



## DECISION

*Fair Work Act 2009*

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

### **Transport Workers' Union of Australia** (AM2010/120)

Waste management industry

COMMISSIONER HARRISON

SYDNEY, 3 NOVEMBER 2010

*Application to vary the industry allowance and insert a new clause relating to casual loading on overtime.*

[1] This decision concerns an application by the Transport Workers' Union (the TWU) to vary the *Waste Management Award 2010* (the Modern Award) pursuant to s.157 and s.160 of the *Fair Work Act 2009* (the Act). The application was lodged in Fair Work Australia on 11 August 2010. The application seeks firstly, to vary terms pertaining to the definition of the industry allowance as prescribed by Clause 20.6(b), and secondly, the insertion of an additional clause confirming overtime rates for casual employees.

[2] The *Transport Workers' (Refuse, Recycling and Waste Management) Award 2001*, (the pre-reform federal award ) in Clause 29.2 prescribed that the waste industry allowance *is paid for all purposes of this award* and thus was included in the overtime and shift loading calculations. The application seeks to address the ambiguity surrounding the interpretation of clause 20.6(b) of the Modern Award.

[3] The TWU seeks a determination to vary the Modern Award by inserting an alternative definition of 'relevant minimum wage', which incorporates the 'industry allowance', and replacing clause 20.6(b) in the Modern Award with 'the industry allowance is for all purposes of this award, including overtime and calculation of shift loadings' to confirm the inclusion of the industry allowance in the calculations of overtime and shift loadings.

[4] The pre-reform federal award at Clause 12.2.5 provided for casual loadings on overtime calculations of 10% , additionally the *Transport Industry - Waste Collection and Recycling (State) Award 2001* at Clause 5(i)(b) and *Transport Industry - Trade Waste (State) Award* at Clauses 5(iii) and 8(i) prescribed a casual loading on overtime of 20%.

[5] The TWU seeks a further determination to vary the Modern Award by inserting clause 12.2.5 of the pre-reform federal award into the Modern Award as clause 14.5, and renumbering the clause currently 14.5 as 14.6.

[6] On 23 August 2010, Directions were published on the Fair Work Australia Award Modernisation website directing parties to file all submissions in relation to this application by close of business Friday 24 September 2010.

[7] Submissions in support of the application were filed in the Tribunal on 8 September 2010 by the Australian Road Transport Industrial Organisation (ARTIO). Submissions were made by the TWU on 10 September 2010 confirming that the application had ‘the support of the major parties to the Award.’ In submissions dated 10 September 2010, The Australian Federation of Employers and Industries (AFEI) objected to the application on the grounds that the Modern Award’s incorporation of the industry allowance, and the inclusion of casual loading in overtime calculations at clauses 14.4 and 30.1 is unambiguous.

### **Submissions**

[8] The TWU submitted that clause 29.2 of the pre-reform federal award provided the waste industry allowance “is paid for all purposes of this award”. It was said ambiguity has arisen in respect to the interpretation of clause 20.6(b) of the Modern Award as to whether the allowance should be included for the purpose of overtime rates.

[9] In respect of the second determination sought, the TWU submitted that during the award modernisation process the provision for casual loading on overtime was omitted by oversight. The wording proposed in this application is identical to that which previously appeared at clause 12.2.5 of the pre-reform federal award.

[10] The Waste Contractors & Recyclers Association of NSW and the ARTIO supported the TWU applications. Mr Ryan for ARTIO stated that the industry allowance provision in the Modern Award has created confusion. He referred to the history of the allowance applying “across the board”. “There was an opinion from (the) Fair Work Ombudsman to say that it didn’t apply and then a written advice changed that opinion. So we say there is confusion and the application by the TWU will remedy that confusion.”<sup>1</sup>

[11] AFEI opposed both applications and submitted that no ambiguity, error or uncertainty exists. It was submitted that clause 14.4 clearly states that the 25% casual loading is paid on ordinary hours. It was said the wording of the Modern Award reflected the draft proposals of the TWU and the waste management industrial associations.

[12] Applications to vary a modern award are subject to the provisions of ss157, 158 and 160 of the Act which are relevantly set out below:

**“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

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<sup>1</sup> Transcript PN36.

(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.

Note 1: FWA must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If FWA is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

[...]

(3) FWA may make a determination or modern award under this section:

(a) on its own initiative; or

(b) on application under section 158.

**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:

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.
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**160 Variation of modern award to remove ambiguity or uncertainty or correct error**

(1) FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

(2) FWA may make the determination:

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award.”

[13] I am satisfied that the variations sought are necessary to achieve the modern awards objective pursuant to s.157 of the Act. In my view ambiguity has arisen in relation to the interpretation of clause 20.6(b) and the variation will provide clarity. Reinserting the former provisions for casual loading on overtime which appeared at clause 12.2.5 of the pre-reform federal award would correct what appears to be an error within the meaning of the relevant statutory provisions. A determination will issue accordingly.

COMMISSIONER

*Appearances:*

*O Fagir*, Transport Workers' Union of Australia

*T Khoury*, Waste Contractors and Recyclers Association of NSW

*A Doyle*, Australian Federation of Employers and Industries

*P Ryan*, Australian Road Transport Industrial Organisation

*Hearing details:*

2010.

Sydney/Melbourne (Videolink):

6 October.

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