



# DECISION

*Fair Work Act 2009*

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

## **Property Sales Association of Queensland, Union of Employees (AM2012/341)**

Real estate industry

COMMISSIONER ASBURY

BRISBANE, 29 NOVEMBER 2012

*Application to vary the Real Estate Industry Award 2010.*

### **Background**

[1] This is an application under s.160 of the *Fair Work Act 2009* (the Act) by the Property Sales Association of Queensland, Union of Employees (PSAQ), to vary the *Real Estate Industry Award 2010* (the Award) to remove what is said to be an ambiguity or uncertainty. The application is supported by the Queensland Real Estate Industrial Organisation of Employers (QREIOE).

[2] The variation sought is to Item E.3.4(e) of Schedule E of the Award. That Schedule deals with Transitional provisions for written agreements, and Item E.3.4 which includes the provision sought to be varied, is in the following terms:

“Until a written agreement is registered with QPIR:

- (i) a person may not be a commission-only employee; and
- (ii) the employer must pay on a weekly basis, in addition to any payment of commission, bonus or other incentive payments, not less than the minimum weekly wage specified in clause 14.1.”

[3] The variation sought to Item E.3.4(e) of Schedule E would result in the provision being in the following terms:

“Until a written agreement is registered with QPIR:

- (i) the employer must pay on a weekly basis, in addition to any payment of commission, bonus or other incentive payments, not less than the minimum weekly wage specified in clause 14.1.
- (ii) a person may not be a commission-only employee.”

[4] The grounds upon which the variation is sought as set out in the application are:

“This reversal of order is necessary to remove the ambiguity of the application of clause E.3.4(e).

- The intent of this clause when composed by the Real Estate Industrial Group for submission to the Australian Industrial Relations Commission in 2009 as a consent award and subsequently approved by FWA in the Modern Award M000106 was to continue the requirement of employers that did not register agreements between them and an employee, regardless of their method of remuneration, to pay that employee all of the entitlements provided for in the Award in addition to any commissions bonuses or incentives paid to that employee.
- The current order of the sub clauses referred to herein above, and the word “and” as the final word in the current sub clause (i) has caused some confusion as to whether the current sub clause (ii) applies only to employees employed on a commission only basis, or applies to all employees. It was clearly accepted by the parties to the consent award that it applied to all employees.”

[5] The PSAQ and the QREIOE submit that the variation should operate retrospectively from 1 January 2010.

### **Submissions**

[6] In its submissions in support of the variation, the PSAQ points to the fact that the provision sought to be varied applies only in the State of Queensland. When the Award was developed, the industry parties agreed that certain existing provisions of the previous State Awards would be preserved where possible, in the transitional period up to 1 January 2015. Reference was made to the *Property Sales Award Queensland - State 2005* and the *Property Management Award Queensland - State 2005* which provided that employers who failed to comply with registration and approval requirements for “mandatory registered employment agreements” were prevented from offsetting commission paid to real estate salespersons or property managers, against wages and/or paid leave entitlements under the Award.

[7] It is submitted that the purpose of these provisions was to ensure that the unique flexibility that those State Awards provided for employers and employees did not lead to undocumented and sub-standard conditions of employment, and that the intent of those provisions would be continued in the *Real Estate Industry Award 2010* as part of the transitional provisions.

[8] It is further submitted that the wording of Item E.3.4(e) in Schedule E of the Award has inadvertently created an unintended ambiguity, because the current order the subclauses and the use of the term “and” as the final word in (i) of that item, has caused confusion as to whether (ii) applies only to employees on a commission only basis or to all employees. It had been clearly accepted by parties to the Award that it applied to all employees.

[9] The PSAQ submits that s.160 of the Act provides the authority for Fair Work Australia to “remove an ambiguity or uncertainty or to correct an error.” The PSAQ also

submits that the variation should be made retrospective and that s.165(2) provides for this to occur. The PSAQ concedes that there have been no claims or disputes arising out of the situation to date, but contends that the parties to the Award recognise the potential for these to occur. Accordingly it would be remiss for the PSAQ not to request the earlier operative date to prevent disputation about the correct interpretation during that period.

[10] The QREIOE agrees that the current construction of Item E.3.4(e) of the Award has the potential to cause confusion or misinterpretation in relation to the intent of the clause due to the conjunction “and” appearing immediately after subclause (i). The application for variation is intended to remove such confusion or misinterpretation and to clarify that subclause (i) was always intended to apply to all relevant employees and not only those employed on a commission-only basis. Further, the QREIOE is of the view that the application is consistent with the current award review process.

### **Legislative provisions**

[11] Section 160 of the Act provides as follows:

#### **160 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, employee, organisation or outworker entity that is covered by the modern award.

[12] In relation to the date upon which a variation comes into operation, s.165 of the Act provides:

#### **165 When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages**

##### *Determinations come into operation on specified day*

(1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

(2) The specified day must not be earlier than the day on which the determination is made, unless:

(a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

(b) FWA is satisfied that there are exceptional circumstances that justify specifying an earlier day.

*Determinations take effect from first full pay period*

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

### **Consideration**

[13] Section 160 is found in Division 5 of Part 2-3 of Chapter 5 of the Act. That Division is entitled: "*Exercising modern award powers outside 4 yearly reviews and annual wage reviews*". The *Explanatory Memorandum to the Fair Work Bill* states that: "Division 5 sets out limited circumstances in which modern awards may be made, varied or revoked outside the system of annual wage and 4 yearly modern award reviews".<sup>1</sup> The current legislative provisions differ from those under the previous iterations of the legislation, in that there are no general powers for Fair Work Australia to vary modern awards. Previously the power to vary awards was governed by criteria such as satisfaction on the part of the Tribunal that the variation was necessary or expedient for the purpose of preventing or settling a dispute.

[14] The power in s.160 of the Act to vary a modern award is discretionary. The exercise of the power first requires consideration of whether there is an ambiguity, uncertainty or error in an award. If it is established that this is the case, further consideration is required as to whether the discretion should be exercised. Where there is no ambiguity or uncertainty, or where the Tribunal is not satisfied that there is an error in the terms of an award, there is no jurisdiction to vary a modern award under s.160 of the Act<sup>2</sup>. This is consistent with the clear intention of the legislature to limit the circumstances under which modern awards can be varied outside 4 yearly and annual wage reviews.

[15] In *Master Builders Australia Limited*<sup>3</sup> when considering an application under s.160 to vary a modern award, Senior Deputy President Watson adopted the useful summary set out by Senior Deputy President Marsh in *Re Beltana No. 1 Salaried Staff Certified Agreement 2001*<sup>4</sup> as follows:

- the correct approach to identifying an ambiguity or uncertainty requires the making of an objective judgment as to whether, on the proper construction of the relevant provision of an agreement, the wording of that provision is susceptible to more than one meaning (PR917548 at para.49, PR903843 at para.7, Print M2454 at p.3);
- the words used in the provision are construed in their context including where appropriate the relevant parts of the parent award with which a complementary provision is to be read (Print Q2603 at para.30 per Munro J);

- s.170MD(6)(a) is not confined to the identification of which words of a clause give rise to an ambiguity or uncertainty. A combination of clauses may have that effect (Print R2431 at para.12) *[Note: Section 170MD(6)(a) empowered the Australian Industrial Relations Commission to vary a certified agreement to remove ambiguity or uncertainty];*
- the Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention (Print M2454 at p.4, Print R2431 at para.14);
- the Commission’s task is to make an objective judgment as to whether the wording of a provision is susceptible to more than one meaning. It must avoid contentions that are ‘self serving’ (PR924146 at para.20 and PR903843 at para. 7).”

**[16]** With respect to when a variation comes into operation, it is clear from s.165(2) that the Tribunal must be satisfied that there are exceptional circumstances before specifying a date earlier than the date on which a determination that varies a modern award is made, and that the date of operation can only be retrospective where the determination is made under s.160 of the Act.

**[17]** The Explanatory Memorandum states that the day on which a determination that varies a modern award (other than in relation to wages) will almost always come into operation on or after the day on which it is made, and that Fair Work Australia may only vary an award retrospectively in very limited circumstances where:

- The determination relates to a variation to remove an ambiguity or uncertainty or to correct an error; and
- The Tribunal is satisfied that there are exceptional circumstances that justify doing so.<sup>5</sup>

## **Conclusions**

**[18]** It is not apparent on the face of Item E.3.4(e) of Schedule E that there is an ambiguity, uncertainty or error in the terms of the Award, particularly when the Item is read in conjunction with the rest of Schedule E. Item E.3.1 provides that agreements required to be made under both clauses 15.1 or 16.2 of the Award, or if no such agreement is required to be made, a written agreement specifying that the employee is not entitled to any form of bonus, commission or incentive payment, are required to be registered as set out in clauses of the Schedule E including clause E.3.4.

**[19]** Clause 15 of the Award provides for employees to be paid the minimum weekly wage prescribed under the Award, and in addition, an amount of commission or bonus or incentive payment. Where such an agreement is reached it must be evidenced in writing. Clause 16 of the Award provides for commission-only employment, whereby subject to meeting certain criteria, an agreement may be made between an employer and employee for the employee to be paid commission so that certain Award clauses do not apply. The Award also allows for commission entitlements under a commission-only agreement calculated to include

entitlements under the NES paid in advance. Such an agreement must also be evidenced in writing.

[20] By virtue of Item E.3.1 both forms of written agreement are required to be registered as provided in Item E.3.4. Until such agreements are registered, by virtue of Item E.3.4(e), a person may not be a commission-only employee and the employer must pay on a weekly basis not less than the minimum weekly wage rate, in addition to the commission, bonus or other incentive payments. The fact that Item E.3.4(e)(i) applies to commission-only employees does not mean that Item E.3.4(e)(ii) is restricted to such employees. There is nothing to suggest that Item E.3.4.(e)(ii) applies to commission-only employees subject to agreements under clause 16 of the Award and not to employees on wages and commission under agreements required to be reached pursuant to clause 15 of the Award.

[21] Further, other than the submissions of the PSAQ and the QREIOE there is no material before me to establish that there is ambiguity, uncertainty or error in relation to the provisions sought to be varied. The submissions are unsupported by evidence and amount to assertions about possibilities. Indeed the PSAQ concedes that there have been no claims or disputes arising out of the provision in its current form. It is also the case that pursuant to clause E.4, Schedule E of the Award will cease to operate on 31 December 2014.

[22] Accordingly, there is no jurisdiction under s.160 to vary Item E.3.4(3) and the application is refused.

## COMMISSIONER

### *Appearances:*

*Mr B. Gannon and Mr T. French* on behalf of the Property Sales Association of Queensland.

### *Hearing details:*

2012.

Brisbane:

August 31;

October 5.

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<sup>1</sup> The Parliament of the Commonwealth of Australia House of Representatives *Fair Work Bill 2008 Explanatory Memorandum* at paragraph 609.

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<sup>2</sup> Master Builders Australia Limited (AM2011/51) [2012] FWA 62; Manufacturing and Associated Industries and Occupations Award 2012 (AM2011/55) [2012] FWA 2556.

<sup>3</sup> AM2011/51

<sup>4</sup> PR932468 at [23].

<sup>5</sup> *Fair Work Bill 2008 Explanatory Memorandum* op. cit. at paragraph 629.