



## DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 5, Item 6 - Review of all modern awards (other than modern enterprise and State PS awards) after first 2 years

**National Catholic Education Commission and others**  
(AM2012/13 and others)

Educational Services

COMMISSIONER DEEGAN

CANBERRA, 22 JULY 2013

*Modern Awards Review 2012 - application to vary the Educational Services (Teachers) Award 2010.*

[1] This decision concerns applications to vary a number of clauses in the Educational Services (Teachers) Award 2010 [MA000077] (the Award) made by:

- National Catholic Education Commission (NCEC) (AM2012/13)
- Independent Schools Victoria (ISV) on behalf of Independent Schools Tasmania, Independent Schools Queensland, the Associations of Independent Schools in New South Wales, South Australia and Western Australia (AM2012/118)
- Falcan Pty Ltd (Falcan) (AM2012/142)
- Independent Education Union of Australia (IEU) (AM2012/185)
- Australian Childcare Centres Association (ACCA) (AM2012/243)

[2] The applications were made under Sch. 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) as part of the review of all modern awards which the Commission<sup>1</sup> is required to conduct after the first two years of all modern awards coming into effect (the 2012 Review).

### Relevant legislation

[3] Schedule 5, Item 6 of the Transitional Act provides:

- (1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, the FWC must conduct a review of all modern

awards, other than modern enterprise awards and State reference public sector modern awards.

- (2) In the review, the FWC must consider whether the modern awards:
- (a) achieve the modern awards objective; and
  - (b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

(2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

(3) The FWC may make a determination varying any of the modern awards in any way that the FWC considers appropriate to remedy any issues identified in the review.

(4) The modern awards objective applies to the FWC making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.

(5) The FWC may advise persons or bodies about the review in any way the FWC considers appropriate.

(6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of the FWC) has effect as if subsection (2) of that section included a reference to the FWC's powers under subitem (5).

[4] Provisions of the *Fair Work Act 2009* (the Act) are also applicable and relevant to the 2012 Review. Sections 134 and 138 provide as follows:

### **134 The modern awards objective**

*What is the modern awards objective?*

(1) The FWC 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*.

### **138 Achieving the modern awards objective**

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

### **The Full Bench Decision**

[5] In considering these applications I have been guided by the Full Bench decision of 29 June 2012<sup>2</sup> concerning the conduct of the 2012 Review. The Full Bench said:

[63] Under subitem 6(3) of Schedule 5, the Tribunal has a broad discretion to vary any of the modern awards in any way that it considers necessary to remedy any issues identified in the Review. However, subitem 6(4) provides that in making such a variation the Tribunal must take into account the modern awards objective in s.134 of the FW Act, and, if varying modern award and minimum wages, the minimum wages objective in s.284.

[6] The Full Bench also said:

[89] In circumstances where a party seeks a variation to a modern award in the Review and the substance of the variation sought has already been dealt with by the Tribunal in the Part 10A process, the applicant will have to show that there are cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome.

[7] In relation to the application of s.138 of the Act to the 2012 Review: The Full Bench said:

[33] We are satisfied that s.138 is relevant to the Review. The section deals with the content of modern awards and for the reasons given at paragraph [25] of our decision it is a factor to be considered in any variation to a modern award arising from the Review. We also accept that the observations of Tracey J in *SDAEA v NRA (No.2)*, as to the distinction between that which is “necessary” and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.

[34] While s.138 is relevant to the Review there is still the question of the extent of its impact and the circumstances in which it will have on an application to a variation

determination. The supplementary submissions revealed a diversity of views about these issues. We are not persuaded that these issues have been the subject of sufficient debate at this stage. The precise impact of s.138 is a question best considered in the context of a particular application. We agree with the RCAV's supplementary submission that "the nature of the evidence and the facts as found arising from that evidence will condition the exercise of power and the ultimate outcome required to be determined by the review".

### **The Review Process**

[8] A directions hearing took place on 19 April 2013. Directions were issued on the same day for the filing of submissions and evidence in support of the applications and for interested parties to respond. The applications were listed for hearing on 27 May 2013.

### **Application by National Catholic Education Commission (AM2012/13)**

[9] This application sought to vary six clauses of the Award:

- *Part-time employment - Clause 10.4* - to remove the provision that deems part-time employees working more than 90% of full time hours as full-time employees.
- *Fixed term employment - Clause 10.6* - to remove the 12 months limit on fixed term appointments.
- *Recognition of Previous Service - Clause 13.2(b)* - to remove this sub-clause which provides that where a part-time employee works more than 90% of a full-time load, service will count as a full-time year.
- *Vehicle Allowance - Clause 15.4* - to decrease the amount of the vehicle allowance provided to the 'Tax Office Rate'.
- *Ordinary Hours of Work - Clause 19.5* - to include 'professional development or training deemed essential by the employer' as an exemption to the 205 employee attendance days.
- *Breaks - Clause 20* - to reduce the required break after 5 hours of work from 30 minutes to 20 minutes when a teacher is on yard duty or alternatively allow for the hours in which the teacher is entitled be arranged flexibly to meet the needs of the work environment.

[10] The NCEC did not file any evidence or further submissions in support of any of the proposed variations and did not take part in either hearing in relation to the review of the Award. In those circumstances, and given the lack of support for the variations, it is convenient to deal with the application as a whole.

[11] Noting the lack of supporting evidence and submissions the AEU opposed all the variations sought by the NCEC. A similar position was adopted by the IEU which also submitted that no teacher employed in a Catholic school is subject to the award provisions complained of as each one is covered by an enterprise agreement. ISV and those organisations represented by it also opposed the variations sought by the NCEC as not being within the scope of the Review.

[12] The issues involved in each of the variations sought were matters dealt with by the Full Bench in the Part 10A process. The applicant has put forward no cogent reason, nor any supporting evidence, for departing from the previous Full Bench position. Accordingly, the variations sought are not matters that properly fall within the scope of this Review. Application AM2012/13 in its entirety is dismissed.

### **Application by Independent Schools Victoria and Others (AM2012/118)**

[13] Originally, four variations were sought to the Award by ISV, but one variation, concerning accident pay in Clause 16 was withdrawn prior to the hearing.

[14] The remaining variation sought to:

1. Alter the definitions of three, four and five year trained teachers in clause 3.1 of the Award and a sentence concerning recognition of previous teaching experience be added to clause 13.2(a);
2. Insert a new clause 10.4(e) in the Award to provide rates of payment for part-time teachers working additional hours; and
3. Amend a perceived cross-referencing error in clause 19 of the Award.

[15] ISV filed submissions in support of Variation 1 and made oral submissions at the hearing. The variation originally sought to amend the definitions of four-year trained and five-year trained teachers. ISV also made an amendment to this variation as originally sought. ISV took the view that it would help employers and employees to have the definitions slightly amended given that there are now different arrangements applying to early childhood teachers in the implementation of the National Quality Framework and the establishment of the Australian Children's Education and Care Quality Authority in 1 January 2012. As a consequence, and for reasons of consistency, ISV also proposed to amend the definition of a three-year trained teacher.

[16] According to ISV, the proposed variations make the definitions more consistent with those recognised in the industry and would provide assistance to new entrants to the industry, whether employers or employees. While those employers and employees that have been in the industry sector for some time have an understanding of how the definitions work, questions are raised about whether a particular qualification would be recognised as either four-year trained or five-year trained. The definition of three-year trained did not pose the same difficulty.

[17] ISV noted that the proposed variations would assist in the easier interpretation of the Award definitions.

[18] The application to vary the definitions was opposed by the AEU. It was submitted that the matter of the definitions had been a live issue during the Part 10A process and that various proposals were made by the parties at that time. The AEU noted the lack of supporting documentary and witness evidence and took issue with ISV's claim that the current definitions were causing difficulty and confusion. It was put that the current award provision was operating without anomaly or technical difficulty and there was no evidence before the Commission to suggest otherwise.

[19] The IEU did not object to the variation sought. The CCSA supported the proposed variation agreeing with the ISV submission that it would remove ambiguity and accurately reflect the changed arrangements for Early Childhood Education and Care under the National Quality Framework.

[20] As the variation proposed by the ISV was opposed by the AEU, concerns a matter considered and determined during the Part 10A Review process and was not supported by any evidence to substantiate the claim that the current provision is ambiguous or not operating effectively, there is no basis upon which the variation can properly be made during this Review. The application to vary the specified definitions in clause 3.1 is dismissed.

[21] So far as Variation 2 is concerned it was the ISV submission that the variation was not a matter considered in the Part 10A Review process as it was seeking that part-time teachers working additional hours would be remunerated at the same rate as their part time hours together with an additional loading of 25%. Those additional hours would not accrue leave of any kind.

[22] Both the IEU and the AEU objected to Variation 2 on the grounds that it concerned a matter that was considered by the Full Bench as part of the Part 10A process and no cogent reason had been advanced for departing from the previous decision.

[23] The proposed variation was also opposed by CCSA which submitted that it would cause administrative complexity.

[24] As no cogent reasons have been advanced to support a departure from the previous Full Bench decision concerning the matter of payment for part time hours, I dismiss the application to vary clause 10.4 of the Award (Variation 2).

[25] No interested party lodged an objection to the third variation sought by ISV, the purpose of which is to amend clause 19.6 of the Award to provide that clause 19.4 does not apply to employers that adhere to the calendar and school year of a foreign country. The AEU, IEU and CCSA all recognised that the variation is sought to correct a cross-referencing error not picked up at the time the Award was made.

[26] I accept that the variation is a technical amendment to correct an error made at the time the Award was made. The Award will be amended as proposed by ISV.

#### **Application by Falcan Pty Ltd (AM2012/142)**

[27] Initially Falcan sought variations to two clauses of the Award. One variation which dealt with the subject of transitional rates in the Award was referred to a Full Bench. The other variation which sought to alter Clause B.3.1 - Meal Break and Rest Pauses was withdrawn on the morning of the hearing. Consequently there are no variations sought by Falcan which require further consideration.

#### **Application by Independent Education Union of Australia (AM2012/185)**

[28] This application was withdrawn by the IEU at the hearing of the matter.

**Application by Australian Childcare Centres Association (AM2012/243)**

[29] ACCA sought a variation to clause 11.3 of the Award to replace the current extended notice periods contained in that clause with those set by the National Employment Standards.

[30] The submission in support of the variation asserted that the proposed amendment would assist in the effective operation of the Award and remove an anomaly which has created technical and administrative difficulties for employers within the industry. ACCA also claimed that the variation would assist in achieving the modern awards objective while conceding that the existing award is not inconsistent with those objectives. It was submitted that the variation sought should be regarded as an evolutionary or consequential change. In essence the change sought would achieve some consistency in conditions applying to employees of child care centres, whether they are teachers or child care workers. It was noted that the Award currently has a separate schedule that recognises special conditions for teachers employed in long day care centres operating for at least 48 weeks per year.

[31] This application was supported by Business SA which submitted that it would ensure that the Award continued to provide a fair and relevant minimum safety net of terms and conditions and remove the uncertainty and confusion caused by different conditions applying to staff working in child care centres.

[32] The application was opposed by the AEU which noted that ACCA recognised that the provision operated in such a way that it was not inconsistent with the modern awards objective and did not raise an anomaly or technical difficulty. It was submitted that the subject of the variation was a live issue during the Part 10A process and that no new issues had been raised by ACCA.

[33] The application was opposed by the IEU who filed a witness statement directed at demonstrating that the matter had never been raised as a problem by employers of IEU members and noting that the four weeks' notice had been a requirement under NAPSAs in NSW, Queensland and Victoria. The IEU noted that ACCA called no evidence in support of the submission that the current provision had created technical and administrative difficulties for employers. Finally, the IEU noted that the proposed variation was part of the position of ACCA during the Part 10A process and that their position in this regard was not adopted by the Full Bench.

[34] The ISV and the other associations represented by the organisation also opposed the variation on the basis that the issue had been considered in the Part 10A process and is not a matter that is permitted to be dealt with under the principles of the Transitional Review.

[35] The application was also opposed by CCSA on essentially the same grounds as those raised by the other parties opposing the variation.

[36] I am satisfied that the issue that is the subject of the variation sought by ACCA was a matter dealt with by the Full Bench in the Part 10A process and, as such, should not be subject to this Review without some cogent reason. ACCA have not provided any evidence of

any change that has occurred since the Award was made or any evidence that the Award is not meeting the modern awards objective.

[37] The application made by ACCA is dismissed.

[38] A determination for the purpose of correcting the cross-referencing error in clause 19.6 of the Award will be published with this decision.



*Appearances:*

Mr D. Colley for the Australian Education Union.

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

Ms K. Knopp for the Independent Schools Victoria and Others.

Mr D. Morphett for Falcan Pty Ltd.

Mr J. Gunn for Community Connections Solutions Australia.

*Hearing details:*

2013.

Melbourne:

May 27.

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<sup>1</sup> On 1 January 2013, Fair Work Australia was renamed the Fair Work Commission (the Commission). In this decision I have referred to the Commission which incorporates reference to Fair Work Australia as it was known prior to 1 January 2013

<sup>2</sup> [2012] FWAFB 5600.