



FAIR WORK  
AUSTRALIA

# DECISION

*Fair Work Act 2009*

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

## **Application by ACH Group and others** (AM2010/8)

VICE PRESIDENT WATSON

SYDNEY, 28 APRIL 2010

*Application to vary the Nurses Award 2010 – annual leave – transitional provisions.*

### **Introduction**

[1] This is an application by a number of employers involved in the aged care industry in South Australia for the variation of the *Nurses Award 2010*<sup>1</sup> (the Award). The variation seeks the extension of the transitional provisions of the Award to the annual leave provisions of the Award.

[2] The matter was heard on 16 March 2010. Mr P Eberhard represented the applicants. Mr N Blake represented the Australian Nursing Federation (ANF). Further written submissions were filed by the parties on 22 and 25 March 2010.

### **Background**

[3] The Award is an occupational award made under the award modernisation process conducted by the Australian Industrial Relations Commission (AIRC) under Part 10A of the *Workplace Relations Act 1996* (the WR Act). The content of the Award was determined having regard to the award modernisation criteria contained in the WR Act and the Minister for Employment and Workplace Relations Award Modernisation Request. Regard was had to the existing terms and conditions of nurses throughout Australia in the various types of operations covered by the Award.

[4] The effect of the Award for employers in the aged care industry in South Australia was to increase the amount of annual leave for nurses from four to five weeks per annum.

[5] The application seeks to extend the transitional provisions of the Award to annual leave and thereby allow for the phasing in of the increased annual leave.

[6] The applicants relied on correspondence from the Minister in August 2009 urging the Commission to reduce the impact of marked increases in award obligations by utilising the full five year transitional period to phase in increased obligations.

[7] The question of whether transitional provisions should extend to annual leave was addressed by a Full Bench of the AIRC in various decisions. In its decision of 2 September 2009 the Full Bench said:<sup>2</sup>

“[23] We now deal with the provisions for phasing-in changes in entitlements resulting from the making of modern awards. We received many proposals in relation to the scope of such provisions. At one extreme it was suggested that every condition in every award-based transitional instrument should be identified and preserved or phased out in some way. That approach would lead to many pages of schedules to each award and would place an intolerable compliance burden on employers. We regard it as important to balance the need for phasing provisions against the desirability of confining the regulatory burden as much as possible. Unless the provisions are capable of being understood and applied without too much difficulty the modern award objective might be frustrated. We have decided to limit the number of matters which are governed by phasing provisions to the main matters affecting pay. Phasing provisions will necessarily be complex. By limiting the number of matters we hope to minimise complexity and reduce the scope for confusion.”

[8] In relation to this Award an application was made in late 2009 by the Chamber of Commerce and Industry of Western Australia for the extension of transitional provisions to annual leave. The matter was determined by a Full Bench of Fair Work Australia (FWA) pursuant to item 14 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. In its decision of 23 March 2010 the Full Bench said:<sup>3</sup>

“[24] Taking into account the submissions in both the main case and this later application, we are of the view that we should not make any special provision for phasing-in the increase in annual leave. As the unions pointed out, in the case of some employees covered by the modern award, annual leave entitlements will be reduced. If we were to revisit our earlier conclusions for employers, we would be obliged to do so for employees also. The outcomes may not be perfect but they have been arrived at after lengthy and appropriate consideration.

[25] In additional important matter is that if we were to make special transitional provisions relating to an increase in annual leave in this case, interested parties would be entitled to seek phasing-in of increases and decreases in annual leave whenever they occur as a result of the operation of the NES and modern awards. This would have the potential to lead to a general reappraisal of transitional provisions, to introduce further complexity and to undermine the approach that has been adopted in relation to transitional provisions generally. Under that approach, changes in annual leave are generally not the subject of transitional provisions. While there may be cases in which changes in annual leave entitlements are so significant as to lead us to depart from the approach, this case is not one of them. The application is rejected.”

## Conclusions

[9] The employers state that the cost impact of the additional week’s annual leave is immediate and significant and cannot be offset by reference to other entitlements. They submit that the variation is necessary to achieve the modern award objective of taking into account the likely impact on business, productivity and employment costs.

[10] The ANF strongly opposes the application primarily on the grounds that the matter has already been fully ventilated and determined.

[11] The subject of this application has been considered on at least two occasions by Full Benches of the AIRC and FWA. Those decisions acknowledge that some changes in obligations will occur as part of the award modernisation process and that in order to minimise complexity transitional provisions are limited to matters affecting pay. The decisions make it clear that the position was reached after lengthy and appropriate consideration. FWA has specifically rejected the same variation to this Award.

[12] In my view there is no basis to revisit the conclusions contained in the Full Bench decisions referred to above. In my view it cannot be concluded that the variation is necessary to achieve the modern awards objective. The application is therefore dismissed.

VICE PRESIDENT WATSON

*Appearances:*

*P Eberhard* for ACH Group and others

*N Blake* for the Australian Nursing Federation

*Hearing details:*

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Melbourne  
March 16

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<sup>1</sup> MA000034

<sup>2</sup> [2009] AIRCFB 800

<sup>3</sup> [2010] FWAFB 2016