



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

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

National Tertiary Education Industry Union (AM2010/248)

VICE PRESIDENT LAWLER

MELBOURNE, 4 FEBRUARY 2011

Application to vary the coverage clause of the Higher Education Industry - General Staff - Award 2010.

[1] This is an application by the National Tertiary Education Industry Union (NTEU) pursuant to s.157 of the *Fair Work Act 2009* (**FW Act**) to vary the *Higher Education Industry - General Staff - Award 2010* (**General Staff award**). The application is supported by the Australian Services Union and is opposed by the Australian Federation of Employers and Industry (**AFEI**).

[2] There is no dispute that the NTEU has standing under s.158 of the FW Act to make the present application.

[3] The Higher Education Industry was part of the priority stage of the Award Modernisation process conducted by the Australian Industrial Relations Commission (**AIRC**) under Part 10A of the *Workplace Relations Act 1996*. The General Staff award was made as part of the priority stage.

[4] One of the issues canvassed in submissions and argument in relation to award modernisation for the Higher Education Industry was whether university unions and student unions should be covered by a higher education modern award. The Full Bench of the AIRC postponed elements of the Higher Education Industry to stage 3 of the award modernisation process. In particular, the issue of modern award coverage for university unions and student unions was not decided at that time.

[5] The issue was revisited in submissions made in relation to stage 3. In its statement accompanying the publication of stage 3 exposure drafts the Full Bench of the AIRC noted:

“[64] We have decided that coverage of university unions and student unions can most appropriately be dealt with by amendment to the *Higher Education Industry–General Staff–Award 2010* rather than by the creation of an award specific to those organisations.”

[6] The Full Bench did not make any orders varying the General Staff award at that time.

[7] The matter appears to have ‘slipped between the cracks’ and was raised again by the NTEU in the form of an application to vary the General Staff award, being an application with

matter number AM2009/173. In a decision handed down on 26 February 2010, the Full Bench of Fair Work Australia (which had, by virtue of transitional provisions, taken over variation applications that had not been finalised by 1 January 2010) dealt with application AM2009/173 as follows:

[3] We deal first with the application by the NTEU to include university and student unions in the modern award. It is proposed that the definition of “General staff” in cl.3.1 be amended to include reference to employees of university unions and students unions and that a new definition be added to clause 3.1 in the following terms:

“University unions and student unions means associations of students, or of students and others, established primarily or exclusively for the purpose of providing representation or services to students”.

[4] In its decision of 22 May 2009 the Full Bench of the Australian Industrial Relations Commission concluded:

“We have decided that coverage of university unions and student unions can most appropriately be dealt with by amendment to the Higher Education Industry—General Staff—Award 2010 rather than by the creation of an award specific to those organisations.”

[5] The NTEU seeks to give effect to this decision. The application is consistent with the decision and no submission has been made in opposition to it. We shall vary the modern award in the manner sought.”

[8] The “manner sought” was a substituted definition for the expression “general staff” (which referred to “university unions and student unions”) and a new definition for the expression “university unions and student unions”. The Full Bench varied the definition for “general staff” and added a definition for “university unions and student unions”, effectively in the terms sought by the NTEU. The NTEU had not sought any variation to the coverage clause in the General Staff award and no variation to the coverage clause was made by the Full Bench.

[9] The coverage clause in the General Staff award provides:

“4.1 This industry award covers employers throughout Australia in the higher education industry as defined and their employees engaged as general staff in the classifications listed in clause 15—Rates of pay in this award to the exclusion of any other modern award.”

[10] The expression “Higher Education Industry” is defined in clause 3.1 of the General Staff award:

“**Higher education industry** means educational institutions providing undergraduate and postgraduate teaching leading to the conferring of accredited degrees and performing research to support and inform the curriculum.”

[11] This definition makes it clear that the Higher Education Industry is constituted by “educational institutions providing undergraduate and postgraduate teaching leading to the

conferring of accredited degrees and performing research to support and inform the curriculum”. Neither a university union nor a student union is an “educational institution” of this sort. The better view is that university unions and student unions are not part of the higher education industry *as defined* in the General Staff award and are therefore not covered by the General Staff award. This is a view shared by both the NTEU and AFEI.

[12] The result is that the amendments sought by the NTEU in AM2009/173 and made by the Full Bench were not effective in achieving the outcome decided by the Full Bench of the AIRC that coverage of university unions and student unions be under the General Staff award. The most likely explanation is simply one of mistake or oversight, first by the NTEU in failing to seek a variation to the coverage clause and then by the Full Bench in failing to appreciate that that mistake or oversight had been made.

[13] The variation sought by the NTEU in the present application would add words to the coverage clause as follows:

“4.1 This industry award covers employers throughout Australia in the higher education industry as defined, and University unions and Student unions as defined, and their employees engaged as general staff in the classifications listed in clause 15— Rates of pay in this award to the exclusion of any other modern award.”

[14] This variation would finally give proper effect to the decision of the Full Bench of the AIRC that coverage of university unions and student unions be under the General Staff award.

[15] AFEI opposed the variation essentially on the same grounds that it had opposed the inclusion of university unions in higher education sector awards. Plainly enough, the AFEI’s submissions in support of those grounds were considered by the Full Bench of the AIRC and rejected by it.

[16] I am not persuaded that the General Staff award lacks classifications to adequately cover work performed by employees of university unions and student unions. The General Staff award contains a broad-banded classification structure with classification definitions cast in generic terms.

[17] Section 157 relevantly provides:

“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

...

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.

[18] The modern awards’ objective is set out in s.134.

[19] I am satisfied that the variation sought by the NTEU is necessary to achieve the modern awards' objective. The Full Bench of the AIRC decided, after considering submissions by interested parties, including those of AFEI, that coverage of university unions and student unions should be under the General Staff award. Necessarily implicit in that decision is a conclusion that the modern awards' objective could best be achieved in relation to the university unions and student unions by having such employers covered by the General Staff award. The variation presently sought by the NTEU seeks only to achieve the outcome clearly intended by the Full Bench and in this sense is properly to be regarded as necessary to achieve the modern awards' objective. An order will issue varying the General Staff award as sought by the NTEU.

[20] To the extent that coverage under the General Staff award may place university unions and student unions at a competitive disadvantage in relation to particular activities, as contended by the AFEI, and that this has become clearer over time, I make two observations. First, this is an issue that can be raised in the 2012 Full Bench review of the General Staff award as a basis for revisiting the coverage of the General Staff award.

[21] Secondly, it should not automatically be assumed that the General Staff award, after it has been varied in the manner indicated, will necessarily be the award that covers an employee of a university union working in, say, a catering business or retail outlet operated by the university union. Depending upon the circumstances, that university union may well operate in the hospitality or retail industries as well as in the Higher Education Industry and be covered by multiple modern awards with the coverage question in relation to a particular employee being resolved by the standard clause that appears in all of the modern awards in the following terms:

“4.6 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.”

[22] Further, it may be open to a university union or student union to reduce the scope for debate as to the applicable modern award by conducting particular business functions that may be subject to the competitive disadvantage problems of which AFEI complains through separate corporate entities.

VICE PRESIDENT

Appearances:

E. Floyd for the National Tertiary Education Industry Union.

W. Fridelle for the Australian Municipal, Administrative, Clerical and Services Union.

D. Makins for the Australian Federation of Employers and Industries.

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