



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

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

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Real Estate Employers' Federation of NSW and the Australian Federation of Employers and Industries

(AM2010/50)

CLERKS—PRIVATE SECTOR AWARD 2010

[MA000002]

Clerical industry

VICE PRESIDENT WATSON

SYDNEY, 21 MAY 2010

Application to vary clause 25 Ordinary hours of work (other than shiftworkers) – spread of hours substituted for those of the majority of employees at the workplace – Fair Work Act 2009 ss 157, 160.

Introduction

[1] The Real Estate Employers' Federation of NSW and the Australian Federation of Employers and Industries (the applicants) have jointly made an application to vary clause 25.1(b) of the *Clerks – Private Sector Award 2010*¹ (the Award) in relation to hours of work.

[2] I made directions for the filing of outlines of submissions in the matter and heard from the parties on 19 May 2010. At the hearing Mr R Warren represented the applicants, Mr M Mead represented the Australian Industry Group (AIG), Mr P Warren represented the Australian Sugar Milling Association, Queensland, Union of Employers (ASMA) and Mr K Harvey represented the Australian Services Union (ASU).

The application

[3] Clause 25.1(b) of the Award provides as follows:

- “(b) The ordinary hours of work may be worked from 7.00 am to 7.00 pm Monday to Friday and from 7.00 am to 12.30 pm Saturday. Provided that where an employee is employed in association with other classes of employees who work a five-day week the spread of hours during which ordinary hours can be worked are the hours contained in a modern award which apply to the majority of the employees at the workplace. Employees engaged in a call centre can be rostered to work ordinary hours from midnight Friday to midnight Saturday.”

[4] The applicants seek to replace the second sentence in this clause with the following:

“Provided that where an employee works in association with other classes of employees who work ordinary hours outside the spread prescribed by this clause, the hours during which ordinary hours may be worked are as prescribed by the modern award applying to the majority of the employees in the workplace.”

[5] The applicants submit that the existing provision is ambiguous and should be made clearer. They submit that in the context of real estate agencies where employees may work a variety of hours arrangements from part-time, five day weeks, five half day weeks, to six day weeks, it is not clear whether the spread of ordinary hours is varied by the clause. They submit that the clause has the unintended consequence of allowing some real estate agencies to roster ordinary hours at weekends and disallow other agencies from doing so by virtue of the five day limitation on the hours of other employees.

[6] The applicants accept that if ordinary hours are able to be worked after 12.30 pm on Saturday by virtue of the substitution clause, the Saturday penalty in clause 27.2 of the Award still applies. Further, the applicants submit that the clause does not appear to be consistent with the decision of the Full Bench that led to the provision.² In making the Award the Full Bench said:

“[230] The hours provisions published in the exposure draft have been modified slightly. We do not intend to remove the facility for ordinary hours on Saturday morning, as sought by the ASU, or extend ordinary hours to Saturday afternoon as sought by some employers. We will however provide for a penalty of time and a quarter for ordinary hours worked on Saturday. The clause also provides that the ordinary hours which apply to the majority of employees at the workplace under another modern award will apply.”

[7] The applicants rely on s 160 of the *Fair Work Act 2009* (the Act) which permits variations to modern awards to remove an ambiguity or uncertainty or to correct an error. In the alternative they submit that the variation could be justified by s 157 of the Act because it is necessary to achieve the modern awards objective.

The position of other parties

[8] The Real Estate Employers' Federation of Western Australia and the Chamber of Commerce and Industry WA support the application. The AIG and ASMA do not oppose the facility for modifying the hours of work of clerks by reference to other employees but submit that the Award should create an option rather than an obligation to substitute the ordinary hours provision. The AIG also raises a concern about clause 28.1 of the Award.

[9] The ASU is strongly opposed to the application. It submits that the application seeks to re-agitate matters that have been determined by a Full Bench and the real object is to avoid penalty payments at weekends. The ASU submits that the variation would radically affect the terms and conditions of clerical employees in other industries and will create more uncertainty than the current provision. It submits that the intent of the clause is to confine the substitution to situations where employees work a five day week which will primarily be Monday to Friday. The ASU raised a number of other grounds for rejecting the application.

Conclusions

[10] The current modern award clause was adopted having regard to the various award provisions applying to clerical employees. Most of those awards contained mechanisms for altering the spread of hours to suit the needs of particular businesses. The flexibility arose either from the terms of the hours provision itself, a term which allowed variation by individual or majority agreement or a term which allowed variation by reference to the hours worked by a majority of employees in an establishment.

[11] The hours of work clause determined by the Full Bench contains an ability to work ordinary hours on Saturday mornings, a limited ability to alter the spread of hours by up to one hour by agreement and a substitution clause where an employee is employed in association with other classes of employees. The latter provision is expressed to relate to other classes of employees who work a five day week.

[12] In my view there is an ambiguity in the clause because it does not make clear whether some or all of the other employees are required to work a five day week. On one view only one other employee is required. Alternatively, all employees who work 'in association with' clerical employees need to be five day workers. An intermediate interpretation may also be available.

[13] It is undesirable that an ambiguity of this nature remains in the Award. In my view it should be removed. The Full Bench clearly determined that a substitution of hours clause should be contained in the Award. There does not appear to me that there is any logical reason for the five day week limitation on its operation. The application seeks to remove the ambiguity and clearly reflect the decision of the Full Bench in making the Award. I therefore consider that the variation should be made in the terms sought in the application.

[14] Under the revised clause it will be a question of fact whether clerical employees are engaged 'in association with' other classes of employees. One can envisage that this will clearly be the case when a clerical employee assists another category of employee in carrying out duties. However, where the clerical employees are engaged in another work area and the interaction between them and other categories of employees is limited, a contrary conclusion may be reached.

[15] In the light of my conclusions it is unnecessary to consider the other bases for the application. Further, I do not think that this application is the appropriate vehicle to consider other changes sought by the AIG and ASMA.

VICE PRESIDENT WATSON

Appearances:

K Harvey for the Australian Services Union

R Warren for the Real Estate Employers' Federation of NSW and the Australian Federation of Employers and Industries

M Mead for the Australian Industry Group

P Warren with *D Nolan* for the Australian Sugar Milling Association, Queensland, Union of Employers

Hearing details:

2010

Sydney, Brisbane (by video link)

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¹ MA000002

² [2008] AIRCFB 1000