



DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—*Fast Food Industry Award 2010* (AM2017/49)

Fast Food Industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE

MELBOURNE, 21 MAY 2018

Fast Food Industry Award 2010 – 4 yearly review – objection to participation in review proceedings

Introduction

[1] This decision deals with an objection by Ai Group to the Retail and Fast Food Workers Union Inc (‘RAFFWU’) being, or being treated as, a ‘party principal’ to the review of the *Fast Food Industry Award 2010* (the Fast Food Award). The review in question is being conducted pursuant to s.156 of the *Fair Work Act 2009 (Cth)* (the Act), which provides that the Commission must conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014 (the Review).

[2] Two outstanding substantive issues remain to be determined in the review of the Fast Food Award. It is in the context of the proceedings dealing with those issues that Ai Group has raised its objection.

[3] [Directions](#) were issued on 21 March 2018 requiring the Ai Group to file any written material in relation to the objection and giving RAFFWU and any interested party the opportunity to respond. A [submission](#) was received from the Ai Group on 4 April 2018. RAFFWU filed a [submission in reply](#) on 18 April 2018.

[4] Ai Group submit that the Commission should not permit RAFFWU to be, or be treated as, a party principal to the review (and thus should not permit RAFFWU to cross examine witnesses or make written or oral submissions) for the following reasons:

- (i) RAFFWU is not directly affected by the proposed variations to the Fast Food Award.

(ii) RAFFWU is not a registered organisation such that it is not subject to the extensive legislative regime applying to registered organisations and entailing that it ought not be permitted to appear on a basis equivalent to a registered organisation.

(iii) RAFFWU has filed no evidence in the proceedings.

(iv) There is no evidence that RAFFWU has any members at McDonald's, Hungry Jack's, Red Rooster, Chicken Treat, Oporto or any other large employer in the fast food industry apart from Domino's.

(v) There is no evidence of the number of members of RAFFWU working at Domino's.

(vi) The interest of fast food employees in the review is being represented by the SDA (which according to its submissions filed on 16 March 2018 has 21,500 members working in the fast food industry, including at McDonald's, Hungry Jack's, KFC and Domino's) which is an organisation which is subject to the extensive legislative regime applying to registered organisations.

[5] We would observe at the outset that Ai Group's submission fails to appreciate the nature of modern awards and the fact that the proceedings in question are part of the Review.

[6] As the Commission has observed on a number of occasions, the nature of modern awards under the Act is quite different from the awards made under previous legislative regimes. Previously, awards were made in settlement of industrial disputes. The content of these instruments was determined by the constitutional and legislative limits of the tribunal's jurisdiction, the matters put in issue by the parties (i.e. the 'ambit' of the dispute) and the policies of the tribunal as determined from time to time in wage fixing principles or test cases. Previously, an award generally only bound the employers, employer organisations and unions which had been parties to the industrial dispute that gave rise to the making of the award and were named as respondents. Modern awards are very different to awards of the past.

[7] There are no longer named respondents or 'parties principal' to modern awards. Modern awards apply to, or cover, certain persons, organisations and entities (see ss.47 and 48), but these persons, organisations and entities are not 'respondents' to the modern award in the sense that there were named respondents to awards in the past. The nature of this shift is made clear by s.158 which sets out who may apply for a determination making, varying or revoking a modern award. Under previous legislative regimes, the named respondents to a particular award would automatically have the requisite standing to make such applications; that is no longer the case.

[8] The nature of the Review is also relevant. The Review is to be distinguished from *inter partes* proceedings. Section 156 imposes an obligation on the Commission to review *all* modern awards and each modern award must be reviewed in its own right. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application.¹

¹ 4 *Yearly Review of Modern Awards – Annual Leave* [2016] FWCFB 3177 at [135]–[140]

The Commission is not required to make a decision in the terms applied for (s.599) and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).²

[9] Turning to the objection advanced by Ai Group, it seems to us that the proposition that RAFFWU not be treated as a ‘party principal’ to the review of the Fast Food Award is misconceived. The notion of an association or organisation being a ‘party principal’ to a review proceeding finds no support in the Act. Indeed the expression ‘party principal’ does not appear in the Act.

[10] In review proceedings procedural fairness may demand that certain persons or entities be heard, for example, those covered by the relevant award; those who may be affected by the outcome of the proceeding; or those who represent persons who may be affected. But such persons or entities are not regarded as a ‘party principal’ to the proceeding. Rather, they simply have a right to be heard.

[11] The gravamen of Ai Group’s submission is that RAFFWU be denied the opportunity to cross examine witnesses and make submissions in the review proceedings relating to the Fast Food Award. This submission is devoid of merit. It is not contested that RAFFWU has members (at Domino’s) who may be affected by the outcome of these proceedings. In such circumstances we would have thought that RAFFWU has a *right* to be heard. But in any event we need not go so far, as we are satisfied that RAFFWU should be permitted to fully participate in the proceedings.

[12] In concluding, we would observe that there is no merit in any of the points advanced by Ai Group in support of its objection. These points may be shortly disposed of:

- (i) The fact that RAFFWU is not ‘directly affected’ by the variations which are the subject of the review proceedings is immaterial. The present proceedings are plainly distinguishable from the circumstances in *Re Vickers*³. The point is that RAFFWU has members who may be so affected. In this respect RAFFWU is in no different position to the SDA or Ai Group, neither of which will be ‘directly affected’ by the proceedings as they are not covered by the Fast Food Award (the Fast Food Award does not apply to the SDA or Ai Group as the award is not expressed to ‘cover’ them, see ss.47-48 and clause 4 of the Fast Food Award).
- (ii) The fact that RAFFWU is not a registered organisation is not the critical consideration in this particular case. A number of unregistered associations regularly appear in the Commission proceedings (the Australian Mines and Metals Association for instance) and the Act does not confer a preferential right of appearance on the basis of registration as an organisation.

² Ibid at [60]

³ [2017] FWCFB 3131

- (iii) The fact that RAFFWU has filed no evidence in the proceeding is irrelevant. The variations are being sought by Ai Group and to the extent that there may be said to be an evidentiary burden it rests on the proponent of the variations. We would also observe that the SDA has not filed any evidence in the proceedings.
- (iv) The number of RAFFWU members and who they work for is not material. The fact that RAFFWU has members who may be affected by the proceedings is the pertinent point.
- (v) The fact that the interests of fast food employees are being represented by the SDA does not preclude the involvement of another entity representing employees' interests.

[13] Having regard to the nature of these proceedings and RAFFWU's interest, we reject Ai Group's submission. RAFFWU may cross-examine the Ai Group's witnesses and advance submissions in the proceedings.

[14] The matter has been listed over 2 days on **29 June and 16 July 2018 in Sydney**. A notice of listing has been issued.

PRESIDENT

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