

From: Chambers - Bissett C
Sent: Thursday, 28 June 2018 3:18 PM
To: marie.v@southwest.com.au
Subject: AM2018/6: Application by Vonnie Chapman

Dear Ms Chapman

I refer to Mention held on 26 June 2018 in regard to your s.158 application to vary the *Corrections and Detention (Private Sector) Award 2010* (the Corrections Award). Commissioner Bissett has asked me to respond to you and provide the following information as was discussed at the mention.

Requirements of the FW Act

A number of sections of the FW Act are relevant.

Section 157

Section 157 of the *Fair Work Act 2009* (FW Act) deals with the circumstances in which a modern award can be varied. It provides that the Commission can vary an award if it is satisfied that the variation is necessary to achieve the modern awards objective. It states:

157 FWC may vary etc. modern awards if necessary to achieve modern awards objective

- (1) The FWC may:
 - (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award;
or
 - (b) make a modern award; or
 - (c) make a determination revoking a modern award;

if the FWC 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: The FWC 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 the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

- (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
 - (a) the variation of modern award minimum wages is justified by work value reasons; and
 - (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

You should note in particular the requirements for adjusting the minimum wages in the Award as specified at s.157(2) – that is, that the change must be justified on work value grounds

Section 156

Section 156(4) of the FW Act defines “work value reasons” as follows:

156 4 yearly reviews of modern awards to be conducted...

- (4) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.

Section 134

That modern awards objective, expressed in s.134 of the FW Act, is 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
 - (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or

- (iv) employees working shifts; 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*...

Decision of the Commission

The following paragraphs from the Full Bench decision in *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [\[2014\] FWCFB 1788](#) may be of interest to you. Note the awards referred to in paragraph 24 are what are now the modern awards including the Corrections Award.

[24] ...Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the *Workplace Relations Act 1996* (Cth) were deemed to be modern awards for the purposes of the FW Act... Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act...

[38] Under s.157(1) the Commission must be satisfied that ‘a determination varying a modern award ... is *necessary* to achieve the modern awards objective’ (emphasis added). In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (SDA v NRA (No 2)) 22 Tracey J considered the proper construction of s.157(1). His Honour held:

“The statutory foundation for the exercise of FWA’s power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is “necessary” in order “to achieve the modern awards objective”. That objective is very broadly expressed: FWA must “provide a fair and relevant minimum safety net of terms and conditions” which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.

The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.

The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective...

In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary."

[My emphasis added, endnotes omitted]

Reasons for variation

From the mention it appears that what you are seeking to address through your application is a circumstance where your employer requests or asks if you would like to change duties such that you move out of work subject to coverage under the *Security Services Award 2010* into work (for which your employer holds a contract) covered by the Corrections Award and that, in this process, your classification is altered because of the different work resulting in a decrease in pay. Whilst that is an unfortunate circumstance and is perhaps one addressed through bargaining, it is not readily apparent that it is a circumstance that would form a reason on work value grounds to vary the Corrections Award.

If you wish the Commissioner to consider varying the Corrections Award, you will need to file more detailed information identifying the clauses in that modern award that you seek to vary, provide details of the nature of the variation and the grounds upon which you seek the variation. This should be by reference to the relevant sections of the FW Act outlined above.

The Commissioner requires this information prior to taking any further steps in respect of the matter.

If you have any queries in relation to this matter you can contact me on the details below.

Kind regards

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