[2011] FWA 2623

FAIR WORK AUSTRALIA

DECISION

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

The Master Builders' Association of New South Wales
(AM2010/257)

Building, metal and civil construction industries

SENIOR DEPUTY PRESIDENT ACTON MELBOURNE, 9 MAY 2011

Introduction

[1] This matter concerns an application by The Master Builders' Association of New South Wales (MBANSW) to vary the *Building and Construction General On-site Award 2010* (Building Award 2010).[1] The variation sought is to add the following to clause 17 of the Building Award 2010:

> "17.8 Service under this clause 17 must be calculated from 1 January 2010 and where an employee is engaged after that date from the date of engagement."

Clause 17 of the Building Award 2010

[2] Clause 17 of the Building Award 2010 concerns an industry-specific redundancy scheme and is as follows:

> "**17. Industry specific redundancy scheme**
>
> **17.1** The following redundancy clause for the on-site building, engineering and civil construction industry (as defined) is an industry specific redundancy scheme as defined in s.12 of the Act. In accordance with s.123(4)(b) of the Act the provisions of Subdivision B—Redundancy pay of Division 11 of the NES do not apply to employers and employees covered by this award.
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> **17.2 Definition**
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> For the purposes of this clause, **redundancy** means a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty. **Redundant** has a corresponding meaning.

17.3 Redundancy pay

(a) A redundant employee will receive redundancy/severance payments, calculated as follows, in respect of all continuous service with the employer:

Period of continuous service with an employer	Redundancy/severance pay
1 year or more but less than 2 years	2.4 weeks' pay plus for all service in excess of 1 year, 1.75 hours pay per completed week of service up to a maximum of 4.8 weeks' pay
2 years or more but less than 3 years	4.8 weeks' pay plus, for all service in excess of 2 years, 1.6 hours pay per completed week of service up to a maximum of 7 weeks' pay
3 years or more than but less than 4 years	7 weeks' pay plus, for all service in excess of 3 years, 0.73 hours pay per completed week of service up to a maximum of 8 weeks' pay
4 years or more	8 weeks' pay

(b) Provided that an employee employed for less than 12 months will be entitled to a redundancy/severance payment of 1.75 hours per week of service if, and only if, redundancy is occasioned otherwise than by the employee.

(c) **Week's pay** means the ordinary time rate of pay at the time of termination for the employee concerned.

(d) If an employee dies with a period of eligible service which would have entitled that employee to redundancy pay, such redundancy pay entitlement will be paid to the estate of the employee.

(e) Any period of service as a casual will not entitle an employee to accrue service in accordance with this clause for that period.

(f) Service as an apprentice will entitle an employee to accumulate credits towards the payment of a redundancy benefit in accordance with this clause if the employee completes an apprenticeship and remains in employment with that employer for a further 12 months.

17.4 Redundancy pay schemes

(a) An employer may offset an employee's redundancy pay entitlement in whole or in part by contributions to a redundancy pay scheme.

(b) Provided that where the employment of an employee is terminated and:

(i) the employee receives a benefit from a redundancy pay scheme, the employee will only receive the difference between the redundancy pay in this clause and the amount of the redundancy pay scheme benefit the employee receives which is attributable to employer contributions. If the redundancy pay scheme benefit is greater than the amount payable under clause 17.3 then the employee will receive no redundancy payment under clause 17.3; or

(ii) the employee does not receive a benefit from a redundancy pay scheme, contributions made by an employer on behalf of an employee to the scheme will, to the extent of those contributions, be offset against the liability of the employer under clause 17.3, and payments to the employee will be made in accordance with the rules of the redundancy pay scheme fund or any agreement relating thereto. The employee will be entitled to the fund benefit or the award benefit whichever is greater but not both.

(c) The redundancy pay scheme must be an Approved Worker Entitlement Fund under the Fringe Benefits Tax Regulations 1992 (Cth).

17.5 Service as an employee for the Crown in the Right of the State of Western Australia, the Crown in the Right of the State of New South Wales, Victorian Statutory Authorities, or the Crown in the Right of the State of Victoria will not be counted as service for the purpose of this clause.

17.6 Employee leaving during notice period

An employee whose employment is to be terminated in accordance with this clause may terminate their employment during the period of notice and if this occurs, the employee will be entitled to the provisions of this clause as if the employee remains with the employer until expiry of such notice. Provided that in such circumstances, the employee will not be entitled to payment instead of notice.

17.7 Transfer of business

(a) Where a business is, before or after the date of this award, transferred from an employer (in this subclause called **the old employer**) to another employer (in this subclause called **the new employer**) and an

employee who at the time of such transfer was an employee of the old employer in that business becomes an employee of the new employer:

(i) the continuity of the employment of the employee will be deemed not to have been broken by reason of such transfer; and

(ii) the period of employment which the employee has had with the old employer or any prior old employer will be deemed to be service of the employee with the new employer.

(b) In this subclause, **business** includes trade, process, business or occupation and includes part of any such business and **transfer** includes transfer, conveyance, assignment or succession whether by agreement or by operation of law. **Transferred** has a corresponding meaning."

[3] "Continuous service" is defined in clause 3.1 of the Building Award 2010 as follows:

"continuous service means the period of service of an employee notwithstanding the employee's absence from work for any of the following reasons:

- annual leave, personal leave or parental leave;
- illness or accident up to a maximum of four weeks after the expiration of paid sick leave;
- jury service;
- injury received during the course of employment and up to a maximum of 26 weeks for which the employee received worker's compensation;
- where called up for military service for up to three months in any qualifying period;
- long service leave; and
- any reason satisfactory to the employer, provided the employee has informed the employer within 24 hours of the time when the employee was due to attend for work, or as soon as practicable thereafter, of the reason for the absence and probable duration".

MBANSW and other submissions in support

[4] In its application to vary the Building Award 2010, the MBANSW stated "[t]he proposed variation will clarify the basis on which the period of service under the [Building] Award [2010] is to be calculated." In submissions in support of its application, the MBANSW maintained:

- Item 5(1) of Part 3 of Schedule 4 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (FW(TPCA) Act) provides, in general, that an employee's service with an employer before 1 January 2010 counts as service of the employee with the employer for the purpose of determining an employee's entitlements under the National Employment Standards (NES). Item 5(4) provides that item 5(1) does not apply in relation to an employee and an employer for the purposes of Subdivision B of Division 11 of the NES, which deals with redundancy pay, if the terms and conditions of employment that applied to the employee's employment by the employer immediately before 1 January 2010 did not provide for an entitlement to redundancy pay. There is no equivalent to item 5 of Part 3 of Schedule 4 of the FW(TPCA) Act in relation to calculating the service of an employee for the purpose of determining the employee's entitlements under a modern award.

- It was not possible for FWA or the Australian Industrial Relations Commission (AIRC) to include in a modern award an industry-specific redundancy scheme that operated prior to 1 January 2010.

- Accordingly, in calculating an employee's entitlement to redundancy pay under clause 17.3 of the Building Award 2010, the calculation of continuous service cannot include any period of service on the part of the relevant employee prior to 1 January 2010.

- In summary, the Building Award 2010 commenced operation on 1 January 2010. Immediately prior to 1 January 2010, the employees whose terms and conditions of employment are subject to the Building Award 2010 did not enjoy an entitlement to redundancy pay of the kind provided by clause 17 of the Building Award 2010. There is no equivalent transitional provision in respect of the Building Award 2010 such as item 5 of Part 3 of Schedule 4 of the FW(TPCA) Act which would preserve an employee's pre-1 January 2010 service. Therefore the Building Award 2010 confines the relevant period of "continuous service" in clause 17 to the period from 1 January 2010. The effect of the proposed clause 17.8 is to confirm this interpretation. The variation will remove any ambiguity or uncertainty about the operation of clause 17 of the Building Award 2010.

[5] The variation sought by and the submissions of the MBANSW were supported by the Master Builders Australia Limited, the Housing Industry Association Limited and the Australian Federation of Employers and Industries and, in part, by the Australian Chamber of Commerce and Industry.

Union submissions in opposition

[6] The application to vary was opposed by the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU), The Australian Workers' Union (AWU), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) and the Construction, Forestry, Mining and Energy Union (CFMEU). In opposing the application the unions referred to the decision of the Award Modernisation Full Bench of the AIRC which made the Building Award 2010.

[7] In that decision making the Building Award 2010, the Award Modernisation Full Bench said in respect of the Building Award 2010:

> "[69] The final award incorporates some alterations in the definitions clause, including minor changes to adult apprentice and air-conditioning work definitions. We have also added a definition of continuous service, reflecting the award definition in the National Building and Construction Industry Award 2000 (Building and Construction Award), to apply in respect of redundancy arrangements and the living away from home-distant work provision...
>
> [75] We have decided to include the current industry award redundancy provisions in the modern award as an industry-specific redundancy scheme.
>
> [76] Section 141 of the Fair Work Bill 2009 permits the inclusion of such a scheme in a modern award. The consolidated request deals with industry specific redundancy schemes in the following way:
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> 'Termination and Redundancy
>
>> 36. The NES excludes employees from redundancy entitlements where their award contains an 'industry specific redundancy scheme'. An 'industry specific redundancy scheme' in a modern award will operate in place of the NES entitlement in these circumstances.
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>> 37. An 'industry specific redundancy scheme' is one identified as such in a modern award.
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>> 38. The Commission may include an 'industry specific redundancy scheme' in a modern award.
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>> 39. In determining whether particular redundancy arrangements constitute an 'industry specific redundancy scheme', the Commission may have regard to the following factors:
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>> - when considered in totality, whether the scheme is no less beneficial to employees in that industry than the redundancy provisions of the NES; and
>> - whether the scheme is an established feature of the relevant industry.'
>
> [77] We are satisfied that the redundancy scheme in the building industry award redundancy provisions is an established feature of the building and construction industry. Having regard to the arbitral history and general application of the current redundancy prescriptions within awards in the building and construction industry the scheme is properly described as an industry specific redundancy scheme.

[78] The redundancy benefits in the NES had their origin in the *Termination, Change and Redundancy Case,* (TCR Case) modified in the *Redundancy Case 2004*. However, award provisions for redundancy in the building and construction industry took a different path, reflecting the particular circumstances of employment in that industry. That arbitral history commenced with a decision in 1989 of a Full Bench, which applied the TCR Case with modifications to suit the employment terms and conditions applying in the industry. Special provision was included for the accrual of redundancy benefits because of the high labour mobility in the industry. Before an order could be issued, however, some employer parties to the relevant awards obtained an order nisi for prohibition in the High Court. The Full Bench orders, and the High Court proceedings, were overtaken by a 1990 decision which determined what was to become the final form of the redundancy provisions for the building and construction industry. That decision was based on an in-principle agreement between organisations respondent to the awards. Two appeals against this decision were dismissed.

[79] In June 1998, another Full Bench of the Commission considered the redundancy scheme within building and construction industry awards, inserting the provisions in the *Building and Construction Industry (Northern Territory) Award 1996*, against the opposition of employers. The Full Bench stated:

> ‘We are satisfied that the variation of the Award in the terms set out in Exhibit B13 would bring that award into conformity with comparable federal awards that apply generally in the building and construction industry throughout Australia. Those provisions, and …the corresponding State awards, reflect the outcome of a relatively tortuous process of arbitration and negotiation. That process resulted in the development of what was described by several Full Benches as “one general statement of benefits to apply to redundancy in the building and construction industry… ….
>
> We are satisfied that it is appropriate, and consistent with the merits of the case, that the award should be varied to reflect what we accept to be effectively a national minimum award or safety net standard condition applicable to the building and construction industry.’

[80] Whilst, as noted in our 23 January 2009 statement, the current award prescription does not reflect the standard for larger employers arising from the *Redundancy Case 2004* decision, when regard is had to the slightly more beneficial scale of benefits in earlier years, the broader application of the benefit and the pattern of limited periods of continuous service within the industry to which the building and construction redundancy provisions were directed we are also satisfied that when considered in totality, the scheme is no less beneficial to employees in the industry than the redundancy provisions of the NES. In relation to the pattern of service in the industry, we have relied on to the data supplied by Incolink, BERT and CoINVEST contained in the CFMEU submission of 11 March 2009.

[81] The Master Builders Australia (MBA) and some other employer bodies contended that the building industry arrangements cannot constitute an industry specific redundancy scheme. It was pointed out that the application of the scheme extends beyond redundancy as defined by the NES. Some suggested that the definition

of redundancy in the current award provisions should be modified to reflect the NES. We do not accept these submissions. There are several reasons. First, in determining whether a particular scheme is an "industry specific redundancy scheme" the Commission can have regard to the factors mentioned in the passage we have set out above. Having regard to those factors, we are satisfied that they apply to the scheme. Secondly the definition of redundancy in the NES does not apply to an industry specific scheme. Clause 64, which is in Subdivision C—Limits on scope of this Division – of the NES, provides that Subdivision B does not apply to an employee covered by a modern award which includes an industry-specific redundancy scheme. While Subdivision B sets out the circumstances in which the NES entitlement to redundancy pay arises and to the amount of the entitlement that sub-division does not apply to an industry-specific redundancy scheme. It follows that an industry-specific redundancy scheme can deviate from the NES redundancy prescription in relation to both the circumstances in which the benefits arise and the amount of the benefits. Thirdly, the ability to include an industry-specific redundancy scheme in a modern award implies that the scheme as a whole can be included. A modified scheme might not meet the criterion, found in the consolidated request, that the scheme be a feature of the industry. Finally, the building industry scheme clearly falls within the definition of industry specific redundancy scheme in s.12 of the Fair Work Bill 2009, the relevant part of s.12 reads:

> '**industry-specific redundancy scheme** means redundancy or termination payment arrangements in a modern award that are described in the award as an industry-specific redundancy scheme.'

[82] The modern award has clarified provisions permitting some other payments to be offset against payments required under the industry specific redundancy scheme. Payments made to an employee from a redundancy pay fund, where such payments are made, or contributions on behalf of an employee to such a fund where no payments are made upon termination can be offset."[2] (Endnotes omitted. Underlining added)

[8] The unions also pointed out that the issue of transitional provisions in respect of the redundancy provisions in the Building Award 2010 was the matter of submissions before the Award Modernisation Full Bench. However, the Full Bench decided there was no reason to include any additional transitional provisions in the Building Award 2010 and they would vary that award to include the model transitional provisions including the phasing schedule.[3]

[9] The unions further submitted that:

- Under clause 17 of the Building Award 2010 the calculation of the entitlement to redundancy payments depends on the continuous service, as defined in clause 3, of an employee with the employer. The only periods of service not counted are any period of service as a casual (clause 17.3(e)), period of service as an apprentice if the employee does not remain in employment with that employer for at least 12 months after completing the apprenticeship (clause 17.3(f)), or service as an employee for the Crown in the Right of the State of Western Australia, the Crown in the Right of the State of New South Wales, Victorian Statutory Authorities, or the Crown in the Right of the State of Victoria (clause 17.5).

- Further, clause 17.3 provides for an employee to receive redundancy payouts in respect of "all" continuous service with the employer and clause 17.7 expressly provides that where there has been a transfer of business prior to the making of the Building Award 2010, employment with the previous employer "will be deemed to be service of the employee with the new employer." These are clear indications the Award Modernisation Full Bench which made the Building Award 2010 did not intend service only to be calculated from 1 January 2010 for the purposes of clause 17 of the Building Award 2010.

- There is no ambiguity or uncertainty as to the operation of clause 17 of the Building Award 2010.

- There is no barrier in the FW Act or the FW(TPCA) Act to service prior to 1 January 2010 being counted for the purpose of clause 17 of the Building Award 2010. Nor is there an omission or lacuna in the FW Act or FW(TPCA) Act concerning the transitional arrangements for clauses like clause 17 of the Building Award 2010. Transitional provisions are contained both within the body of the Building Award 2010 and its Schedule A. Consistent with the decision of the Award Modernisation Full Bench, none specifically deal with clause 17 of the Building Award 2010.

- It is the termination of an employee's employment for reasons other than misconduct or refusal of duty, rather than the length of an employee's service with the employer, that leads to a redundancy payment pursuant to clause 17 of the Building Award 2010. If the termination occurs after 1 January 2010 then clause 17 applies. Clause 17 of the Building Award 2010 does not have retrospective operation. It only applies to termination from 1 January 2010. The recognition of service prior to 1 January 2010 for the purpose of calculating the entitlement under the clause does not offend the common law presumption against retrospectivity. As the Victorian Full Supreme Court pointed out in *Robertson v City of Nunawading*:[4]

> "The common law principle which is applicable may for present purposes be taken from two statements, recently cited by Gibbs, J., in *Mathieson v Burton* (1971), 124 C.L.R. 1, at p. 22; [1971] A.L.R. 533, one from the judgment of Wright, J., in *Re Athlumney; Ex parte Wilson*, [1898] 2 Q.B. 547, at pp. 551-2; [1895-9] All E.R. Rep. 329, the other from the judgment of Dixon, J., in *Maxwell v. Murphy* (1957), 96 C.L.R. 261, at p. 267; [1957] A.L.R. 231. The first is as follows:-
>
>> 'Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.'

The other statement, that of Dixon, J., is as follows:-

> 'The general rule of the common law is that the statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.'

It is to be observed that this principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does not more than that: *Maxwell on Interpretation of Statutes*, 12th ed., pp. 216-7."[5] (Underlining added)

Conclusion

[10] I am not persuaded I should vary the Building Award 2010 to incorporate a new clause 17.8 as proposed by the MBANSW.

[11] In my view, a plain reading of clause 17, in conjunction with the definition of "continuous service" in clause 3, of the Building Award 2010 indicates the continuous service of an employee with their employer for the purposes of clause 17 is not restricted to the employee's service from 1 January 2010 and can include the employee's service prior to 1 January 2010. The provisions of clause 17.7, concerning a transfer of business, support this construction.

[12] The MBANSW's contention that clause 17 is ambiguous or uncertain is unfounded. Clause 17 of the Building Award 2010 only applies to a redundancy of an employee that occurs or occurred on or after 1 January 2010. No legislative provisions preclude or precluded the industry-specific redundancy scheme in clause 17 of the Building Award 2010 from counting as service the service of an employee prior to 1 January 2010, for the purpose of determining the employee's redundancy pay entitlements under the scheme.

[13] It is apparent from the decisions of the Award Modernisation Full Bench of the AIRC that the industry-specific redundancy scheme provisions in clause 17, the "continuous service" definition in clause 3 and the transitional provisions in the Building Award 2010 were well considered by the Full Bench.

[14] In the circumstances, I am not satisfied the MBANSW proposed variation in this matter is necessary to remove an ambiguity or uncertainty or to correct an error in the Building Award 2010 or to achieve the modern awards objective. The application in AM2010/257 is dismissed.

SENIOR DEPUTY PRESIDENT

Appearances:

T Stanley of Senior Counsel and *R Calver* for The Master Builders' Association of New South Wales and Master Builders Australia Limited.

S Maxwell for the Construction, Forestry, Mining and Energy Union.

G Noble for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).

A Kentish for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

L Buntman and *Z Angus* for The Australian Workers' Union.

A Matheson for the Housing Industry Association Limited.

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[1] MA000020.

[2] *Award Modernisation*, [2009] AIRCFB 345.

[3] *Award Modernisation,* [2009] AIRCFB 800 at paragraph 119.

[4] [1973] VR 819.

[5] Ibid at 823 - 824.