



## DECISION

*Fair Work Act 2009*

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

**Robert Williams**

(AM2010/102)

### **SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010**

[MA000100]

Social, community, home care and disability services

VICE PRESIDENT WATSON

SYDNEY, 19 AUGUST 2010

*Application to vary clause 34 - Ceremonial leave.*

[1] This decision concerns an application by Mr Robert Williams pursuant to s 160 of the *Fair Work Act 2009* (the Act) to vary clause 34 of the *Social, Community, Home Care and Disability Services Industry Award 2010*<sup>1</sup> (the Modern Award) to remove ambiguity or uncertainty or correct error.

[2] The matter was listed for hearing on 9 August 2010. Mr R Williams appeared on his own behalf. Mr J Nucifora represented the Australian Services Union (ASU).

#### **The application**

[3] Clause 34 of the Modern Award provides as follows:

**“34. Ceremonial leave**

An employee who is legitimately required by Aboriginal tradition to be absent from work for Aboriginal ceremonial purposes will be entitled to up to 10 working days’ unpaid leave in any one year, with the approval of the employer.”

[4] The applicant submitted that clause 34 restricts ceremonial leave to Aboriginal indigenous Australians only and discriminates against Torres Strait Islanders who are also indigenous Australians. He submitted that clause 28 of the *Social and Community Services Industry - Community Services Workers - Northern Territory Award 2002*<sup>2</sup> recognised

indigenous custom and traditional law by providing special leave to participate in ceremonial activities. This clause extended to Torres Strait Islanders.

[5] The applicant seeks to delete clause 34 and replace it with the following:

**“34. Ceremonial leave**

An employee who is legitimately required by indigenous tradition to be absent from work for Aboriginal or Torres Strait Islander ceremonial purposes will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.”

[6] The ASU supported the application. It submitted that the limitation in the clause was an oversight during the drafting stages of the Modern Award and that it was certainly not the intent of the ASU to exclude Torres Strait Islanders.

[7] Further material was provided by the ASU following the hearing of the matter. It provided a list of ten relevant award-based transitional instruments where the provision of ceremonial leave was provided. Eight expressly extended to Torres Strait Islanders and two did not. The ASU submitted that the clear majority of awards which include Torres Strait Islanders should lead to their inclusion in the Modern Award.

[8] The ASU submitted that the oversight may be due to the Modern Award adopting the identical ceremonial leave clause from the *Aboriginal Community Controlled Health Services Award 2010*<sup>3</sup> (the ACCHS Modern Award). This Award however provided the following accompanying definition at clause 3:

**“Aboriginal person** will be taken to include a Torres Strait Islander person”

[9] Many other modern awards provide for such a ceremonial leave clause. Most have adopted the model ceremonial leave clause from the ACCHS Modern Award. For example, the *Aged Care Award 2010*,<sup>4</sup> the *Health Professionals and Support Services Award 2010*,<sup>5</sup> and the *Nurses Award 2010*.<sup>6</sup> The definition of **“Aboriginal person”** however appears to have been left out of all three of these modern awards as well as the Modern Award to which this application relates. The *Labour Market Assistance Industry Award 2010*<sup>7</sup> adopted different wording for its ceremonial leave clause and expressly included Torres Strait Islanders.

[10] I am satisfied that the exclusion of Torres Strait Islanders from the entitlement to ceremonial leave is an unintended consequence of the Modern Award. I am satisfied that the application should be granted and that the error should be remedied by making the variation sought. A determination to this effect will be issued with this decision with an operative date of 1 January 2010.

VICE PRESIDENT WATSON

*Appearances:*

*R Williams* on his own behalf

*J Nucifora* for the Australian Services Union

*Hearing details:*

2010

Sydney (video link to Darwin, Melbourne)

August 9

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<sup>1</sup> MA000100

<sup>2</sup> AP817216CRN

<sup>3</sup> MA000115

<sup>4</sup> MA000018

<sup>5</sup> MA000027

<sup>6</sup> MA000034

<sup>7</sup> MA000099