



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

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

Allan Dalmeida

(AM2010/5)

COMMISSIONER LARKIN

SYDNEY, 30 APRIL 2010

Application to vary the Passenger Vehicle Transportation Award 2010.

[1] On 19 January 2010 Mr Allan Dalmeida (the applicant) made an application under s. 158 of the *Fair Work Act 2009* (the Act) seeking that the Passenger Vehicle Transportation Award 2010 (the PVT Award) be varied. The application sought to vary paragraph (d) of clause 10.5, which deals with, inter alia, a minimum payment of two hours to a casual employee transporting school children to and from school, to include bus drivers who transport persons with a disability to and from Learning and Leisure Centres or Workshops.

[2] The application stated that the industry of the employer was charter bus operator. An attachment to Form F46 outlined the variation sought under the heading “ATTACHMENT – FORM 46 APPLICATION TO VARY A MODERN AWARD BRISBANE CHARTER BUS PTY LTD A.B.N. 70 138 664 865”.

[3] The matter was listed for the purpose of programming and mention on 3 February 2010. On that occasion, Mr Dalmeida appeared by video link to Brisbane. Mr Story appeared for the Australian Federation of Employers & Industries (AFEI), Mr McDonald appeared for the Bus Industry Confederation (BIC) and Mr Fagir for the Transport Workers’ Union of Australia (TWU).

[4] In written submissions filed 2 February 2010 and in oral submissions on 3 February 2010, the AFEI stated that on its interpretation of the PVT Award at clause 10.5(d) and the definition of broken shift at clause 3.1 the PVT Award would provide to the applicant the flexibility it sought and, therefore, Mr Dalmeida’s application would not be necessary. The AFEI sought clarification from Fair Work Australia and agreed that AFEI would lodge an application to vary the PVT Award to remove an ambiguity or uncertainty under s. 160 of *the Act*. On that basis, Mr Dalmeida sought that his application (AM2010/5) be stood over pending a determination of the application, which AFEI were to lodge under s.160 of *the Act*.

[5] On 15 March 2010 AFEI advised Fair Work Australia that it had decided not to make an application under s. 160 of *the Act* as it considered a further application was unnecessary as, “*At question in matter 2010/5 (sic) was the interpretation of clauses concerning broken shifts for drivers of passenger vehicles, in particular for those engaged on a casual basis. It is the view of AFEI, given our interpretation of the clauses concerned, that there is no cause to warrant an application to vary the award to seek clarification*”.

[6] Following the AFEI correspondence above, matter AM2010/5 was listed for the purpose of mention on 22 March 2010. On that occasion, the TWU raised an objection to the application. The BIC indicated that it wished to support the application.

[7] Directions were issued on 22 March 2010 requiring the TWU to file its submissions by 6 April 2010. BIC and any other party interested were directed to file submissions by 16 April 2010. The applicant, Mr Dalmeida, was directed to file any submissions in reply by 21 April 2010.

[8] In summary, the TWU, after setting out the statutory context relevant to the application, submitted the following:

- The applicant was not competent to bring the application as, it appeared, he was an employee of Brisbane Charter Bus Pty Ltd and not *“an employee, employer, or organisation entitled to represent the interests of one or more employers who are covered by the modern award”*.¹
- Alternatively, assuming the application to be competent, it had not established the necessary connection to the modern award objectives to enliven the Tribunal’s jurisdiction.
- If the Tribunal found that it did have jurisdiction to make the variation sought, the application should be dismissed as an increase in one employer’s wage costs as a result of the commencement of the Award did not form a sufficient basis for granting a variation, and
- *“No rationale whatsoever is put forward to support that part of the application which seeks to “provide for drivers of other groups to be paid a minimum of two hours for each shift and disability groups to be included as one of those groups”. On one view this aspect of the application is a cynical attempt to use the sympathetic nature of one part of the employer’s operations to obtain a broad commercial benefit”*.²

[9] BIC filed submissions on 14 April 2010. The submissions, in summary, stated:

- That the purpose of Section 157 was not to reconsider matters that have already been the subject of consideration by the Full Bench of the Australian Industrial Relations Commission (AIRC) and determined during the Award modernisation process.
- That the applicant had not provided sufficient evidence that would enable the Tribunal to make a variation under Section 157 of the Act.
- BIC agreed with the TWU’s submissions and that the application should be dismissed.

[10] Mr Dalmeida filed submissions on 22 April 2010 and outlined the reasons for the application to vary the Award *“by my business for who I am the Employer”*. It was submitted that the application was based on:

“...the words used in 10.5.(d) (*sic*) of the award, and I sought to seek a variation to the PVTA based on my interpretation of this section. Without applying the definition of “Broken Shift” it was clear that the award treated differently casual employees (drivers) and casual employees who solely transport school children to and from school.

As we provide transport for people with a disability on a daily basis Monday to Friday similar to the way school children are collected and transported to and from the schools they attend, I sought to have the PVTA varied to have casual employees who solely transport people with a disability also included in the same way the PVTA interprets this section for casual employees who drive school children.”³

[11] Mr Dalmeida disputed the submissions filed by the TWU and outlined the rationale for the application. In conclusion, Mr Dalmeida submitted:

“Prior to the first meeting on Wednesday, 3rd February 2010 I did receive advice from the AFEI that a definition of “Broken Shifts” would satisfy one of our reasons listed in our submission, “the additional cost factors”. Because this represented the major reason in our submission we requested to withdraw our variation on 2nd February 2010.

As the matter of ambiguity or uncertainty was not addressed from the initial meeting on the 3rd February 2010 it was (*sic*) been determined to proceed with initial (*sic*) application. I can only base this application based on my interpretation of the PVTA.

Having considered the submissions provided by the AMU (*sic*) and the Bus Industry Confederation and the ambiguity in relation to 10.5 (d) (*sic*) it is now our view that this application should not proceed”.⁴

[12] The applicant in the matter before me has withdrawn the application to vary clause 10.5(d) of the PVT Award. In the circumstances I must respect the employer’s request that the application not proceed to a determination.

[13] In this decision I have set out the history and outlined a small summary of the submissions objecting to the application for, in my view, a very good reason. It appears to me that persons with an interest in the PVT Award have differing views in relation to the interpretation of provisions of that award associated with minimum payment for a casual employee and the significance of the definition of a broken shift. The AFEI has expressed its view of the interpretation of those provisions, which, on my understanding, the TWU do not support. Fair Work Australia has not expressed an opinion on either view nor, on my understanding, has the matter been determined by the Court. The views expressed by an employer/employee organisation do not determine the application of the PVT Award provisions and, in my view, caution should be exercised by any employer applying those views to the operation of their business.

[14] As the application is no longer before Fair Work Australia the file, AM2010/5, will close.

COMMISSIONER

Appearances:

Mr A Dalmeida, on his own behalf.

Mr O Fagir, for the Transport Workers' Union.

Mr I McDonald, for the Bus Industry Confederation.

Mr D Story, for the Australian Federation of Employers & Industries.

Hearing details:

Sydney.

2010:

February, 3 and

March, 22.

Final written submissions:

2010:

February, 22.

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¹ Written submissions at point 3.2.

² Ibid at point 4.5.

³ Written submissions at points 1.1 and 1.2.

⁴ Ibid at points 3.1 to 4.1.