



DECISION

Fair Work Act 2009

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

Security Providers Association of Australia Limited (SPAAL) (AM2010/79)

Road transport industry

COMMISSIONER LEWIN

MELBOURNE, 9 DECEMBER 2010

Application to vary a modern award—jurisdiction—standing of applicant.

[1] This decision concerns an application by Security Providers Association of Australia Limited (SPAAL) to vary the *Transport (Cash in Transit) Award 2010* (the modern award), under s.157 of the *Fair Work Act 2009* (the Act). SPAAL seeks to vary the modern award to include provisions for a classification and rate of pay for non-armoured (soft skin) vehicle operators.

[2] The application was lodged in Fair Work Australia on 11 June 2010. Directions were posted on the award modernisation website which required interested parties to make submissions by the close of business on Wednesday 30 July 2010. Chubb Security Services (Chubb), Australian Security Industry Association Limited (ASIAL), the Transport Workers' Union (TWU) and Security Specialists all filed Submissions in Fair Work Australia on 30 July 2010 pursuant to those directions.

Statutory Provisions

[3] The relevant statutory provisions are sections 157 and 158 of the Act. The provisions of s.157 are set out below:

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

(1) FWA may:

- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or
- (b) make a modern award; or
- (c) make a determination revoking a modern award;

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

(2) FWA may make a determination varying modern award minimum wages if FWA 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 FWA is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

(3) FWA may make a determination or modern award under this section:

- (a) on its own initiative; or
- (b) on application under section 158.”

[4] The nature of the application is to vary the Award so as to include new provisions and is thus appropriately considered accordingly. The provisions of s.158 of the Act impose limits upon who may apply to vary a modern award in this manner. Relevantly, the persons who may make such application are set out in a table to s.158 of the Act, which it is not convenient to reproduce, but is addressed in the submissions of the TWU which are set out below.

Jurisdiction

[5] The TWU is an industrial organisation of employees covered by the Award. The TWU’s submissions of 30 July 2010 are set out below:

“AM2010/79 – SPAAL application to vary the Transport (Cash-in-Transit) Award Submission of the Transport Workers’ Union of Australia

1. No jurisdiction

1.1 This is an application by the Security Providers Association of Australia Ltd (SPAAL) to vary the *Transport (Cash-in-Transit) Award (CIT Award)*, presumably made under section 157 or 160 of the *Fair Work Act 2009 (FW Act)*.

1.2 Section 158 of the Fair Work Act 2009 (FW Act) provides:

“Applications to vary, revoke or make modern award

(1) The following table sets out who may apply for the making of a determination varying or revoking a modern award, or for the making of a modern award, under section 157: **Who may make an application?**

<i>Item</i>	<i>Column 1</i>	<i>Column 2</i>
<i>1</i>	<i>This kind of application ... an application to vary, omit or include terms (other than outworker terms</i>	<i>may be made by ... (a) an employer, employee or organisation that is covered by the modern</i>

*coverage terms) in a award; or
modern award (b) an organisation that is
entitled to represent the
industrial interests of one or
more employers or
employees that are covered
by the modern award.*

1.3 Section 160 of the FW Act provides:

“Variation of modern award to remove ambiguity or uncertainty or correct error

(1) FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

(2) FWA may make the determination:

(a) on its own initiative; or

(b) on application by an employer, employees, organisation or outworker entity that is covered by the modern award.

1.4 Section 12 (“Dictionary”) of the FW Act provides

“...”organisation” means an organisation registered under the Fair Work (Registered Organisations) Act 2009.

1.5 SPAAL is not registered under the *Fair Work (Registered Organisations) Act* and is therefore not an organisation within the meaning of the FW Act. Nor is it an employer or employee covered by the CIT Award.

1.6 SPAAL has no standing to bring an application under sections 157 or 160 of the FW Act.

1.7 This application is incompetent and must be dismissed.”

Employer submissions

[6] ASIAL is a registered organisation of employers who are entitled to represent the interests of employers in the industry. At paragraphs 13 - 14 of the Submissions of ASIAL filed in Fair Work Australia on 30 July 2010, ASIAL submitted that the application should be dismissed, or alternatively, that it should be “held over for at least 3 months to allow all relevant industry stakeholders to discuss in depth what (if any) changes should be contemplated by FWA when determining variations that include a new classification in an award specifically developed for Cash In Transit by Armoured Car”.

[7] Chubb is a major employer in the security and cash in transit industry. In their submission of 30 July 2010, Chubb submitted that the matter should not be determined, but similarly adjourned.

[8] Security Specialists is an employer of persons involved in soft skin cash transit operations which supported the application of SPAAL.

[9] No objection to the deferral of determination of the application proposed by ASIAL and Chubb was received from the applicant SPAAL. Accordingly, I have deferred consideration of the matter for several months, nothing further has been submitted in that time.

Discussion

[10] It is first necessary to deal with the jurisdictional objection of the TWU. On what is before me, I consider the objection to be sound, and that the applicant does not have standing to bring the application. I note that the application is an application to include additional terms in the Award and is thus, subject to s.157 and s.158 of the Act.

[11] Section 157(3) of the Act provides that Fair Work Australia may exercise a discretionary power to include additional terms in a modern award on its own initiative. That, however, is a discretion which should be cautiously exercised. I'm not inclined to consider the exercise of that discretion on the material before me.

Conclusion

[12] I conclude that the application of SPAAL is beyond jurisdiction, as SPAAL are not an employer or an organisation referred to in s.158 of the Act as competent to bring the application.

[13] Since the filing of the application no interested person competent to bring an application which seeks the variation sought by the applicant has done so. Notwithstanding the expressed intentions of those interested persons to meet and confer in relation to the subject matter of the application. I do not intend to consider the exercise of the discretionary power to vary the Award on my own initiative on what is before me. Should an interested person competent to bring an application wish to do so there is no bar to that occurring at an appropriate time.

[14] The application is dismissed.

[15] An order will issue accordingly.

COMMISSIONER

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