FAIR WORK AUSTRALIA

DECISION

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

The National Electrical Contractors Association
(AM2010/48)

ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING AWARD 2010
(AM2008/15) [MA000025]

SENIOR DEPUTY PRESIDENT WATSON MELBOURNE, 30 JUNE 2010

Application to vary or revoke a modern award.

[1] This decision concerns an application by The National Electrical Contractors Association (NECA), pursuant to s.157 of the *Fair Work Act 2009* (the Act), to vary the *Electrical, Electronic and Communications Contracting Award 2010*[1] (the 2010 modern award).

[2] The application is made under s.158 of the Act, as an application to vary terms (other than outworker terms or coverage terms) in the 2010 modern award. As an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the 2010 modern award, NECA has standing to make the application.

[3] The application relies on s.157(1) of the Act, which empowers Fair Work Australia to make a determination varying a modern award, other than to vary modern award minimum wages, if satisfied that making the determination or modern award outside the system of four yearly reviews of modern awards is necessary to achieve the modern awards objective.

[4] The modern awards objective is set out in s.134 of the Act, as follows:

> "(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."

[5] The application seeks to:

1. Vary clause 12.2(c) of the 2010 modern award, to accommodate trainee apprentices by inserting the words highlighted below:

"(c) Subject to clause 12.1(a) hereof, a trainee or indentured apprentice will be indentured in any of the following trades:

- electrical;
- instrumentation;
- electronic/communications;
- refrigeration air-conditioning; or
- power lines work and cable jointing." [The trainee apprentice issue.]

2. Delete clause 15.6 of the 2010 modern award, which reads:

"An employee will be entitled to a pro rata payment for any period of continuous service which is less than a full year at any of the year levels referred to." [The redundancy issue.]

3. Insert a new clause 17.5(a)(iii) to the 2010 modern award dealing with travel and expenses, as highlighted below:

"(iii) Where the employer has no recognised registered office or depot, or where the employer does not have a registered office or depot in the State or Territory in which work is being performed, the distance (for the purpose of calculating an employee's entitlement for travel and expenses) shall be calculated from the Post Office of the nearest town." [The location of workshop or depot issue.]

4. (A) Delete clause 17.5(b) of the 2010 modern award, which reads:

"**(b) Motor vehicle allowance**

An **employer** must pay an employee a motor vehicle allowance of $0.74 per kilometre as compensation for expenses where the employee, by agreement with their employer, uses their own motor vehicle in the following cases:

(i) for the distance of the employee's journey which is in excess of the distance of the journey between the employee's home and their workshop or depot where the employee starts or finishes work at a job away from their workshop or depot; or

(ii) for the distance of the employee's journey where the employee is recalled to work overtime after leaving their employer's business; or

(iii) for the distance of the employee's journey in travelling between their workshop or depot and a job or between jobs; or

(iv) for the distance of the employee's journey in travelling to or from distant work."

or,

(B) in the alternative, vary clause 17.5(d)(i) of the 2010 modern award, as highlighted below:

(i) where the job site is situated up to 50 kilometres from the employer's registered office or depot(s) an amount of $14.00 per day. Payment of this amount is instead of the provisions of clause 17.5 (b). [The motor vehicle allowance issue.]

[6] In the course of the consultations on 6 May 2010, NECA clarified the fourth variation sought, indicating that its concern, about double counting, related to clause 17.5(b)(i) only and not the whole of clause 17.5(b).

[7] The application was dealt with by written submissions in accordance with directions issued on 14 April 2010 and consultations which occurred on 6 May 2010.

[8] The application was wholly supported by the Australian Federation of Employers and Industries (AFEI). The application was wholly opposed by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), except in relation to the trainee apprentice.

[9] In opposing the other variations the CEPU submitted, generally, that in considering whether a variation was "necessary to achieve the modern awards objective", in the matter of an application by Integrated Trolley Management Pty Limited[2] to vary the *General Retail Industry Award 2010*[3] and the *Cleaning Services Award 2010*,[4] Vice President Watson described the test as a "significant hurdle" and held that a variation should not be granted unless it has been "demonstrated that the conclusions of the Full Bench of the AIRC are wrong or inappropriate".[5]

[10] The CEPU also noted the observations of the Award Modernisation Full Bench that:

> "Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration."[6]

[11] The CEPU contended that the variations sought by NECA do not pass this "significant hurdle". With the exception of the issue of trainee apprentices in New South Wales, the variations relate to "substantive terms". It submitted that NECA had advanced no reason to date as to why the decision of the Award Modernisation Full Bench of the Australian Industrial Relations Commission (AIRC) in making the 2010 modern award was wrong or inappropriate. Instead, the submissions of NECA relate solely to the merits of the individuals terms. The CEPU disagreed with the conclusions reached in those submissions in support of the variations which, in any event, are outside the scope of s.157. It submitted that the terms that NECA seeks to vary were found in each of the drafts filed by it during the award modernisation process and were the result of extensive negotiation amongst industry participants, including the CEPU.

The trainee apprentice issue

[12] NECA sought this variation in order to accommodate a species of apprenticeships called trainee apprenticeships, which are recognised in s.7(3)(d) of the *Apprenticeship and Traineeship Act 2001* [NSW] (the NSW Act). Section 7 of the NSW Act provides for applications to establish apprenticeships and traineeships, which:

> "in the case of an apprenticeship that the relevant industrial award or agreement provides may be undertaken as a trainee apprenticeship, must indicate whether or not the apprenticeship is to be undertaken as a trainee apprenticeship".

[13] NECA pointed to clause 14.4.1 of the *Electrical, Electronic and Communications Contracting Industry (State) Award NSW* [NAPSA][7] (the NSW award) which provided for trainee apprentices:

> "14.4.1 An employer shall not employ juniors in the following trades otherwise than under an indentured apprenticeship or trainee apprenticeship as hereinafter provided . . ."

[14] NECA submitted that the proposed variation meets the modern awards objective stated in ss.134(1)(c), (d), (f) and (h) of the Act.

[15] The absence of a provision for trainee apprenticeships in a modern award was the subject of a variation to the *Nursery Award 2010*[8] by the Award Modernisation Full Bench,[9] which varied the award to include minimum wage rates for apprentices, with separate rates for trainee apprentices, to operate, as a transitional provision, until 31 December 2014.

Consideration

[16] This variation was agreed to by the parties and, in my view, is necessary to give effect to the modern awards objective, as stated in ss.134(1)(c), (d), (f) and (h) of the Act. I will vary the 2010 modern award in similar terms to the variation in the *Nursery Award 2010*, including trainee apprentices within clause 12.2(c) as follows:

> "Subject to clause 12.1(a) hereof, a trainee apprentice or indentured apprentice will be indentured in any of the following trades:
>
> - electrical;
> - instrumentation;
> - electronic/communications;
> - refrigeration air-conditioning; or
> - power lines work and cable jointing."

[17] In addition, the 2010 modern award will be varied to include a new transitional clause to be inserted as clause 16.4(c) in the following terms:

> "**(c) Trainee apprentices minimum wages (New South Wales only)**
>
> (i) A trainee apprentice in New South Wales will be paid the percentages of the minimum wage rate for the Electrical worker grade 5 classification in clause 16.2 as set out in the following table:

Year of apprenticeship	**%**
1st year	46
2nd year	59
3rd year	77
4th year	86

> (ii) In addition to the minimum wage payments arising from clause 16.4(c)(i), apprentices will be paid the full amount of the tool allowance in clause 17.2(b) and the fares allowances in clause 17.5(d) and the percentages shown in clause 16.4(c)(i) of the electrician's licence allowance in clause 17.2(c), the travel time allowance in clause 17.5(c) and the industry allowance in clause 17.2(a). Any other special allowances in clauses 17.3 and 17.4 and allowances for travel and expenses in clause 17.5 will be paid to apprentices on an 'as incurred' basis at the rate specified, subject to clause 17.1(b).

(iii) The all-purpose rate to be paid to an apprentice will be the sum of the minimum wage rate arising from clause 16.4(c)(i), the full amount of the tool allowance in clause 17.2(b) and the percentages shown in clause 16.4(c)(i) of the electrician's licence allowance in clause 17.2(c) and the industry allowance in clause 17.2(a). The weekly all-purpose rate of pay is payable for all purposes of the award and will be included as appropriate when calculating payments for overtime, all forms of paid leave, annual leave loading, public holidays and pro rata payments on termination."

[18] Clause 16.5 of the modern award will be varied to read:

"Clauses 16.4(b) and (c) cease to operate on 31 December 2014."

The redundancy issue

[19] Clause 15.1 of the 2010 modern award provides that redundancy pay is provided for in the National Employment Standards (NES), but supplements the NES in several respects, including clause 15.6 which states:

"An employee will be entitled to a pro rata payment for any period of continuous service which is less than a full year at any of the year levels referred to."

[20] NECA contended that clause 15.6 of the 2010 modern award appears to provide a pro rata redundancy payment entitlement to any employee who has been employed for less than 12 months, which is at odds with the redundancy scale provided for in the NES in s.119 of the Act and s.121 of the Act which states that the redundancy scale in s.119 "does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination . . . the employee's period of continuous service with the employer is less than 12 months" and extends the redundancy benefit generally by the provision of pro rata payments.

[21] Clause 15.6 was a feature of the *National Electrical, Electronic and Communications Contracting Industry Award 1998*[10] (NEECCI award) at clause 12.3.3 which stated:

"Provided that an employee shall be entitled to a pro rata payment for any period of continuous service which is less than a full year at any of the year levels referred to above".

[22] NECA submitted that the NEECCI award "only covered Victoria, Tasmania, South Australia and the Australian Capital Territory, with NAPSAs covering the other States", none of which had the provision contained in clause 15.6 of the 2010 modern award. It submitted that, as a result, an obligation, whose origins stem from clause 12.3.3 of the NEECCI award, has been extended from a minority of the States and Territories to the entire country and industry.

[23] NECA submitted that to extend the pro rata redundancy payment obligation provided for by clause 15.6 to all those electrical employers (who have 15 or more employees) throughout all the States and Territories, is arguably at odds with the modern awards objective provided for by s.134(1)(f) of the Act.

[24] NECA submitted that clause 15.6 of the 2010 modern award should be deleted.

[25] AFEI noted that the 2010 modern award provides an entitlement to redundancy pay to employees with less than 12 months employment with an employer, an unusual award entitlement only previously applicable in the minority of States and Territories.

[26] The CEPU submitted that the increased benefit of the award, as opposed to the NES, reflects the transitory nature of the industry. This is particularly important in an industry that experiences significant "peaks and troughs" and short term contracts. For example, in the Northern Territory, there are 21 construction projects scheduled to commence in the next six months, of which only two are planned to take longer than 12 months to complete. This is a reflection of the nature of the industry generally across the Commonwealth.

Consideration

[27] I am not persuaded by NECA and AFEI that the variation proposed is necessary to achieve the modern awards objective. Clause 15.6 was included in the 2010 modern award by the Award Modernisation Full Bench, supplementing the NES entitlement, having regard to the circumstances of the industry, including then current award regulation across the industry. The issues now raised by NECA were raised by it and considered in the making of the 2010 modern award. The exposure draft published on 23 January 2009 contained the provision in clause 16.6 which NECA now seeks to delete. NECA in its 13 February 2009 submissions concerning that exposure draft put the same argument then[11] as it puts now.

[28] The Award Modernisation Full Bench was not persuaded by those arguments to alter the exposure draft by deleting that clause, having regard to the object of Part 10A of the *Workplace Relations Act 1996* (WR Act), the matters in s.576B of that Act and the terms of the Minister's request, including its objects. These considerations broadly reflect the modern awards objective. In specific terms, the object of Part 10A of the WR Act, to which the Award Modernisation Full Bench was directed by the Minister's request, included a requirement that modern awards "must be simple to understand and easy to apply, and must reduce the regulatory burden on business"[12] and "must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work".[13] Also s.576B of the WR Act requires that regard be had to "promoting the creation of jobs, high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market".[14] These matters include the considerations within s.134(1)(f) of the Act on which NECA relies in support of this element of its application.

[29] NECA has not identified changed circumstances which would warrant reconsideration of clause 15.6 nor that the decision of the Award Modernisation Full Bench was wrong or inappropriate in light of the modern awards objective. That part of the NECA application to delete clause 15.6 of the 2010 modern award is refused.

The location of workshop or depot issue

[30] NECA submitted that the 2010 modern award makes no provision for circumstances where an employer has no identifiable registered office or depot, particularly in circumstances where either intrastate and/or interstate work is being performed. It submitted that this circumstance is dealt with in *Electrical Contracting Industry Award – State 2003* (QLD),[15] (the Qld award) at clause 8.2.8(a):

> "Where the employer has no recognised workshop or place of business, or where the employer's workshop or place of business is outside the State, the distance (for the purpose of reckoning fares and travelling time) shall be calculated from the General Post Office, Brisbane, or outside Brisbane, from the principal Post Office of the nearest town."

[31] NECA submitted that the absence of a similar provision in the 2010 modern award would create a significant economic impost on those employers who secure work at distant locations, given the "motor vehicle" allowance [clause 17.5 (b)] and the "fares" allowance provisions [clause 17.5 (d)] are based on the location of the employer's workshop or depot.

[32] NECA submitted that the proposed variation meets the modern awards objective stated in s.134(1)(d), (f) and (h) of the Act.

[33] The CEPU submitted that:

- the NECA proposal would potentially give significant economic advantage to contractors from outside a particular location in which work was to be performed, to "undercut" others from within that location;

- the variation sought relies on the provision in the Qld award, a provision that was removed by the establishment of the 2010 modern award. There was ample opportunity to argue this matter during the AIRC's conduct of the award modernisation process;

- this matter was not overlooked or ignored during award modernisation, but was carefully considered, and is simply a result of the "swings and roundabouts" nature of some of the outcomes of award modernisation.

Consideration

[34] NECA has not identified changed circumstances which would warrant the addition of its proposed clause 17.5(a)(iii) to the 2010 modern award, nor that the decision of the Award Modernisation Full Bench was wrong or inappropriate in light of the modern awards objective. That part of the NECA application is refused.

[35] I am not satisfied that the additional clause 17.5(a)(iii) sought is necessary to meet the modern awards objective stated in ss.134(1)(d), (f) and (h) of the Act. In terms of previous awards, the additional clause sought only appears in the Qld award,[16] at clause 8.2.8(a). The provision did not generally operate in the industry within previously applicable awards.

[36] Further clause 8.2.8(a) is included in the Qld award for the purpose of clause 8.2.3 of that award. That clause prescribes the payment of varying travel allowances plus a payment for excess travel of varying periods of time, referable to the distance from their employer's workshop or recognised place of business in the case of a distance of work within 50 kilometres, or access to the provisions of clause 8.1 (Country work) in the case of distances in excess of 50 kilometres from the workshop or place of business. Clause 8.2.8(a) of the Qld award is directed to that form of entitlement.

[37] The 2010 modern award provisions, said by NECA to require the additional clause 17.5(a)(iii) - the "motor vehicle" allowance [clause 17.5(b)] and the "fares" allowance provisions [clause 17.5(d)] – operate in a different manner, not requiring the Queensland provision in order to avoid the consequences asserted by NECA when an employer undertakes work outside of their State. Each of the provisions in clause 17.5(b) references an entitlement to "the distance of the employee's journey" using their own motor vehicle. Clause 17.5(d) provides a fixed payment where the job site is situated up to 50 kilometres from the employer's registered office or depot (clause 17.5(d)(i)), which would not be affected by the circumstances raised by NECA and, for distances beyond 50 kilometres an additional entitlement to travelling time "for each occasion the distance in excess of 50 kilometres is travelled either to start work on the job site or after ceasing work on the job site" (clause 17.5(d)(ii)).

The motor vehicle allowance issue

[38] NECA submitted that the effect of clause 17.5(b) of the 2010 modern award appears to be that if an employer requires an employee to start and/or finish on a job site (rather than at the employer's registered office or depot) and in doing so, requires the employee to use their own vehicle, then not only will the employer have to pay a "fares" allowance of $14.00 (per clause 17.5(d)(i)) and a "travel" allowance of $4.30 (per clause 17.5(c)) but also, in accordance with clause 17.5(b), be burdened with the economic impost of a motor vehicle allowance of $0.74 cents per kilometre for any travel undertaken within the 50 kilometre radius in those scenarios provided for in clauses 17.5(b)(i) through to (iv) of the 2010 modern award.

[39] Clause 17.5(b) was a feature of the NSW award[17] and operated as an "either / or" term, where the parties had an option to nominate for either:

(i) payment of a motor vehicle allowance based on kilometres; or

(ii) a daily "fares" allowance – but not both.

[40] Clause 4.4.3.1 of the NSW award stated:

> "In lieu of the provisions of paragraph 4.3.1 and subparagraph 4.3.3.1 of this clause, employees to whom this section applies shall be paid an allowance per day as set out in Item 2 of Table 4 – Expense Related Allowances, of Part B, Monetary Rates, as compensation for average excess fares to and from the places of work".

[41] Clause 17.5(b) of the 2010 modern award was not a term or obligation under the NEECCI award.

[42] NECA submitted that the proposed variation meets the modern awards objectives stated in ss.134(1)(d), (f) and (h) of the Act.

[43] The CEPU submitted that clause 17.5(b) of the 2010 modern award is broader than simply travelling to and from work; it makes clear that an employee is entitled to mileage payments when working overtime, travelling between sites during the day and for travelling to and from distant work. This is in addition to any payment for fares incurred in travelling to work. It contended that the adoption of the NECA proposal would result in a reduction in entitlements of $23.00 per day (the difference between $0.74 x 50 kilometres and the $14.00 allowance proposed).

[44] The CEPU submitted that clause 17.5(b) of the modern award is qualified by agreement between an employer and an employee as to the use of the employee's private vehicle for the purpose of the payments within the clause.

Consideration

[45] I note, at the outset, that the issue does not involve payment in respect of the use of an employee's private vehicle for the purpose of the employer's business, which is separately provided for in clause 17.5(f) of the 2010 modern award.

[46] The issue raised by NECA is one of double counting in respect of travel, when an employee uses their own vehicle, by payment of the motor vehicle allowance and the start and/or finish on the job allowance in clause 17.5(d)(i). That would involve payment of both the $14.00 travel allowance and the per kilometre motor vehicle allowance.

[47] Clause 17.5(b) of the 2010 modern award is not found in the NEECCI award,[18] the *Electrical Engineering and Contracting Industries (Northern Territory) Award 2002,*[19] the Qld award,[20] the *Electrical Contracting Industry (SA) Award*[21] or the *Electrical Contracting Industry Award R 22 of 1978 (WA).*[22]

[48] Clause 17.5(b) of the modern award appears to have its origin in clause 4.3.3 of the NSW award.[23] In that award clause 4.4.3.1 – the daily fares allowance – is expressed to be instead of the motor vehicle allowance.

[49] Clause 17.5 of the 2010 modern award was included in the separate NECA and CEPU drafts of 31 October 2008, in clause 19.2(c) but with clause 19.2 being noted by NECA and the CEPU to be "the subject of ongoing discussions between NECA and the CEPU". The clause was not in the joint NECA/CEPU draft award filed on 28 November 2008 but appeared in the exposure draft published on 23 January 2009.

[50] In its 13 February 2009 submission in relation to the exposure draft, NECA submitted that clause 18.5(f), the general motor vehicle allowance in relation to use of private vehicles for business purposes should be deleted as the use by employees of their own vehicles was already covered by clause 18.5(b). The CEPU submission of 16 February 2009 made no comment on clause 18.5(b).

[51] It appears that clause 17.5(b) was placed in the exposure draft in error, reflecting the earlier separate drafts of NECA and the CEPU, given the observations by the Award Modernisation Full Bench that:

> "Turning now to the draft Electrical Modern Award we have adopted the draft jointly proposed by the National Electrical and Communications Association (NECA) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), although with some modification."[24]

[52] Clause 17.5(b) of the 2010 modern award was not a provision of any existing award other than NSW award[25] in which the daily fares allowance is expressed to be instead of the motor vehicle allowance. Further, the inclusion of clause 17.5(b), without any qualification as to double counting, would impose additional and, to the extent it involves double counting,

unwarranted employment costs on employers (s.134(f)). I find that a variation to the 2010 modern award is necessary to achieve the modern awards objective. In my view that objective will be best met, in the circumstances of this matter, by qualifying the access to clause 17.5(b) by adding the words proposed by NECA, as modified to relate to clause 17.5(b)(i) only, to 17.5(d)(i) – "Payment of this amount will be instead of the provisions of clause 17.5(b)(i)".

[53] Clause 17.5(d) of the modern award will be varied to read:

> "When required by the employer to start and/or cease work on the job site, employees will be entitled to the following allowances as appropriate:
>
> (i) where the job site is situated up to 50 kilometres from the employer's registered office or depot(s) an amount of $14.00 per day. Payment of this amount is instead of the provisions of clause 17.5(b)(i).

[54] A determination [MA000025 PR998376] varying the 2010 modern award will be issued accordingly.

SENIOR DEPUTY PRESIDENT

Appearances:

P Green with *S French* on behalf of The National Electrical Contractors Association.

M Murphy on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

C Blades on behalf of the Australian Federation of Employers and Industries.

Hearing details:

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[1] MA000025.

[2] [2010] FWA 3317.

[3] MA000004.

[4] MA000022.

[5] [2010] FWA 3317 at paras 10 and 11.

[6] [2009] AIRCFB 645, at para 3.

[7] AN120191.

[8] MA000033.

[9] [2009] AIRCFB 896; order in PR990479.

[10] AP791396.

[11] At paragraph 6.

[12] Section 576A(2)(a) of the WR Act.

[13] Section 576A(2)(c) of the WR Act.

[14] Section 576B(2)(a) of the WR Act.

[15] AN140103.

[16] ibid.

[17] AN120191.

[18] AP791396.

[19] AP819377.

[20] AN140103.

[21] AN150050.

[22] AN160108.

[23] AN120191.

[24][2009] AIRCFB 50, at para 45.

[25] AN120191.