



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

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

National Retail Association Ltd

(AM2010/16)

Master Grocers Australia Limited

(AM2010/17)

Australian Retailers Association

(AM2010/39)

Jim Whittaker

(AM2010/44)

GENERAL RETAIL INDUSTRY AWARD 2010

[MA000004]

Retail industry

VICE PRESIDENT WATSON

SYDNEY, 9 JULY 2010

Application to vary the General Retail Industry Award 2010– minimum casual engagement – proposed reduction from three hours to two hours and one and a half hours for secondary students in afternoons during the week - whether variation necessary to achieve the modern awards objective - Fair Work Act 2009 ss 134, 157, 158.

[1] This decision concerns applications by the National Retail Association (NRA), Master Grocers Australia Limited (MGA), the Australian Retailers Association (ARA) and Mr J Whittaker pursuant to s 158 of the *Fair Work Act 2009* (the Act) to vary the *General Retail Industry Award 2010* (the Award).¹

[2] The applications seek to reduce the minimum daily engagement for casual employees in clause 13.4 of the Award. The original applications sought to reduce the minimum casual engagement from three hours to two hours, or in one case one and a half hours. The NRA and ARA subsequently amended their applications to seek a minimum engagement period of two hours except for secondary students who may be engaged for a minimum of one and a half hours 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. A large number of submissions and witness statements were filed and placed on the Fair Work Australia (FWA) website.² An application by Great Southern

Personnel was withdrawn prior to the hearing.³ Mr Whittaker did not file any material in support of his application and was not represented in the proceedings.

[4] The applications were listed for hearing in Melbourne on 6, 7 May and 3 June 2010. At the hearing Mr N Tindley represented the NRA, Mr C Issa represented the MGA, Mr T Halls represented the ARA, Mr D Mammone represented the Australian Chamber of Commerce and Industry (ACCI), Mr C Dowling with Mr W Friend of counsel represented the Shop, Distributive and Allied Employees Association (SDA) and Mr T Shipstone represented the Australian Council of Trade Unions (ACTU).

[5] The applications were supported by ACCI, the Australian Federation of Employers and Industries (AFEI), the Australian Newsagents' Federation, VANA LTD, Queensland Newsagents' Federation (the Newsagents Federations), and the United Retail Federation. They were opposed by the SDA and the ACTU.

Background

[6] Prior to the award coming into existence a large number of award-based transitional instruments regulated the employment of retail employees across Australia. Of the main common rule retail awards a two hour minimum engagement period applied to junior casuals in South Australia, school students involved in trolley collection in Western Australia, and generally in Victoria. Three hour minima applied in New South Wales, Queensland, the ACT, and for most casuals in South Australia and Western Australia. A four hour minimum applied in Tasmania.

[7] Most of these provisions are long standing and the result of contested proceedings in State industrial tribunals. The Victorian provision arose from a wide ranging review of retail hours provisions by the Industrial Relations Commission of Victoria in 1991. A Full Bench reduced the minimum engagement period for casuals from three to two hours in circumstances where employers had communicated a policy to decasualise the retail industry.⁴

[8] The Award subject to this application was made by a Full Bench of the Australian Industrial Relations Commission (AIRC) during stage one of the award modernisation process. The SDA proposed a three hour minimum engagement. A two hour minimum was proposed by some employer groups for junior casuals or by agreement with an employee. An exposure draft of the Award was published on 12 September 2008. The exposure draft provided for a minimum engagement of three hours for casual employees.

[9] Many submissions were made in response to the exposure draft and consultation hearings were conducted by the Full Bench. The Award published on 19 December 2008 retained the three hour minimum casual engagement in clause 13.4. It appears that a summary of previous award provisions on the AIRC website incorrectly recorded that the *Shop, Distributive and Allied Employees Association - Victorian Shops Award*⁵ had a three hour minimum engagement for casuals when the award minimum was in fact two hours.

[10] An application to temporarily preserve the two hour minimum engagement period for junior casuals was made as part of the proceedings regarding transitional provisions for modern awards. No preservation was made by the AIRC as a result of that application.

The Applications

[11] The NRA and ARA applications seek to vary the award by replacing clause 13.4 with the following:

“13.4 The minimum daily engagement of a casual is 2 hours, except:

- (a) for secondary students who may be engaged for a minimum of 1.5 hours between 3.30pm and 6.00pm Monday to Friday.”⁶

[12] The MGA application seeks to reduce the minimum engagement from three to two hours for casual employees. The application by Mr Whittaker seeks to reduce the minimum casual engagement from three hours to one and a half hours.

The relevant legislation

[13] The applications seek the variation to the Award under s 157 of the Act which provides:

“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.”

[14] 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*.”

[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.” Limited other opportunities for variations also exist to remove an ambiguity or uncertainty or to correct an error. The test in s 157(1) is the test the applicants need to meet. In my view this legislative test displaces general merit considerations in an application of this type.

[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 “indispensable 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.

The Evidence

[17] The NRA led evidence from two secondary school students from Terang Secondary College in Terang in South Western Victoria.⁷ Both had been employed by the Terang and District Co-op during weekday afternoons until January 2010. They gave evidence that they lost their jobs because the award required a minimum engagement of three hours and they were only available after school from approximately 4.00pm until the store closed at 5.30pm. In the case of one of the students he was unable to work at the associated supermarket which remained open later because of sporting commitments. The NRA also led evidence from the

owner of a newsagency in suburban Adelaide who said that in 2010 he had ceased to offer afternoon shifts to school students as they were not able to work the three hour minimum engagement after school before his shop closed at 5.30pm.⁸

[18] The MGA led evidence from three employers that operate small supermarket businesses in country Victoria.⁹ They each employ local juniors in their businesses. They explained the difficulties in moving from a two to a three hour minimum engagement period for school students. In some cases the change has led to less employment of juniors after school during the week. The witnesses explained why the ability to employ such juniors on two hour engagements after school is beneficial to the business, beneficial to other employees and often preferred by the students themselves because they are looking to fit some casual work into their school, sport and other commitments.

[19] The ARA filed some witness statements but as its witnesses were not made available for cross-examination these statements were not admitted into evidence. The ARA did however tender the results of a survey of retail outlets. This survey revealed that over 50% of respondents employ students on short shifts before close of business and that the majority of students are not available until 4.00pm or later. Most businesses close at or before 5.30pm, and most students are available for work for two hours or less. A majority of respondents asserted that they will stop employing school students after school or stop employing students at all. About 60% of respondents dedicated that they do not employ school students because of the minimum shift requirements in the award.

[20] The SDA led evidence from several union officials from various state branches of the SDA. That evidence dealt with the incidence of casual employment, part time employment and the impact of minimum engagement periods. Many also gave evidence of the history of minimum engagement periods in award-based transitional instruments.

[21] The SDA also led evidence from Dr Iain Campbell, a senior research fellow at RMIT University.¹⁰ Dr Campbell gave evidence of research he had recently conducted as part of a project for the ACTU. That research dealt with the general demographics of casual employment and the common desire of casual employees for more stable employment. He also gave evidence on the level of underemployment in Australia particularly in the retail industry. This underemployment is essentially a desire of part-time and casual employees to work more hours. Dr Campbell advocates higher minimum engagement periods for casual employees to drive longer engagements for casual and part-time employees.

Grounds and Submissions

[22] The NRA contends that the variation is required to achieve the modern awards objective. It submits that the current award provision excludes young people from participation in the workforce, particularly in regional areas, where limited employment opportunities arise and young people have restrictions on the hours that they are available to work due to educational commitments. The NRA contends that the question of minimum engagement for casual employees was not an issue that parties turned their minds to during the award modernisation consultation process. It submits that the inclusion of a three hour minimum engagement for casual employees has resulted in unforeseen negative consequences, particularly for school students in Victoria and South Australia.

[23] The ARA submits that the three hour minimum engagement for casual employees contravenes a number of objects of the Act. It submits that reducing the minimum engagement to two hours will promote workforce participation of school-aged children. The ARA submits that the variation would allow students to work after school without an increased cost being imposed on their employer resulting from payments being made for hours not worked by employees due to restrictions on their availability.

[24] MGA submits that FWA should not wait until the four yearly review of modern awards to consider the question of minimum engagement of casual employees. It contends that this issue was not addressed during the award modernisation consultation process. The MGA submits that a three hour minimum engagement does not promote flexibility and results in loss of jobs or a reduction in hours for school students who have limited availability after school. MGA submits that these problems particularly arise in regional areas where opening hours are often not as long as in cities and suburbs.

[25] ACCI supports the applications. It submits that the variation sought by the applicants is necessary to achieve the modern awards objective. ACCI submits that there is a range of minimum engagements for casual employees in the various applicable award-based transitional instruments. It submits that minimum casual engagement ranges from three hours to one and a half hours for particular employees. ACCI contends that the modern award objectives require a consideration of operational requirements of a business and that modern awards not impact negatively on productivity, employment costs, regulatory burden, or jobs and business viability.

[26] AFEI supports the applications. It contends that the retail industry is one of the largest employing sectors and has experienced a decline in employment levels with slow recovery when compared with other industries. It contends that a high proportion of juniors employees work in the retail industry and submits that a reduction in the minimum engagement would assist students to balance employment and school commitments.

[27] The Newsagents Federations contend that the three hour minimum shift does not accommodate the needs of employees unable to work a shift of three hours duration where they may be restricted by their personal commitments and the trading hours of the employer. The United Retail Federation submits that a number of award-based transitional instruments contained a casual minimum engagement of less than three hours. It contends that a minimum engagement of three hours has a significant impact on employees and employers.

[28] The SDA and ACTU oppose the applications. The SDA submits that the minimum engagement of casual employees was the subject of submissions by various parties during the award modernisation consultation process.¹¹ It submits that the matter has previously been considered by a Full Bench of the AIRC and that a single member of the Tribunal should not review a matter determined by a Full Bench where there has been no change in circumstances and in the absence of manifest error by the Full Bench.

[29] The SDA submits that while the applications focus on the impact of a three hour minimum engagement for junior casual employees with restrictions on availability due to school commitments, the Award applies to a broader range of employees. It submits that to vary the award in the terms proposed in order to serve the needs of a small group of

employees covered by the Award would undermine the safety net applying to all casual employees.

[30] The ACTU contends that the matter has already been determined by a Full Bench of the AIRC and should not be re-litigated so soon after the making of the award. It contends that the need for stability of the modern award system is an important public interest consideration. The ACTU supports the submissions of the SDA.

Conclusions

[31] In my view the context of this application is significant. The Award minimum engagement period arose from lengthy award modernisation proceedings before a Full Bench of the AIRC. This matter was specifically addressed by a number of parties and every opportunity was available for all interested parties to make submissions in the matter. The three hour minimum was reflective of most of the award-based transitional instruments. That result was consistent with the general approach of the AIRC to reflect the majority or critical mass of pre-existing provisions in national modern awards.

[32] I have dealt with the legislative test and the general approach to that test in paragraphs [13]-[16] above. I adopt and apply that approach. Since the award was made there has been no change in circumstances. However it has become apparent that the change from two to three hours in some areas has led to less employment of school students after school because their availability to work during shop opening hours is often less than three hours. The impact on individuals in that situation is significant and has an impact on employment opportunities for youth in regional areas in particular. It also has an impact on the flexibilities available to employers and other employees. There was no evidence presented of any broader problems in Victoria caused by the reduction in minimum engagement periods for casuals other than school children.

[33] However there is very limited evidence of this impact and its extent is unknown. There is also very little evidence of the nature of alternative arrangements. It may be that a requirement to cover the work of school children has in some cases prevented other employees from finishing their shifts earlier to care for younger children after school. It may be that the change has resulted in other employees gaining access to more hours of work consistent with their wishes. These changes of course can only arise where the minimum engagement period has increased. For the most part this is confined to Victoria, South Australia and Western Australia. In other states the three hour minimum or a longer minimum period has been in place for some time.

[34] The applicants need to establish much more than that the variation is desirable. Under the Act they need to establish that the variation is necessary to achieve the modern awards objective. In other words the applicants must establish that the modern awards objective would not be achieved unless the variation is made. I am unable to reach such a conclusion. Three hour minimum engagement provisions have applied generally in a number of States for many years. There has been no evidence and no submissions made to the effect that significant problems arise in those states which result in the modern awards objective not being achieved. No such submission was made during the award modernisation process and no such submission has been made now.

[35] I acknowledge the particular impact on some individuals in Victoria. I also acknowledge the strength of arguments that it is desirable to provide youth with employment opportunities. It follows that award provisions which limit opportunities for youth employment should be avoided if possible. However the interests of fairness to employees generally must be considered and balanced against other objectives. For example, a general reduction in the minimum engagement period could mean that many casual employees are engaged for shorter periods and consequently receive less pay for each engagement even though the travel costs of attending work are unchanged.

[36] These merit considerations would be relevant to a general review of the operation of the award provisions. There will be opportunities to consider these matters in the two year review of awards in 2012¹² and the four yearly review of awards in 2014.¹³ However in my view the evidence and concerns raised by the applicants fall well short of satisfying the test that the variation is necessary to achieve the modern awards objective. The applications are dismissed.

VICE PRESIDENT WATSON

Appearances:

N Tindley for the National Retail Association

C Issa for Master Grocers Australia Limited

T Halls for Australian Retailers Association

D Mammone for Australian Chamber of Commerce and Industry

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

T Shipstone for the Australian Council of Trade Unions

Hearing details:

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June 3

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¹ MA000004

² <http://www.fwa.gov.au/index.cfm?pagename=awardsmodernvar010110>

³ AM2010/36

⁴ Decision D91/0320, per Boulton P, Lawrence DP, Marsh DP, Eggington C and Bornstein C

⁵ AP796250

⁶ Exhibit T1

⁷ Transcript of proceedings 6 May 2010 at PN845 - 923 and PN930 - 965

⁸ Transcript of proceedings 7 May 2010 at PN1041 - 1083

⁹ Transcript of proceedings 6 May 2010 at PN110 - 194; PN97 - 245 and PN260 - 337

¹⁰ Transcript of proceedings 7 May 2010 at PN1089 - 1563

¹¹ Outline of Submissions of the Shop, Distributive and Allied Employees Association, 27 April 2010 at para 33 - 38

¹² *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* Schedule 5 item 6

¹³ *Fair Work Act 2009* s 156