



DECISION

Fair Work Act 2009

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

Board of the Australian & New Zealand Certified Environmental Practitioner Scheme (AM2010/118)

VICE PRESIDENT LAWLER

BRISBANE, 8 DECEMBER 2010

Application to vary the Professional Employees Award 2010.

[1] This is an application pursuant to s.158 of the *Fair Work Act 2009* (**FW Act**) by the Board of the Australian and New Zealand Certified Environmental Practitioner Scheme (**Board**) for a variation to the *Professional Employees Award 2010*¹ (**Award**) pursuant to s.157.

[2] The variation sought by the Board is an addition of paragraphs to the classification definitions for Level 3 - Professional and Level 4 - Professional as follows:

“An employee at this level may be a registered professional and meet the requirements for certification acceptable to the Board of the Australian and New Zealand Certified Environmental Practitioner Scheme.”

[3] Directions for the filing of submissions by interested parties were issued.

[4] The Board did not file a submission and did not appear at the hearing. A number of individuals filed very short submissions in support of the application. These were mostly from environmental practitioners recording their belief in the importance of environmental scientists being covered by the Award. A submission of a page and half in support was also received from a Queen’s Counsel who has a deep background in environmental law and practice. None of these individuals appeared at the hearing. Appearances at the hearing were confined to the three objectors who had filed submissions in opposition to the application: the Australian Industry Group (**AiG**), the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (**AMWU**) and the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**).

[5] AiG objected to the standing of the Board to bring the application. Pursuant to s.158(1), an application under s.157 to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award can only be made by:

“(a) an employer, employee or organisation that is covered by the modern award; or

- (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.”

[6] On the material before me I cannot be satisfied that the Board comes within these categories. I note in particular that the Board chose not to file any submission in reply or to appear at the hearing to challenge the jurisdictional objections raised by AiG and others. I am not satisfied that the Board has standing to bring the application and, accordingly, I am not satisfied that I have jurisdiction to deal with the application.

[7] A further jurisdictional objection was based on the requirement in s.157(1) that Fair Work Australia (FWA) is “satisfied” that the variation sought by the applicant is “outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.”

[8] The modern awards objective is set out in s.134(1):

“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.”

[9] For the reasons advanced by AiG, I am not persuaded that the variation “outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective” and accordingly, I am obliged to refuse the application irrespective of the merit it may have in the context of a review of the Award.

[10] Further, I note that the Board previously made an application to the Australian Industrial Relations Commission (AIRC)² to vary the definition of “professional scientist” in

the Award in such a way as to make certification by the Board a sufficient qualification to be classified as a “professional scientist”. That application was refused. The Full Bench noted:

“[9] In our view, and against the background of the objections, there is no proper basis made out to grant this application and, accordingly, it must be refused. The suggestion by APESMA that the Institute raise this matter in the review contemplated by s.6 of Schedule 5 to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 is worthy of consideration.”³

[11] Although, formally, this is a different application to the application in AM2009/211, in substance it is directed at achieving the same result. I agree with the submission of the AMWU that the present application has same defects as application rejected by the Full Bench.

[12] Both the AMWU and APESMA took objection to the form of the proposed variations. In all the circumstances it is unnecessary to deal with those objections.

[13] For the reasons I have given I am not persuaded that I have jurisdiction to entertain the application or make a determination varying the Award as sought. Moreover, even if I had jurisdiction, as a matter of discretion I would refuse the application because it is not in substance different from the application previously rejected by the Full Bench and it suffers from the same defects identified by the Full Bench in rejecting the earlier application.

[14] This is not to say that there should not ultimately be a variation that will achieve what the Board appears to be seeking to achieve, namely certification by the Board as a sufficient condition for coverage by the Award. However, this will need to occur as part of a review of the Award or pursuant to an application by an applicant with standing who has addressed the matters identified by the Full Bench. It may be noted that many environmental professionals may well be covered by the Award by virtue of the definition of “professional engineering duties” in the Award.

VICE PRESIDENT

Appearances:

A. Dalton for the Australian Industry Group.

M. Butler for the Association of Professional Engineers, Scientists and Managers, Australia.

C. Estoesta for the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU).

Hearing details:

2010.

Melbourne-Sydney (video link):

October 18.

¹ MA000065.

² AM2009/211.

³ [2010] FWAFB 1386