



FAIR WORK  
AUSTRALIA

## DECISION

*Fair Work Act 2009*

s.160 - Determination varying a modern award to remove ambiguity or uncertainty or correct error

(AM2010/103)

SENIOR DEPUTY PRESIDENT WATSON

MELBOURNE, 11 JULY 2011

*Determination on Fair Work Australia's own initiative to remove ambiguity or uncertainty to correct error.*

[1] This decision concerns the definition of “Food and beverage attendant grade 2” in clause B.2.2 of Schedule B—Classification Structure and Definitions in the *Restaurant Industry Award 2010* (the modern award).<sup>1</sup>

[2] The clause, as published in the modern award reads:

“**B.2.2 Food and beverage attendant grade 2** means an employee who has achieved the appropriate level of training and who is engaged in any of the following:

- (a) supplying, dispensing or mixing of liquor;
- (b) assisting in the cellar;
- (c) undertaking general waiting duties of both food and/or beverage including cleaning of tables;
- (d) receipt of monies;
- (e) attending a snack bar; and
- (f) delivery duties.”

[3] On 20 May 2011, the clause was varied by Fair Work Australia, on its own motion, pursuant to s.160 of the *Fair Work Act 2009* (the Act) to remove ambiguity or uncertainty or correct error.<sup>2</sup> The determination of the President of Fair Work Australia giving effect to the variation stated:

“It is ordered that the *Restaurant Industry Award 2010* be varied by deleting the following phrase appearing in clause B.2.2:

**‘B.2.2 Food and beverage attendant grade 2** means an employee who has achieved the appropriate level of training and who is engaged in any of the following:’

and inserting

**‘B.2.2 Food and beverage attendant grade 2** means an employee who has not achieved the appropriate level of training and who is engaged in any of the following:’” [Variation emphasised]

[4] On 21 June 2011 Mr G Parkes, Workplace Relations Director of the Restaurant & Catering Australia (RCA), wrote to the President of Fair Work Australia enquiring as to whether the variation was made as a result of an application by another party or made by Fair Work Australia under its own motion. He described the variation as substantive and indicated that RCA had not been given an opportunity to put submissions.

[5] On 23 June 2011 an Associate to the President responded:

“The President has asked me to inform you that the variation was made as a result of what was thought to be a clerical error in the production of the award. It did not involve any application or hearing and should not be regarded as indicative of a formation of any view about the merits of the provision.

In light of the issues raised in your letter the President has decided to refer the question of the proper wording of the relevant clause to Senior Deputy President Watson to determine.”

[6] As a result, the following advice was posted under this matter number on the Fair Work Australia modern award variations web-site, with notice to all interested persons who have registered an interest in the modern award:

“On 20 May 2011 a determination, PR508273, was issued varying the classification definition of the Food and beverage attendant grade 2 in the *Restaurant Industry Award 2010*. The determination was issued on the Tribunal’s own motion pursuant to s.160 of the *Fair Work Act 2009* to correct what was thought to be a clerical error in the publication of the award.

As the result of correspondence received from the Restaurant & Catering Industry Association the President has referred the question of the proper wording of the relevant clause to Senior Deputy President Watson to determine.

The matter is listed for consultation at 10.00 am on 5 July 2011 in Melbourne.”

[7] The correspondence referred to above was posted on the web-site.

[8] On 29 June 2011 a submission of United Voice was posted on the web-site. It suggested:

“ . . . that the history of this matter, including the origins of the definitions of Food and Beverage Attendants grades 2 and 3, and the linkage in the Modern Award between

classifications and qualifications, clearly indicates that the omission of the word “not” from the introductory words of the grade 2 definition was an error, and that the correction contained in Determination PR508237 was an entirely appropriate means to correct the error.”

[9] The consultation occurred in Melbourne on 5 July 2011. It was attended only by Mr C Dixon, representing the RCA. He submitted that the change made in the determination in PR508237 was substantive and the original wording, which appeared in both the exposure draft and the modern award as made on 1 January 2010, was the result of considered attention and was intended. He submitted that the variation created a problem in that the modern award, as varied, now requires that school based trainees, with appropriate qualifications but no experience are required to be classified at the level of Food and beverage attendant grade 3 which states:

“**B.2.3 Food and beverage attendant grade 3** means an employee who has the appropriate level of training and is engaged in any of the following:

- (a) supplying, dispensing or mixing of liquor;
- (b) assisting in the cellar;
- (c) undertaking general waiting duties of both food and liquor including cleaning of tables;
- (d) receipt of monies;
- (e) assisting in the training and supervision of food and beverage attendants of a lower grade;
- (f) delivery duties; and
- (g) taking reservations, greeting and seating guests.”

### Consideration

[10] I am satisfied that the variation effected by determination in PR508237 was necessary and appropriate to correct an error reflected in both the exposure draft and the modern award as made.

[11] In the proceedings in which the modern award was made there was an issue as to the appropriate classification structure to be included in the modern award. United Voice (then the Liquor, Hospitality and Miscellaneous Union) supported the adoption of a structure drawn from the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998*.<sup>3</sup> The RCA and the Australian Federation of Industries and Employers supported a structure drawn from the *NSW Restaurants, &c., Employees (State) Award*.<sup>4</sup> The Award Modernisation Full Bench favoured the broader range of classification proposed by United Voice for the purposes of the exposure draft.<sup>5</sup>

[12] In the decision concerning the making of the modern award, the Award Modernisation Full Bench stated:

“The RCA and AFEI proposed that the classification structure in the exposure draft, which was drawn from the Victorian Restaurant Award, should be replaced with the structure in the NSW Restaurant Award. They argued that this structure suits the industry better and that the structure in the exposure draft, coupled with the definition of ‘appropriate level of training’ in cl.3, does not suit the operational requirements of the industry. An element of their submission was based on the rejection of a linkage between classification levels and qualifications on the basis that some qualifications may not be relevant to the work required in a restaurant. We are satisfied that the classification structure in the exposure draft should be maintained. As noted in our statement of 25 September 2009 [[2009] AIRCFB 865 at para 209] it provides a broader range of classifications relevant to the industry. We have addressed the RCA’s concern about the linkage between classification levels and qualifications by altering the definition of ‘appropriate level of training’ to refer to qualifications relevant to the classification in which an employee is employed, as proposed by the ACTU.”<sup>6</sup>

[13] It is clear that the Award Modernisation Full Bench intended the classification structure to reflect the structure in the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998*, subject to modification of the definition of appropriate level of training to make it clear that qualifications were relevant to the classification in which an employee is employed.

[14] The preamble to the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998* definition of the Food and beverage attendant grade 2 classifications was in the same terms as now appears, as varied, in the modern award. The intention of the Award Modernisation Full Bench was to include the definition in those terms in both the exposure draft and the modern award. The omission of the word “not” from the definition in the modern award was clearly in error and was appropriately rectified by the variation to the modern award effected by determination PR508237.

[15] The RCA proposition that the preamble to the Food and beverage attendant grade 2 as originally included in the modern award was correct is unsustainable having regard to the classification structure as a whole. Aside from the additional function “taking reservations, greeting and seating guests” within the Food and beverage attendant grade 3 classification, grades 2 and 3 as originally published in the modern award and now sought by RCA are materially in identical terms and are of the same effect. Thus an employee with the appropriate level of training and engaged in supplying, dispensing or mixing of liquor or assisting in the cellar or undertaking general waiting duties of both food and liquor including cleaning of tables; or receipt of monies or assisting in the training and supervision of food and beverage attendants of a lower grade or delivery duties could be classified as either grade 2 or grade 3 under the RCA proposition.

[16] Further, a concluding note to the definition of “appropriate level of training” in the modern award<sup>7</sup> states, to avoid doubt, that for “Food and beverage attendants grade 2, classification at grade 3 is subject to the employee having completed AQF Certificate II qualifications relevant to the grade 3 classification”, making it plain that the possession of relevant qualifications distinguishes grades 2 and 3.

[17] The apparent genesis for the RCA position was its proposition that the Food and beverage attendant grade 2 classification, as amended would require the classification of school based trainees with relevant qualifications at Grade 3, despite their lack of experience.

This proposition does not advance the contention that the definition of Food and beverage attendants grade 2 as originally published was correct. The classification structure is qualification based, with experience only arising in respect of the introductory level. Further, it cannot be suggested that the classification structure was or should have been based on the circumstances of school based trainees, rather than employees generally within the industry.

### **Conclusion**

[18] I am satisfied that the definition of the Food and beverage attendant grade 2 classification contained in the modern award when made in 1 January 2010 was in error. I am satisfied that the variation effected by Determination in PR508237 to alter the preamble to the definition to read “Food and beverage attendant grade 2 means an employee who has not achieved the appropriate level of training and who is engaged in any of the following:” was necessary and appropriate to correct the error. The variation properly reflected the intention of the Award Modernisation Full Bench.

[19] No further action is required in respect of this matter.

### SENIOR DEPUTY PRESIDENT

#### *Appearances:*

C. Dixon for the Restaurant & Catering Australia.

#### *Hearing details:*

2011.

Melbourne:

July 5.

Printed by authority of the Commonwealth Government Printer

<Price code A, PR511438>

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<sup>1</sup>MA000119.

<sup>2</sup>PR508273.

<sup>3</sup>AP787213CRV.

<sup>4</sup> AN120468.

<sup>5</sup> [2009] AIRCFB 865, at paras 208 and 209.

<sup>6</sup> [2009] AIRCFB 945, at para 183.

<sup>7</sup> Clause 3.1.