



DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 5, Item 6 - Review of all modern awards (other than modern enterprise and State PS awards) after first 2 years

ACT School Canteen Association Incorporated and others
(AM2012/3 and others)

Educational Services

COMMISSIONER DEEGAN

CANBERRA, 22 JULY 2013

Modern Awards Review 2012 - application to vary the Educational Services (Schools) General Staff Award 2010.

[1] This decision concerns four applications to vary the Educational Services (Schools) General Staff Award 2010 [MA000076] (the Award) made by:

- The ACT School Canteen Association Incorporated (AM2012/3);
- The ACT Council of Parents and Citizens Association Incorporated (AM2012/6);
- The National Catholic Education Commission (NCEC) (AM2012/13); and
- The Independent Schools Association of Victoria on behalf of Independent Schools Tasmania, Independent Schools Queensland, the Associations of Independent Schools in New South Wales, South Australia and Western Australia (AM2012/117).

[2] The applications are made under Sch. 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) as part of the review of all modern awards which the Fair Work Commission (the Commission)¹ is required to conduct after the first two years of all modern awards coming into effect (the 2012 Review).

[3] The decision also deals with two technical amendments to the Award put forward by the Commission.

Relevant legislation

[4] Schedule 5, Item 6 of the Transitional Act provides:

- (1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, the FWC must conduct a review of all modern

awards, other than modern enterprise awards and State reference public sector modern awards.

- (2) In the review, the FWC must consider whether the modern awards:
- (a) achieve the modern awards objective; and
 - (b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

(2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

(3) The FWC may make a determination varying any of the modern awards in any way that the FWC considers appropriate to remedy any issues identified in the review.

(4) The modern awards objective applies to the FWC making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.

(5) The FWC may advise persons or bodies about the review in any way the FWC considers appropriate.

(6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of the FWC) has effect as if subsection (2) of that section included a reference to the FWC's powers under subitem (5).

[5] Provisions of the *Fair Work Act 2009* (the Act) are also applicable and relevant to the 2012 Review. Sections 134 and 138 provide as follows:

134 The modern awards objective

What is the modern awards objective?

(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
- (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*.

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.

The Full Bench Decision

[6] In considering these applications I have been guided by the Full Bench decision of 29 June 2012² concerning the conduct of the 2012 Review. The Full Bench said:

[63] Under subitem 6(3) of Schedule 5, the Tribunal has a broad discretion to vary any of the modern awards in any way that it considers necessary to remedy any issues identified in the Review. However, subitem 6(4) provides that in making such a variation the Tribunal must take into account the modern awards objective in s.134 of the FW Act, and, if varying modern award and minimum wages, the minimum wages objective in s.284.

[7] The Full Bench also said:

[89] In circumstances where a party seeks a variation to a modern award in the Review and the substance of the variation sought has already been dealt with by the Tribunal in the Part 10A process, the applicant will have to show that there are cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome.

[8] In relation to the application of s.138 of the Act to the 2012 Review the Full Bench said:

[33] We are satisfied that s.138 is relevant to the Review. The section deals with the content of modern awards and for the reasons given at paragraph [25] of our decision it is a factor to be considered in any variation to a modern award arising from the Review. We also accept that the observations of Tracey J in *SDAEA v NRA (No.2)*, as to the distinction between that which is “necessary” and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.

[34] While s.138 is relevant to the Review there is still the question of the extent of its impact and the circumstances in which it will have on an application to a variation

determination. The supplementary submissions revealed a diversity of views about these issues. We are not persuaded that these issues have been the subject of sufficient debate at this stage. The precise impact of s.138 is a question best considered in the context of a particular application. We agree with the RCAV's supplementary submission that "the nature of the evidence and the facts as found arising from that evidence will condition the exercise of power and the ultimate outcome required to be determined by the review".

Application by ACT School Canteen Association Incorporated (AM2012/3) and Application by ACT Council of Parents & Citizens Association Inc (AM2012/6)

[9] These applications are conveniently dealt with together as they relate to the same issue. AM2012/3 was filed on 24 January 2012 and AM2012/6 was filed on 2 February 2012. Neither application sets out the variation sought. Both applicants appear to be seeking a variation to Clause 3 Coverage of the Award to clarify the award coverage of staff employed in school canteens in the ACT.

[10] No submissions or evidence was filed by either applicant in accordance with the Directions issued on 19 April 2013.

[11] On 24 May 2013, the Australian Education Union (AEU) responded to the applications stating that the issues raised are not matters that fell within the terms of the Review as set out in Item 6(2) of Schedule 5 and the Full Bench principles.

[12] On 17 May 2013, the Independent Schools Victoria and other associations represented by the organisation responded to the applications noting that any change to the coverage clause of the Award would need to be carefully considered as it could have an inadvertent effect on other suppliers of school services.

[13] Given the form of the applications filed and the failure to provide any further submissions or evidence in support of the application, I have determined that I do not have before me the necessary information upon which I could be satisfied that a variation to the Award is necessary to meet the modern awards objective. Further, it is not clear from the scant information provided that the Award in its current form is not meeting the modern awards objective.

[14] For the reasons I have provided, applications AM2012/3 and AM2012/6 are dismissed.

Application by National Catholic Education Commission (AM2012/13)

[15] This application sought to vary Clause 16.9 Vehicle Allowance to decrease the amount payable per kilometre where an employee is required to use his or her own motor vehicle for the performance of their duties. The NCEC sought to decrease the allowance to the "Tax Office Rate".

[16] The Independent Education Union (IEU) responded to this application noting that the provision was common to all modern awards and that the NCEC did not cite any industry

specific reason for the variation. The IEU took the view that the application would need to be considered by a Full Bench if it was found at this stage of the 2012 Review to have merit.

[17] The representative of Independent Schools Victoria and Others also noted that the matter of a vehicle allowance had been considered during the Part 10A award modernisation process (Part 10A process) and that the Full Bench had rejected an application to set the allowance at the Tax Office Rate. In those circumstances it was submitted that the application made by the NCEC was not permitted under the principles of the 2012 Review.

[18] Community Connections Solutions Australia (CCSA) also objected to the variation noting that the Australian Taxation Office does not set vehicle allowance rates but issues guidance on the tax free component. It was submitted that the variation does not address an anomaly or a technical problem arising from the Part 10A award modernisation process but would operate to disadvantage both employees and employers.

[19] The subject of this variation was dealt with by the Full Bench in the Part 10A process. The applicant has shown no cogent reason for departing from the previous Full Bench position. Accordingly, application AM2012/13 is dismissed.

Application by Independent Schools Victoria and Others (AM2012/117)

[20] On 8 March 2012 Independent Schools Victoria, on behalf of Independent Schools Tasmania, Independent Schools Queensland, the Associations of Independent Schools in New South Wales, South Australia and Western Australia made an application to vary a number of clauses in the Award. Three of the four variations proposed were withdrawn before the hearing.

[21] The remaining variation seeks to vary the Award to correct what appears to be minor drafting errors in clauses 22.3(a)(ii) and 22.3(e)(i) of the Award in order that the description of the classification groups is consistent.

[22] No other interested party who made submissions concerning this application objected to the variation.

[23] I am satisfied that the proposed variation to clauses 22.3(a)(ii) and 22.3(e)(i) of the *Educational Services (Schools) General Staff Award 2010* is appropriate and consistent with the legislative requirements and objectives. I will make a determination consistent with this.

The Technical Amendments

[24] The Commission suggested a technical change to the Award for the purpose of providing a more transparent process when adjusting wages as a consequence of the Annual Wages Review. Currently the Award does not specify the method used to convert wages from weekly to annual amounts despite the fact that the Award provides both annual and weekly wages. It was suggested that the mechanism in clause 11 of the Award determining the salary for employees on leave without pay be adopted for this purpose.

[25] Notification of the suggested variation was published on the website as part of the Directions issued on 19 April 2013 and interested parties were asked to provide their views. No interested party opposed the variation and a number supported it. A determination varying the Award to provide for the conversion of wages from weekly to annual amounts will be issued with this decision.

[26] This completes the review of the Award other than in respect of matters that have been referred to a Full Bench.



Appearances:

Mr D. Colley for the Australian Education Union.

Mr A. Odgers, with Ms C. Matthews, for the Independent Education Union of Australia.

Ms K. Knopp for the Independent Schools Victoria and Others.

Hearing details:

2013.

Melbourne:

May 27.

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¹ On 1 January 2013, Fair Work Australia was renamed the Fair Work Commission (the Commission). In this decision I have referred to the Commission which incorporates reference to Fair Work Australia as it was known prior to 1 January 2013.

² [2012] FWAFB 5600.