



REPORT TO THE FULL BENCH

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 Yearly Review of Modern Awards: Alpine Resorts Award 2010—Report to the Full Bench

(AM2014/198)

COMMISSIONER BISSETT

MELBOURNE 25 MAY 2015

4 Yearly Review of Modern Awards: Alpine Resorts Award 2010—Report to the Full Bench

[1] A conference of parties with an interest in the *Alpine Ski Resorts Award 2010* (the Award) was held on 14 May 2015. In attendance was Mr Crawford and Mr Shepherd from the Australian Workers’ Union (AWU), Mr Harmer and Mr Shaw with Mr Girling of the Australian Ski Areas Association (ASAA), Ms Street from AiG, Mr Arndt from ABI & NSW and Ms Goodwin representing Mount Hotham Resort Management Board.

[2] The conference was called in relation to the decision of the Full Bench in *4 yearly review of modern awards – Alleged NES Inconsistencies*.¹ In that decision the Full bench said:

[14] In the December decision, we found that clause 11.5 of the *Alpine Resorts Award 2010*, which provides “*The hourly rate of seasonal employees will include an 8.33% loading of the applicable hourly rate instead of annual leave*”, was inconsistent with s.87(1) in that, by paying out annual leave as a loading on ordinary pay, it did not provide for the taking of annual leave with pay as properly understood (see *Canavan Building Pty Ltd*) or the payment of untaken annual leave on termination. The draft determination for this award proposed the deletion of the current clause 11.5 and the insertion of the following: “*Seasonal employees are entitled to annual leave in accordance with the NES*”.

[15] The Australian Ski Areas Association (ASAA), although it did not appear at the earlier hearing of this matter on 24 October 2014 or otherwise make any submissions prior to the December decision, nonetheless now submitted the Full Bench erred in treating clause 11.5 of the *Alpine Resorts Award 2010* as falling within category 4, and that the award should have been placed in category 5 on the basis that ASAA contested the issue of NES inconsistency. The ASAA further submitted the decision in *Canavan* was distinguishable, in that in the ski industry, having regard to the relatively short and fixed-term nature of engagement of employees, the payment of the 8.33%

¹ [2015] FWCFB 3023.

loading was not cashing out of annual leave but “*the pre-payment of a payment that employees will inevitably receive upon the termination of their employment pursuant to s.90(2)*”. ASAA submitted in the alternative that *Canavan* was incorrectly decided. In relation to the draft determination, ASAA submitted that clause 11.5 be deleted, but not without consequential adjustment to the rates of pay in order to prevent an effective double-payment of annual leave to employees.

[16] The Australian Workers’ Union (AWU) did not oppose the making of the determination, but noted that it had made an application for the *Alpine Resorts Award 2010* to be varied to provide for the payment of an annual leave loading of 17.5% which, it was put, “*would mitigate the disadvantage that seasonal employees may otherwise suffer, if they simply just lose that 8.3 [sic] per cent loading*”.⁸ That submission appeared to assume a reduction in the hourly rate of pay for seasonal employees equivalent to the amount of the 8.33% loading would follow from the making of the draft determination.

[17] We reject the primary submission made by the ASAA. Nothing has been put to us which would cause us to revisit *Canavan* or our December decision, in which *Canavan* was applied to clause 11.5 in a straightforward way.

[18] The published draft determination does not provide for any change to the hourly rates of pay for seasonal employees. We accept 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. In circumstances where we have not yet received any submissions from the parties concerning the rates of pay for seasonal employees, we consider it would be premature to proceed to make the draft determination at this stage. We propose instead to convene an urgent conference of the parties to consider the issue of the rectification of the NES inconsistency in clause 11.5, the rates of pay for seasonal employees and the AWU’s application for an annual leave loading on a conjoint basis. This conference will be conducted by Commissioner Bissett.

[3] Mr Harmer for the ASAA says that at the hearing before the Full Bench on 26 February 2015 in relation to the *4 yearly review of modern awards – Alleged NES Inconsistencies*, VP Hatcher made clear that no changes will be made to Awards until the totality of matters associated with the 4 yearly review has been considered.

[4] Mr Harmer read from an excerpt of the transcript from that hearing:

VICE PRESIDENT HATCHER: “That won't happen. I can assure you there will be no single alteration to any modern award taking effect separately in advance of the modern award. That is, when a modern award is made, all the provisions will take effect at the same time, not at different times. To the extent - which is probably the case - that the draft determination will have consequences for the remuneration structure in the award, the parties will have an opportunity to make submissions about that when the Ski Industry Award comes up in the stage process.”

[5] On this basis the ASAA propose that the matters identified be ‘change managed’ during the off season period, between the 2015 and 2016 ski seasons, when the matters can be resolved with minimum disruption to the employment contracts that have already been issued for the 2015 ski season and can be properly built into the 2016 contracts or at least provide

advance notice of likely amendments required to the contracts at the time the contracts are entered into.

[6] Mr Girling says that seasonal contracts (including casual contracts) for the ski season can be entered into in as early as October/November for returning staff, and February for new staff.

[7] The ASAA says that it respects the decision of the Full Bench but relies on statements made about the awards not being finalised until everything is finalised. Mr Harmer noted that the group 2 award matters are listed for hearing before a Full Bench on 7 and 8 October 2015. The ASAA does however say that, should the Commission proceed to issue a determination varying the Award by removing clause 11.5 it would need to consider its options, including legal options such as referring the matter to the Federal Court, to stop such a determination taking effect.

[8] The ASAA proposes that all claims in respect of this Award be dealt with by a separate and specific full bench. The claims include:

- Award coverage;
- NES inconsistencies;
- Application of annual leave loading;
- Casual and part-time employment matters; and
- Technical/drafting matters associated with the exposure draft.

[9] It argues for a separate full bench on the grounds that the Award is unique in that it derives predominantly from a NSW Award which was a consent award. The making of the consent award also involved the striking of demarcation agreements that resulted in approximately 14 unions agreeing not to press for their rights with respect to this specific (part of the broader) industry. ASAA further noted the flexibilities in the Award which do not appear in other modern awards, the unique nature of the snowsports industry and the significant capital investment of the Alpine Resorts in alpine lifting facilities.

[10] ASAA says that a separate Full Bench will be required to consider the coverage issues that have been raised by various parties and it would be suitable for that Full Bench to consider all claims in respect of this Award.

[11] ASAA also says that there would be efficiency in having all matters dealt with by a separate Full Bench as the resolution of the major issues will require a range of other amendments to the Award, such that technical and drafting matters will become tied up with those matters. It further says that if the Commission is minded to ensure consistency with other issues that could be considered common issues, such as some casual and part-time employment issues in the Award, the separate Full Bench considering all claims in respect of this Award could await the decision of any Full Bench considering common issues relevant to claims in respect of the Award.

[12] The AWU considers it important for the NES inconsistency to be addressed but submits this should be done in a manner which avoids any financial disadvantage for employees. Finding a method to achieve this has not proven easy thus far. As a result, the AWU supports a process whereby the parties, and the Commission, work towards ensuring

that the NES inconsistency is addressed in sufficient time to allow the new arrangements to be implemented for the 2016 ski season.

[13] The AWU supports the various substantive issues which have been raised by the parties being dealt with by a separate and specific Full Bench, and accepts it may be more efficient if this Full Bench also deals with technical and drafting issues arising from the Exposure Draft.

[14] The AiG accept the clause 11.5 is inconsistent with the NES but have no view as to resolve the issues at hand.



COMMISSIONER