



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

BPL Adelaide Pty Ltd
(AM2012/331)

Poultry Processing Award 2010
[MA000074]

Poultry processing

COMMISSIONER HAMPTON

ADELAIDE, 30 AUGUST 2013

Modern Awards Review 2012 - matters allocated to single member - rest breaks provision - whether ambiguous and uncertain - whether award operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process - operation of award provision problematic and leading to anomalies - award to be varied - whether proposed provision is appropriate - proposal consistent with the apparent intent of clause and with modern awards objective - determination issued varying the award.

1. Background

[1] This decision deals with an application to vary the *Poultry Processing Award 2010* made by BPL Adelaide Pty Ltd (BPL). This, along with many other applications, have been made in the context of the review of modern awards being conducted by the Fair Work Commission in accordance with the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act) (the Transitional Review).

[2] The application concerns a single provision of the award; namely, clause 25.2 *Rest Breaks*. The context for this provision is set by clause 25 *Breaks*, which presently reads as follows:

“25. Breaks

25.1 Meal breaks

An employee is entitled to an unpaid meal break on each day of work of not less than 30 minutes or more than 60 minutes to be taken not later than six hours after the commencement of work.

25.2 Rest breaks

An employee is entitled to rest breaks of 10 minutes each in the forenoon and in the afternoon, without deduction of pay.

25.3 Crib time

Where shiftwork comprises consecutive shifts of at least eight hours each per day, an employee working shiftwork is entitled to a paid 20 minute crib time instead of any other meal break provided in this award.”

[3] BPL contends that the provision is ambiguous and such that it produces results which are uncertain and potentially absurd. It has proposed a revised clause that it contends is clear, appropriate and consistent with the outcomes contemplated by the Transitional Review.

[4] The proposed provision was amended on one limited aspect during the course of proceedings.

[5] The South Australian Employers Chamber of Commerce and Industry, trading as Business SA (BSA) and Australian Business Industrial (ABI) support the proposed variation.

[6] The National Union of Workers (NUW), “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) and The Australian Workers’ Union (AWU) have all indicated that they do not oppose the variation of the award to insert the amended provision.

[7] The amended provision is however opposed by the Australian Federation of Employers and Industry (AFEI) and The Australian Industry Group (AiG) on the basis of certain jurisdictional and merit grounds.

[8] The following issues arise for determination in this matter:

- Is clause 25.2 such that the Poultry Processing Award 2010 should be varied as part of the Transitional Review; and if so
- What should the revised provision be?

2. The application and the case in support

[9] BPL’s application as amended proposes that the existing clause 25.2 be replaced with the following provision:

“25.2 Rest breaks

- (a) An employee is entitled to one rest period of ten minutes during a shift with a duration of more than three hours and less than or equal to six hours (excluding any unpaid meal break).

- (b) An employee is entitled to two rest periods of 10 minutes each during a shift with a duration of more than six hours (excluding any unpaid meal break).”

[10] Mr Parker, who appeared with permission for BPL, contends that the existing clause was both uncertain and inequitable in its application. In particular, BPL contends that there was no definition of the terms “forenoon” and “afternoon” within the award and the use of a dictionary definition¹ in that context (for example) could lead to apparently unintended consequences. These included:²

- Employees being entitled to one paid rest period if they work hours of **any** duration between sunrise and noon and another paid rest break if they work **any** hours between noon and sunset;
- Employees working night shift are not entitled to any paid rest breaks;
- Employees working a full shift of any duration that does not fall into both forenoon or afternoon are only entitled to a single paid break; and
- Employees working shifts of any duration that extend across noon (such as 11.00am to 2.00pm) would be entitled to two paid rest breaks.

[11] BPL contends that the proposed new clause would ensure that an employee who works more than three hours and up to six hours in a shift would receive one rest break. An employee working more than six hours would be entitled to two rest periods. This was said to be clear in its application and apply to all relevant employees in a consistent manner.

[12] In relation to the jurisdiction of the Commission to grant the application, BPL contends that the amendment was necessary to meet the modern award objective and in particular to ensure that it was simple and easy to understand, operating efficiently and without anomalies.

[13] BPL also contends that the existence of clauses similar to the existing award in some other former instruments did not mean that the application of the provision was clear. In particular, it argues that the relevant terms had not been the subject of any decisions or judicial clarification and remains ambiguous.

[14] BPL put in the alternative, that the Commission could exercise its own jurisdiction pursuant to s.160 of the Act to vary the award to remove any ambiguity or uncertainty.

[15] BSA and ABI support the submissions of BPL and the amended application.

3. The positions of the other parties

[16] As outlined earlier, all of the employee organisations seeking to be heard indicated that they did not oppose the amended application. The NUW further contends that the existing clause leads to anomalies and technical issues and that the application should be dealt with on its merits. This approach was supported by the AMWU and AWU.

[17] AFEI opposes the application and contends that the existing provision was considered by the Full Bench as part of the award modernisation process and that the final clause adopted

reflected the approach found in former NAPSAs³ applying in New South Wales⁴ and Queensland.⁵

[18] AFEI also contends that there had been no evidence of actual concerns with the existing provision and no evidence that the award was not operating effectively. In relation to shift workers, it also argues that these workers were on different arrangements with paid meal breaks and the differential application of clause 25.2 was not anomalous.

[19] In the event that the Commission found that the existing clause was uncertain, the AFEI contends that the amended proposal was not the appropriate remedy.

[20] AiG also opposes the application, supports the position of the AFEI, and contends that there was no evidence to support the alleged concerns. Further, AiG notes that the application was lodged by a single employer. In that light, it suggests that the issue could be dealt with through an enterprise agreement. It further contends that the use of the terms “forenoon” and “afternoon” had operated in similar clauses in two of the NAPSAs and some other instruments⁶ without apparent problems.

[21] To the extent that there was a problem with the existing clause, AiG contends that the uncertainty did not arise from the part 10A award modernisation process and the proposed new clause went well beyond addressing the issues arising from the use of the terms “forenoon” and “afternoon.” As such, AiG says that the application, if granted, would significantly increase the rest break entitlements of afternoon and night shift workers and reduce flexibility in the workplace.

4. Consideration

4.1 Is clause 25.2 such that the Poultry Processing Award 2010 should be varied as part of the Transitional Review?

[22] The legislative context for the Transitional Review is principally set out in Item 6 of Schedule 5 of the Transitional Provisions Act:

“6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years

- (1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.

Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWA is required to conduct under the FW Act.

- (2) In the review, FWA 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 FWA from reviewing 2 or more modern awards at the same time.
 - (3) FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.
- Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).
- (4) The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.
 - (5) FWA may advise persons or bodies about the review in any way FWA considers appropriate.
 - (6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA's powers under subitem (5).

[23] The modern awards objective is set out in s.134 of the Act:

“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.”

[24] The legislative context for the Transitional Review was comprehensively dealt with in a Full Bench decision⁷ of 29 June 2012 (the June 2012 Full Bench decision). Further, the Full Bench in *Modern Awards Review 2012 - Penalty Rates*⁸ further observed as follows:

“[8] The June 2012 Full Bench decision construed Item 6 according to its terms, having regard to the context and legislative purpose. Part of that context was the award modernisation process conducted by the former Australian Industrial Relations Commission under Part 10A of the Workplace Relations Act 1996 (Cth) (the WR Act). We deal with the award modernisation process in section 2 of this decision.

[9] The June 2012 Full Bench decision observed that two points about this historical context were particularly relevant:

“The first is that awards made as a result of the award modernisation process are now deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Provisions Act). Implicit in this is a legislative acceptance that the terms of the existing modern awards are consistent with the modern awards objective. The second point to observe is that the considerations specified in the legislative test applied by the Tribunal in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective which now appears in s.136...”

[10] The June 2012 Full Bench decided that two other textual considerations were also relevant. The first is that subitem 6(2)(b) of Schedule 5 directs specific attention to whether modern awards ‘are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.’ No such legislative direction is reflected in the provisions which deal with the 4 yearly review of modern awards (s.156 of the Act).

[11] The second textual consideration is that, Item 6 does not prescribe how the Commission is to be constituted for the purpose of conducting the Transitional Review. This may be contrasted with the 4 yearly reviews provided in s.156 and the award modernisation process under Part 10A of the WR Act, both of which are to be conducted by a Full Bench. The fact that the Transitional Review of a modern award

may be conducted by a single member also suggests that the legislature contemplated that the Transitional Review would be more confined in scope than the 4 yearly reviews in s.156.

[12] These considerations led the June 2012 Full Bench to conclude as follows:

“[91] It is important to recognise that we are dealing with a system in transition. Item 6 of Schedule 5 forms part of transitional legislation which is intended to facilitate the movement from the WR Act to the FW Act. The Review is a “one off” process required by the transitional provisions and is being conducted a relatively short time after the completion of the award modernisation process. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. In this context it is particularly relevant to note that s.134(1)(g) of the modern awards objective requires the Tribunal to take into account:

“the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia . . .”

[99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a “high threshold” for the making of variation determinations in the Review, as proposed by the Australian Government and others.

[100] The adoption of expressions such as a “high threshold” or “a heavy onus” do not assist to illuminate the Review process. In the Review we must review each modern award in its own right and give consideration to the matters set out in subitem 6(2). In considering those matters we will deal with the submissions and evidence on their merits, subject to the constraints identified in paragraph [99] above.”

[13] We now return to Item 6 of Schedule 5.

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

[25] I have applied this approach to the determination of this application.

[26] The terms of clause 25.2 were considered and included by the AIRC as part of the Part 10A award modernisation process⁹ and on that basis, it is appropriate to consider whether there are cogent reasons to support a variation as part of the Transitional Review. The Full Bench in each decision referred to above has noted the relatively narrow scope of the Review but also emphasised that a broad discretion is established by subitem 6. Importantly, it is the considerations of the Act that must be applied; namely whether the award achieves the modern awards objective and is operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

[27] Having considered the terms of the award, its establishment by the AIRC, and the materials and submissions provided by the parties, I find that clause 25.2 is such as to be uncertain in its application. Further, I also find that the provision creates anomalies and technical problems in its application so as to fall within the scope of subitem 6(2)(b) of the Transitional Act.

[28] The terms “forenoon” and “afternoon” are not defined in the award and given the context in which they are to be applied are capable of multiple meanings. They might be taken to refer to all hours that fall before noon (am) and after noon (pm) respectively; however, a more natural application of these concepts would be the daylight hours falling with those parameters.

[29] The fact that these terms were used in some of the former NAPSAs is a relevant consideration however as there is no indication that a definitive or authoritative meaning has been applied in that context, clause 25.2 remains uncertain. I note also that the provisions of each of the former NAPSAs are different with only the Queensland award¹⁰ containing the precise formulation now found in clause 25.2.

[30] Further, as contended by BPL, the clause produces differential results depending upon when employees are engaged, without any apparent justification for those results. This includes the provision of a rest break without any minimum period of work in either the am or pm (for example) and the potential for two rest breaks in a single short “shift” simply because part of the period of work falls either side of noon.

[31] In terms of shift workers, it is the case that the award in clause 25.3 provides paid crib breaks for some of these employees and this could be one reason why the existing rest break provision should not apply. But clause 25.2, however applied, does not consistently exclude, or apply to, shift workers. It would appear to apply to any shift work falling in the morning (or am) period and/or in the afternoon (or pm) period. Only those shift workers who may work hours completely outside of those periods would appear to be excluded. On that basis, anomalies between employees - both shift and non-shift workers - arise from the existing clause.

[32] It is also evident that the clause 25.2 was expressly inserted as part of the Part 10A award modernisation process and this is sufficient to mean that the anomalies and technical problems arose from that process. I also consider that the degree of uncertainty and

differential application of the existing clause is such that cogent reasons exist to vary the award as part of the Transitional Review.

[33] In making each of the above findings I have considered the absence of specific evidence of the difficulties arising from the provision. However, in this case the uncertainty and differential application arises directly and evidently from the existing award provision itself. I note that this is akin to the circumstances faced by the Full Bench when dealing with the issue of compensation for public holiday work under the *General Retail Industry Award 2010* as considered in the *Modern Award Review 2012 - Public Holidays*¹¹ matter.¹²

[34] On the basis of my findings it is appropriate to vary the award in relation to clause 25.2 as part of the Transitional Review.

4.2 What should the revised provision be?

[35] The clause proposed in the revised application has been set out earlier in this decision. It maintains the fact that each rest period is of ten minutes duration and is unpaid. It also introduces the following new concepts:

- One rest break for a work period (shift) between three hours and less than or equal to six hours (excluding any unpaid meal break); and
- Two rest breaks during a work period (shift) with a duration of more than six hours (excluding any unpaid meal break).

[36] I have, as suggested by AiG, considered the terms of the various former NAPSAs applying in the industry. I have also considered the other relevant provisions of this award with a view to giving effect to the modern awards objective.

[37] The concept of having two rest periods in the course of a normal full work “shift” is consistent with the intent of the former NASPAs and the thrust of the existing clause 25.2. Further, the concept of limiting the single rest period to “shifts” between three and six hours is also broadly consistent with the minimum engagement provisions of the award (clause 12.5 and clause 13.1) and the benchmark for the meal break provision (clause 25.1).

[38] I accept that the proposed clause will potentially provide an additional entitlement to some shift workers. However, it will also potentially reduce the entitlement for some workers who by reason only of working across noon are presently entitled to two rest breaks.

[39] Importantly, and subject to two minor editorial revisions, I consider that the proposed new clause is fair and reasonable given the modern awards objective. Its intended application will also be clear and consistent.

[40] The clause would be clearer if it referred to “rest **breaks**” and did not refer to “shifts” given that this latter expression is only used within this award in relation to shiftworkers. The amended provision will refer to “periods of work” in that regard.

5. Conclusion

[41] I have found that the award should be varied in relation to clause 25.2 as part of the Transitional Review. I have also found that the proposal set out in the amended application, with minor adjustments, is appropriate in all of the circumstances.

[42] I have issued a determination¹³ varying the award in conjunction with this decision. That determination establishes that the variation will come into effect on and from 23 September 2013. I note that the effect of the Act is that the determination will take effect in relation to employees at the start of each employee's first full pay period that starts on or after that date.¹⁴



Appearances:

J Parker of Minter Ellison with permission for BPL Adelaide Pty Ltd.

S West of the South Australian Employers Chamber of Commerce and Industry, trading as Business SA and for Australian Business Industrial.

T Doyle of the Australian Federation of Employers and Industry.

G Vaccaro of the Australian Industry Group.

K Veleso of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU).

J Blaxland of the Australian Workers' Union.

P Richardson of the National Union of Workers

Hearing details:

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¹ Macquarie Dictionary.

² Schedule to the application.

³ Notional Agreement Preserving a State Award.

⁴ *Poultry Industry Preparation (State) Award* (NSW).

⁵ *Poultry Processing Award - State* (Qld).

⁶ Some enterprise agreements have adopted a similar model to the existing award clause.

⁷ *Modern Awards Review 2012* [2012] FWAFB 5600.

⁸ [2013] FWCFB 1635.

⁹ The clause was inserted in the award by the AIRC in the present form following the publication of a draft containing a different proposal.

¹⁰ Clause 6.2.3.

¹¹ [2013] FWCFB 2168.

¹² *Ibid* at par [175]. See also *Shop, Distributive and Allied Employees Association* [2013] FWC 4949.

¹³ PR540794.

¹⁴ S.165 of the Act.