



DECISION

Fair Work Act 2009

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

Charles Kajewski and others

(AM2010/128)

Waste management industry

COMMISSIONER HARRISON

SYDNEY, 4 NOVEMBER 2010

Application to amend clause 27.2 and 27.3.

[1] This decision concerns an application by Mr Charles Kajewski and others to vary the *Waste Management Award 2010* (the Modern Award) pursuant to s.158 of the *Fair Work Act 2009* (the Act). The matter was lodged in Fair Work Australia on 18 August 2010.

[2] The application refers to the *Local Government Employees' (Excluding Brisbane City Council) Award State 2003* (notional agreement preserving a state award) and the provisions pertaining to ordinary hours and penalty rates. At Clause 6.1.2(a) ordinary hours of work are confirmed as being '*on any 5 consecutive days in the week, Monday to Sunday inclusive*'; at Clause 6.1.2(a)(i) that ordinary hours on a Saturday '*shall be paid at the rate of time-and-a-half for the first 3 hours and double time thereafter*'; and (ii) '*ordinary hours worked on a Sunday shall be paid for at the rate of double time*'; and 6.1.3(b) '*the ordinary hours of work prescribed herein shall not exceed 10 hours on any day*'. Accordingly, the application seeks to amend Clause 27.2(a) of the Modern Award with respect to its definition of 'ordinary hours', to allow for such hours to be up to ten per day and to be worked on Saturday and/or Sunday so that the Modern Award will prescribe an entitlement to the accrual of annual leave, personal/carer's leave, and the 'superannuation guarantee'. Consequently, an amendment recognising ordinary hours on Saturday and/or Sunday pertaining to rostered days off in Clause 27.3(b)(iv) of the Modern Award is also sought. The application further seeks to incorporate loadings on the ordinary rate when ordinary hours worked fall on Saturday and/or Sunday.

[3] Mr Kajewski and others seek a determination to vary the Modern Award at clause 27.2 by replacing eight hours with ten hours; to substitute the word 'Friday' with the word 'Sunday'; and for ordinary hours worked on a Saturday to be paid at the rate time-and-a-half for the first two hours and double-time thereafter, and Sunday to be paid at the rate of double-time. Further, that the word 'Friday' be replaced with Sunday at 27.3(b)(iv).

[4] On 23 August 2010, Directions were published on the Fair Work Australia Award Modernisation website directing parties to file all submissions in relation to this application by close of business Friday 24 September 2010.

[5] Submissions objecting to the application were filed in the Tribunal by the Australian Road Transport Industrial Organisation (ARTIO) on 8 September 2010 on the grounds that the amendments to the Modern Award sought by the application do not pertain to ambiguities or errors, relate to a group of specific employees and the definition of the term ‘ordinary hours’ and thus could best be addressed via collective bargaining and the making of a workplace agreement or individual flexibility arrangements prescribed at Clause 7 of the Modern Award. The Transport Workers’ Union (TWU) on 10 September 2010 served submissions objecting to the application also on the grounds that it did not correct an ambiguity or error, Clause 27 of the Modern Award reflected Clause 32 of the *Transport Workers’ (Refuse, Recycling and Waste Management) Award 2001* (the pre-reform federal award), and that an Enterprise Agreement may be negotiated to address the specific local conditions of their employment. The Australian Federation of Employers and Industries (AFEI) filed submissions on 10 September 2010 also objecting to the application on the basis that the amendments sought would significantly change the Modern Award, and supported the ARTIO’s suggestion that the Applicants vary the aforementioned terms through an individual flexibility agreement pursuant to Clause 7 of the Modern Award.

[6] Applications to vary a modern award are subject to the provisions of ss157, 158 and 160 of the Act which are set out below:

“157 FWA may vary etc. modern awards if necessary to achieve modern awards objective

(1) FWA may:

- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or
- (b) make a modern award; or
- (c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note 1: FWA must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If FWA is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

[...]

(3) FWA may make a determination or modern award under this section:

- (a) on its own initiative; or
- (b) on application under section 158.

158 Applications to vary, revoke or make modern award

(1) The following table sets out who may apply for the making of a determination varying or revoking a modern award, or for the making of a modern award, under section 157:

1	an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award	(a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.
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160 Variation of modern award to remove ambiguity or uncertainty or correct error

(1) FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

(2) FWA may make the determination:

- (a) on its own initiative; or
- (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award.”

[7] Having carefully considered the submissions of the applicants it is my view that if the working patterns of the employees of Anuka Services are such that they create an anomaly with regard to accrual of leave and superannuation entitlements, then the remedy lies in applying individual flexibility agreements or an enterprise agreement.

[8] Such remedies to the issues raised by the applicants are contemplated by the modern awards objective to “encourage collective bargaining” and in this regard I note the preference of Anuka Services is to engage in enterprise bargaining.

[9] I am not satisfied the applicants have established that an ambiguity or error arises within the meaning of s.160 of the Act. The application is therefore dismissed.

COMMISSIONER

Appearances:

C Kajewski, Applicant

M Burns, Transport Workers' Union of Australia

T Khoury, Waste Contractors and Recyclers Association of NSW

A Doyle, Australian Federation of Employers and Industries

P Ryan, Australian Road Transport Industrial Organisation

R Evelyn, Anuka Services

Hearing details:

2010.

Sydney/Brisbane/Melbourne (Videolink):

6 October.

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