



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

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

Victorian Hospitals' Industrial Association
(AM2010/31)

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

Health and welfare services

VICE PRESIDENT WATSON

SYDNEY, 12 MAY 2010

Variation of the Health Professionals and Support Services Award 2010 – whether variation necessary to remove ambiguity or uncertainty or correct an error – Fair Work Act 2009 ss 157, 160.

Introduction

[1] This decision concerns an application by the Victorian Hospitals' Industrial Association (VHIA) to vary clause 31.1 of the *Health Professionals and Support Services Award 2010*¹ (the Award) pursuant to s 160 of the *Fair Work Act 2009* (the Act). Clause 31 deals with annual leave. The application is made for the purposes of removing an ambiguity or uncertainty or correcting an error in the award regarding the quantum of the annual leave entitlements of various categories of employees covered by the Award.

[2] At the hearing of this matter on 13 and 21 April 2010, Mr Gostencnik with Ms Preston of counsel appeared on behalf of the VHIA, Mr Wilkinson appeared for the Australian Dental Association (ADA), Mr McLeay appeared for the Health Services Union of Australia (HSUA), Ms Brown appeared for the Health Services Union (HSU), and Mr Broanda appeared for the Australian Workers Union of Employees, Queensland (AWUEQ).

Background

[3] Prior to 2010, annual leave entitlements were provided for in awards and the Australian Fair Pay and Conditions Standard contained in the *Workplace Relations Act 1996* (WR Act). The obligations contained in all applicable instruments were required to be observed. In the health industry, nurses commonly received an additional week's annual leave entitlement while other employees generally had a base entitlement of four weeks. Seven day shift workers were generally entitled to an additional week's leave.

[4] An example of the way in which the additional leave entitlement was provided for health professionals is clause 32.3 of the *Health and Allied Services – Public Sector – Victoria Consolidated Award 1998*.² It provides:

“32.3 Seven Day shift workers

A shift worker who during the yearly period in respect of which his or her annual leave accrues is rostered as part of his or her ordinary duties on ten or more weekends for four hours or more, shall be entitled to one week’s (seven consecutive days) annual leave in addition to the leave prescribed in clause 32.1.”

[5] From 1 January 2010 annual leave entitlements arise from the National Employment Standards (NES) in Chapter 2, Part 2 of the Act and the provisions of applicable modern awards. Section 87(1) and (3) are the relevant provisions of the Act for current purposes. Those provisions create an entitlement of either four or five weeks depending on the circumstances of the employment. For award covered employees the additional entitlement is to be determined by reference to a definition of shiftworker for the purposes of the NES contained in the applicable modern award. Section 87(1) and (3) 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.”

[6] Clause 31.1 of the Award provides as follows:

“31. ANNUAL LEAVE

Annual leave is provided for in the NES. This clause contains additional provisions.

31.1 Quantum of 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 24–Span of hours.”

[7] The application in this matter seeks to address the circumstances in which an employee is entitled to an additional week’s annual leave. The VHIA submits that the wording of this provision does not reflect the terms of pre-existing awards or the submissions of the parties. It submits that in addition to being entitled to an additional weeks leave pursuant to the NES by virtue of the definition for that purpose contained in clause 31.1(b), shiftworkers, or workers who work for more than four ordinary hours on 10 or more weekends, are entitled to an additional weeks leave. It submits that shiftworkers could be entitled to up to seven weeks annual leave; five weeks under the NES, an extra week under clause 31.1(a) by virtue of being shiftworkers alone, and another week if they qualify for the weekend work leave entitlement.

[8] The VHIA submits that the clause is ambiguous and in error because it results in entitlements in excess of that provided for health professionals previously. It submits that such a result is not consistent with the award modernisation request or the relevant provisions in Part 10A of the WR Act.

[9] The application is supported by Private Hospital Industry Employer Associations and the ADA. It is opposed by the HSUA, the AWUEQ and the Liquor, Hospitality and Miscellaneous Union.

[10] The unions generally submit that the current arrangements have been determined by a Full Bench, they work and do not need to be reviewed or replaced. They submit that there is no ambiguity and no error and the variations sought are unnecessary and inappropriate.

Conclusions

[11] The annual leave provisions in this Award should be expressed in clear and unambiguous terms. Because of the way in which annual leave is dealt with in the Act, the Award needs to properly define the circumstances in which the additional week's annual leave is provided.

[12] The award modernisation request and Part 10A of the WR Act required the Australian Industrial Relations Commission (AIRC) to establish a definition relevant to the additional week's annual leave. The approach of the AIRC was to do so essentially by reference to the pre-existing qualification for the additional week's leave in the relevant industry or area of employment.

[13] The Award can also supplement the annual leave entitlements in the NES in circumstances described in the request. The AIRC only did so when there was an historical basis for a more beneficial entitlement.

[14] In my view the existing clause is ambiguous and on its face creates obligations greater than those which previously applied. There is no history of more generous entitlements than the four and five week standard in this area of employment and therefore the modern award clause should not provide any additional entitlements. To the extent it may provide for entitlements greater than the four and five week standard the provision in my view is inconsistent with the intention of the AIRC and is therefore an error.

[15] The Award annual leave clause should define the basis of the additional week's leave for the purposes of NES by defining the term "shiftworker" for this purpose in a similar way to which the qualification for the additional week was expressed in previous awards. This will usually be a class of shiftworkers only - not all shiftworkers for other purposes of the Award.

[16] In my view the application in this matter properly reflects the previous award qualifications for the additional week's leave. I will make a determination in terms of the application to correct the ambiguity and errors involved in the current clause with an operative date of 1 January 2010.

VICE PRESIDENT WATSON

Appearances:

V Gostencnik with *R Preston of counsel* for the Victorian Hospitals' Industrial Association

D Wilkinson for the Australian Dental Association

M McLeay for the Health Services Union of Australia

H Brown for the Health Services Union

D Broanda for the Australian Workers Union of Employees, Queensland

Hearing details:

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