FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.158 - Application to vary or revoke a modern award

Fair Work (Transitional Provisions & Consequential Amendments) Act 2009
Sch. 3A, Item 30 - FWA to consider making orders to continue effect of long service leave terms of Division 2B State awards

Shop, Distributive and Allied Employees Association

(AM2010/260, 261, 262, 263, 264)

Various industries

COMMISSIONER HAMPTON ADELAIDE, 9 FEBRUARY 2011

Transitional arrangements - Division 2B award - orders to preserve long service leave entitlements - Full Bench decision determined that orders would be made on application - whether order can and should now be made.

INTRODUCTION AND BACKGROUND

[1] This matter concerns five applications by the Shop, Distributive and Allied Employees Association (the SDA) to preserve certain Long Service Leave (LSL) provisions arising from an award originally made by the Industrial Relations Commission of New South Wales. The award in question is the *Broken Hill Commerce and Industry Consent Award* 2008[1] (the Broken Hill award).

[2] The applications concern parties that are now subject to the terms of the following modern awards:

- *Fast Food Industry Award 2010*
- *General Retail Industry Award 2010*
- *Hair and Beauty Industry Award 2010*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
- *Pharmacy Industry Award 2010.*

[3] Although broadly notified, no party or organisation other than the SDA sought to make submissions or be heard in this matter.

[4] Having heard the matters on 8 February 2011 I granted leave to amend the applications and then made an order[2] largely as sought. My reasons for so doing are as follows.

[5] The background to these applications is largely set out in the decisions of the Full Bench dealing with the transitional arrangements to apply to employers and employees who became national system parties by virtue of Division 2B of the *Fair Work Act 2009* (the Fair Work Act). That is, parties who were the subject of a referral of industrial relations powers to the Commonwealth by most State Governments during 2009. Many of these parties were subject to State awards that have been preserved by virtue of Schedule 3A of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act). The Full Bench dealt with certain requirements of the Transitional Act in two decisions; namely, *Award Modernisation – Division 2B State Awards*, 5 November 2010 [2010] FWAFB 8558 and subsequently on 17 December 2010 in *Award Modernisation – Division 2B State Awards* [2010] FWAFB 9774.

[6] Item 3 of Schedule 3A to the Transitional Act provides that on the commencement of the referral, which was 1 January 2010, employers and employees affected by the referral commence to be covered by federal instruments known as Division 2B State awards. A Division 2B State award is taken to include the terms and conditions which were contained in the relevant State award immediately before the referral. Subject to certain exceptions that are not presently relevant, Division 2B State awards which are not enterprise awards terminated 12 months after the Division 2B referral commencement.[3]

[7] The Full Bench considered, amongst many other matters, whether the terms of the Division 2B State awards dealing with LSL should be preserved. In its November decision, the Full Bench determined as follows:

> "LONG SERVICE LEAVE
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> [54] Long service leave is dealt with in item 30 of Schedule 3A. It is not necessary to set it out in full. It requires Fair Work Australia to consider whether to make an order continuing the effect of terms relating to long service leave in a Division 2B State award for a transitional period of up to five years.
>
> [55] The ACTU, supported by the New South Wales Government and a number of unions, submitted that we should make a general order preserving long service leave entitlements in Division 2B state awards for the duration of the transition period. It was said that such an order will ensure that employees previously covered by Division 2B State awards are subject to the same arrangements as employees covered by s.113 of the Fair Work Act. There was no opposition to this proposal. However it would be preferable to make an order for each relevant Division 2B State award. We attach a draft order as Appendix C to this decision. The order will be made in relation to a particular Division 2B State award on application."[4]

THE APPLICATIONS

[8] The SDA applications as filed sought that Fair Work Australia **vary** the respective modern awards. The evident purpose of each application was however to give effect to the decision of the Full Bench in the context of Item 30 of Schedule 3A of the Transitional Act.

[9] The grounds of each application filed included the following:

> "1. Item 30(1)(a)(i) of Schedule 3A of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth*)* imposes an obligation on Fair Work Australia to consider whether to make an order to continue the effect of terms relating to long service leave contained in a Division 2B state award.
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> 2. We submit that the reduction of an employee's long service leave entitlement following the transition to the modern award on 1 January 2011 is less beneficial than the long service leave entitlements provided in the Division 2B state award.
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> 3. On that basis, we submit that Fair Work Australia should make an order to vary the modern award in order to preserve the long service leave entitlements of the Division 28 state award."

[10] Prior to the hearing of the matter I raised with the SDA, via a Statement that was published generally,[5] whether the applications should be considered as being for an **order** contemplated by the Full Bench pursuant to Item 30.

[11] Mr Blairs, who appeared for the SDA confirmed that this was the intention and in that light I exercised my powers pursuant to ss.586 and 599 of the Fair Work Act to deal with the applications on that basis. As such, the applications were varied and joined to reflect a request for a single order pursuant to Item 30 of the Transitional Act.

[12] The SDA contended that the applications should be granted to ensure that the employees concerned had their existing LSL entitlements and rights preserved in a manner consistent with arrangements provided by National Employment Standard (NES) established by s.113 of the Act. That is, pending the development of a nationally consistent LSL standard, it was intended that existing LSL arrangements from whatever source be generally preserved.

[13] The SDA submitted that employees who transferred from the *Broken Hill Commerce and Industry Agreement Consent Award 2001 NAPSA*[6] to the various modern awards listed in these applications on 1 January 2010 had their long service leave entitlements preserved by virtue of the operation of the relevant NES in s.113(3) of the Fair Work Act. However, employees who transferred from the Broken Hill award to the various modern awards on 1 January 2011 were said not to be covered by s.113(3).

[14] The SDA also argued that the power for Fair Work Australia to make the orders remained, given that the Full Bench had already considered and determined the substantive matter during the transitional period referred to in Item 30 of Schedule 3A. Although not necessarily a prerequisite, the SDA also contended that it had filed the applications during that period.

THE REQUIREMENTS FOR AN ORDER TO BE MADE

[15] Item 30 of Schedule 3A of the Transitional Act provides as follows:

> "30 FWA to consider making orders to continue effect of long service leave terms of Division 2B State awards

(1) During the period of 12 months starting on the Division 2B referral commencement, FWA:

(a) must consider whether any orders should be made in relation to which the following conditions are satisfied:

(i) the purpose of making the order is to continue (in whole or in part) the effect of terms relating to long service leave that are contained in a Division 2B State award, other than a Division 2B enterprise award;
(ii) the order only relates to employees, employers or other persons covered by the Division 2B State award; and

(b) may make one or more such orders.

(2) An order under subitem (1):

(a) takes effect at the end of 12 months after the Division 2B referral commencement; and
(b) ceases to have effect:

(i) at the end of 5 years after the Division 2B referral commencement; or
(ii) if the order is expressed to cease to have effect at an earlier time—at that earlier time.

(3) Paragraph 675(1)(a) of the FW Act has effect as if it also included a reference to an order under subitem (1).

(4) To the extent that a term of a Division 2B State award, or of an enterprise agreement, is detrimental to an employee, in any respect, when compared to an order under subitem (1), the term of the award or agreement is of no effect.

Note: A term of a Division 2B State award, or of an enterprise agreement, that provides an entitlement that is at least as beneficial to an employee as a corresponding entitlement of the employee under the order will continue to have effect.

(5) The regulations may make provisions that apply to determining, for the purpose of this item, whether terms of a Division 2B State award or an enterprise agreement are, or are not, detrimental in any respect when compared to an order under subitem (1)."

[16] There are no relevant regulations established for the purposes of subitem (5).

[17] Section 675(1)(a) of the Fair Work Act provides in effect that an order made under this Item is enforceable.

[18] Leaving aside for the moment the issues associated with the timing of the applications, the Transitional Act requires consideration of the following conditions in relation to this matter.

Is the Broken Hill award a Division 2B award for present purposes?

[19] The meaning of a Division 2B award is established by a combination of Division 2B of the Fair Work Act and Items 2 and 3 of Schedule 3A of the Transitional Act. Without specifying each of those requirements, it is evident that the Broken Hill award is a Division 2B award. It is an award[7] of a prescribed State Industrial body in a referring State and it regulates wages and conditions of employment. It is also not an enterprise award given that it applies generally within the Broken Hill region.[8]

Does the Broken Hill award provide terms relating to LSL?

[20] Clause 1.17 of the award provides certain LSL benefits in the following terms:

> "1.17. Long Service Leave
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> a. As per the Long Service Leave Act 1955 and any further amendments thereto, provided however, that thirteen (13) weeks long service leave .will be granted at the end of ten (10) full complete years.
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> b. This concession only commences to accrue on or after January 1, 1971.
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> c. All other provisions, conditions, durations, qualifying periods and etc. of the Long Service Leave Act remain unaltered, and are not affected by the above concession of 13 weeks long service leave for ten years service.
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> d. An employee who has completed five years (but less than 10 years) of service is entitled to long service pro rata payment if he or she:
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> i Resigns as a result of illness, incapacity, domestic or other pressing necessity
> ii Is dismissed for any reason except serious and wilful misconduct
> iii Dies
>
> e. For all employees, on termination of employment after 10 years service, long service pro-rata payment shall be calculated at 1.3 weeks per year for all service up to fifteen years. After fifteen years of service, long service payment shall be calculated at 1.3 weeks for each completed year of service."

Are the LSL terms of the Broken Hill award beneficial?

[21] Although not a condition as such, there would clearly be no purpose in considering an order where at least some of the award terms were not beneficial to employees. In the absence of these orders, the LSL entitlements of the relevant parties would generally fall to be determined by the relevant State LSL Act, in this case the *Long Service Leave Act 1955 (NSW)*.[9] Subclauses 1.17(a) and (e) of the Broken Hill award increase the basic LSL entitlement for all service after 1 January 1971 when compared with the State Act.

[22] In that light, the terms of the Broken Hill award are beneficial within the meaning of the Transitional Act. Any order would of course operate subject to the no detriment terms of Item 30(4).

CAN AND SHOULD AN ORDER NOW BE MADE?

[23] This question arises in particular as the matter is being finalised by Fair Work Australia outside of the period referred to in Item 30(1). That period ended on 31 December 2010.

[24] I have in that light considered whether the power to grant the order remains available. In my view, Fair Work Australia is able to make the order as sought for the following reasons.

[25] Item 30 contemplated Fair Work Australia acting of its own motion to consider the relevant issues. The Full Bench did so when it commenced proceedings on 23 April 2010.[10] During the months that followed, the Full Bench specifically considered whether orders should be made in relation to the LSL terms of Division 2B awards under Item 30 and concluded that this should be done.

[26] The Full Bench however considered that the form of orders should be made by reference to each applicable Division 2B award rather than as a general order and invited applications to that end. The SDA applications simply give effect to the consideration and decision of the Full Bench made during the period referred to in Item 30(1).

[27] In that light, I can see no warrant to apply the particular powers given to Fair Work Australia narrowly so as to now prevent the making of an order to continue (in whole or in part) the effect of terms relating to long service leave that are contained in a particular Division 2B State award that was standing at the point when the Full Bench determined its position on the matter.

[28] The terms of Item 30(1) also mean that even when satisfied that the conditions have been met, the decision to make such an order remains discretionary.

[29] Having considered all of the circumstances I also find that the making of the order is appropriate and in accordance with the objects of the Act and the evident purpose of the transitional arrangements associated with the legislation. This approach is consistent with the decision of the Full Bench to provide for the continuation of the relevant LSL provisions and I also note that the SDA acted promptly to give effect to that determination.

THE FORM OF ORDER

[30] Most of the terms of an order to be made in this context are set out within Item 30 and are reflected into the model order appended to the November 2010 decision of the Full Bench.[11]

[31] The Full Bench envisaged the orders being made by reference to the particular Division 2B award rather than as a variation, or order in relation, to one or more modern awards. The applications in this matter were framed in part around the nominated modern awards and have been dealt with on that basis.

[32] As a result, the order issued by me is also framed around parties who were covered by the Broken Hill award immediately prior to 1 January 2011 and who are now covered by one or more of the nominated modern awards.

[33] In accordance with Item 30(2) the order takes effect on and from 1 January 2011 and I determined that it would cease to have effect on 31 December 2014. This latter date is the maximum period permitted by the Transitional Act and lines up with the conclusion of the other transitional arrangements determined by the Full Bench for the Division 2B parties.

[34] In order to assist the parties, I will raise with the relevant FWA staff the desirability of having reference to these orders (and any others of the same nature) being made in connection with each relevant modern award as "published" on the Fair Work Australia website. I will also confirm the need for Fair Work Australia to maintain ready access to the Division 2B awards for the entire transitional period.

COMMISSIONER

Appearances:

D Blairs with *S McMillan*, for the Shop, Distributive and Allied Employees Association.

Hearing details:

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[1] RA120088

[2] RA120088 PR506544 issued on 8 February 2011.

[3] See item 21 of Schedule 3A of the Transitional Act.

[4] *Award Modernisation – Division 2B State Awards* [2010] FWAFB 8558, 5 November 2010 per Giudice J, Acton SDP and Hampton C.

[5] Statement issued 3 February 2011 and published on the FWA website.

[6] The 2001 "NAPSA" award [AN120088] contains very similar LSL provisions to the Division 2B award. The Notional Agreement Preserving a State Award was established in 2006 as a result of the *Workplace Relations Amendment (Work Choices) Act 2005*.

[7] The Broken Hill award is expressed to be an award under the terms of the *Industrial Relations Act 1996 (NSW)* and operated on that basis.

[8] See Item 2(4) of Schedule 6 of the Transitional Act. The Broken Hill award applied generally to parties engaged in commercial and industrial activity on the County of Yancowinna with the exception of certain nominated categories of employment that are not presently relevant.

[9] See the discussion of State LSL law and the operation of the NES in *Armacell Australia Pty Ltd and others* [2010] FWAFB 9985, 24 December 2010 per Giudice J, Acton SDP and Lewin C.

[10] *Statement: Award Modernisation - Division 2B State Awards*, Giudice J [2010] FWA 3102. Certain parties, including the ACTU who raised the issue of LSL, also made applications to Fair Work Australia as part of that process.

[11] Appendix C to [2010] FWAFB 8558.