



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

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

Aged Care & Housing Group Inc & others

(AM2010/45)

AGED CARE AWARD 2010

Aged care industry

VICE PRESIDENT WATSON

SYDNEY, 12 MAY 2010

Variation of the Aged Care Award 2010 – whether necessary to remove ambiguity or uncertainty or correct an error – Fair Work Act ss 157, 160.

Introduction

[1] This decision concerns an application by Aged Care & Housing Group Inc and a number of other employers¹ involved in the Aged Care industry in South Australia regarding the quantum of annual leave entitlements under the *Aged Care Award 2010*² (*the Award*). The application seeks a variation to the Aged Care Award under s 160 of the *Fair Work Act 2009* (the Act).

[2] The matter was listed for hearing on 22 April 2010. At the hearing of the matter, Mr LeQuesne appeared on behalf of the employers, Mr McLeay appeared for the Health Services Union of Australia (HSUA) and Mr Broanda appeared for the Australian Workers Union of Employees, Queensland (AWUEQ). A written submission in support of the application was filed on behalf of several Aged Care Associations.³

Background

[3] Annual Leave entitlements are governed partly by the National Employment Standards (NES) contained in the Act and partly by the terms of modern awards. Modern awards are required to define the definition of employees who qualify for an additional week's annual leave under the NES and may supplement the NES in certain circumstances. Section 87(1) and (3) of the Act provide:

“87 Entitlement to annual leave

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to:

(a) 4 weeks of paid annual leave; or

(b) 5 weeks of paid annual leave, if:

- (i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
- (ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
- (iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees).

Note: Section 196 affects whether FWA may approve an enterprise agreement covering an employee, if the employee is covered by a modern award that is in operation and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

....

Award/agreement free employees who qualify for the shiftworker entitlement

(3) An award/agreement free employee qualifies for the shiftworker annual leave entitlement if:

(a) the employee:

- (i) is employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week; and
- (ii) is regularly rostered to work those shifts; and
- (iii) regularly works on Sundays and public holidays; or

(b) the employee is in a class of employees prescribed by the regulations as shiftworkers for the purposes of the National Employment Standards.

[4] Clause 28.2 of the Award provides

“28.2 Quantum of annual leave

(a) In addition to the entitlements in the NES a shiftworker or an employee who works for more than four ordinary hours on 10 or more weekends is

entitled to an additional week's annual leave on the same terms and conditions.

(b) For the purpose of the NES, a shiftworker is defined as an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker as defined in clause 22.2(a).

(c) 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.”

[5] The applicant employers submit that the clause is ambiguous or in error. They submit that it is not clear whether shiftworkers, as defined in paragraph (b) receive an additional week's leave on top of the five weeks they receive under the NES. They submit that if the clause is not ambiguous it is in error because none of the pre-existing awards except those applying in Western Australia and the Northern Territory provide a six week entitlement to annual leave for aged care employees.

[6] The employers also refer to a decisions of a Full Bench in relation to another variation to the annual leave clause of this award in which the Full Bench said:⁴

“[37] The LHMU submitted that there should be special transitional provisions in relation to the amount of annual leave for employees formerly covered by the WA aged care award. That award currently provides, except for certain classes of employee, for up to seven weeks annual leave being six weeks plus an additional week for shift workers. By contrast, the NES provides for four weeks annual leave which is increased to five weeks by the terms of the modern award in the case of shift workers.

...

[44] In considering this alternative approach we think it is important to acknowledge that the NES contain minimum standards which should not be replaced. Although there are cases in which supplementation is appropriate, the NES are the primary guide to the safety net in relation to the conditions of employment with which they deal...

...

[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.”

[7] The unions submit that there is no ambiguity in this matter and the application represents an attempt to have “a second go” at changes in the annual leave provisions. They submit that the issues associated with this matter and the definitions of shiftworker for the purposes of annual leave were addressed during the award modernisation process and the resultant award provision determined by a Full Bench of the Australian Industrial Relations Commission (AIRC) should not be revisited.

Conclusions

[8] The approach of the AIRC during the award modernisation process was to determine the appropriate definition of shiftworker for the purposes of the additional week's annual leave entitlement by reference to the qualifying provisions of pre-existing award instruments. Supplementation of the standard four and five week entitlements was unusual. The passages from the Full Bench decision quoted above make it clear that apart from the transitional provision for employees in Western Australia there was no intention to supplement the annual leave provisions of this award.

[9] Although the annual leave provisions were the subject of attention by the parties during the consultation process I do not believe that the wording of the existing clauses is satisfactory. I will make a determination varying the award to remedy the ambiguity and error involved in the wording of this clause. The operative date will be 1 January 2010.

VICE PRESIDENT WATSON

Appearances:

R LeQuesne of counsel for the employers

M McLeay for the Health Services Union of Australia

D Broanda for the Australian Workers Union of Employees, Queensland

Hearing details:

2010.

Melbourne, Adelaide

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¹ Anglicare SA; ECH Inc; Helping Hand Aged Care Inc; Life Care Churches of Christ; Lutheran Homes Inc; Resthaven Inc; Southern Cross Care (SA); Uniting Care Wesley Adelaide Inc; Uniting Care Wesley Bowden Inc and Uniting Care Wesley Port Adelaide Inc

² MA000018

³ Aged Care Association Australia Ltd; Aged Care Queensland; Aged & Community Care Victoria; Aged & Community Services Association of NSW & ACT Inc; Aged & Community Services Australia; Aged & Community Services SA & NT Inc; Aged & Community Services Tasmania and Aged & Community Services WA

⁴ [2010] FWA 2026