



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

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

National Union of Workers
(AM2010/116)

Horticultural industry

SENIOR DEPUTY PRESIDENT HAMBERGER

SYDNEY, 27 OCTOBER 2010

Application to vary the Horticulture Award 2010 to include an additional default superannuation fund.

[1] On 5 August 2010, the National Union of Workers ('NUW') made an application to add 'LUCRF' to the list of default superannuation funds listed in Clause 21.4 of the Horticulture Award 2010.

[2] Following the receipt of written submissions by the NUW and the National Farmers' Federation ('NFF') a hearing was held on 14 October 2010.

[3] In its submissions, the NUW relied on the decision of 2 September 2009 by the Full Bench of the AIRC where it said:

"A number of funds have since made applications to be included as named default funds on the basis that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award or on the basis that the representatives of the main parties covered by the award consent. In our view either basis would constitute a good reason for the fund being specified as a default fund in a modern award. Where such grounds exist an appropriate application could be made. We do not intend to deal with such applications, however, in this decision."¹

[4] On 22 September, the NFF made a submission opposing the application. Accordingly, the NUW has not sought to rely on the second ground referred to in the Full Bench decision (the consent of the representatives of the main parties to the award). The NUW has however submitted that the requirements of the first ground is met, namely that LUCRF was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the Horticulture Award 2010.

[5] In particular, the NUW submitted that LUCRF was listed as a default fund in two award-based transitional instruments:

- the South Australian Vegetable Processing (NUW) Award 2003; and

- the Storage Services - Fruit Packing - Victoria - Award 2002.

[6] At the hearing on 14 October 2010, the NUW tendered a statutory declaration by the CEO of LUCRF Super that a number of companies who were respondents to these awards make contributions to LUCRF on behalf of their employees.

[7] However for these award-based transitional instruments to be relevant to the coverage of the Horticulture Award, it is necessary to determine whether the respondents to those awards employ persons who are covered by the modern award.

[8] The relevant parts of the coverage clause of the Horticulture Award 2010 are as follows:

“4.1 This industry award covers employers throughout Australia in the horticulture industry and their employees in the classifications listed in Schedule B - Classification Structure and Definitions, to the exclusion of any other modern award.

4.2 **Horticulture industry** means:

- (a) agricultural holdings, flower or vegetable market gardens in connection with the sowing, planting, raising, cultivation, harvesting, picking, packing, storing, grading, forwarding or treating of horticultural crops, including fruit and vegetables upon farms, orchards and/or plantations; or
- (b) clearing, fencing, trenching, draining or otherwise preparing or treating land for the sowing, raising, harvesting or treating of horticultural crops, including fruit and vegetables.”

[9] During the hearing there was some discussion about whether the coverage of the Horticulture Award 2010 extends beyond the ‘farm gate’. Having examined the transcript of the consultations before Commissioner Lewin that led to the development of the modern award I am satisfied that the reference to ‘*upon farms, orchards and/or plantations*’ should be regarded as qualifying all the activities listed in the preceding paragraph. The phrase ‘*including fruit and vegetables*’ merely emphasises that these products are included in the concept of ‘*horticultural crops*’. The effect of this construction is that the modern award only covers activities such as picking, packing, storing etc. to the extent those activities happen on farms, orchards and/or plantations.

[10] The coverage clause of the South Australian Vegetable Processing (NUW) Award 2003 is as follows:

“6. COVERAGE OF AWARD

This award applies in respect of all persons employed in South Australia in the vegetable processing industry, including persons engaged in, or in connection with:

6.1 the reception, handling, storing, preparation, packing, distribution, delivery or forwarding of vegetables; or

6.2 any other processing of vegetables.”

[11] The coverage clause of the Storage Services - Fruit Packing - Victoria - Award 2002 is as follows:

“5. COVERAGE OF AWARD

5.1 This award applies to the State of Victoria.

5.2 The industries and callings covered by this award are:

5.2.1 preparing, storing or packing fruit for trade or sale;

5.2.2 working in cool stores (exclusively engaged in the cold storage of fruit) attached to any establishment where fruit only is prepared, stored or packed for trade or sale;

5.2.3 but excluding persons engaged in wholesale fruit stores within the district declared in the *Labour and Industry (Metropolitan Industrial Court District) Order 1968*, and persons employed in the trade of processing and packaging berry fruits.

5.3 This award will not apply to persons employed under the Fruit Growing Industry (Consolidated) Award 1976 [Print D1018 [F0026]] as at 16 August 1994.”

[12] It is clear from a comparison of the above coverage clauses that, while there may be some overlap, the coverage of the two transitional instruments extends beyond the coverage of the Horticulture Award 2010. In particular, those transitional instruments cover activities that occur well beyond the farm gate. Such activities would be covered by the Storage Services and Wholesale Award 2010.

[13] The evidence submitted so far by the NUW does not establish that respondents to the two transitional awards employ persons who are covered by the modern award. However it would be premature to dismiss the application. The matter will be re-listed to give the NUW a further opportunity to provide the evidentiary basis for its application.

SENIOR DEPUTY PRESIDENT

Appearances:

Mr M Toner, for the National Union of Workers

Mrs D Wawn, for the National Farmers' Federation

Hearing details:

2010

SYDNEY

14 October

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¹ [2009] AIRCB 800 at [67]