



FAIR WORK  
AUSTRALIA

# DECISION

*Fair Work Act 2009*

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

## **Integrated Trolley Management Pty Limited**

(AM2010/19) (AM2010/20)

## **GENERAL RETAIL INDUSTRY AWARD 2010**

## **CLEANING SERVICES AWARD 2010**

VICE PRESIDENT WATSON

SYDNEY, 23 APRIL 2010

*Application to vary modern award – award coverage – whether trolley collection contractors should be covered by the General Retail Industry Award 2010 – whether the variations sought to the Cleaning Services Award 2010 are necessary to achieve the modern awards objective – Fair Work Act ss 134,157.*

### **Introduction**

[1] This decision concerns applications filed by Integrated Trolley Management Pty Limited (Integrated Trolley Management) pursuant to s 158 of the *Fair Work Act 2009* (the Act). The first application seeks to vary the *General Retail Industry Award 2010*<sup>1</sup> (General Retail Award) by extending its coverage to trolley collection contractors. In the alternative, Integrated Trolley Management seeks to vary the *Cleaning Services Award 2010*<sup>2</sup> (Cleaning Services Award) to include junior rates and transitional provisions in the terms of those contained in the General Retail Award for trolley collection contractors.

### **Background**

[2] The coverage clauses of modern industry awards describe the industry of the employers covered by them and generally contain classifications for all relevant award covered employees employed by such employers. The General Retail Award covers employers engaged in the sale or hire of goods or services to final consumers for personal or household consumption. As retail employers employ people to perform trolley collection duties, the classifications in the award extend to such work.

[3] Employers who provide services to the retail industry are not generally covered by that award. They are likely to be covered by the industry award which applies to the activities of the relevant employer. Examples include cleaning, security, electrical contracting and storage services.

[4] The question of award coverage for trolley collection contractors was considered by a Full Bench of the Australian Industrial Relations Commission (AIRC) during stage two of the award modernisation process. In its decision of 3 April 2009<sup>3</sup> concerning the making of the Cleaning Services Award the Full Bench said:

**“Cleaning Services**

[127] We have decided to make an award called the Cleaning Services Award 2010. For the most part it is in the same terms as the exposure draft published on 23 January this year, although there are a number of changes which should be mentioned.

[128] The coverage clause has been amended. An exclusion has been added to make it clear that trolley collection, which is covered by the General Retail Modern Award is not covered by the award. The definition of event cleaning has been varied to make it clear that the award does not cover repair and maintenance services  
...”

[5] The Full Bench gave further consideration to the appropriateness of award coverage for trolley collection contractors in response to an application to vary the General Retail Award by the Shop, Distributive and Allied Employees Association (SDA) pursuant to s 576H of the *Workplace Relations Act 1996*. In its decision<sup>4</sup> the Full Bench noted:

“[6] A trolley collection contractor performs a service to the retail industry by recovering, protecting and often maintaining property used in the retail industry. The function is of a similar nature to contract cleaning except that contract cleaning contractors provide services to a variety of industries whereas trolley collection contractors provide their services almost exclusively to the retail industry.

[7] In our view the appropriate award coverage is in conjunction with contract cleaning under the Cleaning Modern Award. We reject this part of the application.”

**The General Retail Award**

[6] The application to extend the coverage of the General Retail Award to trolley collection contractors is supported by approximately 120 trolley collections contractors<sup>5</sup> and the Australian Federation of Employers and Industries (AFEI) and opposed by the SDA and the Liquor, Hospitality and Miscellaneous Union (LHMU).

[7] Integrated Trolley Management submits that the terms and conditions contained within the Cleaning Services Award create a significant cost impact on these employers compared to the terms of the General Retail Award. It submits that trolley collection is a fundamental retail operation. It submits that trolley collection contractors may work alongside direct employees of a retail store and perform the same work for different rates of pay.

[8] AFEI support the application and submit that the coverage of trolley collection contractors under the *Shop Employees (State) Award*,<sup>6</sup> an award-based transitional instrument in operation in New South Wales, means the critical mass of coverage rests with coverage of trolley collection contractors under retail industry awards.

[9] The LHMU and SDA oppose the application on the basis that the award coverage has previously been determined by a Full Bench of the AIRC on two separate occasions.

[10] The ability to vary modern awards is limited by the terms of the Act. A variation to terms other than wages can only be made if Fair Work Australia (FWA) is satisfied that the variation outside the 4-yearly reviews of modern awards “is necessary to achieve the modern awards objective.”<sup>7</sup> In my view this is a significant hurdle that any applicant in a matter under s 158 is required to meet. The clear import of this provision is that award variations outside the 4-yearly reviews will be the exception. Other provisions of the Act deal with variations to resolve ambiguities or errors. Applications to vary awards on other grounds must be shown to be necessary to meet the modern awards objective rather than desirable or justified in a general sense. In my view this means that an applicant must establish that the modern awards objective cannot be achieved unless the variation is made.

[11] In the circumstances of this matter, the coverage of the General Retail Award has been recently set. As with other modern industry awards the coverage is defined by reference to the activities of the employer. It has not been demonstrated that the conclusions of the Full Bench of the AIRC are wrong or inappropriate. In my view the terms of awards are best considered by reference to the circumstances of the employment in the context of the employer’s business and businesses of a similar nature – not by seeking to modify the coverage clauses of awards in order to bring about changes in terms and conditions of employment.

[12] For these reasons the applicant has failed to establish that the threshold for the variation is satisfied. This application is dismissed.

### **The Cleaning Services Award**

[13] Integrated Trolley Management submit that prior to December 2009 junior rates of pay were a feature of awards covering trolley collection contractors. It submits trolley collection contractors employ a large proportion of junior employees, estimated at 30% of its workforce. The Cleaning Services Award does not contain junior rates of pay. Integrated Trolley Management propose to insert junior rates of pay based on the percentages contained in clause 18 of the General Retail Award of the relevant weekly rate of pay.

[14] Integrated Trolley Management submits that employees in this industry often have low skills, are born outside of Australia and have limited employment prospects. It submits that the impact of the award threatens to make many businesses uncompetitive and will lead to job losses and business closures as retailers look for more cost effective alternatives such as direct employment.

[15] Integrated Trolley Management also seeks the inclusion of the standard transitional provisions for trolley collection contractors. The transitional provisions contained in the Cleaning Services Award depart from the standard transitional provisions contained in the majority of modern awards. The terms contained in the transitional schedule were in large part agreed by the parties in the contract cleaning industry. Integrated Trolley Management submits that the terms were agreed by cleaning employers and the LHMU and were not agreed by trolley collection contractors.

[16] AFEI support the application to incorporate junior rates of pay in the Cleaning Modern Award. AFEI submits that junior rates were available to trolley collection contractors through applicable award-based transitional instruments in Western Australia, Victoria, New South Wales, Queensland and the Australian Capital Territory.

[17] The LHMU opposes the insertion of junior rates in the Cleaning Services Award. It submits that incorporating junior percentages based on the junior percentages contained in the General Retail Award does not provide an appropriate safety net for employees in the cleaning services industry.

[18] It is clear that the employers involved in the processes leading to the making of the Cleaning Services Award were primarily from the contract cleaning industry. Trolley collection contractors had limited involvement even though it was determined that they would fall within the scope of the award. An application by the SDA to include them within the General Retail Award was rejected by the award modernisation Full Bench on 22 December 2009.<sup>8</sup>

[19] I am satisfied in these circumstances that the position of trolley collection contractors has not been fully considered in the making of the Cleaning Services Award. As a result a number of important matters relevant to the content of the award have not been considered until this application. These matters include the widespread use of juniors, the widespread existence of junior rates in applicable pre-existing instruments and the immediate cost impact on trolley collection contractors of making the Cleaning Services Award. In my view, had these matters been considered, efforts would have been made to minimise the cost impact of the changes brought about by the making of the award.

[20] In these circumstances I am satisfied that the changes sought are necessary to achieve the modern awards objective. In my view a number of the elements of the modern award objective are relevant, particularly the needs of the low paid, the need to promote social cohesion and the impact of the exercise of modern award powers on business, employment costs and employment growth. Given the potentially significant impact of the award on trolley collection contractors and their employees I do not believe that the modern awards objective can be achieved unless changes are made to the award. I note that employees of trolley collection contractors were previously able to employ junior employees on junior rates under retail awards that applied in New South Wales, Queensland and the Australian Capital Territory and under building services awards that applied in Western Australia and Victoria. I will insert provisions in the award to provide for junior rates for trolley collection contractors based on the General Retail Award scale and to provide for the standard transitional clauses to apply to trolley collection contractors.

#### VICE PRESIDENT WATSON

##### *Appearances:*

*Mr S Hills with Mr D Vickery* for Integrated Trolley Management Pty Limited

*Mr A Doyle* for the Australian Federation of Employers and Industries

*Ms C Pullen* for the Liquor, Hospitality and Miscellaneous Union

*Ms S Burnley* for the Shop, Distributive and Allied Employees Association

*Hearing details:*

2010.

Sydney

March 29

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<sup>1</sup> MA000004

<sup>2</sup> MA000022

<sup>3</sup> [2009] AIRCFB 345

<sup>4</sup> [2009] AIRCFB 983

<sup>5</sup> Exhibit H1

<sup>6</sup> AN120499

<sup>7</sup> s157(1).

<sup>8</sup> [2009] AIRCFB 983