warrant a departure from that general approach.

[24] It is common ground between the ASU and the local government associations that appeared to oppose the ASU's application, that the local government modern award presently has general application in the Northern Territory but only very limited application in the rest of Australia. It is unlikely that that situation will change in the near future. We will assume the correctness of the submission of the Western Australian Local Government Association (WALGA) that the local government modern award is likely to apply to some local government bodies in Western Australia. We accept that relevant employees in the Northern Territory and Western Australia had a prior award entitlement to both annual leave and bereavement leave that is in excess of the NES standards. The remoteness of the Northern Territory and the north west of Western Australia and, so far as indigenous employees are concerned, the cultural significance of attendance at funerals and difficulties associated with travelling to remote communities, are circumstances that may be seen as explaining a greater level of entitlement to annual leave and bereavement (compassionate) leave than that provided for in the NES. We think these circumstances sufficiently special to justify a preservation of superior prior entitlements to annual leave and bereavement (compassionate) leave during the whole of the transitional period.

[25] We are not persuaded by submissions on behalf of WALGA to the effect that a number of local government employers in Western Australia who may be covered by the local government modern award on the basis that they may be constitutional trading corporations will be unfairly prejudiced by the proposed variation. The unfairness is said to arise from an unexpected maintenance, on a transitional basis, of the superior pre-existing entitlement to the type of leave in question. This is not a species of unfairness that sounds in any prejudice beyond that which is attendant on granting any application to preserve superior prior entitlements on a transitional basis.

[26] The general approach of the Full Bench of the AIRC suggests that, generally, prior award entitlements to jury service make-up pay should not be preserved for the transitional period. We can discern no particular circumstances that would justify a departure from that general approach in this case.

[27] It seems to us that the omission of the standard clause noting that personal/carer's leave and compassionate leave entitlements are provided for in the NES was also an oversight that should be corrected under s.160.

[28] In all the circumstances, we think it appropriate to vary the local government modern award by omitting sub-clause 25.7 and inserting a new clauses 25A and 29 as follows:

25A. Personal/carer's leave and compassionate leave

Personal/carer's leave and compassionate leave are provided for in the NES.

29. Transitional provision—annual leave, personal/carer's or sick leave and compassionate or bereavement leave

- (a) An employee who is entitled to annual leave, personal/carer's or sick leave or compassionate or bereavement leave in accordance with the terms of a notional agreement preserving a State award or a federal award applying in only one State or Territory:

- (i) that would have applied to the employee immediately prior to 1 January 2010, if the employee had at that time been in their current circumstances of employment and no agreement-based transitional instrument or no agreement made under the Act had applied to the employee; and
- (ii) that would have entitled the employee to personal or sick leave in excess of the employee's entitlement to such leave under this award or the NES,

is entitled to the amount of such leave which exceeds the employee's entitlement to such leave under this award or the NES.

- (b) This clause ceases to operate on 31 December 2014.

[29] These variations should operate from 1 January 2010.

VICE PRESIDENT

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¹ Section 157(1) of the FW Act.

² Section 134(2)(a) of the FW Act.

³ Vice President Lawler did not form part of the Full Bench for purposes of Stages 2 and 4 and the decision in relation to transitional provisions.

⁴ [2009] AIRCFB 945.

⁵ [2008] AIRCFB 1000.

⁶ [2009] AIRCFB 345.

⁷ [2009] AIRCFB 800.

⁸ [2009] AIRCFB 800 at [88] – [89].

⁹ [2010] FWAFB 2016 at [24] – [25].

¹⁰ [2010] FWAFB 2026 at [45] – [47].

¹¹ [2010] FWAFB 1985 at [5].