FAIR WORK AUSTRALIA

DECISION

Fair Work (Transitional Provisions and 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.

Australian Nursing Federation
(AM2010/265, AM2010/266, AM2010/267, AM2010/268)

Health Services Union of Australia
(AM2011/4, AM2011/5, AM2011/6)

VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER HAMPTON SYDNEY, 17 JUNE 2011

Applications for long service leave orders.

Introduction

[1] This matter concerns four applications by the Australian Nursing Federation (the ANF) and three applications by the Health Services Union of Australia (the HSU) to preserve certain long service leave (LSL) provisions contained in former State awards that became instruments under the *Fair Work Act 2009* (the FW Act) by virtue of Division 2B of that Act.

[2] The applications seek to rely upon item 30 of Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act).

[3] The applications were initially considered by single members of Fair Work Australia however the matters are before this Full Bench following a direction issued by the President pursuant to s.582 of the FW Act.

[4] The applications were initially opposed on merit by the Aged and Community Services Association of NSW and ACT (ACSA), the Aged Care Association Australia - NSW (ACAA-NSW) and Australian Business Industrial (ABI). These parties have also subsequently opposed the applications on jurisdictional grounds.

[5] The Catholic Commission for Employment Relations (CCER) supported the applications. The CCER did not make detailed submissions in relation to the jurisdictional issue.

The earlier Full Bench decisions

[6] Important elements of the background to these applications are set out in the decisions of a Full Bench that dealt with the transitional arrangements to apply to employers and employees who became national system parties by virtue of Division 2B of the FW 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 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.

[7] 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 commenced to be covered by federal instruments known as Division 2B State awards. A Division 2B State award was 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.[1]

[8] The earlier 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
>
> [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."[2]

Is there jurisdiction to now make the orders sought?

[9] This issue arises given the timing of the applications and/or their determination by Fair Work Australia.

[10] The ANF applications were filed in late 2010 and the HSU applications were filed in early 2011. None of the applications were finalised prior to 31 December 2010, that is, within the period referred to in item 30(1) of Schedule 3A of the Transitional Act.

[11] 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).”

The positions advanced by the ANF and HSU

[12] The ANF and HSU (collectively the applicants) filed separate but broadly consistent submissions and they contend that the earlier Full Bench decision must be taken to mean that Fair Work Australia considered and ruled on the matters referred to in item 30 of Schedule 3A. That is, the Full Bench announced its decision and pronounced orders that were to be perfected or entered through a process that it established. In that light, it was argued that the administrative process for the perfection or entering of the orders need not occur within the 12 month period referred to in item 30.

[13] The applicants argued that s.33(1) of the *Acts Interpretation Act 1901* provides for the performance of powers conferred. That is, the presumption of regularity and the manner in

which Fair Work Australia has dealt with the matter should lead to the conclusion that the power to make the orders remained.

[14] Further and in the alternative, the applicants contended that item 30 of Schedule 3A should not be construed to have the effect that, having considered the matters set out in item 30(1)(a) the orders can only be made within the 12 month period referred to in item 30(1). Rather, the item should be construed to give effect to Parliamentary intention. It cannot be said that it was Parliament's intention that the item should operate or be construed in such an arbitrary and capricious manner such that while Fair Work Australia had fully considered the matters it was obliged to do so, it was then precluded from making orders by reason of procedural provisions.

[15] It was contended that if it were Parliament's intention to cut off by way of time limit the opportunity to have rights preserved it would have made its intention apparent. See for example language used in Schedule 6 item 4(3)(b) and item 10.[3] Were it Parliament's intention to have the opportunity to have rights preserved cut off by imposition of a time limit there would have been no need to make provision as is made in item 30(2)(a). That is, the time of the effect of the orders operates regardless of when the order is made.

[16] Further, the applicant's contended that the relevant item should be read in accord with s.15AA of the *Acts Interpretation Act 1901* and in that context it was said that item 30 appears in a part of the Act dealing with the preservation of entitlements in a transitional period.

[17] The applicants argued that properly construed, the word "may" in item 30(1)(b) provides a grant of power to be exercised if the condition for the exercise of the power has been satisfied i.e. the consideration of the matters set out in item 30(1)(a). That is, it provides that Fair Work Australia must do certain actions required by the item (which were done) and having done so it may then make orders consistent with the consideration by the Tribunal of the prescribed matters as contemplated.

[18] The item should not be read in all the circumstances now before Fair Work Australia in such a way as to shut out an applicant who has otherwise complied with the procedural requirements of the Act.

[19] The applicants argued that having considered the matters in item 30(1) within the time provided, Fair Work Australia has no power to now further consider the matters in item 30(1), and as such need not deal with the merit questions raised by the employer respondents in this matter.

[20] The HSU proposed in the further alternative that we should exercise powers under s.602 of the FW Act to correct a defect or irregularity in the earlier Full Bench decision should that be necessary to avoid unnecessary technicality.

The positions advanced by ACSA, ACCA-NSW and ABI

[21] ACSA, ACAA-NSW and ABI (collectively the employers) also filed broadly consistent submissions on the question of jurisdiction. They contended that the Tribunal's discretion to make an order under Schedule 3A, item 30 of the Transitional Act is limited to "the period of 12 months starting on the Division 2B referral commencement (1 January 2010)". As a result, Fair Work Australia has no power (or jurisdiction) to make an order to

continue the effect of long service leave terms of Division 2B State awards post 31 December 2010.

[22] The employers contend that the earlier Full Bench did not make an order, rather, it set out a "draft order" (at Appendix C to its decision), and stated that "The order will be made in relation to a particular Division 2B State award on application."

[23] It was submitted that the words of item 30(1) are clear and that there is little need to resort to questions of intention. Notwithstanding this, the construction adopted by the employers was said to be consistent with Parliament's intention. That is, the intention was to ensure, pursuant to Schedule 3A, items 29 and 30, that variations and orders made to continue the effect of certain terms of Division 2B State awards were made prior to such awards terminating. To construe items 29 and 30 any other way would produce absurd results in that there would be 'gaps' in the application of 'preserved' terms of 2B State awards that could only be cured by way of retrospective order.

[24] Further, the employers argued that Parliament could not have intended that such orders could be made at anytime, with retrospective effect, as they create potential strict liability offences under the FW Act. This would be unjust and would require clear express words.

[25] It was contended that Schedule 3A, item 30(2)(a) of the Transitional Act provides for the prospective (not retrospective) application of any order made continuing the effect of long service leave terms. Prospective in the sense that if an order is to be made during the period of 12 months starting on the Division 2B referral commencement (ending 31 December 2010), it takes effect at the end of the 12 months after 2B referral commencement (starting 1 January 2011). In that context it was argued that any order made under item 30 affects substantive not procedural rights.

[26] To make an order post 31 December 2010 would offend the rule that a statute ought not be given retrospective operation affecting rights or obligations unless the language of the statute expresses or requires such a construction.[4]

[27] The employers argued that s.602 of the FW Act could not be applied in this case given the process implemented, and decision made, by the earlier Full Bench.[5] There were no unintended consequences, rather it was suggested that the Full Bench indicated that the decision marked the end of the process under items 29 and 30 of Schedule 3A.[6]

[28] To the extent that the ANF or HSU seek to rely upon the decision of Commissioner Hampton in *Shop, Distributive and Allied Employees Association* [2011] FWA 761,[7] it was respectfully submitted that it not be followed.

Consideration of the jurisdictional issue

[29] Item 30 contemplated Fair Work Australia acting of its own motion to consider the relevant issues. The earlier Full Bench did so when it commenced proceedings on 23 April 2010.[8] During the months that followed, the Full Bench specifically considered, amongst many other matters, 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.

[30] 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 statement of the earlier Full Bench that the decision marked the end of the process must be seen in the context that it had decided the item 30 issue and was anticipating that applications would be made to confirm the relevant awards to be cited in any final orders.

[31] The question remains however, whether the jurisdiction to now make the orders sought in these matters has survived the conclusion of the period ending on 31 December 2010.

[32] Some of the contentions of the parties relate to the question of whether the decision of the Full Bench amounted to a formal order. We do not consider this to be the relevant question. The jurisdictional issue is whether this Full Bench is now precluded by the terms of item 30(1) from finalising the orders that the earlier Full Bench decided should be made.

[33] In seeking to give effect to the intention of the Transitional Act, we must take into account that the provision intended that where appropriate, the LSL provisions of the Division 2B awards would be preserved for an interim period. We have no doubt that the earlier Full Bench concluded that this should be done and that it decided to make orders of a particular type, on application. We will also return briefly to the overall intent of the Act in this context as part of the merit of the applications.

[34] We have considered whether item 30(1) requires any orders to be finalised during the period. In our view such an interpretation would not be correct. By the terms of item 30(1) Fair Work Australia was obliged to consider during the relevant period whether the orders should be made. The item provided it with a discretionary power to make orders consequent upon this consideration. The import of item 30(2) is that whenever the order was made, it takes effect at the end of the 12 months concluding on 31 December 2010. The need to provide continuity of LSL provisions from the point that the Division 2B awards ceased is evident, and represents legislative intention that the orders may operate retrospectively if needed. In our view these provisions do not require that all steps in the making of the orders be taken prior to 1 January 2011.

[35] The earlier Full Bench undertook the task envisaged by the legislation prior to 1 January 2011. The process envisaged by the earlier Full Bench was that applications could be made that nominated particular Division 2B awards. The merit of making the orders and the form of the orders was determined by the earlier Full Bench. As the actual orders needed to be made by reference to nominated awards further applications were contemplated. In that context, the subsequent applications were not initiating a new process but rather the administrative mechanism established by Fair Work Australia to nominate those awards and conclude the matter dealt with by the earlier Full Bench. This is in many respects equivalent to a process of perfecting court orders as contended by the applicants.[9] The substantive task of considering whether orders should be made was completed in the earlier Full Bench decision.

[36] Accordingly, we consider that jurisdiction remains to make the orders sought.

Should the orders now be made?

[37] Given the view that we have taken about the affect of the earlier Full Bench decision, there is in our view little if any scope to further consider the merit of making the orders. We also note that these applications were clearly made as a direct consequence of the earlier Full Bench decision and no other applications to nominate awards have been made in the intervening period. Each of the awards as nominated in the application is a relevant award as contemplated by item 30 and the earlier Full Bench decision, and the orders should be made.

[38] The parties did present detailed arguments as to whether the LSL provisions were preserved for those employees previously covered by Notional Agreements Preserving State Awards (NAPSAs).[10] This was done on the basis that consistent treatment of the Division 2B and NAPSA parties would be desirable given the general approach of the earlier Full Bench to the relevant transitional arrangements.[11]

[39] It is not necessary or appropriate for us to deal with this aspect. Any view we may take would not be binding and the circumstances here make the objective of consistency between these parties of much less significance. That is, the purpose of the transitional arrangements on LSL within the Act more generally[12] was to preserve existing LSL arrangements applying at the time of the establishment of the National Employment Standards, pending the determination of a genuine national LSL standard. There are already different LSL provisions specifically preserved by the Act for the interim period - including former LSL awards of the Australian Industrial Relations Commission (AIRC), preserved agreements, State reference instruments applying to non-constitutional corporations subject to an AIRC award, and each existing State LSL Act. The retention of the different arrangements for LSL applies within the system irrespective of the legal position on LSL pertaining to the former NAPSA parties. The preservation of the Division 2B awards on LSL is consistent with the approach taken generally with respect to the transitional arrangements for LSL and sits comfortably with the approach adopted by the earlier Full Bench on the matter.

[40] Orders in relation to each of the applications are being issued in conjunction with this decision. These are in line with those determined by the earlier Full Bench and made by reference to each Division 2B award cited in the respective applications.

VICE PRESIDENT WATSON

Appearances:

E. White of counsel and *N. Blake* for the Australian Nursing Federation

D. Langmead of counsel and *M. McLeay* and *A. Coquillon* for the Health Services Union of Australia

G. Boyce for the Aged and Community Services Association of NSW and ACT and the Aged Care Association Australia - NSW

B. Briggs for Australian Business Industrial

D. Yuille for the Catholic Commission for Employment Relations

Hearing details:

2011.
Before Commissioner Hampton:
Adelaide - Melbourne - Sydney (by video link)
February, 23

Before Vice President Watson:
Sydney - Melbourne (by video link)
February, 17

Before the Full Bench
Melbourne - Sydney (by video link)
April, 7

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

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

[3] The ANF also referred to s.111AAA (4) of the *Workplace Relations Act* inserted in that Act with effect from 1 January 1997 would have been used. That section expressly provided that in certain circumstances the Australian Industrial Relations Commission was to "cease dealing" with the dispute which had been before it prior to the coming into effect of s.111AAA.

[4] *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Rodway v The Queen* (1990) 169 CLR 515 at 518; *Vansittart v Taylor* (1855) 4 E & B 910 at 914.

[5] *Raybos (Australia) Pty Limited v Tectran Corporation Pty Limited* (1988) 77 ALR 190 at 191.

[6] [2010] FWAFB 9774 at [20].

[7] This matter involved an application made in similar circumstances to that of the ANF applications in this matter. The Commissioner found that there was jurisdiction to make the orders in that case however we note that there were no contrary positions or objections advanced in that matter.

[8] *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.

[9] This is somewhat analogous to the approach applied by Zelling J in *The Church of the New Faith Inc v Bower and Australian Broadcasting Commission (No 2)* [1979] 21 SASR 161 at 163.

[10] Established under the *Workplace Relations Act 1996* by virtue of the *Workplace Relations Amendment (Work Choices) Act 2005*.

[11] In general terms, the earlier Full Bench determined that the transitional arrangements for the Division 2B parties should match those already applying to the former NAPSA parties. We note that certain differential arrangements do already apply to the Division 2B parties as a result of the earlier Full Bench decision and this recognises the different starting point and timing of the transitional provisions for these parties - see: *Award Modernisation – Division 2B State Awards*, 5 November 2010 [2010] FWAFB 8558 at par [28].

[12] Including in particular the NES in s.113.