[2011] FWA 7889

FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.158—Application to vary or revoke a modern award

Tas Security Services Pty Ltd
(AM2011/31)

Security services

COMMISSIONER LEWIN MELBOURNE, 2 DECEMBER 2011

Application to vary a modern award - minimum engagement - scheme of legislation - modern award objectives - variation unnecessary

Introduction

[1] This decision concerns an application to vary the *Security Services Industry Award 2010* (the Award). The Award is a modern award. The application seeks to vary the minimum engagement provisions of the Award. The application has been made by Tas Security Services Pty Ltd (TSS). TSS is an employer covered by the Award which employs security guards in the State of Tasmania.

[2] Fair Work Australia has jurisdiction to vary a modern award. However, that jurisdiction and the exercise of the power to vary a modern award is subject to specific statutory considerations. Modern awards are the subject of Part 2-3 of Chapter 2 "Terms and Conditions of Employment" of the *Fair Work Act 2009* (the Act).

[3] Division 2 of Part 2-3 of Chapter 2 of the Act sets out the modern awards objectives as follows:

> **"134 The modern awards objective**
>
> *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*.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of FWA's *modern award powers*, which are:

(a) FWA's functions or powers under this Part; and

(b) FWA's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: FWA must also take into account the objects of this Act and any other applicable provisions. For example, if FWA is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[4] The Award was made by the Full Bench of Fair Work Australia by decision of 19 December 2008 [1] with effect from 1 January 2010. In accordance with the provisions of Division 3 of Part 2-3 of Chapter 2 of the Act, the Award provides minimum wages and terms and conditions of employment applicable to the employees of national systems employers[2] in the security industry. The Award operates accordingly throughout the Commonwealth of Australia. Additionally, the Award applies to non national systems employers in those states which have referred industrial relations powers to the Commonwealth, namely New South Wales, Victoria, Queensland, South Australia and Tasmania.

[1] PR985126.

[2] *Fair Work Act 2009* (Cth), s.14.

[5] It is of note that, subsequent to the making of the Award, an application to vary the Award was made by the Australasian Security Industry Association Ltd (ASIAL). The application sought variations to several of the provisions of the Award in relation to different types of conditions of employment. The application addressed the provisions of clause 21 of the Award. The decision of the Full Bench decided the application in relation to clause 21 as follows:

> "**Hours of work and related matters (Clause 21)**
>
> **[18]** ASIAL proposes the changes to cl.21 that it submitted will clarify the operation of that clause and improve its interaction with the clauses dealing with rostering. The LHMU agrees that these changes clarify the operation of the award without altering its substance and does not oppose them. We will vary the Security Services Award as suggested by ASIAL."[3]

[6] Specifically, the application in this matter now seeks to vary the provisions of clause 21.2 of the Award. The terms of Clause 21.2 are set out below:

> "**21.2 Shift duration**
>
> (a) Ordinary time shifts must be limited in duration to:
>
> **(i)** for casual employees—a minimum of four and a maximum of 10 ordinary hours;
>
> **(ii)** for full-time employees—a minimum of 7.6 and a maximum of 10 ordinary hours; and
>
> **(iii)** for part-time employees—a minimum of one fifth of the employee's agreed weekly hours or four hours (whichever is the greater) and a maximum of 10 ordinary hours.
>
> **(b)** Notwithstanding clause 21.2(a), by agreement between the employer and the majority of employees concerned in a particular establishment, ordinary working hours exceeding 10 but not exceeding 12 hours per shift may be introduced subject to:
>
> **(i)** proper health monitoring procedures being introduced;
>
> **(ii)** suitable roster arrangements being made;
>
> **(iii)** proper supervision being provided;
>
> **(iv)** adequate breaks being provided; and
>
> **(v)** an adequate trial or review process being implemented where 12 hour shifts are being introduced for the first time.

[3] *Application by Australasian Security Industry Association Ltd* [2009] AIRCFB 963, PN18.

(c) Employees are entitled to be represented for the purposes of negotiating such an agreement. Once agreement is reached it must be reduced to writing and kept as a time and wages record.

(d) Clause 21.2(b) is not intended to prevent an employer implementing 12 hour rosters through the use of regular rostered overtime (subject to the requirements in the section 12 of the NES in relation to the right of an employer to require reasonable overtime) or individual flexibility agreements made pursuant to clause 7—Award flexibility."

[7] The variation sought by the application is expressed by TSS as follows:

"To reduce the minimum hours of employment of an employee at any one time to those hours particular individual employees are available by their choice to work at any one time due to physical incapacity, financial restriction or other limitation, in order to enable the ongoing employment of those employees having regard to their individual limitations, in accordance with the industry award, and to be non discriminatory by our/ their mutual choice in their ongoing employment"

[8] The Act provides that four yearly reviews of modern awards are to be conducted by Fair Work Australia. The four yearly reviews are to be conducted as provided for by Division 4 of Part 2-3 of Chapter 2 of the Act.

[9] Division 5 of Chapter 2 of the Act provides that Fair Work Australia may vary a modern award outside the four yearly review mechanism provided for by Division 4 thereof. The relevant provisions of Division 5 in this case are contained in s.157 which 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)."

[10] It is appropriate to observe that the power to vary the Award outside the four yearly review provisions of the Act applicable to modern awards is contingent upon there being a circumstance or circumstances which give rise to satisfaction on the part of Fair Work Australia that there is a necessity to vary a modern award to meet the modern awards objective. Such satisfaction must be arrived at on a proper basis and in accordance with a procedure which affords natural justice to persons whose interests may be affected by a determination to vary a modern award.

[11] In order to establish whether or not such satisfaction can be arrived at the following procedure was adopted by the Tribunal.

Procedural history

[12] The application in this matter was lodged in Hobart on 22 June 2011 by Mr Edward Harding, Director of TSS. The application was displayed on Fair Work Australia's Modern Award website (the website).

[13] On 2 August I issued directions that TSS file submissions it intends to rely on by 12 August 2011. The directions were displayed on the website. Those directions were complied with on 12 August 2011 and the submissions displayed on the website.

[14] The matter was listed for hearing in Hobart on 19 August 2011. The notice of listing was shown on the Fair Work Australia website. The witnesses who gave evidence at Hobart are:

- Mr David O'Halloran, CRS Southern Tasmania
- Mr Kim Valentine, Valentine Vocations
- Mr Steve Harrop, TSS employee.

[15] Mr Peter Tullgren of United Voice also attended at the hearing in Hobart. Mr Tullgren made no submissions at the hearing and reserved the right of United Voice to make submissions and cross examine the witnesses at the appropriate time.[4] United Voice is a registered organisation of employees with industrial coverage of persons employed in the security industry.

[16] On 9 September 2011 I issued further directions, foreshadowed at the hearing of 19 August 2011, that:

- The applicant file and serve submissions in relation to those employees with incapacities relied on as the basis for the application in this matter by 30 September 2011
- Mr O'Halloran of CRS Southern Tasmania file with Fair Work Australia copies of records of employment referrals to TSS by 30 September 2011

[4] Transcript, PN425.

- Mr Valentine of Valentine Vocations file with Fair Work Australia copies of records of employment referrals to TSS by 30 September 2011
- Any party opposing the application file submissions with Fair Work Australia by 14 October 2011
- Any other party supporting the application file submissions with Fair Work Australia by 14 October 2011.

Those directions and the transcript of the proceedings at Hobart were shown on the Fair Work Australia website.

[17] Submissions were received by the applicant, Mr Valentine and the Department of Human Services, on behalf of CRS, in response to the directions issued to Mr O'Halloran, in accordance with the directions.

[18] United Voice filed submissions opposing the application in this matter on 12 October 2011.

[19] All of the above submissions were shown on the website. No other employer or organisation of employers or employees filed any material in relation to the application.

Consideration

[20] At the commencement of consideration of the application, it is appropriate to refer to the context in which the application is made. Although an investigation of the relevant Australian Bureau of Statistics (ABS) statistics are broadly indicative of an industry of several thousand employers and tens of thousands of employees,[5] it is not necessary to conduct precise quantitative research to note that the application is made by one employer in an industry of considerable size and geographic diversity. As has been observed, in this context, no other person covered by the Award has sought to provide evidence or material, including submissions, to the effect that it is necessary, in order to achieve the modern awards objective, to vary the minimum engagement provisions of the Award. Moreover, the background to the making of the Award and the subsequent application to vary the Award in relation to clause 21 should be noted. Accordingly, the case before the Tribunal is confined to consideration of the grounds upon which the application is made and the evidence and material brought by TSS, in order to establish and make out those grounds.

[21] The grounds upon which the application is made are set out below:

> "1. Tas Security Services Pty Ltd has for many years been in the forefront in employing persons with disabilities referred to it by rehabilitation providers, both government and private.
>
> 2. Some 30% + of our employees are rehabilitees or retirees who have elected to work casually or permanently in the security industry.

[5] Australian Bureau of Statistics, *Australian Industry, 2009–10*, Catalogue No. 8155.0, June 2011, ABS, Canberra; Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits, Jun 2007 to Jun 2009*, Catalogue No. 8165.0, February 2011, ABS, Canberra.

> 3. A very small number of these employees have physical or financial limitations which prevent their employment as prescribed by the award with respect to minimum hours of employment at any one time.
>
> 4. To strictly observe the award in the case of these employees would obligate us to terminate their employment, potentially cancel service agreements in place where Govt and private client specifications do not enable employment for less than the minimum prescribed hours or otherwise force further adverse publicity to the very positive discrimination against persons with disabilities trying to earn a living by the restricted employment opportunity available to them through my company.
>
> 5. There appears to be a view that termination of employment of those persons for whom this variation is sought would, in itself, be illegal and discriminatory."

[22] The evidence of the applicant in support of those grounds is comprised of witness statements and viva voce evidence at Hobart on 19 August 2011.

[23] I now turn to consider the grounds upon which the application is made as referred to above in more detail. For this purpose it is convenient to distinguish two aspects of those grounds.

[24] The first aspect concerns people with disabilities who are said to have physical limitations because of which the existing minimum shift provisions carry adverse consequences for their employment by TSS. It is notable that this category of persons is said to be a "very small number".

[25] Such persons are said to be referred to TSS by Government and private rehabilitation service providers. It was in respect of this ground that Messrs O'Halloran and Valentine gave evidence.

[26] The second aspect referred to concerns persons who have what is referred to as "financial limitations."

[27] I turn first to the evidence concerning persons whose physical disabilities TSS submits are a relevant consideration in relation to the operation of clause 21.2 of the Award. No such persons were called to give evidence. Indeed, on what was put to the Tribunal at Hobart on 19 August 2011 and in the submissions filed by TSS, I am unable to conclude that there is any evidence or material upon which I could make a sound finding that such persons exist. In the course of the proceedings TSS was unable to probatively identify a person whose capacity for employment would not permit them to complete the minimum engagement prescribed by clause 21.2 because of a physical disability. Moreover, the evidence and submissions filed by Messrs O'Halloran and Valentine is that they have not on any occasion referred an employee to TSS whose capacity had been assessed so that they would not enable to perform four hours work continuously. In fact, the evidence of those witnesses was that they had no experience of the capacity of a person referred to any employer for rehabilitation being assessed as unable to perform four hours work consecutively. Such assessments as were identified in the evidence and material were based exclusively on capacity to perform a number of hours in a week, which in all cases exceeds four. Accordingly, to the extent that the application is made on this

ground it must fail for want of a substantial factual basis to be considered, having regard to the statutory criteria under which the application falls to be determined.

[28] It is unnecessary to determine whether such facts, if proven, would be a relevant or persuasive consideration which could give rise to a finding that it is necessary to vary the minimum shift duration prescribed by the modern award in order to meet the modern awards objective.

[29] I now turn to the evidence of Mr Harrop and the ground upon which the application is based which is referred to as "financial limitations".

[30] At the hearing in Hobart, Mr Harrop gave evidence which may be considered to be highly contextual. Mr Harrop is a retired police officer in receipt of a police service pension. Mr Harrop is employed by TSS as a security guard. Mr Harrop does not suffer from a physical disability. Indeed the circumstances relied upon by TSS in relation to Mr Harrop are that on a particular day Mr Harrop performs work on different contracts. One is for the Tasmanian Police and the other is at the State Library of Tasmania. Mr Harrop performs a four hour shift at Tasmania Police every Friday and then proceeds to perform a separate engagement at the State Library of Tasmania every second Friday for one hour and 45 minutes. Mr Harrop's evidence is that if the income he receives from the fortnightly second engagement equals the amount payable for four hours of work the total income he receives from TSS has the consequence that his partner's Centrelink benefit is reduced by an amount determined by the relevant social security entitlements scheme.

[31] Briefly, it can be surmised that the submission of TSS is that there are persons, such as Mr Harrop, whose income can rise, in circumstances where they are paid for a shift of work of four hours, such that a social security entitlement of another person will be affected.

[32] It is of course impossible on the evidence to judge how extensive such circumstances may be. It should also be readily apparent that such circumstances would be infinitely contingent and highly variable among persons working or likely to work in the industry. It is therefore impossible to extrapolate the quantitative dimension of this experience among employees in the industry and their partners. At least, on the applicant's case, this would be no more than "a very small number".

[33] Nevertheless, I shall consider the evidence having regard to the relevant statutory provisions. To do so it is necessary to consider whether varying the minimum hours to meet such circumstances is necessary to achieve the modern awards objective.

[34] On my reading of the modern awards objective as set out above I am unable to conclude that reducing the minimum shift engagement in order to accommodate the circumstances made out in Mr Harrop's evidence is necessary to achieve that objective. My reasons for this conclusion are set out below and address each of the matters to be taken into account when considering the achievement of the modern awards objective as contained in s.134 of the Act.

Relative living standards and needs of the low paid

[35] In my view, the evidence does not go to questions of the relative living standards of the low paid or the needs of the low paid. This subject was not, in my view, addressed in any way by the evidence.

The encouragement of collective bargaining

[36] The evidence does not in any way touch upon the encouragement of collective bargaining.

The need to promote social inclusion through increased workforce participation

[37] The evidence of Mr Harrop does not deal with the promotion of social inclusion through increased workforce participation. Mr Harrop is a workforce participant, fit and able to work as required. The evidence of Mr Harrop goes to the effect of his income from his police service pension and from work in the industry on the social security entitlement of his partner. His participation in the workforce is unaffected by the Award. The matter raised in his evidence concerns household financial considerations which do not relate to Mr Harrop's participation in the workforce but a preference to maximise the access available for Mr Harrop's partner to a social security benefit. Mr Harrop wishes to manage his participation in paid employment for reasons which have no connection with the modern awards objective.

The need to promote flexible modern work practices and the efficient and productive performance of work

[38] The evidence of Mr Harrop does not identify any inefficient or ineffective workplace practice which is derived from the minimum engagement provisions of the Award. There is no suggestion that another workforce participant would not be able to perform the second of the two shifts performed by Mr Harrop should he decline to perform it because of the effect on his partner's social security entitlement. Moreover, there is no evidence that beyond the social security entitlement of Mr Harrop's partner, the minimum engagement provisions cause inefficient work performance by Mr Harrop or other employees or that such employees do not perform their work productively.

The principle of equal remuneration for work of equal or comparable value

[39] The issue of equal remuneration for work of equal value does not arise.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

[40] There was no evidence from TSS that the minimum engagement provisions of the Award imposed an insurmountable regulatory burden upon the industry. Moreover, the circumstance whereby the application draws no support from other employers is a relevant consideration in respect of the regulatory impact of the minimum engagement provisions on employment costs and productivity. I note that TSS referred to situations where its client or potential clients may wish to engage a security guard for less than four hours. It seems to me that this possibility may be accepted for present purposes. Indeed, not only the users of security services providers but many other persons may wish to engage employees for short periods. The proposition is a general one which reduces to a submission that there should be

no minimum engagement provision in the Award, which would be consistent with what is sought by TSS as set out above in the extract from the Form 46 which initiated the proceedings. Minimum engagement provisions are a common feature of modern awards. Accordingly, the clear inference must be that such provisions form part of a fair and relevant safety net of minimum terms and conditions of employment, which is the objective expressed in s.134. I shall determine this matter on that basis.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

[41] The terms of clause 21.2, in my view, are simple and easy to understand and in light of the history of the Award and these proceedings would not seem to be unsustainable from an industry perspective.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

[42] I doubt that Mr Harrop's evidence, or that of Messrs Valentine and O'Halloran, could in any way be said to relate to employment growth, inflation or the sustainability, performance and competitiveness of the national economy.

Conclusion

[43] For all of these reasons, on what is before me, I am not satisfied that it is necessary to vary the provisions of clause 21.2 in order to meet the modern awards objective. The modern awards objective is to ensure that, together with the National Employment Standards, a modern award provides a fair and relevant safety net of terms and conditions of employment. The provisions of clause 21.2 have been judged by the Full Bench of Fair Work Australia to contribute to the achievement of that objective, after extensive proceedings in which submissions were received from the industry and relevant employee organisations. On what is before me, no necessity to vary the provisions of clause 21.2 is made out. In these circumstances no power to vary the modern award outside the system of four yearly reviews arises. The application in this matter is therefore dismissed. An order will issue accordingly.

COMMISSIONER

Appearances:

E Harding for Tas Security Services Pty Ltd

P Tullgren for United Voice

Hearing details:

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