



DECISION

Fair Work Act 2009

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

Australian Federation of Employers and Industries

(AM2011/12)

ROAD TRANSPORT AND DISTRIBUTION AWARD 2010

[MA000038]

Road transport industry

SENIOR DEPUTY PRESIDENT HARRISON

SYDNEY, 30 JANUARY 2012

Application to vary the Road Transport and Distribution Award 2010.

[1] The Australian Federation of Employers and Industries (AFEI) has applied under s.158 of the *Fair Work Act 2009* (the Act) to vary the *Road Transport and Distribution Award 2010*¹ (RT&D Award). The application seeks to insert a new clause which will read as follows:

“25. Shiftwork for dairy industry distribution and vending employees

25.1 This clause applies to dairy industry distribution and vending employees engaged in shiftwork.

25.2 Definitions

For the purposes of this clause:

(a) afternoon shift means a shift finishing after 6:30pm and at or before midnight.

(b) Dairy industry distribution and vending employees means employees engaged in or in connection with the storage, packing, carting, distribution and vending of milk, cream, butter cheese and their derivatives (including fruit juices, yoghurt, custard, dairy foods and any other products where the primary product includes the above) that is for resale by retail outlets (route trade) and schools or end users such as households, hospitals, office blocks, factories or similar outlets. It does not include the transport of such product in bulk to processing factories/facilities, nor transport of any such product from processing factories/facilities to a warehouse or distribution facility.

- (c) day shift means a shift which commences at 5.30am or later, but finishes at or before 6.30pm;
- (d) early morning shift means a shift finishing after 9am and at or before 2pm.
- (e) night shift means a shift finishing after midnight and at or before 9am;
- (f) rostered shift means a shift of which the employee concerned has had at least 48 hours notice; and
- (g) shiftwork means work that is not performed within the day shift hours,

25.3 Shift work hours and shift rosters

- (a) The hours of work of employees on shiftwork must be an average of 38 per week. The ordinary hours of work must not exceed ten hours per day (inclusive) of meal breaks on one of the following bases:
 - (i) 38 hours within a work cycle not exceeding seven consecutive days; or
 - (ii) 76 hours within a work cycle not exceeding 14 consecutive days; or
 - (iii) 114 hours within a work cycle not exceeding 21 consecutive days; or
 - (iv) 152 hours within a work cycle not exceeding 28 consecutive days.
- (b) Shift rosters must specify the commencing and finishing times of ordinary hours of respective shifts and not be altered unless 48 hours notice is given.

25.4 Shift allowances

For ordinary hours shift workers must be paid as follows:

Shift	% of the ordinary time rate
Early morning shift	110
Afternoon shift	112.5
Night shift	115

25.5 Shiftwork—casual employees

Casual employees engaged on shiftwork must be paid the casual loading of 25% in addition to the shift loading specified at clause 25.3 above.

25.6 Shiftwork—overtime

For all time worked in excess of the ordinary shift hours or on a shift other than a rostered shift, shiftworkers will be paid at time and a half for the first two hours and double time thereafter.

25.7 Transfer to existing shift rosters

Forty-eight hours notice of any change of shift must be given to an employee, in default of which overtime rates must be paid for work done outside the ordinary shift hours within 48 hours of being notified of the change.

25.8 Transfer of day worker to or from shiftwork

Unless otherwise agreed between an employer and an employee, day workers must be given at least 10 hours off duty immediately before commencing, or after ceasing shiftwork, and may be transferred to or from shiftwork on 48 hours notice. In default of such notice an employee must be paid overtime rates for all work done outside previous ordinary working hours within 48 hours of being notified of the change.

25.9 Work on Saturday, Sunday or public holidays

(a) Shiftworkers, for work on a rostered shift, the major portion of which is performed on a Saturday, Sunday or public holiday will be paid as follows:

- Saturday—at the rate of time and a half;
- Sunday—at the rate of double time; and
- Public holidays—at the rate of double time and a half.

(b) The penalty rates prescribed by this clause for work on a Saturday, Sunday or public holiday will be payable instead of the shift allowance prescribed in clause 25.3.

25.10 Meal breaks

All shiftworkers while working on early morning, day, afternoon or night shift will be entitled to a paid meal break of 20 minutes. An employee must not be required to work more than five hours without a meal break.

25.11 Rates when shift extends beyond midnight

Notwithstanding anything contained in this clause, each shift must be paid for at the rate applicable to the day on which the major portion of the shift is worked.

25.12 Holiday shifts

Where the major portion of a shift falls on the public holiday the whole of the shift will be regarded as a public holiday shift.”

[2] In summary, the variation seeks to insert a new shift being an early morning shift, different span times for shifts and an allowance for shifts which is less than that currently in the RT&D Award. The variation relies on s.157 of the Act which provides that a variation to a modern award may be made outside the system of four yearly reviews if the variation is necessary to achieve the modern awards objective. I here note that the effect of item 6 of Schedule 5 to the Fair Work (TPCA) Act 2009 is that there will be a review of modern awards “as soon as practicable” after 1 January 2010. The timetable for this review is the subject of a Statement dated 17 November 2011.² Accordingly, there will be a 2 yearly review of modern awards in which Fair Work Australia (FWA) is required to consider whether the modern awards achieve the modern awards objective. That objective is found in s.134 of the Act. It is in these terms:

“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.
...”

[3] The application to vary was opposed by the Transport Workers’ Union of Australia (TWU) and the Australian Road Transport Industrial Organisation (ARTIO). Australian Industry Group (AiG) indicated it neither supported nor objected to the application. There were numerous conferences before me and between the parties in an attempt to reach some agreement or compromise but this was not achieved.

[4] AFEI acknowledges that during the modern award making process it did not make any submissions about the sector of the industry that is the subject of this application to vary. The process which resulted in the RT&D Award was part of what was described as stage 2. The industries which would be considered in that stage were announced in a Statement issued in September 2008. Lists of all of the existing awards that may be subsumed into any new modern awards that may be made as part of this process were also published.

[5] An exposure draft of the RT&D Award was published on 23 January 2009, accompanied by a Full Bench Statement. About this exposure draft it said:

“[98] The RT&D Modern Award covers the road transport and distribution industry as defined in the exposure draft. The definition is broad and is intended to incorporate the scope of the pre-reform *Transport Workers Award 1998* (Transport Workers Award) and NAPSAs operating in each state as the general industry transport award. It also incorporates the transport activities previously covered by freight forwarding, petrol and petroleum products, crude oil and gas and quarried materials awards. These are a subset only of the sectors covered by the exposure draft and the parties should give close consideration to the definition of the industry.

[99] We are aware that the definition of the industry does not reproduce the wording in each of the existing scope or incidence clauses in relevant pre-reform awards and NAPSAs. The parties should give consideration to whether there is a need to specifically identify other activities. In this respect, however, we note the breadth of paragraph 3.1(a) of the definition and it may not be necessary to specifically identify the various subcategories of those goods, wares and merchandise, etc.³

[6] The coverage of the award in the exposure draft (which was substantially the same as that in the final award) was defined by reference to the definition of the transport and distribution industry. That definition contained the following:

“(a) the transport by road of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock, including

where the work performed is ancillary to the principal business, undertaking or industry of the employer;

(b) the receiving, handling or storing of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise in a distribution facility;

...

(h) the transport on public roads of milk and cream in bulk, and the transport, vending and distribution of milk, cream, butter, cheese and their derivatives (including fruit juices, yoghurt and custard); and/or
..."

[7] The RT&D Award was made on the 3 April 2009, accompanied by a Full Bench Decision an extract from which is as follows:

“[168] We have previously published exposure drafts of each of the awards we now propose to make. We should make a number of comments about issues raised by the parties concerning the exposure drafts and variations of substance that have been made to the drafts. We refer first to the RT&D Modern Award. In our statement of 23 January 2009 we said that the definition of the industry should be closely considered by the parties and submissions made as to whether the description was sufficient to encompass the various sectors of the industry that were being incorporated into the award. No party submitted that any additional paragraphs needed to be added to the definition and accordingly it retains paragraphs (a) to (i) however we have made some variations to make it clear that the award relates to the transport of goods etc by road. We have also adopted the definition of a distribution facility as proposed by the Transport Workers’ Union (TWU) so it is clear that they are facilities which are operated by an employer as part of its road transport business.”⁴

[8] There could have been no doubt the employers in the sector of the industry which is the subject of this application to have had a reasonable opportunity to make submissions about the provisions of the RT&D Award that should relate to its activities. They did not take advantage of that opportunity. It should also be noted that in deciding upon the terms of the RT&D Award the Full Bench did not adopt a number of more beneficial pre-existing provisions which the TWU urged upon it. In this respect I note in particular the higher weekly rates in some New South Wales NAPSA’s.

[9] In both the exposure draft and final award the shift work spans and allowances were the same. Clause 22.4 is of particular relevance to this application. That clause provides for a specific allowance for certain sectors of the industry that traditionally have early starts. I should reproduce both clause 22.3 and 22.4:

“22.3 The ordinary hours of work must not exceed eight hours per day and must be worked continuously (except for meal breaks) between the hours of 5.30 am and 6.30 pm. The spread of ordinary hours may be altered in any depot, yard or garage by one hour at each end by agreement between the employer and the majority of employees concerned. Agreement may thereafter be reached between the employer and an individual employee.

22.4 The times within which ordinary hours of work may be performed will not apply to:

- (a) newspaper deliveries, where for the sole purpose of transport and delivery of daily newspapers;
- (b) meat deliveries, where for the sole purpose of loading, transport and delivery of butcher’s meat from abattoirs or meat works and where such meat is to be used for human consumption;
- (c) live poultry, where for the sole purpose of loading, transport and delivery of live poultry from poultry farms to poultry processing plants; or
- (d) a driver employed at a fish, fruit or vegetable store.

Provided that instead of the times in clause 22.3 an employer may require an employee to commence ordinary hours of work between 12.01 am and 6.00 am (Monday to Friday inclusive) but not otherwise and, in which case, the weekly wage rate of the employee must be increased by 30%.”

[10] It is to be noted that the scope of persons to be covered by the variation is described by reference to the activities of employees engaged in dairy industry distribution and vending. AFEI described these employees are those engaged in the purchase, sale and delivery of milk and related products for resale retail outlets or for consumption by hospitals, schools, workplaces and households. As indicated in the application, it is not intended to cover the bulk sale and transport of milk and related milk related products to large retailers nor the bulk transport of milk and dairy products, the transport of milk from farms to processing facilities or from processing facilities to warehouses and distribution centres. Other than the submission that employees in this sector were traditionally paid lesser allowances for the early starts they commonly undertook no submission was made which sought to identify any difference in the driving and related work undertaken by these employees and those undertaking comparable driving and related work in other sectors of the transport industry.

[11] AFEI referred to numerous award-based transitional instruments (pre-reform awards and NAPSA’s) which operated within the sector prior to the coming into operation of the

RT&D Award. It submitted that the shift definitions and the applicable allowances recognised that it operated predominantly in the evenings and early mornings. That continued to be the case and it sought to continue the same flexibility with respect to work undertaken at these times. I note that this reference to flexibility in fact means to work at these times for a lesser amount than that currently in the RT&D Award.

[12] It is unclear whether the definition of dairy industry distribution and vending employees has been taken in whole or in part from any previously applicable award or awards although I note that the inclusion of fruit juices in the goods referred to in the definition was said to have been taken from the definition in the Transport Workers (Milk Carters) Award 2002, a pre-reform award.⁵ I requested AFEI to reconsider the definition however no further proposal was advanced. I comment later about the manner in which the sector, the subject of this application, has been defined.

[13] The most significant effect of the variation sought is the introduction of an early morning shift with an allowance at a lesser rate to what would be payable under the current award for hours worked during the corresponding span. The need for this is justified as being necessary to achieve the modern award objectives and in particular those in ss134(1)(d) and 134(1)(f). In its submissions AFEI gave the example of a milk vendor who operates a run from 1am to 9am and provided calculations of the amounts that an employer engaging an employee for such a run previously under the NAPSA's in southern Queensland and New South Wales and the pre-reform award in Victoria might have been required to pay. Other than what was said in a witness statement to which I next refer there was no evidence that the identified run time was in fact a "common run" in this sector.

[14] AFEI relied on the written statement of Mr Wilce who described himself as a leading hand/delivery driver employed by Brisbane Milk Distributors Pty Ltd (BMD). AFEI submitted that this statement demonstrates the impact of the RT&D Award on this employer. I have considered all of that statement. I note that employer operates 14 milk runs in south-east Queensland and into northern New South Wales. It employs 32 people of which 18 are delivery drivers. The drivers are currently employed under a collective agreement which was approved by the then Workplace Authority in July 2009 and is known as the Brisbane Milk Distributors Pty Ltd Delivery Drivers Collective Workplace Agreement 2009-2012 (BMD agreement). There are a number of shifts worked by the drivers which range from those starting at 12.45am and finishing at 8.45am through to a 9pm start and finishing at 5am.

Employees are paid an annual salary which is averaged out to a weekly wage. Mr Wilce said that if these employees had to be paid under the RT&D Award they would need to be paid additional amounts and in some cases a significant additional amount.

[15] The calculations in Mr Wilce's statement did not indicate what may be the increase in costs if the existing allowance in clause 22.4 for early starts was applied. The calculations did not address the impact of the transitional provisions in Schedule A to the RT&D Award. I also note they do not provide an award level comparison with the grades of drivers employed by BMD. From a perusal of the BMD agreement it appears there are no classification levels and the only position which is referred to is that of a delivery driver. Employees are paid in accordance with a daily pay scale which is to compensate for a 6 day week, public holidays, annual leave loading, overtime, cash handling allowance, night worker allowance and penalty payments for work outside of specified spread of hours. I am not satisfied the calculations provided by BMD assist with the actual difference in employments costs between the award based transitional instruments which may have previously covered BMD and the RT&D Award.

[16] ARTIO submitted that the requirement to promote flexible work practices requires an employer to review its operations to ensure that they are being conducted as efficiently as possible and there has been no attempt by BMD to review or restructure its operations. It submits that in some instances only a small alteration to its start times would eliminate overtime and reduce costs substantially. It also submits that shift allowances can be 'transitioned' up to 2014 which would also provide ample time for the dairy distribution and vending industry to come to terms with the RT&D Award provisions. It notes that the only evidence presented about labour costs, apart from some comparisons with pre-existing NAPSAs, concerned one employer (BMD) which does not currently employ workers under the RT&D Award. These submissions are, in my opinion, persuasive and weigh against the granting of the application to vary the award in the terms sought. In making this comment I do accept that there will be constraints on the hours in which deliveries may be made so that traffic interference is minimised and parking restrictions and client delivery times are accommodated. It is not apparent that these requirements cannot be achieved by a variation to clause 22.4 of the award.

[17] AFEI referred to two Full Bench decisions dealing with applications to vary the General Retail Industry Award 2010⁶ as examples of the acceptance of an application to vary

a modern award to recognise hours of work and shift standards that had previously applied within the relevant sector of the industry now covered by that award.⁷ Particular reference was made to the application for an early start shift allowance to apply to bakery production employees and the Full Bench comment that penalty payments should be consistent with the penalties for baking production employees in manufacturing awards, noting that many of the pre-existing awards applied to bakers in both industries. The Full Bench adjusted the allowance for shifts commencing on or after 2am to 12.5% for the entire shift. The amount of this allowance was relied upon by AFEI. It made no reference however to the further comment of the Full Bench that in respect of a shift which commences prior to 2am that those employees are not sufficiently distinguishable from the night shiftworkers and therefore should be entitled to the night shift allowance for their shift. The level of that allowance is the same as the allowance currently in clause 22.4 of the RT&D Award.

[18] I turn now to the interaction of the industry coverage of the RT&D Award which is referable to the definition of the road transport and distribution industry and the employee related definition in the AFEI application of dairy industry distribution and vending employees. Despite my request to consider this wording no attention has been given to the impact of the inclusion of the words “in or in connection with” at the commencement of the definition. These words are not in the definition of the road transport and distribution industry and my current view is that they are not appropriate to be in any definition that may be incidental to an application of the nature here made by AFEI. I also note the catch all phrase “any other products where the primary product includes the above”. The need for this is not clear but in any event it is likely to give rise to uncertainty.

[19] Having considered all of the submissions and the witness statement I am not persuaded that the variation is necessary to achieve the modern awards objective. This ruling should not be taken to deny AFEI the opportunity to make another application to vary the RT&D Award as part of the imminent 2 yearly review. In this regard I note the TWU submitted there are provisions of the RT&D Award it is likely to seek be considered in that review and it may be appropriate for AFEI to raise the circumstances of this sector of the industry again then.

[20] Finally, I note that I have earlier indicated the primary position of ARTIO and AiG about the fate of this application. Each also submitted that in the event a variation was made it would seem to be appropriate that it be to clause 22.4. Understandably, as neither supported

the need for a variation no alternate draft was proposed. AFEI expressly opposed a variation to clause 22.4 to accommodate its concerns. In this context it also addressed the manner in which the transitional provisions of the award operated. These considerations are of wider importance than just the sector of the industry for which AFEI appears and an opportunity to comment on them should be given to others with an interest in this modern award. I have decided to not make any specific ruling about them and note that the transitional provisions in modern awards are also to be reviewed in the 2 yearly review.

[21] I decline to make the variation sought by the AFEI.

SENIOR DEPUTY PRESIDENT

Appearances:

Mr D Story for Australian Federation of Employers and Industries

Mr O Fagir and Mr M Burns for the Transport Workers' Union of Australia

Mr P Ryan for Australian Road Transport Industrial Organisation

Ms V Paul and Ms C Brooks for Australian Industry Group

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¹ MA000038

² [2011] FWA 7975

³ [2009] AIRCFB 50

⁴ [2009] AIRCFB 345

⁵ AP 817124

⁶ MA000004

⁷ [2010] FWAFB 305 , [2010] FWAFB 1958