



DECISION

Fair Work Act 2009

s.158 - Application to vary or revoke a modern award

Independent Education Union of Australia (AM2010/95)

Educational services

VICE PRESIDENT LAWLER

MELBOURNE, 29 DECEMBER 2010

Application to vary the Educational Services (Teachers) Award 2010.

[1] This is an application pursuant to s.157(1)(a) of the *Fair Work Act 2009* (**FW Act**) by the Independent Education Union of Australia (**IEUA**) for Fair Work Australia (**FWA**) to vary the *Educational Services (Teachers) Award 2010*¹. There is no contest that the IEUA has standing under s.158 of the FW Act to make the application.

[2] I note that the IEUA did not press the application at this stage in so far as the IEUA sought an order extending to employers covered by the relevant Division 2B State Awards. In so far as the application related to those employers, it is adjourned generally.

[3] There was an issue during the award modernisation process as to whether teachers who worked in preschools and early childhood services should be covered by an education modern award that covered school teachers generally or whether they should be covered by a separate modern award for children's services. In its Stage 4 decision, the Full Bench of the Australian Industrial Relations Commission (**AIRC**) determined that there should be separate awards.

[4] The rates of pay for preschool and early childhood teachers under the relevant NSW NAPSAs - the *Teachers (Non-Government Pre-Schools (State) Award 2006*² or the *Teachers (Non-Government Early Childhood Service Centres Other Than Pre-Schools) (State) Award 2006*³ - were above the rates of pay set for such teachers in the *Children's Services Award 2010*⁴. The standard transitional provisions in modern awards would see a transitioning down of the NAPSA rates of pay to match the rates in the modern award (excluding the effects of increases from annual safety net reviews) in successive 20 per cent tranches over the period to 2014. However, the Full Bench of the AIRC made special transitional arrangements for those teachers in the *Children's Services Award 2010*. In particular, clause A3.7 provides:

“A.3.7 The following transitional arrangements apply to an employer in New South Wales, Western Australia and Tasmania which, immediately prior to 1 January 2010:

(a) was obliged,

- (b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or
- (c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged

by a transitional minimum wage instrument and/or an award-based transitional instrument to pay a minimum wage higher than that in this award for an employee engaged in a classification lower than Children's Services Employee Level 3.1 and all classifications of Support Worker in Tasmania and Western Australia, and for all classifications in New South Wales.

The employer must:

- (i) continue to pay no less than the minimum wage in the transitional minimum wage instrument and/or award-based transitional instrument; and
- (ii) apply any increase in minimum wages in this award resulting from an annual wage review."

[5] It will be noted that the effect of this clause was to preserve for employees covered by the *Children's Services Award 2010* the superior pre-existing pay entitlements under the relevant NAPSAs of teachers in those States.

[6] It is common ground that the NSW NAPSAs covered teachers who are now covered by a combination of the *Children's Services Award 2010* and the *Educational Services (Teachers) Award 2010*. For practical purposes, the *Children's Services Award 2010* covers teachers in 'stand alone' preschools and early childhood centres while the *Educational Services (Teachers) Award 2010* covers preschool and early childhood teachers working in schools that also have pre-school or early childhood programs.

[7] A consequence of the inclusion of the special transitional provision in the *Children's Services Award 2010* but not the *Educational Services (Teachers) Award 2010* is that teachers previously covered by one of the NSW NAPSAs who are now covered by the *Educational Services (Teachers) Award 2010* will have their minimum wage entitlements reduced whereas those covered by the *Children's Services Award 2010* will not. This has led to anomalies. For example, if the existing transitional provisions remain in place the modern award rates of pay for two-year trained child care workers exceed those of four-year trained teachers who, in the majority of cases, will be supervising them.

[8] The present application seeks to address this issue by the inclusion of similar special transitional arrangements in the *Educational Services (Teachers) Award 2010* to ensure that all teachers in NSW previously covered by one of the NSW NAPSAs who are not covered by either modern award will be treated in the same way in so far as their transitional wage entitlements are concerned.

[9] The application has the support of Community Connections Solutions Australia Inc. (CSSA), an industry association that has the largest membership of preschool and early childhood centre operators in NSW. The application is opposed by the Australian Federation of Employers and Industries (AEFI) (an employer organisation that represents a number of

employers in the preschool and early childhood sector) and the Australian Childcare Centres Association (ACCA).

[10] That standard term was included in the *Educational Services (Teachers) Award 2010*.

[11] There is nothing in the decision that accompanied the making of the *Educational Services (Teachers) Award 2010* to suggest that the Full Bench actively turned its mind to the issue raised in this application. In particular, there is nothing in that decision to suggest that the Full Bench thought that there was some basis for treating preschool and early childhood teachers differently in terms of appropriate wage rates depending upon whether they work in a stand-alone preschool or early childhood centre on the one hand or a preschool or children's service operated as part of a school on the other.

[12] In its award modernisation decision of 2 September 2009⁵, the Full Bench of the AIRC noted of the standard transitional provisions included in modern awards:

“[22] We have decided that the model commencement and transitional clause should contain a review term. Given the number and diversity of award matters to which the model provisions are capable of applying, it cannot be assumed that they satisfactorily deal with all of the issues which might arise during the transition period. The review terms will be in the following form:

“2.5 Fair Work Australia may review the transitional arrangements in this award and make a determination varying the award.

2.6 Fair Work Australia may review the transitional arrangements:

- (a) on its own initiative; or
- (b) on application by an employer, employee, organisation or outworker entity covered by the modern award; or
- (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
- (d) in relation to outworker arrangements, on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the provisions relate.” ”

[13] I am not persuaded that the matters advanced by AFEI and ACCA properly justify the different treatment given to preschool and early childhood teachers by the two modern awards. In particular, the fact that the wage rates in the NSW NAPSAs, determined by the NSW Industrial Relations Commission, were a product of agreement between industry parties and incorporated allowances and other entitlements, is not to the point. The same circumstance was present for teachers covered by the *Children's Services Award 2010* who received the benefit of the special transition provision in that award. It is a matter of significance that CSSA supports the application. I have accorded some weight to the reasons advanced by CSSA for its support of the application. It is probable that the failure to include a

special transitional arrangement in the *Educational Services (Teachers) Award 2010* similar to that included in the *Children's Services Award 2010* was a matter of oversight - first on the part of the IEUA in failing to press for the inclusion of such an arrangement in the *Educational Services (Teachers) Award 2010* in the event that the Full Bench was against its submissions that there should only be one award covering teachers and then on the part of the Full Bench because it received no submissions on the issue.

[14] I have had regard to the modern awards objective in s.134. I agree with the submissions of the IEUA that the matters specified in s.134(d), (e) and (g) favour the granting of the application. To the extent that the matter specified in s.134(f) weighs against the granting of the application, it is adequately addressed if the variation is not made retrospective.

[15] In all the circumstances I am satisfied that the *Educational Services (Teachers) Award 2010* should be varied to include a special transitional provision similar to that included in the *Children's Services Award 2010* and that such variation is necessary to achieve the modern awards objective. Having regard to the regulatory burden on employers in the retrospective adjustment of rates for all affected teachers, I am not persuaded that it is appropriate to make that variation retrospective. An order varying the *Educational Services (Teachers) Award 2010* has been issued in conjunction with this decision.

VICE PRESIDENT

Appearances:

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

L. *Moloney* for the Australian Childcare Centres Association.

D. *Makins* for the Australian Federation of Employers and Industries.

I. *Alchin* for Community Connections Solutions Australia Inc.

Hearing details:

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⁵ [2009] AIRCFB 800