



REASONS FOR DECISION

Fair Work Act 2009

s.157 - FWA may vary etc. modern awards if necessary to achieve modern awards objective

s.158 - Application to vary, revoke or make modern award

s.159 - Variation of modern award to update or omit name of employer, organisation or outworker entity

NGS Super Pty Ltd

(AM2012/336, AM2012/337, AM2012/338)

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

[MA000027]

SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

[MA000100]

CHILDREN'S SERVICES AWARD 2010

[MA000120]

Health and welfare services

COMMISSIONER MCKENNA

SYDNEY, 27 JULY 2012

Applications to vary modern awards - lack of standing - applications dismissed.

[1] On 20 July 2012, I dismissed three applications by NGS Super Pty Ltd (“NGS Super”) to vary modern awards. I now publish my reasons.

Background

[2] On 2 July 2012, NGS Super lodged a number of applications seeking the variation of certain modern awards. Three of the five applications were allocated to me:

- the application in AM2012/336 sought to vary the *Health Professionals and Support Services Award 2010* (“the first application”);
- the application in AM2012/337 sought to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (“the second application”); and

- the application in AM2012/338 sought to vary the *Children's Services Award 2010* ("the third application").

[3] The variation sought in the first application was:

"This application is made for the variation of the Health Professionals and Support Services Award 2010 in the following terms:

by deleting the name 'UCSuper' in subclause 22.4(k) and inserting in lieu thereof, the name 'NGS Super'."

[4] The grounds in support of the first application read:¹

"1. NGS Super is a multi-employer industry super fund that specialises in providing superannuation benefits for employees in finance, education, health and community-focused organisations.

2. On 1 March, 2012, NGS Super merged with UC Super. NGS Super is the successor fund to/of UC Super.

3. UC Super was included as a named default superannuation fund in the Health Professionals and Support Services Award 2010 when Health Professionals and Support Services Award 2010 commenced on and from 1 January, 2010.

4. Given that NGS Super has merged with UC Super, the Application seeks to clarify the true and correct name of the merged legal entity operating since 1 March, 2012, being NGS Super. The variation sought merely corrects the true and correct name of the operative fund for the purposes of the Health Professionals and Support Services Award, 2010.

5. The Application is consistent with the Full Bench Decision of 2 September, 2009 [(2009) AIRFB 800].

6. The Application is consistent with the Award Modernisation Request made by the Minister for Employment and Workplace Relations as amended on 26 August, 2009.

7. Accordingly, the Applicant seeks that the Health Professionals and Support Services Award, 2010 be varied in the terms sought."

[5] The variation sought in the second application, together with the grounds in support of that application, was to relevantly identical effect as the first application - albeit concerning cl.23.4(j) of the *Social, Community, Home Care and Disability Services Industry Award 2010*.

¹ The spelling in the grounds in support of the application alternated between "UCSuper" and "UC Super".

[6] The third application sought the following variation to the *Children's Services Award 2010*:

“In clause 20.4 of the Award, delete the following words after (j):

‘any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September, 2008, provided the superannuation fund is an eligible choice fund’,

And then insert after (j) the following words:

‘NGS Super’;

Add a new subclause as follows:

‘(k) any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September, 2008, provided the superannuation fund is an eligible choice fund’.”

[7] The purpose of the variation sought in the third application was to include NGS Super as a new default superannuation fund in the *Children's Services Award*, in circumstances where it has not previously been nominated in that award. The application outlined the grounds in support of the proposed inclusion as follows:

“1. NGS Super is a multi-employer industry super fund that specialises in providing superannuation benefits for employees in the finance, education and community focussed organisations.

2. NGS Super has its origins as an established education sector industry superannuation fund since 1988.

3. On 1 April 2011, NGS Super merged with Cuesuper. NGS Super was the successor fund to/of Cuesuper.

4. On 1 March 2012, NGS Super merged with UCSuper. NGS Super is the successor fund to/of UCSuper.

5. As at April, 2012, NGS Super has 103,023 members, including 1,958 pension members, 5,538 participating employers and assets under management totalling \$4,500,000,000.

6. NGS Super is now the amalgamated/consolidated fund (comprising what used to be known as NGS Super, Cuesuper and UC Super).

7. NGS Super is currently named as a default superannuation fund in the following modern awards:

a. Banking, Finance and Insurance Award 2010;

b. Education [sic] Services (Schools) General Staff Award 2010; and

c. Education [sic] Services (Teachers) Award 2010.

8. The Children's Services Award 2010:

a. applies to a large number of employers who are presently contributing to NGS Super on behalf of their employees;

b. applies to a large number of members of NGS Super employed in educational services in Australia;

c. operates to the exclusion of all federal awards and Notional Agreements Preserving State Award (NAPSAs);

d. removes the pre-existing legal entitlement for employers (who were not making contributions to NGS Super for the benefit of their employees before 12 September, 2008) to make contributions at any later time, unless their employees specifically request they do so.

9. The consequence of matters referred to in 8. above, is that unless NGS Super is included in Clause 20.4 of the Children's Services Award 2010 and named as a "default" superannuation fund, NGS Super:

(i) will be denied its existing status as a "default fund" in that part of the education industry in Australia where it has an existing presence as a named fund; and

(ii) will lose the substantial benefit of the inflow of "default" contributions by existing employers who have commenced contributions after 12 September, 2008 and before 1 January 2010; and

(iii) will be denied any new employer contributions who may wish to make contributions to NGS Super at any time after 1 January, 2010; and

(iv) as a further consequence, the loss of potential new employers and employee members to replace those that leave for any reason will compromise the size and prosperity of the NGS Super fund in a way that will reduce the capacity of NGS Super to maintain or increase its return on members' funds (all of which is returned to members), and will detrimentally effect the potential growth in the retirement funds available for its members.

10. The operation of the Children's Services Award 2010 without the inclusion of NGS Super as a "default" fund would be contrary to Clause 2(c) of the Award Modernisation Request ("the AM Request") because employees who are members of NGS Super will be disadvantaged on the basis that additional employers will be prevented from making contributions to NGS Super thus denying the fund growth and investment opportunities.

11. Accordingly, this application to vary the Children's Services Award 2010 is consistent with the AM Request and is necessary to be made to ensure that the Children's Services Award 2010 does not operate in a manner which contravenes the Request and the intent of the Request.”

[8] Copies of the applications, together with the notices of listing concerning the applications, were posted on Fair Work Australia’s Award Modernisation website and, in accordance with the usual practice concerning such matters, notified to subscribers having an interest in the respective awards.

[9] At the initial mention of the applications on 13 July 2012, the only appearance was that by a solicitor acting for NGS Super. I indicated I was, for reasons elaborated more fully below in this decision, minded to summarily dismiss each application.

[10] The solicitor acting for NGS Super submitted that the applications should not be dismissed and requested a hearing on a later date. Accordingly, I listed the applications for hearing on 20 July 2012. The notices of listing were again dealt with in accordance with the usual practice for modern award-related applications.

[11] At the hearing on 20 July 2012, Mr N Chadwick, solicitor for NGS Super, together with an employee of NGS Super, were the only appearances.

Consideration

[12] NGS Super operates a superannuation fund and brings all three applications in that capacity. It may be noted while the applications did not specify the particular provisions under which the applications were made, Mr Chadwick submitted that s.159 of the Act was the relevant provision concerning the first and second applications; and s.157(1), specifically s.157(3)(a), was the relevant provision concerning the third application.

[13] It is plain that NGS Super did not have standing to make an application to vary a modern award as NGS Super is not within the classes of statutorily-defined, eligible applicants. As to an application concerning s.159, see s.159(2) as to who may make an application; and as to an application concerning s.157, see s.158 as to who may apply for a determination. In this respect, see also the decision ([2010] FWA 2475) of *Smith C* (as he then was) dismissing an application made by AMP Life Ltd to include the AMP Superannuation Savings Trust as a default superannuation fund in the *Professional Employees Award 2010*.

The first and second applications

[14] Mr Chadwick submitted that even if NGS Super did not have standing to make the first and second applications, I should make a determination on my own initiative to vary the modern awards in the terms that had been sought in the applications. In this respect, Mr Chadwick submitted that no party had appeared to oppose the applications and the proposed variations were essentially administrative in nature. Mr Chadwick also adverted to the recent decision ([2012] FWA 5836) and determination (PR526089) of *Sams DP* in an application by NGS Super to vary the *Aged Care Award 2010*.

[15] Mr Chadwick submitted I should effect the variations sought in the first and second applications pursuant to s.159 of the Act, so as to update the name of an “organisation”, namely, that of his client. Section 159 of the Act is in the following terms:

“159 Variation of modern award to update or omit name of employer, organisation or outworker entity

(1) FWA may make a determination varying a modern award:

(a) to reflect a change in the name of an employer, organisation or outworker entity; or

(b) to omit the name of an organisation, employer or outworker entity from the modern award, if:

(i) the registration of the organisation has been cancelled under the *Workplace Relations Act 1996*; or

(ii) the employer, organisation or outworker entity has ceased to exist; or

(c) if the modern award is a named employer award and the named employer is the old employer in a transfer of business—to reflect the transfer of business to the new employer.

(2) FWA may make a determination under this section:

(a) in any case—on its own initiative; or

(b) if paragraph (1)(a) or (b) applies—on application by the employer, organisation or outworker entity referred to in that paragraph; or

(c) if paragraph (1)(c) applies—on application by:

(i) the old employer or the new employer; or

(ii) a transferring employee who was covered by the modern award as an employee of the old employer; or

(iii) an organisation that is entitled to represent the industrial interests of the old employer, the new employer, or one or more employees referred to in subparagraph (ii).”

[16] Section 159 of the Act, as it concerns the changing of the name of an “organisation” in a modern award, can be construed to refer only to a registered organisation and, in this respect, see also s.12 (The Dictionary) of the Act as to the definition of “organisation”. Even if I had been minded to act on my own initiative in circumstances where NGS Super had no standing to make the applications (which I was not), s.159 of the Act, on which Mr Chadwick relied in relation to the first and second applications, could not be used as a jurisdictional

vehicle to effect the variations sought by NGS Super either on the basis of an application brought by a competent applicant or on my own initiative pursuant to s.159(2)(a) of the Act. That is, NGS Super is not an “organisation” as contemplated within the meaning of s.159 of the Act.

The third application

[17] As to the third application, which sought to include NGS Super as a new default superannuation fund in the *Children’s Services Award 2010*, I note the comments of *Bissett C* in a decision ([2010] FWA 6098) dismissing an application to add the MTAA Superannuation Fund as a default superannuation fund in the *Passenger Vehicle Transport Award 2010*:

“[12] Second, the AMWU submitted that the application is consistent with the views expressed by the Award Modernisation Full Bench. In their decision of 2 September 2009, in discussing the model superannuation clause to be included in modern awards, the Full Bench stated:

[65] In its decision of 19 December 2008, the Commission, in commenting on the model superannuation clause, said:

‘[90] The terms of the exposure draft concerning the default fund provision were the cause of a number of submissions from employer and employee interests, from superannuation funds and the superannuation industry. We have decided to allow as a default fund any fund to which the employer was making contributions for the benefit of employees on 12 September 2008. This approach is likely to minimise inconvenience for employers. While funds other than those provided for will not qualify as default funds employees may still exercise their right to choose in favour of these funds.’

[66] In our view the nomination of default funds should be made on some readily ascertainable basis and one which does not lead to any disruption. For that reason it was decided to provide for named default funds as the primary basis. The secondary basis was any fund to which the employer was making contributions before 12 September 2008. That date was chosen because it was the date on which the exposure drafts of the priority modern awards were published.

[67] A number of funds have since made applications to be included as named default funds on the basis that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award or on the basis that the representatives of the main parties covered by the award consent. In our view either basis would constitute a good reason for the fund being specified as a default fund in a modern award. Where such grounds exist an appropriate application could be made. We do not intend to deal with such applications, however, in this decision.

[13] For the reasons expressed below I do not consider that the application is consistent with the views of the Full Bench. The Full Bench clearly established two

grounds for the inclusion of a default fund in a modern award. The first is that the fund was nominated as a default fund in an award-based transitional instrument *relevant to the coverage of the modern award*, or second, that it is a consent position. The overriding consideration is that the nomination of default funds should not lead to any disruption.” [Italics in original]

[18] Thus, for a superannuation fund to be included as a default fund in a modern award, an applicant needs to demonstrate the fund was previously nominated as a default fund in an award that covered both the classes of employers and of employees covered by the modern award or the application had the consent of all relevant parties. There was no appearance at the hearing other than by NGS Super - inferentially leading to the conclusion there was consent, or at the least, no opposition, to the application to include NGS Super as a default fund in the *Children’s Services Award 2010*. However, in view of the approach I had adopted concerning issues of standing in the first and second applications, Mr Chadwick did not press the third application.

[19] I observe that, putting aside any other difficulties in relation to the third application, an overarching consideration concerning superannuation in modern awards arises from the statement by Ross J on 5 July 2012 in *Modern Awards Review 2012-Timetable* [2012] FWA 5721, where this was said:

“[1] Further to earlier statements issued on 17 November 2011 [[2011] FWA 7975] and 27 April 2012 [[2012] FWA 3514] in relation to the 2012 review of modern awards (the Review) this statement provides a summary of progress to date and further details regarding the timetable for dealing with the range of matters to be determined during the review process.

[2] The statement of 17 November 2011 called for applications to be made to vary modern awards as part of the Review. The 279 current applications which have been made include a number of common issues as well as issues which are limited to a particular award.

[3] The scope of the review will be largely confined to the issues raised in the applications. As noted in the 17 November 2011 statement: *‘The review will be based mainly on applications to vary modern awards. In some cases Fair Work Australia may also propose variations. It is likely that these proposed variations will be limited to technical and drafting matters.’*

[4] The statement dated 27 April 2012 indicated that applications dealing with common issues would be determined by Full Benches. The common issues are applications relating to:

- penalty rates;
- apprentices, trainees and junior rates;
- award flexibility and annual leave;
- public holidays and
- superannuation.

[5] The range of issues and the number of applications to be determined in the course of the Review presents a significant challenge to the parties and the Tribunal. Peak employer and union bodies have expressed concern that employer and union representatives may be unable to effectively represent their members in the Review unless the Tribunal adopts a careful and co-ordinated approach to the scheduling of proceedings. This statement responds to those concerns.

[6] The Tribunal intends to adopt a four stage process to the Review. A defined number of matters will be dealt with in each stage. There is to be a degree of flexibility in the implementation of this process. The staging process is intended as a guide to the timeframe within which the Review will be conducted. For various reasons some matters may take longer than indicated, for example where there are a large number of applications to vary some awards. In other instances the interested parties may consent to a particular application, allowing it to be determined more quickly.

[7] Any party wishing to have their application expedited or moved to a later stage are to file an application to amod@fwa.gov.au setting out the grounds in support of the application.

...

Stage 4—1 April to 31 May 2013

[13] The hearing of applications in relation to superannuation will be dealt with in Stage 4 following the release of the Productivity Commission's final report on *Default Superannuation Funds in Modern Awards* due in October 2012. ...” [Italics in original]

[20] Given the matters outlined in the *Modern Awards Review 2012-Timetable*, hearings of applications in relation to superannuation in modern awards are to be dealt with by Full Benches and not until after the release of the Productivity Commission's final report concerning default superannuation funds in modern awards. As the third application was not, in the end, pressed by NGS Super, it was unnecessary for me to further consider matters apposite to the timetable for the review of modern awards.

[21] It was for the foregoing reasons that each application was dismissed on 20 July 2012. Formal orders have now been issued confirming the *ex tempore* dismissal of the applications.

COMMISSIONER

Appearances:

L. *Campbell*, solicitor (13 July 2012) and N. *Chadwick*, solicitor (20 July 2012) for NGS Super Pty Ltd

Hearing details:

2012.
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