[2013] FWC 897

The attached document replaces the document previously issued with the above code on 12 February 2013.

The document has been edited to correct typographical errors in paragraph n[2] by replacing references to ‘West Group Australia’ to ‘Wests Group Australia’.

Sean Howe

Associate to Deputy President Sams

Dated 12 February 2013

[2013] FWC 897

DECISION

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

United Voice - New South Wales Branch; Clubs Australia - Industrial
(AM2012/353)

DEPUTY PRESIDENT SAMS SYDNEY, 11 FEBRUARY 2013

Award modernisation - naming of default superannuation fund - power to correct error - consent of parties - default fund in an award based transitional instrument - determination made.

[1] This decision will determine a joint application, filed by United Voice - Liquor and Hospitality Division NSW Branch and Clubs Australia - Industrial, pursuant to ss 157-160 of the *Fair Work Act 2009* (the 'Act') to vary the *Hospitality Industry (General) Award 2010* [MA000009] (the '*Hospitality Award*'). These provisions are concerned with the powers of the Fair Work Commission ('FWC' or the 'Commission') to make determinations to vary modern awards to achieve the modern award objectives (s 157), to update or omit the name of an employer, an organisation or outworker entity (s 159) or to remove ambiguity or uncertainty or correct error (s 160).

[2] At this point I note that an individual employer, Wests Group Australia, was added as an applicant to the application, by consent, in a second hearing of the matter on 30 January 2013. Wests Group Australia relevantly employs about 760 employees at four registered clubs in New South Wales under the *Registered and Licensed Clubs Award 2010* [MA000058] and the *Hospitality Award*.

[3] The determination sought is to add Club Plus Superannuation Pty Ltd ('Club Plus') as a named superannuation fund in cl 28.4 of the *Hospitality Award*. The grounds and reasons for the application are relatively straightforward and would appear to have been largely uncontroversial in that it was initially said that the application was to proceed by consent.

However, before the application came on for hearing on 22 January 2013, the Commission received correspondence from the Australian Hotels Association (AHA) in which the AHA sought to have the application adjourned and considered at the same time as other applications to vary the *Hospitality Award* under the two yearly review of Modern Awards to be progressed by the Commission later in 2013.

[4] When the matter came on for hearing it appeared that the AHA's objection to the matter proceeding was more substantial and not limited to an issue of timing; rather it had more fundamental objections to the application, concerning the applicants' standing and the merits of the application. In this respect, Mr D *Crowe* for the AHA was joined in opposition to the application, rather curiously, by Mr N *Swancott* from the National Office of United Voice. Mr T *McDonald*, Solicitor for the applicants requested that the Commission hear and determine the application on that day. However, I directed that the parties confer and file further evidence and submissions in support of their respective positions. The matter was relisted for 30 January 2013.

[5] On this day, despite some preliminary jousting as to standing and Mr *McDonald's* application for permission to appear (which was granted), further discussions between the parties produced a consent position as to the powers of the Commission to determine the application, pursuant to s 160 of the Act. I propose to adopt that course in determining this matter.

[6] While not strictly consenting to the application *per se*, Mr *Swancott* submitted that the Commission would need to establish that there was an error, omission or ambiguity in the Award which required correcting by an order of the Commission. In exercising that power in the context of nominating a superannuation fund as a default fund under the Award, the Commission was required to be satisfied that one of two tests (or limbs) were met, in accordance with Full Bench authority on the subject. The onus was on the applicants to convince the Commission in that respect.

[7] As to the tests to be applied, Mr *Swancott* referred to the decision of the Award Modernisation Full Bench of the Australian Industrial Relations Commission [AIRC] in *Re Request from the Minister for Employment and Workplace Relations* (2009) 187 IR 146 at 67:

> 'A number of funds have since made applications to be included as named default funds on the basis that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award or on the basis that the representatives of the main parties covered by the award consent. In our view either basis would constitute a good reason for the fund being specified as a default fund in a modern award.'

[8] Further, Mr *Swancott* noted that a recent decision of a Full Bench of Fair Work Australia (FWA)A, *National Union of Workers v Australian Road Transport Industrial Organization* [2012] FWAFB 7462 reaffirmed the approach of the Award Modernisation Full Bench and said at para [19]:

> 'It is clear that, in giving effect to the Award Modernisation Request, the Award Modernisation Full Bench intended that the inclusion of a superannuation fund, which meets the relevant legislative requirements, nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award would constitute a good reason for the fund being specified as a default fund in the modern award. The inclusion of default funds in modern awards on this basis is to be taken as being consistent with the modern awards objective. A failure to include such a fund would constitute error within the meaning of s.160 of the Act.'

[9] The Full Bench went on to say at para [23]:

> 'The next questions which arise are whether employees and employers previously covered by the Storage General and Warehousing Awards are subject to the coverage of the RT&D Award and whether the Award Modernisation Full Bench considered this question in determining which superannuation funds were included in clause 21.4 of the RT&D Award.'

[10] Their Honours, *Ross* P and *Smith* DP have recently applied this approach to similar applications as the one presently before me. In *Care Super Pty Ltd re Aged Care Award 2010 and others* [2012] FWA 8822, His Honour, the President said:

> 'CareSuper does not meet the standing requirements of s.158 outlined above. However under s.160(2)(a) Fair Work Australia has the capacity to make the applications on its own initiative to remove an ambiguity or uncertainty or to correct an error in a modern award.'

See also: *Catholic Super (CSF Pty Ltd)* [2013] 482 and *NGS Super Pty Ltd* [2012] FWA 10602.

[11] Mr *Crowe* supported Mr *Swancott's* submissions. Mr *McDonald* did not cavil with Mr *Swancott's* reliance on the above authorities. Indeed, he submitted that the principles

established by these authorities were directly applicable to this case. I concur with this analysis.

[12] Putting it in the present context, if the Commission is to correct the omission of Club Plus as a named default superannuation fund under the *Hospitality Award*, I must be satisfied that either, or both, of the following tests are met:

a) the application is made by consent of the main parties covered by the *Hospitality Award*; or
b) Club Plus was a nominated default fund in an award based transitional instrument (including a NAPSA) relevant to the coverage of the *Hospitality Award*.

[13] Mr *McDonald* relied on the evidence of Mr Paul Cahill, the CEO of Club Plus to demonstrate that it is in the interests of employers to be able to pay contributions into the one default superannuation fund and it is in the interests of employees to have their superannuation contributions paid into one fund to maximise their investment earnings by keeping administration costs to a minimum. It was also important, in terms of continuity, that Club Plus continue to support employees and members after they leave the club industry, including many employees who move into the hospitality sector. Mr Cahill was not required for cross examination and I accept his evidence. Indeed, Mr Cahill's evidence seems entirely unremarkable and self-evident.

[14] Putting aside the nuance of whether a party not objecting to an application is akin to consenting to the application, Mr *McDonald* referred to at least two NAPSAs, the *Hotels, Resorts and Certain Other Licensed Premises Award - State (Excluding South East Queensland 2002* [AN140148] and the *Clerks' Award - Hotels and Registered Clubs - State 2003* [AN140068], which covered employees who would be otherwise subsumed in to coverage under the *Hospitality Award* and which name Club Plus as a default superannuation fund (at cl 5.7.4(c) and cl 1.4.1 respectively).

[15] Given this incontrovertible evidence and in accordance with relevant Full Bench authority, I am satisfied that the application should be granted. By doing so, it will also ensure consistency with decisions of other members of the Commission. Even if I be wrong about the competency of this application, I would resolve this matter by exercising the Commission's powers, on my own initiative, to correct an error in the *Hospitality Award* pursuant to s 160(2)(a) of the Act to achieve the same result. A determination to that effect will be published contemporaneously with this decision.

DEPUTY PRESIDENT

Appearances:

Mr T *McDonald*, Solicitor for the applicants.
Mr D *Crowe*, for the Australian Hotels Association.
Mr N *Swancott*, for United Voice, National Office

Hearing details:
2013.
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