

[2011] FWA 3777



FAIR WORK  
AUSTRALIA

## DECISION

*Fair Work Act 2009*

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

### **National Retail Association Limited**

(AM2010/226)

Retail industry

VICE PRESIDENT WATSON

SYDNEY, 20 JUNE 2011

*Application to vary the General Retail Industry Award 2010 - proposed reduction to minimum engagement period for casual employees who are school students on a school day - whether variation necessary to meet the modern awards objective - Fair Work Act 2009 - ss 134, 158.*

### **Introduction**

[1] This decision concerns an application by the National Retail Association Limited (NRA) pursuant to s 158 of the *Fair Work Act 2009* (the Act) to vary the *General Retail Industry Award 2010* (the Award).<sup>1</sup> In general terms the application seeks to reduce the minimum engagement period for casual employees who are secondary school students to one hour and thirty minutes on school days.

[2] The matter was heard in Melbourne on 6 December 2010, 27, 28 and 29 April 2011. At the hearings Ms J Duff appeared for the NRA, Mr D Mammone appeared for the Australian Chamber of Commerce and Industry (ACCI), Mr P O'Grady of counsel appeared on behalf of Victorian Minister for Employment and Industrial Relations (the Victorian Minister) and Mr W Friend and Mr C Dowling of counsel appeared on behalf of the Shop, Distributive and Allied Employees Association (SDA).

[3] The variation is supported by ACCI and the Victorian Minister, both of whom sought to intervene in the matter, and opposed by the SDA.

### **Background**

[4] A number of applications were made in 2010 seeking a reduction to the minimum engagement for casual employees under the Award (the 2010 applications).<sup>2</sup> The 2010 applications differed from the application presently before me in that they sought the minimum engagement be reduced to two hours for all casual employees. The present NRA application is confined to a reduction in the minimum casual engagement period for

secondary school students on school days. The 2010 applications were dismissed in a decision dated 9 July 2010.<sup>3</sup> An appeal was lodged by two of the applicants. Permission to appeal was not granted, however the Full Bench said:<sup>4</sup>

“**[29]** Before concluding we return to the submission made by the ARA, which we referred to earlier, that we should make provision for student casuals to be engaged for less than three hours in specified circumstances. Although it is not necessary to set it out, it should be recorded that the ARA tendered a detailed proposal. No such proposal was ever put to the Vice President. For that reason it would not be appropriate to entertain it in an appeal from the Vice President’s decision, which we have found to be free from error. On the other hand, we cannot see any barrier to the ARA, or any other interested party, making an application to vary the award to deal specifically with the engagement of student casuals. The fate of any such application would of course depend upon the tribunal’s assessment, in the relevant statutory context, of the material and submissions advanced for and against it.”

**[5]** The Full Bench decision was handed down on 8 October 2010 and the NRA application in this matter was made on the same day. An application in similar terms was later made by the Australia Retailers Association (the ARA).<sup>5</sup> The ARA application was withdrawn on 4 March 2011.

### **The Application**

**[6]** Clause 13.4 of the Award is in the following terms:

“**13.4** The minimum daily engagement of a casual is three hours.”

**[7]** The NRA application seeks that clause 13.4 be varied by the addition of the following:

“, save that:

- a) where an employee is a secondary school student; and
- b) the employee is working between the hours of 3.00pm and 6.30pm on a day which they are required to attend school; and
- c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than 3 hours;

then, the minimum engagement period for the employee will be one hour and thirty minutes.”

### **The relevant legislation**

**[8]** The application by the NRA has been made under s 158 of the Act invoking the powers of FWA to vary a modern award pursuant to s 157 of the Act. Section 157 reads:

“**157 FWA may vary etc. modern awards if necessary to achieve modern awards objective**

(1) FWA may:

- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or
- (b) make a modern award; or
- (c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note 1: FWA must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If FWA is setting modern award minimum wages, the minimum wages objective also applies (see section 284).”

**[9]** The NRA contends that the variation should be made because making the variation outside the system of four yearly reviews of awards is necessary to achieve the modern awards objective. The modern awards objective can be found at s 134 of the Act. It provides:

**“134 The modern awards objective**

*What is the modern awards objective?*

(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.”

### **The evidence**

[10] Evidence was led by the NRA and the SDA which provided a factual context to the submissions they made about the test required to be applied by the legislation. The weight of some of the evidence was limited because of its indirect nature, it addressed limited personal circumstances or involved the expression of personal opinions. It is appropriate that I provide a brief summary of the main points of that evidence. I have, of course taken into account the entirety of the evidence in reaching the conclusions in this matter giving what I have considered to be appropriate weight.

[11] The NRA led evidence from only one witness - Mr Gary Black, Executive Director of the NRA. Mr Black gave evidence that the results of a telephone survey conducted by NRA staff established that there was broad support from those surveyed for the introduction of a provision allowing student casual employees to work less than three hours on a school day. In response to the question “Would the reduction of the minimum shift requirements from 3 hours to 1 ½ hours on school days for casual employees make it easier for you to employ school kids after school?” most respondents answered “Yes”. Some answered “No” because of the current availability to employ school students and some because they are not interested in employing school students. According to the survey results a number of businesses indicated that they would employ more school students if a one and a half hour minimum engagement period was adopted. A number indicated that they would not.

[12] The SDA led evidence from four employees, two SDA organisers and two academics. The employees were Mr Luke Swetman, Ms Georgia Munro, Mr Christopher Carranza and Mr Tysan Allen. The evidence from the employees was that they would prefer to work longer shifts and that shifts of one and a half hours would not be worthwhile due to factors such as cost of transport, time taken to travel to and from work and the amount of money received for working a shift of one hour and thirty minutes duration. In cross examination they acknowledged that other school students may be prepared to work shorter shifts if it suited their individual circumstances.

[13] Further evidence was led from two SDA organisers, Ms Terrie Carrington, an SDA Organiser in Queensland and Ms Louise Buesnell an SDA Organiser in New South Wales. Ms Carrington gave evidence that students do not want to work shorter shifts and would prefer longer shifts. Ms Buesnell gave evidence of a survey seeking the views of students on a shift shorter than three hours, she indicated that the responses were that students did not consider a shorter shift to be worth the time, cost and effort to attend.

[14] The SDA also led evidence from two academics, Dr Iain Campbell a Senior Research Fellow at RMIT University and Dr Robin Price a Senior Lecturer at the Queensland University of Technology.

[15] Dr Campbell gave evidence in the present NRA application and in the 2010 applications. Dr Campbell gave evidence concerning the number of school students in employment and the number of school student employed in the retail industry. Dr Campbell gave evidence that Australia has a relatively high level of youth employment in comparison to other OECD countries, which he suggests indicates there are few barriers to the employment of school children in Australia. Dr Campbell asserts that granting the application is more likely to have a negative, rather than positive effect on the workforce participation of school students.

[16] Dr Price gave evidence of research she had conducted concerning young people's experiences of work. She said that during her research no employer mentioned the minimum engagement period as an issue concerning youth employment. Dr Price asserted that a one hour and thirty minute minimum engagement period would create an incentive for retailers to substitute more expensive forms of labour with school children. She also asserted that students generally wanted to work longer shifts, that students were often taken to and from work by parents, and a shorter minimum engagement may place additional pressures on these parents and that a minimum engagement period of three hours in Queensland does not provide a barrier to the employment of school children.

[17] Various documents and reports were also tendered into evidence including a report by the House of Representatives Standing Committee on Education and Training on combining school and work and supporting successful youth transitions,<sup>6</sup> ABS Labour Force statistics,<sup>7</sup> an ACCI Issues Paper on Youth Employment<sup>8</sup> and responses to a Victorian discussion paper on the youth transitions system.<sup>9</sup>

[18] On the evidence before me I am satisfied that retail establishments across Australia have a variety of opening hours and that many, especially in regional areas, do not open beyond 5.30pm or 6.00pm on week days. I am also satisfied that many school students currently in employment find that the existing three hour minimum period of engagement is important to their decision to undertake part time employment after school because the cost and inconvenience of attending work is compensated for by payment of at least the minimum period of engagement. A shorter period may mean that employment is no longer viable in their circumstances.

[19] I am satisfied that if shorter periods of engagement are available then employers may be more prepared to hire school students after school. It is difficult to assess the extent of this factor or the circumstances in which this may arise as the evidence before me does not deal with these issues. It appears that it may arise where opening hours are limited and the existing minimum engagement period precludes employment for the students during their period of availability. It may also arise where longer opening hours operate but there is a desire to engage junior employees to work for short periods to undertake specific tasks or assist at busy periods. In other words it is not clear whether future employment provided if the application is granted would be limited to circumstances where employment of school students for three hours is not currently possible or would be utilised in substitution for other existing

arrangements. It is therefore not clear what impact may flow to other employees from any such change.

[20] The retail industry is often the source of an employee's first job and can therefore play an important role in the transition from education to work - even though the employee ultimately pursues a career in other industries. The evidence establishes that there has been a growth in the proportion of secondary students undertaking part-time employment over the past 30 years and that a substantial proportion of these students are employed in the retail industry. The proportion of students in employment is currently approximately 37%, almost half of whom are employed in the retail sector. The proportion of school children in employment is higher than in most OECD countries. Youth unemployment in Australia is also relatively high - often more than double the general rate of unemployment. The youth unemployment rate has been in excess of 15% for much of 2010-2011.

[21] The House of Representatives Standing Committee Report records that there is a general consensus that young people's participation in some form of work while at school holds an inherent value. The report states that combining school and work can:<sup>10</sup>

- Enhance a student's confidence and self esteem;
- Contribute to their financial well-being;
- Facilitate the development of social networks;
- Allow students to gain useful knowledge and independence and exercise greater responsibility and self-reliance;
- Instil a work ethic and attitude, and
- Enable students to develop work and organisational skills, including time management skills.

[22] The report also acknowledges that the extent of work should be limited and an appropriate balance struck between work and educational commitments. At some point as work demands increase work can start to become an impediment to school performance.

[23] In a response to the Victorian discussion paper on youth transition system, the Brotherhood of St Laurence expressed the view that more attention should be paid to the needs of students who undertake paid work and study. It said:

“Part-time or casual work can have considerable benefits for students, including independence, confidence and work skills, and new networks; and these may assist them in getting new work in the future. However students in rural areas, from low socio-economic status communities or from refugee or migrant backgrounds may be less able to access part-time jobs. For those students who would benefit from part-time work while studying full time, but who lack access to such opportunities, processes are required through community, business and schools partnerships to enable the development of safe, meaningful employment opportunities that benefit young people.”<sup>11</sup>

## **Submissions**

[24] The NRA particularly relies upon s 134(c) of the Act and contends the variation sought is necessary to achieve the modern awards objective of “promoting social inclusion

through increased workforce participation.” It submits that “social inclusion” in the context of the work of Fair Work Australia (FWA) must be about creating employment opportunities.

[25] The NRA submits when balancing the factors to be taken into account in s 134 of the Act, the majority of factors favour the granting of the application. The NRA submits that its evidence demonstrates that a three hour minimum engagement is too restrictive for the needs of employers and employees in the retail industry.

[26] The NRA submits that clause 13.4 in its present form may be discriminatory in relation to age.

[27] The Victorian Minister submits that the current three hour minimum engagement period for casual employees prevents school students being employed after school where a business is open for a period shorter than three hours after school finishes. The Victorian Minister submitted that granting the application would enhance social inclusion and lead to increased employment opportunities for school students.

[28] The Victorian Minister further submits that a reduction in the minimum engagement for student casuals would further the modern awards objective of promoting flexible modern work practices and the efficient and productive performance of work and reduce unnecessary regulation on business. The Victorian Minister submits that as individual flexibility arrangements are not available in respect of casual minimum engagement periods there is currently no mechanism available to achieve the outcome sought by the NRA.

[29] The Victorian Minister submits that enabling students and their employers the capacity to agree to work less than three hours on a school day would help avoid any negative impact on educational outcomes of working extensive hours. It submits that there are many positive outcomes for young people working a moderate number of hours, including improved employability and smoothing the transition into the labour market after completing high school.

[30] ACCI submits that a variation to the Award that would apply to secondary school student casual employees is necessary to achieve the modern awards objective. ACCI submits that the NRA application is directed to varying the Award for a limited purpose and that the application addresses the concerns of the Full Bench in the Appeals.<sup>12</sup> It submits that the focus should not be on whether there was a manifest error in the award modernisation process or changed circumstances, rather on whether the application is necessary to meet the modern awards objective.

[31] The SDA oppose the variation. It submits that a single member of FWA should not review a decision of a Full Bench where there has been no change in circumstances or in the absence of manifest error. The SDA submit that a variation to a modern award outside of the four yearly reviews of modern awards is only available where FWA is satisfied that the variation is necessary to meet the modern awards objective. It submits that the issue of casual minimum engagement periods was the subject of submissions by parties during the award modernisation process and that a determination was made by a Full Bench of the Australian Industrial Relations Commission to make the Award with a three hour minimum engagement period for casual employees.

[32] The SDA submit that historically three hour minimum shifts have operated successfully throughout Australia without restricting flexible work practices. It submits that there is no direct evidence from the NRA that flexibility is limited as a result of the three hour minimum shift. It further submits that the high level of employment of school children throughout Australia is also an indicator that there is no lack of flexibility in this regard.

[33] The SDA submits that reliance on the modern award objective of promoting social inclusion through workforce participation does not acknowledge the fact that the application is directed at a group who already have a good deal of social inclusion through participation in education.

[34] In response to the NRA submission that clause 13.4 may be discriminatory the SDA submits that the clause in its current form is not discriminatory and that the proposed amendment is directly discriminatory against school students as employers would be able to offer employees a one and a half hour shift even where there were no barriers to a three hour shift if the award is varied in the manner proposed.

[35] The SDA also submits that the proposed variation may result in school students being at an advantage over unemployed young persons in seeking employment in circumstances where an employer may only need someone for a short period of time. It submits that those unemployed young person's most need to work to promote social inclusion. It further submits that there may be a risk of damaging employment for some groups of employees by making a change to the Award for a group of people who may be happy to work on days when they are able to work a minimum shift of three hours.

[36] The SDA submits that there is no evidence before the Tribunal that would demonstrate that the modern awards objective is not being achieved.

### **Is the Variation Necessary to Achieve the Modern Awards Objective?**

[37] It is necessary to consider the evidence and circumstances of this application against the statutory test set out above. This application is quite different to the application subject to earlier proceedings as it is confined to circumstances after school on weekdays for full time secondary school students. It does not seek a general change to the minimum engagement period for casuals.

[38] The retail sector is the most important industry for school students because it provides a large proportion of employment opportunities for this class of employees. It is clear that the employment opportunities in the industry provide significant benefits for the employees, not only in an immediate sense, but also by equipping them with skills and networks to assist in obtaining, and succeeding in, employment in the future.

[39] While the level of employment of full time students in Australia is high by international comparisons, there is no reason to suggest that it should not be higher. Indeed there is some suggestion in the evidence that the current employment opportunities are gained more by students from stable and well off backgrounds than other groups in the community. Members of other groups, such as those from low socio-economic, regional, migrant or refugee backgrounds are likely to benefit far more from employment opportunities while completing full time education.



[40] The evidence suggests that school students who work at present value the current three hour minimum engagement period and may not find employment viable if this engagement period were reduced. There is a long history of minimum engagement periods for part time and casual employees providing protection for employees from employer expectations of working short periods where the cost and inconvenience of attending the workplace outweighs the benefits received from the engagement. The minimum engagement period does not preclude shorter periods of work - provided payment for the minimum period is made.

[41] Hence different groups of persons are likely to be affected in different ways if this application were granted. One group, comprising existing employees and those in similar circumstances, may have their employment rendered unviable and may effectively be deprived of the opportunity to work if a reduced period of engagement is able to be offered to them. Another group, those who are not able to secure jobs at the moment, may be able to obtain valuable employment if more opportunities become available.

[42] Employers, by virtue of the application by one employer association in the retail industry, and the support of ACCI, seek the opportunity to engage students for shorter periods than three hours. No employer gave evidence as to their reasons for wanting this change, and the reasons and circumstances which may arise if the application is granted must therefore involve some speculation.

[43] The support for the application may be for reasons of cost savings where the work of other employees would be substituted with work of cheaper school students. If this were the case other employees, particularly adult and University students who work part-time may be adversely affected by the proposed change. Existing school students who are engaged for three hours or more may have their periods of employment reduced to save on labour costs. If the change opens up employment opportunities for work over and above the work currently performed by other employees then both the employer and students who obtain employment would be better off. The NRA has not established that this would be the main effect of granting the application.

[44] A variation to the award at this time can only be made if it is established that the variation is necessary to achieve the modern awards objective. The objective contains numerous components, some of which relate to employers and the desirability of flexible work practices and some relate more to employees such as the desirability of promoting social inclusion through greater workforce participation.

[45] The employer evidence did not establish how the change would impact on retail operations and why the change would benefit businesses in the industry. The employer evidentiary case was very brief and indirect. It did not deal with the issues relevant to employer flexibility in any meaningful manner. Nor did it attempt to address the impact of the proposed change on school students and other existing employees. I do not therefore consider that a case has been made out based on employers' desire for more flexible engagement practices that the change sought in the application is necessary to achieve the relevant parts of the modern awards objective.

[46] The issue of promoting social inclusion by increased workforce participation addressed by the Victorian Minister and the employers is a significant matter in the retail

industry because of the importance of this issue to youth employment generally. However I am also of the view that granting the application in its present form may create more opportunities for some school students while disadvantaging others. The disadvantage to some may be so great as to render employment in the industry impractical.

[47] Most of the circumstances and arguments advanced by the NRA in this matter related to circumstances where either employment cannot be offered to school students because of the existing three hour minimum engagement period or where students simply cannot be available for a three hour engagement that employers may be prepared to make available. However the variation to the award sought by the NRA seeks a reduction in the minimum engagement period in wider circumstances where three hour engagements may still be possible. These wider circumstances potentially impinge on the viability of existing employment practices that apply to school students. In short, the increased opportunities provided to some school students may result in a detriment to other school students and the proposed variation may not give rise to a net increase in social inclusion or employment opportunities.

[48] I consider that a modified variation to the Award should be made which confines the proposed exception to the three hour minimum engagement period to circumstances where a longer period of employment is not possible. This will ensure that where a longer period is possible the three hour minimum will continue to apply and school students will continue to have the benefit of such an engagement. Where only a shorter period is possible, then a shorter period of engagement can be utilised and employment that would not otherwise be available may thereby become available. Those who can benefit from such employment will be able to take up the anticipated enhanced employment opportunities. Those who do may well be students in different circumstances to many of those who are currently engaged in employment after school and require the benefits of a three hour engagement. Given the circumstances in which the modified clause will operate I consider that the benefits of promoting social inclusion arising from the variation mean that the change is necessary to achieve the modern awards objective.

[49] I envisage that my intention could be achieved by way of additional conditions on the operation of the exception to the three hour minimum. I publish a draft determination together with this decision. Those wishing to comment on the draft may do so in writing within seven days of the handing down of this decision. I will finalise the variation after considering the additional submissions.

[50] Consistent with the object of simplifying the terms of modern awards the Award is a concise prescription compared to the various awards it replaced. As far as possible this should remain the case. Piecemeal changes directed at limited circumstances should be minimised. The arguments in this matter have been directed to narrow circumstances of employment after school for secondary school students. There has been no consideration of the more general operation of penalty rates, engagement periods, or indeed the entitlements of secondary school students employed before school. There is an impending review of the award required to be undertaken in 2012 pursuant to item 6 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. That review may provide an opportunity to review the operation of the revised clause I have approved in this decision.

VICE PRESIDENT WATSON

*Appearances:*

*J. Duff* for the National Retail Association

*N. Tindley* for the Australian Retailers Association

*D. Mammone* for the Australian Chamber of Commerce and Industry

*P. O'Grady* of counsel for the Victorian Minister for Employment and Industrial Relations

*W. Friend* with *C. Dowling* and of counsel for the Shop, Distributive and Allied Employees Association

*Hearing details:*

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<sup>1</sup> MA000004

<sup>2</sup> AM2010/16, AM2010/17; AM2010/39 and AM2010/44

<sup>3</sup> [2010] FWA 5068

<sup>4</sup> [2010] FWAFB 7838

<sup>5</sup> AM2010/236

<sup>6</sup> Exhibit O1, Attachment 2 *Adolescent overload? Report of the inquiry into combining school and work: supporting successful youth transitions* House of Representatives Standing Committee on Education and Training, October 2009

<sup>7</sup> Exhibit O1, Attachment 3

<sup>8</sup> Exhibit M1, Attachment *Issues Paper Youth Employment*, Australian Chamber of Commerce and Industry, May 2010

<sup>9</sup> Exhibit O1, Attachment 7, *Response to the Stronger futures for all young Victorians Discussion paper on the youth transitions system*, Australian Industry Group, June 2010; and Attachment 8 *Response to the Stronger futures for all young Victorians discussion paper on the youth transitions system* Brotherhood of St Laurence, June 2010

<sup>10</sup> Exhibit O1, Attachment 2 *Adolescent overload? Report of the inquiry into combining school and work: supporting successful youth transitions* House of Representatives Standing Committee on Education and Training, October 2009

<sup>11</sup> Exhibit O1, Attachment 8 *Response to the Stronger futures for all young Victorians discussion paper on the youth transitions system* Brotherhood of St Laurence, June 2010

<sup>12</sup> [2010] FWAFB 7838



## DRAFT DETERMINATION

*Fair Work Act 2009*

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

### **National Retail Association Limited**

(AM2010/226)

### **GENERAL RETAIL INDUSTRY AWARD 2010**

[MA000004]

Retail industry

VICE PRESIDENT WATSON

SYDNEY, XX JULY 2011

*Application to vary the General Retail Industry Award 2010 - clause 13.4.*

A. Further to the decision of Fair Work Australia on 20 June 2011 [[2011] FWA 3777] and pursuant to s 157 of the *Fair Work Act 2009* the *General Retail Industry Award 2010* is varied as follows:

A. Clause 13.4 is varied by the addition of the following words at the end of the clause:

“provided that the minimum engagement period for an employee will be one hour and thirty minutes if all of the following circumstances apply:

- a) the employee is a full time secondary school student; and
- b) the employee is engaged to work between the hours of 3.00 pm and 6.30 pm on a day which they are required to attend school; and
- c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than 3 hours; and
- d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

B. This variation takes effect from 1 July 2011.