

[2016] FWCFB 191

The attached document replaces the document previously issued with the above code on 11 January 2016.

The year of issue on page one has been amended from '2015' to '2016'.

Miriam Henry
Associate to Justice Ross, President

Dated 11 January 2016



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Alleged NES Inconsistences

(AM2014/1)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT BULL
COMMISSIONER BISSETT

MELBOURNE, 11 JANUARY 2016

NES Inconsistences - Pastoral Award 2010, Building and Construction General On-site Award 2010 and Plumbing and Fire Sprinklers Award 2010.

Introduction

[1] In a Statement issued on 31 October 2014¹ we considered the submissions filed by the Fair Work Ombudsman (FWO) and a number of other parties identifying provisions in the modern awards which, the parties contended, were inconsistent with provisions of the National Employment Standards (NES) contained in the *Fair Work Act 2009* (FW Act). The Statement identified five categories in which the alleged NES inconsistencies fell:

- (1) Provisions which are concerned with restrictions on the payment of annual leave loading upon termination of employment.
- (2) *Textile, Clothing, Footwear and Associated Industries Award 2010* provisions.
- (3) Provisions about which there appears to be agreement as to both the existence of an inconsistency with the NES and the award variation appropriate to remedy that inconsistency.
- (4) Provisions about which there appears to be agreement as to the existence of an inconsistency with the NES, but no agreement as yet concerning the appropriate remedial award variation.
- (5) Provisions about which there is, as yet, no agreement as to the existence of an inconsistency with the NES.

¹ [2014] FWCFB 7727

[2] The matters in category 1 were referred to the Annual Leave Full Bench for hearing and determination, and category 2 was directed to be dealt with as part of the broader review of the *Textile, Clothing, Footwear and Associated Industries Award 2010*.²

[3] In respect of matters in categories 3 and 4, we commenced dealing with the alleged NES inconsistencies in our decision issued on 23 December 2014³ (December decision). We made a number of findings where we determined that there was an inconsistency, and subsequently published draft determinations setting out proposed variations to the relevant modern awards to remedy the inconsistency. Interested parties were given an opportunity to file written submissions in relation to the draft determinations and an opportunity to make short oral submissions at a hearing to be held on 26 February 2015. The December decision also established a timetable for parties to provide further submissions in relation to matters raised in category 5.

[4] On 26 February 2015, this Full Bench conducted a hearing in relation to category 5 matters and we issued our decision on 8 May 2015⁴ (May decision). The May decision also dealt with any outstanding issues arising out of categories 3 and 4 to finality and determinations for the modern awards in these categories were published on 27 May 2015, with the exception of three Category 3 and 4 awards.⁵ Determinations varying the *Horse and Greyhound Training Award 2010* and the *Labour Market Assistance Industry Award 2010* were published on 16 October 2015.

[5] In relation to the *Alpine Resorts Award 2010*, we found in the December decision that an inconsistency with the NES existed and a draft determination was subsequently published. We noted in the May decision that “the making of the draft determination without any reconsideration of the rates of pay may have the effect that employees effectively pay seasonal employees for annual leave twice: once in accordance with the NES provisions, and a second time by paying hourly rates of pay which appear to have been loaded to account for the payment of annual leave”. Accordingly, a determination has not been issued for this award. The issue of seasonal rates is being dealt with as part of the broader review of the *Alpine Award 2010*.

[6] In respect of category 5 matters, we considered the submissions of the parties in our May decision and we made a number of findings in relation to: the transfer of employment and service for annual leave purposes, annual leave in advance, unpaid carer’s leave for casual employees, illness during annual leave, notice of termination of employment and the cashing out of personal/carer’s leave. On 27 May 2015, we published draft determinations for proposed variations which remedy the identified NES inconsistencies in this category, and parties were provided with an opportunity to file further submissions.

[7] The only submissions received by the Commission were in relation to the draft determinations dealing with the provisions concerning the transfer of employment and service for annual leave purposes in the following awards:

- *Pastoral Award 2010*; and

² [2014] FWCFB 7727 at [5]

³ [2014] FWCFB 9412

⁴ [2015] FWCFB 3023

⁵ *Alpine Resorts Award 2010, Horse and Greyhound Training Award 2010, Labour Market Assistance Industry Award 2010*

- *Building and Construction General On-site Award 2010*; and
- *Plumbing and Fire Sprinklers Award 2010*.

[8] In circumstances where the Commission did not receive any objections to the draft determinations issued on 27 May 2015 in respect of the category 5 matters these determinations were finalised and published on 16 October 2015.

[9] This decision is concerned with dealing with the submissions filed in respect of the three awards identified at paragraph [7]. In our May decision we relevantly concluded as follows (footnotes omitted):

“[37] We consider that the modern award provisions in question generally are clearly inconsistent with s.91(1). Section 55(1) requires, relevantly, that a modern award “*not exclude the National Employment Standards or any provision of the National Employment Standards*”. Section 91(1) is a provision of the NES (being contained within Division 6, Annual Leave, of Part 2-2, The National Employment Standards), and the modern award provision excludes s.91(1) in the sense that in their operation they negate the effect of the subsection. A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4). Nor do we consider that the provisions in question are to be characterised as dealing with the taking of paid annual leave such as to be authorised by s.93(4); they are rather concerned with the quantum of the annual leave entitlement for which the second employer is liable.

[38] We also reject the specific submission concerning clause 17.7 of the *Building and Construction General On-site Award 2010*. The expression “*industry-specific redundancy scheme*”, as used in s.141, is defined in s.12 to mean “*redundancy or termination payment arrangements in a modern award that are described in the award as an industry-specific redundancy scheme*”. Clause 17.7, despite its location in a clause entitled “*Industry specific redundancy scheme*”, is not concerned with redundancy or termination payment arrangements. Like the other provisions, it excludes s.91(1).

[39] The identified provisions will be removed.”

Submissions

[10] The Australian Business Industrial and the New South Wales Business Chamber Ltd (ABI and NSWBC) submitted that they had anticipated the “identified provisions” would have been removed in their entirety, that it “seems curious that part of the clause is proposed to be maintained in the three Awards, having regard to the Decision”, and that “the entirety of the relevant clauses should be removed from the Award in accordance with the Decision”. Additionally, ABI and NSWBC submitted that “clause 23.7(b) of the Pastoral Award operates to extinguish an express right conferred by section 384 of the FW Act.”

[11] In relation to the *Building and Construction General On-site Award 2010*, the Housing Industry Association (HIA) submitted that there was “an inconsistency between the Decision and the Draft Determination”, whereby the identified provision was not removed, and instead remained in the draft determination and the words “for the purpose of redundancy pay entitlements under this clause” was inserted after clause 17.7(a)(ii).

Conclusion

[12] In relation to the ABI and NSWBC submissions concerning all three awards and the HIA submission concerning the *Building and Construction General On-site Award 2010*, paragraph [39] of our May decision, whilst perhaps not felicitously expressed, was only intended to contemplate the removal of the relevant clauses to the extent necessary to remedy the identified NES inconsistency. The draft determinations are consistent with this intention.

[13] In relation to the specific submissions concerning the *Pastoral Award 2010*, the draft determination was only intended to rectify the NES inconsistency identified in the May decision, and not to deal with any other issues in respect of clause 23.7(b). If ABI and NSWBC wish to pursue changes to clause 23.7(b) in respect of the issue identified in their submissions, they may make a formal application to the Commission to vary or remove this clause as part of the ordinary process of the 4 yearly review of modern awards.

[14] We will therefore issue final determinations in the same terms as the draft determinations.

PRESIDENT

Final written submissions:

10 June 2015 – Housing Industry Australia.

12 June 2015 – Australian Business Industrial and the New South Wales Business Chamber Ltd.

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