



Summary of Decision

15 April 2013

Transitional Review Award Flexibility Decision

[2013] FWCFB 2170

SUMMARY

1. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act) provides that the Fair Work Commission must conduct a review of all modern awards as soon as practicable after 1 January 2012 (the Transitional Review).
2. The Transitional Review is quite separate from, and narrower in scope than, the 4 yearly reviews of modern awards provided for in s.156 of the *Fair Work Act 2009* (Cth) (the Act). The scope of the Transitional Review was dealt with in the June 2012 Transitional Review decision [2012] FWAFB 5600. In the Award Flexibility decision, the Commission adopted the June 2012 Full Bench decision and applied it to the applications before it.
3. This decision deals with 15 applications by various employer organisations to vary the flexibility provision in 10 modern awards.
4. The current model flexibility clause was determined by the AIRC Full Bench during the award modernisation process in June 2008. The model clause was slightly modified in September 2008, December 2008 and April 2009.
5. The Full Bench noted that s.145 (dealing with, among other things, termination provisions in the flexibility term) was not part of the legislative framework at the time of the 2008 AIRC Full Bench decision:

“[181] As previously mentioned, s.145 was not part of the legislative framework at the time of the 2008 AIRC Full Bench decision. This legislative change constitutes a ‘significant change in circumstances’ within the meaning of the June 2012 Transitional Review decision. The change is significant because it provides a legislative safeguard which addresses the central rationale for the 2008 AIRC Full Bench decision. The fact that a review of the model flexibility clause was specifically contemplated by the AIRC at the time it was determined is also an important factor. These matters clearly distinguish the circumstances in these proceedings from those which applied in the Transitional Review Penalty Rates case [2013] FWCFB 1635 and the Transitional Review Public Holidays case.”
6. The Commission rejected applications to vary the scope of the model flexibility term but made a number of other variations to the model term.
7. The Full Bench acknowledged that the expression ‘arrangements for when work is performed’ in paragraph 7.1(a) of the model flexibility term, has given rise to some

ambiguity and uncertainty. One way of providing clarification is to identify the specific provisions within modern awards that fall within the expression.

8. The Full Bench rejected VECCI's submission that minimum engagement periods fall within 'arrangements for when work is performed' and then said:

"[117] Having rejected the contention that minimum engagement terms fall within the meaning of the expression 'arrangements for when work is performed', the task remains to provide greater clarity as to the award terms that do fall within that expression. In our view, this is best done on an award by award basis, on application by an interested party. In the event such an application is made we will publish draft variations which will identify the specific clauses in the relevant modern award which fall within the purview of the expression 'arrangements for when work is performed'."

9. The model flexibility term currently provides that an individual flexibility arrangement (IFA) may be terminated by the employer or the individual employee giving 4 weeks' written notice of termination. The employer organisations generally supported increasing the notice period. A range of notice periods were proposed, from 90 days to 16 weeks.

10. The Full Bench decided to increase the notice period to 13 weeks:

"[187] We are persuaded that it is appropriate to increase the period of notice specified in clause 7.8(a) of the model flexibility term. No particular rationale was advanced in support of the 16 week notice period proposed by Greater Union and Birch, Carroll & Coyle. A period of 16 weeks equates to 112 days, which is greater than the 90 day period recommended by the Panel in the Review Report. In our view it is appropriate to give effect to the Panel's recommendation. However, we think it is simpler and easier to understand and administer a notice period which is expressed in weeks rather than days. Accordingly, we propose to vary clause 7.8(a) of the model flexibility term by deleting the reference to 'four weeks' and inserting a reference to '13 weeks'. We are satisfied that such a variation has merit, will enhance the operational effectiveness of the model term and is consistent with the modern awards objective."

11. The Full Bench determined that the model flexibility clause will be varied in the following respects:

- insert the words 'at the time the agreement is made' into clause 7.3(b)
- delete 'four weeks' from clause 7.8(a) and insert '13 weeks'
- insert a note at the end of clause 7.8:

Note: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the *Fair Work Act 2009* (Cth)).

12. In addition to these variations one further variation was adopted in order to improve the level of compliance with the requirements of the model flexibility term. The evidence suggested that a significant proportion of IFAs were entered into before the individual employee has commenced employment, contrary to the intent of the model flexibility term and the Act. To address this issue the Full Bench decided to insert the following words in the model flexibility term:

‘An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.’

13. The Full Bench concluded as follows:

“[211] The variations proposed are necessary to remedy the issues identified in the Transitional Review and to ensure that the model award flexibility term and modern awards are operating effectively, without anomalies or technical problems arising from the award modernisation process. We are also satisfied that the variations proposed are ‘necessary’ (within the meaning of s.138) to achieve the modern awards objective and will ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions having regard to the matters set out at paragraphs 134(1)(a)-(h). In particular, the variations proposed will provide flexible modern work practices and reduce regulatory burden while taking into account the needs of the low paid and making the model flexibility term simpler and easier to understand.

[212] The determinations giving effect to our decision will be settled by Senior Deputy President Watson, with recourse to the Full Bench if necessary. After the Full Bench dealing with the annual leave aspects of the model award flexibility term has decided the applications before it, a statement will be issued setting out the process of implementing our decision (and the decision of the Annual Leave Full Bench insofar as it deals with the model award flexibility term) in all modern awards.”

14. A number of employer submissions also supported varying the model flexibility term to provide greater clarity about the treatment of non monetary benefits in the assessment of the ‘Better Off Overall Test’ (the BOOT). The Full Bench dealt with this issue in these terms:

“[157] We acknowledge that there is a degree of tension between the illustrative example in the Explanatory Memorandum, the FWO Best Practice Guide and the Bupa decision (albeit that the Bupa decision dealt with the NDT, not the BOOT). But we are not persuaded that it is appropriate for us, in these proceedings, to address that issue.

[158] Observations about the application of the BOOT and the matters which can be taken into account in making such an assessment are best made in the context of a particular case, rather than in the abstract. Any reconsideration of the Bupa decision should be in an appropriate context, such as an application to approve an enterprise agreement, and any party seeking such a reconsideration should make application to have the matter referred to a Full Bench, pursuant to s.615A of the FW Act.”

15. The Full Bench also dealt with ‘preferred hours arrangements’ in IFAs. Under these arrangements hours normally paid at overtime or penalty rates are paid at ordinary rates because an employee voluntarily agrees to work those hours at a particular time. The Full Bench said:

“[136] It follows from the foregoing that on the basis of the current authorities a purported IFA which contains a preferred hours arrangement would not, of itself, result in the individual employee being better off overall. The IFA would need to contain a corresponding benefit that outweighs the detriment of the preferred hours arrangement in order to meet the requirements of the BOOT.”

16. A copy of the proposed new model flexibility term is attached, with the variations as a result of this decision highlighted in red.

[\[2013\] FWC FB 2170](#)

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

- ENDS -

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7. Award flexibility

- 7.1** Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:
- (a) arrangements for when work is performed **as set out in:**
[particular award clauses to be specified on an award-by-award basis on application by an interested party];
 - (b) overtime rates;
 - (c) penalty rates;
 - (d) allowances; and
 - (e) leave loading.
- 7.2** The employer and the individual employee must have genuinely made the agreement without coercion or duress. **An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.**
- 7.3** The agreement between the employer and the individual employee must:
- (a) be confined to a variation in the application of one or more of the terms listed in clause 7.1; and
 - (b) result in the employee being better off overall **at the time the agreement is made** than the employee would have been if no individual flexibility agreement had been agreed to.
- 7.4** The agreement between the employer and the individual employee must also:
- (a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;
 - (b) state each term of this award that the employer and the individual employee have agreed to vary;
 - (c) detail how the application of each term has been varied by agreement between the employer and the individual employee;
 - (d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and
 - (e) state the date the agreement commences to operate.
- 7.5** The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.
- 7.6** Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.
- 7.7** An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

(a) by the employer or the individual employee giving ~~four weeks'~~ 13 weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

Note: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the *Fair Work Act 2009* (Cth)).

7.9 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.