



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.158 - Application to vary or revoke a modern award

Busselton Hockey Stadium Club (Inc)

(AM2010/37)

Licensed and registered clubs

VICE PRESIDENT WATSON

SYDNEY, 19 MAY 2010

Variation to the Registered and Licensed Clubs Award 2010 – part-time employees – entitlement to weekend penalties– whether necessary to achieve modern awards objective – Fair Work Act, ss 134, 157, 158.

[1] This decision concerns an application by the Busselton Hockey Stadium Club (Inc) (the applicant) pursuant to s 157-160 of the *Fair Work Act 2009* (the Act) to vary the *Registered and Licensed Clubs Award 2010*¹ (the 2010 Modern Award) to apply the Monday to Friday rates of pay to part-time employees who perform work at weekends.

[2] The application was made on 14 March 2010. I made directions for the service of the application and the filing of written submissions of interested parties in relation to this matter. Written submissions were filed by the applicant, Hockey WA and the Liquor, Hospitality and Miscellaneous Union (LHMU). No other employer covered by the award made any submission or sought to be represented in the hearings in the matter.

[3] The applicant asserts that it employs three bar/kitchen hands and three maintenance and horticultural employees for between four and ten hours on weekends because matches are substantially played at weekends. It asserts that it historically engaged volunteers to do this work, but as the club has grown it has been able to employ these people on workplace agreements. It submits that the increased cost of the new award is in the order of 35% and that many other clubs are similarly affected but are probably unaware of their obligations under the award. It seeks the variation to apply to itself because it is concerned at the impact of the change on membership fees and membership levels.

[4] The LHMU strongly opposes the application. It submits that the award was the result of an exhaustive process and that the applicant has not established that the test for a variation under s 157 has been met. It submits that an enterprise agreement or an individual flexibility agreement may be a way to address the cost impact beyond that already provided by the Transitional Schedule to the award.

[5] Section 157 provides for a limited ability to vary modern awards outside the four yearly review of all awards. In order to make a variation Fair Work Australia must be satisfied

that the variation is necessary to achieve the modern awards objective. This objective, contained in s 134 of the Act provides:

“134 The modern awards objective

What is the modern awards objective?

(1) FWA 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*.”

[6] The approach of the Australian Industrial Relations Commission in award modernisation was to give effect to the award modernisation objectives in the *Workplace Relations Act 1996* by paying particular regard to the content of pre-existing instruments. The 2010 Modern Award was made with particular regard to awards that previously applied to the relevant operations. The Western Australian *Club Workers' Award, 1976*² was one such award. It provided for all time worked by part-time and full time employees on Saturdays and Sundays to be paid for at the rate of time and a half.

[7] The 2010 Modern Award also contains transitional provisions which provide for the phased introduction of increased penalties and loadings.

[8] In my view the applicant has not established that the variation is necessary to give effect to the modern awards objective. This is a significant hurdle under the Act for any application to vary a modern award outside of the scheduled reviews of awards in two and four years time.

[9] The obligation to pay weekend penalty rates applies to all employers covered by the award. Only one club and its sporting association support the application. Contrary to the submissions of the applicant, weekend penalty payments are not inconsistent with the modern awards objective of providing equal remuneration for work of equal value. If its argument was correct there would be no weekend penalties in any award. Further, the change in award obligations does not appear to be as significant as is made out by the applicant, who was also unaware of the transitional provisions in the award.

[10] It is clearly open to any employer to raise the merits of the penalty regime for employees in this industry at the time of the 2012 and 2014 reviews. As the applicant has not met the statutory test for its application I dismiss the application.

VICE PRESIDENT WATSON

Appearances:

J Sanderson for Busselton Hockey Stadium Club (Inc)

C Pullen for the Liquor, Hospitality and Miscellaneous Union

Hearing details:

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Sydney

May 18

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