FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.158 - Application to vary or revoke a modern award

National Retail Association Limited
(AM2010/90)

FAST FOOD INDUSTRY AWARD 2010

Fast food industry

VICE PRESIDENT WATSON SYDNEY, 10 NOVEMBER 2010

Application to vary the Fast Food Industry Award 2010 - proposed reduction to minimum casual engagement - whether variation necessary to achieve the modern awards objective - standing to make application - Fair Work Act 2009 ss 134, 157, 158.

Introduction

[1] This decision concerns an application by the National Retail Association Limited (NRA), pursuant to s 158 of the *Fair Work Act 2009* (the Act) to vary the *Fast Food Industry Award 2010* (the Award).[1]

[2] The application seeks to reduce the minimum daily engagement for casual employees in clause 13.4 of the Award from three hours to two hours for casual employees with a minimum engagement of one and a half hours for secondary school students performing work between 3.30pm and 6.00pm Monday to Friday.

[3] Directions were issued concerning the filing of evidence and submissions prior to the hearing of the matter. Submissions in support of the application were filed by the NRA. Submissions opposing the variation were filed by the Shop, Distributive and Allied Employees Association (SDA).

[4] The matter was heard in Melbourne on 2 August 2010. At the hearing Mr N Tindley appeared on behalf of the NRA and Mr W Friend with Mr C Dowling of counsel appeared on behalf of the SDA.

[5] After the hearing of the matter a Full Bench handed down its decision[2] in relation to a similar application to vary the *General Retail Industry Award 2010* (the General Retail Industry Award).[3] I invited the parties to make submissions on the significance of this decision to the determination of this matter.[4] Both the NRA and the SDA filed further written submissions. In the course of its submissions the NRA submitted that as a bare minimum Fair Work Australia (FWA) should grant relief in the following terms:

> "The minimum daily engagement of a casual is three hours, save that secondary school students may, by agreement between the employee and their employer, be engaged for a minimum of 2 hours."

Background

[6] The Award was made on 19 December 2008. At the exposure draft stage in stage one of the award modernisation process, a draft award was published covering the entirety of the retail industry. The inclusion of the fast food industry within a retail industry award was opposed by employers. As part of its opposition to the fast food sector being included within the retail industry award, the Australian Industry Group (AIG) filed a proposed award for the fast food industry which contained a minimum engagement period of three hours.

[7] In its submissions the NRA referred to the AIG draft and submitted that the draft was appropriate to the needs of the industry. The NRA also said that the award provides for terms and conditions that were largely consistent with other enterprise awards and the Queensland fast food awards. In the final result the Full Bench of the Australian Industrial Relations Commission (AIRC) made a separate award for the fast food industry. When the Award was first made it did not contain a minimum engagement period for casual employees.

[8] In November 2009 the SDA lodged an application with the AIRC pursuant to s 576H of the *Workplace Relations Act 1996* to vary the Award to, amongst other things, include a minimum engagement period for casual employees. The SDA submitted that the omission of a minimum engagement period appeared to be an oversight. It said that it made its application "in order to prevent abuse of casuals, especially junior casuals."

[9] The AIG indicated that it had no objection to the insertion of a minimum engagement period if they reflect those commonly used in the industry. The NRA submitted that the proposed variations cannot be justified on the basis of any changed circumstances since the creation of the award. The award modernisation Full Bench granted the SDA's application in relation to a minimum engagement period for casual employees in a decision handed down on 29 January 2010.[5]

[10] Minimum engagement periods have been in awards covering the fast food industry for many years. They essentially provide for a minimum payment to employees for each engagement to cover the cost and inconvenience of attending the workplace. The minimum periods in awards replaced by the modern award variously provide for minimum periods of two to four hours. The *National Fast Food Retail Award 2000*[6] (the National Fast Food Award) (which operated as a common rule in Victoria), the New South Wales *Shop Employees (State) Award*,[7] the *Retail and Wholesale Industry - Australian Capital Territory - Award 2000*,[8] the *Retail, Wholesale and Distributive Employees (NT) Award 2000*[9] and the South Australian *Delicatessens, Canteens, Unlicensed Cafes and Restaurants Etc Award*[10] all provided for a three hour minimum engagement.

Evidence

[11] The parties led very little evidence in support of their respective cases.

[12] The NRA led evidence from one witness, Mr Darren Grimwade, the owner of a Pizza Capers franchise in Burpengary Queensland. He said that his opening hours are 12.00pm - 3.00pm and 4.30pm - 9.00pm (10.00pm on Friday and Saturday nights). He said that all of his employees are casual employees and that several school students are usually engaged for the peak period of 5.30pm - 7.30pm each day.

[13] Mr Grimwade said that the three hour minimum casual engagement would result in an estimated six percent increase in labour costs. He gave evidence that as a result of the introduction of the three hour shift minimum for casual employees he is no longer able to offer casual employees two hour shifts for the peak trading period of 5.30pm - 7.30pm. He said that the work his young casual employees have performed has mostly been their first real job, it has given them valuable workplace experience and enabled them to gain important customer and interpersonal skills. He said that he has had two or three parents request the retention of two hour shifts and when this has not been possible they have indicated that their children will not be available to work a longer shift. Mr Grimwade conceded that his business was different to several other specified fast food employers whose peak periods covered a longer period than 2 hours.

[14] The SDA led evidence from Mr Chris Ketter, the Secretary of the Queensland Branch of the SDA. He gave evidence concerning the history of minimum engagement periods for casual employees in award-based transitional instruments that previously applied in Queensland.

[15] The SDA also led evidence from Dr Iain Campbell, a Senior Research Fellow at RMIT University. That evidence was identical to the evidence given by Dr Campbell in the similar application in relation to the General Retail Industry Award. It deals with the nature of casual employment and minimum engagement periods.

[16] The NRA submit that the proposed variation is required to meet the modern awards objective in particular the need to promote social inclusion through increased workforce participation and the promotion of flexible modern work practices and efficient productive performance of work. It submits that the fast food industry employs a significant number of young people and the imposition of a three hour minimum engagement for casual employees has caused a negative impact where young people are restricted in the hours they can work due to school commitments.

[17] The SDA submits that a number of award-based transitional instruments in New South Wales, Victoria and South Australia provided for a three hour minimum for casual employees, as did the National Fast Food Award which operated in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. It contends that a single member of FWA should not review a determination made by a Full Bench where there has been no change in circumstances and no manifest error by the Full Bench.

The relevant legislation

[18] The legislative scheme provides that variations to awards outside the scheduled reviews of awards are subject to limitations. There is a requirement for FWA to review the content of all awards on a regular basis. The next review is in 2012 pursuant to Schedule 5

Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. At such a review all awards are required to be reviewed to consider whether they achieve the modern awards objective and are operating effectively. In the intervening period an applicant for an award variation must satisfy FWA that a proposed variation "is necessary to achieve the modern awards objective." Other avenues for variations to awards exist to remove an ambiguity or uncertainty or to correct an error.

[19] This application is made on the basis that the variation "is necessary to achieve the modern awards objective." The parties accept that this is the test that the applicant must satisfy in order to justify the variation it seeks.

[20] The modern awards objective is contained in s 134 of the Act. It provides:

> "**134 The modern awards objective**
>
> *What is the modern awards objective?*
>
> (1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the ***modern awards objective***."

[21] In the General Retail Industry Award case[11] a Full Bench dealt with the statutory construction of these provisions. It said:

"[20] We deal first with a question of statutory construction. The NRA submitted that the Vice President either misconstrued s.157(1) or wrongly applied the correct construction. It submitted that the Vice President took the approach that the tribunal should not vary a modern award outside the system of four yearly reviews unless there are "exceptional circumstances." The following paragraph of the decision is relied on to support the submission:

> "**[16]** The SDA submitted that the test in s 157 is a significant hurdle the applicants are required to overcome and that variations to awards outside the scheduled reviews of awards will be the exception. The SDA also drew my attention to the explanatory memorandum accompanying the Fair Work Bill which indicates that award variations outside the four yearly reviews will be permitted in "exceptional circumstances." The SDA submitted that the requirement of being necessary to achieve the modern awards objective means something "indispensible or requisite" and that the applicants must establish that the modern awards objective cannot be achieved unless the variation is made. The other parties did not contest the thrust of these submissions. In my view the submissions reflect the legislative requirements. I adopt that general approach."

[21] The paragraph commences by summarising the SDA's submissions. The summary includes references to an award variation outside the 4 yearly review being the "exception", to the use of the expression "exceptional circumstances" in one of the Parliamentary documents and to the requirement that any variation be "indispensable and requisite" for the achievement of the modern awards objective. His Honour then concluded that the submissions reflected the legislative requirements and said he adopted "that general approach". This statement should be read in the context of other relevant parts of the decision. In the paragraph immediately preceding the one relied upon by the appellants the Vice President quoted the words of s.157(1) verbatim:

> "**[15]** The legislative scheme provides that variations to awards are not generally available outside the scheduled reviews of awards. In the intervening period an applicant must satisfy FWA that a proposed variation "is necessary to achieve the modern awards objective."

[22] It is also significant that the Vice President adopted the words of s.157(1) in setting out his conclusions later in the decision. When seen in its full context, the use of the expression "that general approach" is not an indication that the Vice President had adopted the specific submissions advanced. Rather it is an indication of general agreement only.

[23] In our view synonyms such as exceptional, indispensable and requisite and the compound phrase "exceptional circumstances" are of limited value and their use is likely to lead to confusion. While synonyms might in some circumstances assist in the construction of statutes, they ought not to be substituted for the words that the legislature has used. The Vice President did not do so. Nor is there any indication that the Vice President misapplied the correct test. We reject the submission based on statutory construction. The decision is based squarely on proper evidentiary

considerations rather than on too narrow a view of the discretion available to him under s.157(1)."

(references omitted)

The Standing of NRA to make the application

[22] The SDA has challenged the standing of NRA to make the application. The application is made under s 158 of the Act which provides:

"**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:

Who may make an application?

Item	**Column 1** **This kind of application...**	**Column 2** **may be made by...**
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."

[23] The SDA submits that the NRA is not an employer in the fast food industry and is not an organisation as defined in s 12 of the Act. The NRA initially contended that it was an organisation that is entitled to represent the interests of employers covered by the Award. It subsequently contended that the application has been made by it on behalf of employers in the industry in response to requests by employers to seek the change contained in the application. After the hearing of the matter it submitted signed statements of three employers who said they authorise the NRA to make the application on their behalf.

[24] The application in this matter is made in the name of the NRA. It is clear in my view that the NRA is not an organisation within the meaning of that term in the Act, or an employer in the industry and cannot make an application in its own name. It was not until the hearing of the matter that the NRA sought to assert that it was authorised to make the application on behalf of employers in the industry. Any such authorisation does not entitle the NRA to make the application in its own name. It could however entitle the NRA to take steps to make an application in the name of those employers who authorised it to act on its behalf.

[25] No application to amend the application to replace the identity of the applicant has been made. In the absence of such an amendment the application is incompetent. Nevertheless there are strong grounds for allowing such an amendment. In any event the SDA submitted

that FWA should determine the merits of the application together with the issue of standing. I propose to follow that course.

Is the variation necessary to achieve the modern awards objective?

[26] In my view the history of this award provision is a relevant consideration. The Full Bench in the General Retail Industry Award case[12] confirmed that this is the case. It said:

> **"[27]** The Vice President was entitled, perhaps even required, to give consideration to the circumstances which had led to the 3 hour minimum engagement provision in the retail modern award. While the ultimate question was whether he was satisfied that the variation was necessary to achieve the modern awards objective, the positions taken by the parties and the Full Bench in the making of the award were not irrelevant to that question. Two of the matters to which the Full Bench was required to have regard in modernising awards were promoting high levels of employment and protecting the position of young people in the labour market. The modern awards objective refers to a related matter, the need to promote social inclusion through increased workforce participation. There is sufficient similarity in the statutory context to render the earlier proceedings relevant. It was also open to consider whether there had been any change in circumstances since the Full Bench decision. We reject the submission that the Vice President took irrelevant matters into account."
>
> (references omitted)

[27] In this matter the award modernisation Full Bench considered that a case had been made out based on pre-existing instruments and all of the submissions of the parties to insert a three hour minimum engagement period for casuals covered by this Award.[13] In doing so it applied similar statutory considerations to the modern awards objectives. In my view this background imposes a significant onus on the applicant to demonstrate why a different conclusion should now be reached.

[28] The evidentiary case advanced by the applicant can best be described as flimsy. It involves evidence of one employer in one state who conceded that his business is different to others in that state and other states. It cannot be concluded on this evidence that there is a general problem in the industry. The absence of any evidence from employers who have operated with a three hour minimum engagement period as to the impact of the proposal on their businesses and their employees makes it impossible to reach a conclusion that the variation is necessary to achieve the modern awards objective. Further, the absence of evidence of difficulties beyond this single employer suggests that other employers in the industry, including those who have been bound by similar and less flexible provisions for many years have found a way to operate successfully with the minimum engagement period. The same conclusion can also be implied by the support for the three hour minimum by other employers and employer associations, including the AIG which took the major running of employer interests in this industry in the award modernisation process.

[29] The nature of the evidence also falls well short of establishing that the modern awards objective cannot be achieved if the three hour minimum engagement period is retained. It establishes that one employer may face an increase in labour costs by being required to engage casuals for a longer period, or pay them for such period, when there may not be an

operational need for a three hour engagement. There is little consideration of other alternatives such as employing less casuals for the longer period or redeployment of other casual employees. The only evidence of a loss of employment opportunities is limited to a suggestion that some parents, on behalf of school aged employees, do not support a three hour engagement and may suggest that they not continue to make their children available for work. There is no evidence of the extent of this concern or the reasons behind it. It may be nothing more than a preference or choice commonly made by casual employees as to their availability for work. There is no response to the SDA evidence on the importance of minimum engagement periods to casual employees. The evidence of the applicant does not address the balance that is required with award provisions of this type to provide reasonable safeguards for employees against unfair engagement practices and reflect operational and employee needs. Nor was there any attempt to present cogent reasons why the variation should be made by reference to employment practices across the fast food industry.

[30] In order to be considered necessary to achieve the modern awards objective a substantially stronger evidentiary and reasoned case would be required. In the General Retail Industry Award case[14] the Full Bench said:

> "**[14]** No evidence was called in support of a reduction in the minimum period of engagement for casuals other than casual school students. It is hard to imagine a weaker evidentiary case for a general reduction in the minimum period of casual engagement. That deficiency is made more glaring by the applicants' failure to address the substantial evidentiary case put against it by the SDA through its witnesses. That evidence included a substantial statement by a noted academic dealing with the significance of minimum engagement periods as a protection for vulnerable employees, the relationship between the minimum engagement and the time and expense of work-related travel, and the possibility that part-time employees might suffer reductions in hours if casuals could be employed on a two hour minimum. Other witnesses, including 6 union organisers and officials, gave evidence against the claim based on their knowledge of employment conditions in the industry throughout Australia. It is not necessary to detail that evidence. As we have indicated, it was unanswered.
>
> **[15]** We have concluded that it was open to the Vice President on the evidence and other material before him to reject the claim as advanced by the applicants for a reduction in the minimum engagement for casual employees generally.
>
> **[16]** When the evidence in support of a reduction in the minimum period of engagement for casual school students is examined, the position is not much better. Evidence was called from three employers in regional Victoria and one in a suburban shopping centre in South Australia. Two employee witnesses were called in relation to one store, which was also in regional Victoria. There was no evidence at all in relation to the rest of Australia. On the other hand there was a significant amount of contrary evidence from the union witnesses. Apart from the matters already mentioned there was material about the times at which student casuals work, the duration of their shifts and the likely effect of a reduction in the minimum engagement for students on the employment of students themselves and the employment of other types of employees."

[31] The same conclusion necessarily arises from the bare evidentiary case advanced by the applicant in this case. In my view the applicant has failed to establish that the variation is necessary to achieve the modern awards objective.

[32] As noted above I provided the parties with an opportunity to address the significance of the Full Bench decision in the General Retail Industry Award case. The SDA submitted that the decision supported its submissions in various respects. The NRA sought to distinguish the circumstances in the relevant industries. In my view the Full Bench decision provides guidance on the approach to the test in this matter in the manner described above. As indicated above the applicant has failed to establish the necessary case for it to succeed in this matter. Nor has a case been established for any alternative relief.

Costs

[33] The SDA submits that the NRA's application is made without reasonable cause or it should have been reasonably apparent to the NRA that its application had no reasonable prospects of success. It relies on s 611(2) of the Act to seek an order for all of its costs in relation to the application.

[34] The NRA opposes an order for costs. It contends that the outcome of the matter is unclear especially as an appeal against the similar application in the General Retail Industry Award was outstanding at the time the application was heard. It submits that the SDA chose to be involved in the matter and made its own decision as to the engagement of legal representation. The NRA did not obtain legal representation and opposed the SDA's application for legal representation.

[35] Section 611 provides:

> **"611 Costs**
>
> (1) A person must bear the person's own costs in relation to a matter before FWA.
>
> (2) However, FWA may order a person (the first person) to bear some or all of the costs of another person in relation to an application to FWA if:
>
> > (a) FWA is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
> >
> > (b) FWA is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.
>
> Note: FWA can also order costs under sections 376, 401 and 780.
>
> (3) A person to whom an order for costs applies must not contravene a term of the order.
>
> Note: This subsection is a civil remedy provision (see Part 4-1)."

[36] Section 611 provides that generally each party bears their own costs in matters before FWA. An exception to this is provided in subsection (2) but even in those circumstances any order is discretionary. Award variation matters are important cases involving a large number of employers and employees. They should not be made lightly or without a sound case. In my view the SDA makes a valid criticism of the flimsy nature of the evidentiary case and the case for a variation when a Full Bench has recently reached a contrary conclusion. However I consider that the general principle in the Act that each party bear its own costs should be applied in this case. Parties can choose the nature of their representation, subject to meeting the tests in the Act. In this case the SDA chose to be represented by two barristers. A costs order is only justified in rare circumstances. I am not satisfied that an order is justified in this case.

VICE PRESIDENT WATSON

Appearances:

N Tindley for the National Retail Association
W Friend with *C Dowling* of counsel for the Shop, Distributive and Allied Employees Association

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[1] MA000003

[2] *Appeal by National Retail Association Limited; Appeal by Master Grocers Australia Limited* [2010] FWAFB 7838

[3] MA000004

[4] [2010] FWA 7911

[5] *National Retail Association and Australian Industry Group; Shop, Distributive and Allied Employees Association* [2010] FWAFB 379

[6] AP806313

[7] AN120499

[8] AP794740

[9] AP794741

[10] AN150170

[11] *Appeal by National Retail Association Limited, Appeal by Master Grocers Australia Limited* [2010] FWAFB 7838

[12] Ibid

[13] *National Retail Association and Australian Industry Group; Shop, Distributive and Allied Employees Association* [2010] FWAFB 379

[14] *Appeal by National Retail Association Limited, Appeal by Master Grocers Australia Limited* [2010] FWAFB 7838