



DECISION

Fair Work Act 2009

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

Australian Business Industrial (AM2011/26)

Social, community, home care and disability services

COMMISSIONER MCKENNA

SYDNEY, 12 JULY 2011

Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010 re cl.29.2 - Shiftwork

[1] On 9 May 2011, Australian Business Industrial (“ABI”) filed an application pursuant to s.160 of the *Fair Work Act 2009* (“the Act”) seeking to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (“the award”).

[2] Further to discussions held between interested parties after the initial listing of the application, an amended application was filed by ABI on 4 July 2011. Unlike the initial application, the amended application comes before Fair Work Australia with the consent of all interested parties. The grounds in support of the amended application were succinctly outlined by ABI, as follows:

“3. Variation(s) sought:

Deletion of Clause 29.2(a), the definition of a day shift, to remedy an apparent error in the creation of the shiftwork provisions. Subsequent renumbering of Clauses 29.2(b), (c) and (d).

4. Grounds:

1. This is a revised application to vary the [*Social, Community, Home Care and Disability Services Industry Award* [MA000100] (the “SACS Award”)] following consultation between ABI and interested parties in relation to ABI’s original application.

2. The parties have agreed that there is an error in relation to Clause 29.2(a). To remedy this error [the] parties have also agreed that deleting Clause 29.2(a) in its entirety and renumbering Clauses 29.2(b)-(d) is an appropriate remedy.

3. The SACS Award was made at Stage 4 of award modernisation.

4. Clause 29 Shiftwork currently provides

29.2 Definitions

(a) Day shift means any shift that commences earlier than 12 noon and finishes at or before 7.00pm.

(b) Afternoon shift means any shift which finishes after 8.00pm and at or before 12 midnight Monday to Friday.

(c) Night shift means any shift which finishes after 12 midnight or commences before 6.00am Monday to Friday.

(d) A public holiday shift means any time worked between midnight on the night prior to the public holiday and midnight of the public holiday.
(underlining added)

5. The finishing time of a day shift in the definition at 29.2(a) appears to have been put at 7.00pm by error. There was no reason given by the AIRC in the Stage 4 decision of award modernisation proceedings for creating the capacity for a day shift in addition to a day worker, nor why the day shift should finish at or before 7.00pm, thereby creating a one hour 'gap' between the latest time for completing a day shift and the earliest finish time that would give rise to an afternoon shift.

6. During discussions the parties agreed that the day shift provisions in the SACS Award were redundant as an employee who starts work [at] or after 6.00am and finishes [at] or before 8.00pm falls within the definition of a day worker as defined at Clause 25.2(a). A day worker receives the same rates of pay as an employee who works a day shift. The proposed variation would therefore not deprive any employee of any penalty currently provided by the award. Granting the application merely reduces the capacity for confusion.

7. The parties agree that for these reasons the appropriate remedy to the error would be deleting Clause 29.2(a).

8. It is proposed that the variation have effect from the 1 January 2010 as the variation will clarify any uncertainty that may have arisen since the commencement of operation of the modern award and will not affect the entitlements that an employee would have received since this time.

9 The application is consistent with the modern awards objective, in particular the need to ensure a simple, easy to understand award system.” [footnotes omitted]

[3] A draft order was attached to the amended application to give effect to the proposed variation. As to operative date, ABI submitted that Fair Work Australia should be satisfied, pursuant to s.165(2) of the Act, there are exceptional circumstances justifying a variation of the award effective from 1 January 2010. Those submissions went to matters including the intended operation of the award and the provision of clarification as to procedures that are, in any event, being adopted as a matter of practice in the industry. It was also submitted that no one would be adversely affected by a retrospective date of variation.

[4] I have noted the submissions by ABI together with the written submissions in support of the application made by Aged & Community Services Association of NSW & ACT Incorporated (and on behalf of named employer associations), the Australian Federation of Employers and Industries, the Australian Services Union, the Health Services Union and Jobs Australia Ltd. I am satisfied that it is appropriate to make a determination¹ varying the award in the terms proposed, effective 1 January 2010.

COMMISSIONER

Appearances:

Mr B *Briggs*, for Australian Business Industrial.

Ms J *Lawrence*, for the Australian Federation of Employers and Industries.

Mr J *Nucifora*, for the Australian Services Union.

Mr M *McLeay*, for the Health Services Union.

Mr K *Godfrey*, for Jobs Australia Ltd.

Hearing details:

Sydney
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