



DECISION

Fair Work Act 2009

s.157—Variation of a modern award to achieve the modern awards objective

Application to vary the Educational Services (Schools) General Staff Award 2010

(AM2020/17)

Educational services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 24 APRIL 2020

Application by Independent Schools Victoria and Independent Education Union of Australia to vary a modern award to achieve the modern awards objective – Application supported by IEU and Association of Independent Schools New South Wales, Association of Independent Schools South Australia, Association of Independent Schools Western Australia and Independent Schools Tasmania- no submissions opposing the application – application approved and variation determination made.

1. Background

[1] This decision concerns an application to vary the *Educational Services (Schools) General Staff Award 2010* (MA000076) (the Schools – General Staff Award) filed by Independent Schools Victoria (ISV) on 23 April 2020 (the Application).

[2] ISV and Independent Education Union (IEU) have been in discussions directed at reaching a consent position on changes to the Schools – General Staff Award to mitigate the impact of COVID-19 on employees and employers covered by the award. The Application is the product of those discussions and supported by the IEU and the Association of Independent Schools New South Wales, Association of Independent Schools South Australia, Association of Independent Schools Western Australia, and Independent Schools Tasmania.

[3] The application seeks to insert a new schedule – Schedule J – into the Schools – General Staff Award. The new Schedule J:

- allows an employer to direct an employee to reduce their hours by up to 25% (subject to a number of protections);
- contains a clause regarding operational flexibility; and

- provides that any dispute regarding the operation of the Schedule may be referred to the Commission in accordance with clause 9 of the award.

[4] On 23 April 2020, we issued a statement (the 23 April Statement)¹ setting out the background to the application and expressed the following *provisional* view:

‘taking into account the relevant s.134 considerations ... the variation of the Schools – General Staff Award as proposed in the Application is necessary to achieve the modern awards objective.’²

[5] In the 23 April Statement, we invited any interested party to file a written submission supporting or opposing the Application and our *provisional* view by 4pm on Friday 24 April 2020.

[6] In the 23 April Statement we said that if no submissions were filed opposing the Application and our *provisional* view we would grant the application and vary the award accordingly. No such submissions were received. Accordingly, for the reasons which follow, we grant the application and will vary the award. The hearing *provisionally* listed for 10am on Sunday 26 April 2020 is vacated.

[7] In a decision³ concerning the *Hospitality Industry Award 2010* (the Hospitality Decision) we observed that the notice provided to parties of the hearing of that application was much shorter than the Commission’s standard practice. We make the same observation in respect of the present matter. At [9] – [11] of the Hospitality Decision we set out the Commission’s obligations to afford procedural fairness and noting the content of the doctrine of procedural fairness is determined by the context, we concluded as follows:

‘[11] Relevantly, s.577(a) and (b) provide that the Commission must perform its functions and exercise its powers in a manner that:

- ‘(a) Is fair and just; and
- (b) Is quick, informal, and avoids unnecessary technicalities;’.

[12] The key contextual considerations in the matter before us are:

- the statutory framework;
- the consent of the key interested parties;
- the parties’ joint request for expedition; and
- the need to respond quickly to a rapidly changing industrial environment.

[13] In this instance, the consent of the key industrial parties’ is the central consideration.

[14] In the event that this application had been contested then, plainly, different considerations would have been enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter.’

¹ [2020] FWCFB 2112

² Ibid at [20]

³ [2020] FWCFB 1574

[8] Similar circumstances arise in the present matter. The Application was made with the consent of the key industrial parties. As we have mentioned, a statement in relation to the Application was published on the Commission’s website and sent to all subscribers on 23 April 2020. Any interested party was provided with an opportunity to respond to the Application. In these circumstances we are satisfied that we have met our obligation to afford procedural fairness to those affected by the Application.

2. COVID-19 Pandemic

[9] The Application arises from the unique set of circumstances pertaining to the COVID-19 pandemic. The Commission has published an Information Note about measures taken in response to the COVID-19 pandemic, which can be accessed [here](#).

[10] In a series of decisions we have granted consent applications to vary the:

- *Hospitality Industry (General) Award 2010*⁴
- *Clerks – Private Sector Award 2010*⁵
- *Restaurant Industry Award 2010*⁶

[11] These decisions inserted short term measures to provide additional flexibilities to address the consequences of the COVID-19 pandemic.

[12] On 8 April 2020 a Full Bench of the Commission issued a decision⁷ (the April 2020 Decision) varying 99 modern awards to insert the new Schedule – ‘Schedule X - additional measures during the COVID-19 pandemic’. Schedule X provides an entitlement to unpaid ‘pandemic leave’ and the flexibility to take twice as much annual leave at half pay. The following documents informed the Commission’s decision:

- [Information Note on modern awards and industries](#);
- [Information Note on bargaining by business size](#);
- [Information Note on Government responses to the COVID-19 pandemic](#); and
- [Expert report by Professor Borland](#).

[13] In the April 2020 Decision the Full Bench also encouraged industrial parties to continue (or enter into) discussions directed towards consent applications to vary modern awards.

3. The Application

[14] As mentioned earlier, the Application seeks to add a new schedule – Schedule J – to the Schools – General Staff Award. It is proposed that the new schedule operate until 1 August 2020. Schedule J proposes flexibilities in the relation to:

⁴ [\[2020\] FWCFB 1574](#)

⁵ [\[2020\] FWCFB 1690](#)

⁶ [\[2020\] FWCFB 1741](#)

⁷ [\[2020\] FWCFB 1837](#)

- the capacity to direct a full time or part time employee to reduce their hours by up to 25%; and
- certain operational flexibilities

[15] We note that the ability of an employer to direct a full time or part employee to reduce their ordinary hours by up to 25% pursuant to clause J.3.1(a) will be subject to a number of safeguards including:

- the notice of intention must be in writing;
- the direction comes into effect 5 days after the notice of intention is issued to the employee and remains in force for a period of no more than 12 weeks;
- immediately after issuing a notice of intention the employer must discuss the reason behind the direction with the employee (or their representative) and must notify the IEU;
- an employee given a direction will continue to accrue annual leave, personal/carers leave and other accruals based on their ordinary hours of work prior to the reduction in hours resulting from the direction;
- a full time employee directed to reduce their hours retains their substantive full time position; and
- any redundancy payment will be made at the employees substantive fraction prior to the issuing of the direction.

[16] Clause J.3.2(a) of Schedule J provides:

‘As directed by their employer, where necessary an employee will perform any duties that are within their skills and competency regardless of their classification under clause 14 and Schedule B – Classification, provided that the duties are safe, and that the employee is licensed and qualified to perform them.’

[17] The capacity to make directions under clause J.3.2(a) is subject to the following safeguards:

- the duties must be safe and the employee must be licensed and qualified to perform them;
- the employee’s pay must not be reduced; and
- where employees are directed by their employer to perform duties at a higher level than their substantive classification, the higher level classification rates of pay will apply.

[18] The Application notes that as a consequence of the pandemic:

‘schools have had to change the way they deliver their educational curriculum and associated offerings to allow for predominant or exclusive remote learning ...

As a result of the need for remote learning, some work that is performed by employees under the [Award] has been significantly affected.’

4. Consideration

[19] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the *Fair Work Act 2009 (Cth)* (the Act) and provides as follows:

‘What is the modern awards objective?’

134(1) The FWC 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
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; 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**.

When does the modern awards objective apply?

- (2) The modern awards objective applies to the performance or exercise of the FWC’s **modern award powers**, which are:
 - (a) the FWC’s functions or powers under this Part; and
 - (b) the FWC’s functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).’

[20] The modern awards objective is to ‘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 the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[21] The modern awards objective is very broadly expressed.⁸ It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss.134(1)(a)–(h).⁹ Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.¹⁰

[22] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.¹¹ No particular primacy is attached to any of the s.134 considerations¹² and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[23] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.¹³ Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.¹⁴ In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[24] Section 138 of the Act emphasises the importance of the modern awards objective:

‘Section 138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.’

[25] What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.¹⁵

[26] We now turn to the modern awards objective.

⁸ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

⁹ (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

¹⁰ [2018] FWCFB 3500 at [21]–[24]

¹¹ *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]–[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

¹² *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

¹³ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]–[106]

¹⁴ See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]–[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission’s task in the Review

¹⁵ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

[27] We have set out earlier the changes proposed by the Application. We note that proposed Schedule J is about matters that may be included in a modern award pursuant to ss.136(1)(a) and ss.139(1)(a), (b), (c) and (j) of the Act.

[28] The considerations in s 134(da), (e) and (g) are not relevant to the Application. We deal with the other considerations below.

s. 134(1)(a): relative living standards and the needs of the low paid

[29] A threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid,’¹⁶ within the meaning of s.134(1)(a).

[30] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is \$920.00. Data on median weekly full-time earnings are also available from the EEH survey for May 2018, and two-thirds of median earnings is equal to \$973.33.

[31] Using the two-thirds of median full-time wages as the benchmark, employees paid at classification levels 1 to 4.1 in the Schools – General Staff Award are ‘low paid’ within the meaning of s.134(1)(a).

[32] We accept that the proposed variation may result in low paid employees working less hours and consequently receiving less pay. It is axiomatic that such a reduction in pay will mean that they are less able to meet their needs. But, as noted in the Hospitality decision, employers and employees face an invidious choice and the retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority.

[33] We also note the agreed measures to mitigate the impact of reduced hours, particularly by maintaining relevant accruals and the requirement for consultation with affected employees and their representatives, and notification to the IEU.

s. 134(1)(b) the need to encourage collective bargaining

[34] The proposed variation may be said to decrease the incentive for employers to bargain; but it is also likely that employee and employer decision making about whether or not to bargain is influenced by a complex mix of factors. It is also relevant that the proposed variation is time limited. Section 134(1)(b) speaks of ‘the need to *encourage* collective bargaining’. We are not persuaded that the proposed insertion of Schedule J would ‘*encourage* collective bargaining’. It follows that this consideration weighs against the variation proposed.

s. 134(1)(c) the need to promote social inclusion through increased workforce participation

[35] This consideration is directed at obtaining employment. The variation will facilitate the parties’ shared objective of retaining as many employees in employment as practicable in the

¹⁶ [\[2017\] FWCFB 1001](#) at [166]

current crisis. While the variation will not increase workforce participation it will assist in mitigating the employment impacts associated with the COVID-19 pandemic.

s. 134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

[36] It is convenient to deal with these considerations together. The proposed variation will promote flexibility and the ‘efficient and productive performance of work’ and will reduce the regulatory burden on business. This is a factor which weighs in favour of making the variation sought.

s.134(1)(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.

[37] Granting the application is not likely to have any appreciable impact on ‘employment growth, inflation and the sustainability, performance and competitiveness of the national economy’. Accordingly, this consideration is neutral.

5. Conclusion

[38] As we have noted, the terms in Schedule J may be included in a modern award pursuant to ss.136(1)(a) and ss.139(1)(a), (b), (c) and (j) of the Act.

[39] We are satisfied that the variation proposed is necessary to achieve the modern awards objective (s.157) and in so deciding we have taken into account the considerations in s.134(1)(a) to (h) insofar as they are relevant. Further, once varied the Schools – General Staff Award will only include terms to the extent necessary to achieve the modern awards objective (s.138).

[40] For the reasons set out above we will make the variation determination sought. The determination will come into operation on 24 April 2020. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after the day the determination comes into operation.

[41] A copy of the variation determination is at **Attachment A**.

PRESIDENT

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<PR718489>

Attachment A

MA000076 PR718559



DETERMINATION

Fair Work
Act 2009

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

Independent Schools Victoria

(AM2020/17)

EDUCATIONAL SERVICES (SCHOOLS) GENERAL STAFF AWARD 2010

[MA000076]

Educational services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 24 APRIL 2020

Variation to the Educational Services (Schools) General Staff Award 2010 Application to vary the Educational Services (Schools) General Staff Award 2010 – Schedule J – award varied.

A. Further to the decision [[2020] FWCFB 2108] issued by the Full Bench of the Fair Work Commission on 24 April 2020, the above award is varied as follows:

1. By inserting Schedule J as follows:

Schedule J

J.1 Preamble

The purpose of Schedule J is to assist employers and employees in managing and lessening the effect of the Covid-19 pandemic. It is intended to facilitate keeping employees in work in circumstances where the employer has experienced a significant reduction in income and/or a significant diminution in operation.

J.2 Schedule J operates from 24 April 2020 until 1 August 2020. The period of operation can be extended on application.

J.3 During the operation of Schedule J, the following provisions apply:

J.3.1 Direction to reduce hours

- (a) An employer may issue a notice of intention in writing to direct a full-time or part-time employee to reduce their ordinary hours by up to 25% of their ordinary hours. Subject to the terms of this clause, the direction will come into effect 5 days after the notice of intention was issued and will remain in force for a period of no more than 12 weeks.
- (b) Immediately after issuing a notice of intention to direct under clause J.3.1(a) an employer must:

 - (i) discuss the reason behind the direction with the employee or their representative
 - (ii) notify the Independent Education Union of its intention to implement the change(s) in ordinary working hours
- (c) Where an employer complies with clause J.3.1(b) and the discussions result in a different reduction than that contained in the notice of intention, the employer does not need to provide the 5 day notice period again.
- (d) Upon the expiration of a direction made under clause J.3.1(a), an employer can issue a further notice of intention to direct if the circumstances in clause J.1 necessitate.
- (e) An employee given a direction under clause J.3.1(a) will continue to accrue annual leave and personal/carer's leave, and any other applicable accruals under this Award, based on each full-time or part-time employee's ordinary hours of work prior to the reduction in hours occurring as a result of a direction given in accordance with clause J.3.1(a).
- (f) If an employee given a direction under clause J.3.1(a) takes a period of paid annual leave or personal/carer's leave, the payment for that leave will be based on the full-time or part-time employee's ordinary hours of work prior to the reduction in hours as a result of a direction given in accordance with clause J.3.1(a).
- (g) Where an employee typically receives payment during periods of leave without pay in non-term time pursuant to an arrangement under clause 11—Leave without pay during non-term weeks, the employee will be paid during non-term time at the reduced rate of pay. However, in accordance with clause J.3.1(f) above, this does not apply to a period of annual leave taken during non-term weeks in the relevant year. Upon the conclusion of the direction all such employees will receive payment for subsequent non-term periods at the annualised rate of pay applicable prior to the commencement of the direction.
- (h) Consistent with the temporary basis of this schedule a full-time employee directed to work part-time retains their substantive full-time position.

- (i) Any direction provided pursuant to this clause will not enliven clause 13 – Redundancy for any employee. In the event that the employer seeks to affect a larger reduction or to declare the role redundant, an employer will need to comply with clause 8 – Consultation and clause 13 – Redundancy. Any redundancy payment will be made at the employee’s substantive fraction prior to the issuing of the direction.
- (j) Notwithstanding any other provision in this award an employee whose employment is subject to a 25% reduction consistent with this clause cannot have their ordinary hours of work further reduced.

J.3.2 Operational flexibility

- (a) As directed by their employer, where necessary an employee will perform any duties that are within their skill and competency regardless of their classification under clause 14 and Schedule B – Classifications, provided that the duties are safe, and that the employee is licensed and qualified to perform them.
- (b) An employer must not reduce an employee’s pay if the employee is directed to perform duties in accordance with clause.
- (c) Where employees are directed by their employer to perform duties at a higher level than their substantive classification, the higher level classification rates of pay will apply.

J.3.3 Dispute resolution

Any dispute regarding the operation of this Schedule may be referred to the Fair Work Commission in accordance with Clause 9 – Dispute Resolution

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into effect on 24 April 2020. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after 24 April 2020.

PRESIDENT

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