[2013] FWC 6056

DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Item 6, Sch. 5—Modern awards review

Modern Awards Review 2012—*General Retail Industry Award 2010*

(AM2012/8, AM2012/71, AM2012/177, AM2012/196, AM2012/239, AM2012/245, AM2012/266)

Retail industry

JUSTICE BOULTON, SENIOR DEPUTY PRESIDENT SYDNEY, 23 AUGUST 2013

Transitional review of modern awards - review of the General Retail Industry Award 2010 - agreed technical and drafting variations - basis for payment of first aid allowance - entitlement to paid rest breaks - travelling allowance for employees at airports - parking fees reimbursement.

[1] Under Schedule 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act), the Fair Work Commission (the Commission) is required to conduct a review of all modern awards after two years (the transitional review). In the review, the Commission must consider whether the modern awards achieve the modern awards objective and whether they are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

[2] In relation to the transitional review of the *General Retail Industry Award 2010* [1] (the Award), eleven applications were made seeking to vary different aspects of the Award. Parts of these applications, including the entirety of one application,[2] were referred to Full Benches of the Commission considering issues relating to penalty rates, award flexibility, annual leave, public holidays, and apprentices, trainees and junior rates.

[3] Those parts of the applications not referred to Full Benches were called on for mention and programming before me on 14 November 2012, and on 7 February and 9 April 2013. A conference of the interested parties was convened on 13 May 2013. In the course of the mention and conference proceedings, a number of applicants discontinued aspects of their

[1] MA000004.

[2] ACT Region Chamber of Commerce and Industry (AM2012/252).

applications. Some of the other applicants narrowed the range of variations sought, and three applications were withdrawn in full.[3]

[4] Interested parties were directed to file witness statements and written submissions in relation to the transitional review, in accordance with a timetable agreed between the parties. The seven applications still before me were listed for the hearing of witness evidence in Brisbane on 30 May 2013 and for the hearing of submissions in Melbourne on 13 and 14 June 2013.

The Variations Sought

[5] There were several meetings and conferences held between the parties to consider the various applications to vary the Award. These meetings were facilitated by the Shop, Distributive and Allied Employees Association (SDA) and were attended by many of the interested parties. The SDA and the Australian Retailers Association (ARA) prepared a joint report setting out the outcomes of the parties' discussions in relation to the variations sought. There are two categories of matters: agreed matters, and non-agreed matters. It was accepted by the parties that most of the non-agreed matters could be dealt with on the basis of written submissions and without the need for evidence or hearings.

[6] The variations which are agreed between the parties relate to applications by the SDA (payment of wages), the ARA (meal breaks), the National Retail Association (NRA) (Broken Hill allowance), the Baking Manufacturers Industry Association of Australia (BMIAA) (display of award by employers; reference to bakery shops in definition of "general retail industry") and Business SA (definition of "general retail industry", correction of outdated terminology, indicative job titles).

[7] The variations which are not agreed between the parties are:

- An application by the SDA to insert a travelling allowance for employees working at airports, and to insert a parking fees reimbursement clause;
- An application by the NRA in relation to rest breaks and the payment of the first aid allowance;
- An application by the Baking Industry Association of Queensland (BIAQ) to vary several clauses of the Award; and
- Applications by P&P Holdings Pty Ltd (P&P Holdings) in relation to rest breaks, the Award's coverage of bakery shops, and an early morning allowance.

Legislative provisions applicable to the review

[8] The transitional review is being conducted under Item 6 of Schedule 5 to the Transitional Provisions Act. Item 6 provides:

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[3] Master Grocers Australia (AM2012/37), the Australian Municipal, Administrative, Clerical and Services Union (AM2012/102) and VANA Ltd (AM2012/250).

"**6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years**

(1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.

Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWA is required to conduct under the FW Act.

(2) In the review, FWA must consider whether the modern awards:

(a) achieve the modern awards objective; and

(b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

(2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.

(3) FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.

Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).

(4) The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.

(5) FWA may advise persons or bodies about the review in any way FWA considers appropriate.

(6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA's powers under subitem (5)."

[9] The legislative provisions applicable to the transitional review were considered in a decision relating to the *Modern Awards Review 2012* given on 29 June 2012.[4] In that decision, the Full Bench dealt with various preliminary issues relating to the approach to be adopted in the review. In particular, and for the purposes of the present matters, I note and adopt the following conclusions in that decision:

"**[23]** First, any variation of a modern award must comply with the requirements of the FW Act which relate to the content of modern awards. These requirements are set out in Subdivision A of Division 3 of Part 2-3 of the FW Act...

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[4] [2012] FWAFB 5600.

[25] Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards (ss.136–155 of the FW Act) ...

[83] As to the historical context the award modernisation process was conducted by the AIRC under Part 10A of the former WR Act. The process took place in the period from April 2008 to December 2009 and was conducted in accordance with a written request (the award modernisation request) made by the Minister for Employment and Workplace Relations to the President of the AIRC. The award modernisation process was completed in four stages, each stage focussing on different industries and occupations. All stakeholders and interested parties were invited to make submissions on what should be included in modern awards for a particular industry or occupation. Separate processes, including variously, the provision of submissions, hearings and release of draft awards, were undertaken in respect of the creation of each modern award to ensure parties were able to make submissions and raise matters of concern relevant to particular awards. By the end of 2009 the AIRC had reviewed more than 1500 state and federal awards and created 122 industry and occupation based modern awards.

[84] ... The award modernisation process required by Part 10A of the WR Act has been completed.

[85] Two points about the historical context are particularly relevant. The first is that awards made as a result of the award modernisation process are now deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Provisions Act). Implicit in this is a legislative acceptance that the terms of the existing modern awards are consistent with the modern awards objective. The second point to observe is that the considerations specified in the legislative test applied by the Tribunal in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective which now appears in s.136 ...

[89] In circumstances where a party seeks a variation to a modern award in the Review and the substance of the variation sought has already been dealt with by the Tribunal in the Part 10A process, the applicant will have to show that there are cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome ...

[99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a “high threshold” for the making of variation determinations in the Review, as proposed by the Australian Government and others.

[100] The adoption of expressions such as a “high threshold” or “a heavy onus” do not assist to illuminate the Review process. In the Review we must review each modern award in its own right and give consideration to the matters set out in subitem 6(2). In considering those matters we will deal with the submissions and evidence on their merits, subject to the constraints identified in paragraph [99] above.”

[10] The modern awards objective is set out in s.134 of the *Fair Work Act 2009* (the Act) as follows:

"**134 The modern awards objective**

What is the modern awards objective?

(1) The FWC 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 the FWC's modern award powers, which are:

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

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

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

Consideration

Agreed matters

[11] Following conferences with other interested parties, the SDA by a letter dated 28 February 2013 provided a document (the Agreed Wording Document) setting out the agreed wording for nine variations to which the parties that participated in the proceedings consented.[5] One of these variations was subsequently withdrawn.

[12] It is noted that notwithstanding the parties' agreement, the Commission must be satisfied that the variations sought meet the relevant legislative requirements relating to the transitional review. The parties were therefore directed to make written submissions indicating how the proposed changes satisfy these requirements. The matters in this category were also the subject of consideration at the hearings on 13 and 14 June 2013.

[13] As indicated to the parties at the hearings on 13 and 14 June 2013, I consider that each of the variations agreed between the parties should be made in the terms set out in the Agreed Wording Document.

[14] Each of the agreed variations is set out below. In each case the proposed wording has been set out with changes from the current clause underlined, with deletions struck out and new wording in italics.

[15] Business SA seeks to amend the definition of the "general retail industry" in clause 3.1 of the Award. The amended definition would read:

> "**general retail industry** means the sale or hire of goods or services to final consumers for personal, ~~or~~ household *or business* consumption including:".

[16] I am satisfied that there is an anomaly or technical difficulty arising from the award modernisation process in the current definition of the "general retail industry". In its current form, clause 3.1 creates the possibility that retail stores which are not wholesale establishments but which supply business or trade customers may not fall within the general retail industry for award purposes.[6] Such a result is unlikely to have been intended in the making of the award. I am satisfied that the clause should be varied as sought.

[17] The BMIAA also seeks to vary the definition of the "general retail industry" in clause 3.1. The variation would change the reference in the clause to "bakery shops" to read:

> "bakery shops*, where the predominant activity is baking products for sale on the premises*".

[18] I am satisfied that clause 3.1 in its present form creates an ambiguity or technical difficulty, as it may be difficult to discern whether some employees in some bakery shops are covered by the Award or by the *Food, Beverage and Tobacco Manufacturing Award 2010*[7] (the Food Manufacturing Award). The variation will more clearly delineate the bakery shops covered by the Award.

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[5] The TWU initially objected to three of the variations on the joint SDA-ARA list, but withdrew two of its objections on the basis of assurances by Business SA that they were not intended to impact upon workers within the TWU's coverage. The third variation in this category to which the TWU objected was subsequently withdrawn by the NRA.

[6] See e.g. *G.J.E. Pty Ltd* [2013] FWCFB 1705.

[7] MA000073.

[19] The BMIAA also seeks to vary clause 5 ('Access to the award and the National Employment Standards'), which sets out where the Award and the National Employment Standards (NES) can be displayed in an employer's premises. The amended clause would read:

> "The employer must ensure that copies of this award and the NES are *easily* available to all employees to whom they apply either on a noticeboard *or other prominent location* which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible."

[20] I am satisfied that the present clause 5 creates a technical problem because of its consequences for shops that, for legitimate operational reasons, may not have noticeboards. It was the submission of the BMIAA that many of its members in the bakery sector do not have noticeboards due to the potential for mess and destruction of documents, and that electronic communication with bakery staff is not standard practice in the sector. The variation will allow employers more flexibility as to where the Award and the NES are displayed so as to be easily available to all employees.

[21] Business SA seeks to vary the terminology used in clause 12.9 ('Part-time employees' - 'Award entitlements'). The amended clause would read:

> "A part-time employee will be entitled to payments in respect of annual leave, public holidays, ~~*sick leave*~~ *personal leave* and ~~*bereavement leave*~~ *compassionate leave* arising under the NES or this award on a proportionate basis. Subject to the provisions contained in this clause all other provisions of the award relevant to full-time employees will apply to part-time employees."

[22] I am satisfied that the current wording in clause 12.9 reflects that found in the previous legislation and that it should now be varied so as to match the terminology of the NES in the current legislation.

[23] The National Retail Association (NRA) seeks to amend paragraph (c) of clause 20.13 ('Allowances' - 'District allowances') by specifying the basis on which the Broken Hill allowance is to be paid. The amended clause would read:

> "An employee in the County of Yancowinna in New South Wales (Broken Hill) will in addition to all other payments be paid an *hourly* allowance for the exigencies of working in Broken Hill of 4.28% of the standard rate."

[24] I consider that the current wording of clause 20.13(c) creates ambiguity as to the basis upon which the Broken Hill district allowance is payable, and that the addition of the word "hourly" to the clause will resolve the ambiguity.

[25] The SDA seeks to vary clause 23 ('Payment of wages') by inserting a new paragraph between the two paragraphs that currently make up the clause. The new paragraph is in the following terms:

> "*All wages shall be paid on a regular pay day. The employer must notify the employee in writing as to which day is the pay day. Where for any reason the employer wishes to change the pay day, then the employer shall provide at least 4 weeks' written notice to the employee of such change.*"

[26] I am satisfied that the proposed variation to clause 23 is appropriate having regard to modern awards objective, and specifically to ensure that the Award provides a fair and relevant minimum safety net taking into account relative living standards and the needs of the low paid (see s.134(1)(a)). The absence of an award provision requiring that a regular pay day be specified that can only be changed by written notice has the potential to cause uncertainty and difficulty for retail workers, many of whom can be described as low paid. It has not been suggested that the proposed clause will have any significant adverse impact on business.

[27] The ARA seeks to amend the table in paragraph (a) of clause 31.1 ('Breaks during work periods') that sets out employees' entitlement to breaks. In the first column (headed "Hours worked"), the variation would amend the second and third rows as follows:

> "Work 4 hours or more but ~~*less than*~~ *no more than* 5 hours
>
> Work *more than* 5 hours ~~*or more*~~ but less than 7 hours"

[28] I consider that the part of the current table contained in clause 31.1(a) which provides a meal break to employees who "[w]ork 5 hours or more but less than 7 hours" may be seen as inconsistent with clause 31.1(d), which provides that "[n]o employee can work more than 5 hours without a meal break". The clauses create an ambiguity that will be remedied by the variation sought by the ARA. The variation will give full effect the decision in *Re General Retail Industry Award 2010*.[8] In that decision, a new clause[9] was inserted into the Award which was intended to "...effectively allow... five hour periods of work or shifts to be worked without a break for a meal".[10] The parties in the current proceedings submitted that without a corresponding variation to clause 31.1(a), the introduction of clause 31.1(d) gave rise to an ambiguity.

[29] Business SA seeks to vary an indicative job title for a Retail Employee Level 1 as set out in clause B.1.3 of Schedule B to the Award. The varied title would read:

> "Door-to-door Salesperson, *or Retail Outdoor Salesperson*".

[30] I am satisfied that the current indicative job title may create technical difficulty or an ambiguity. The present clause may give the impression that door-to-door sales is the only type of work conducted outside the walls of a shop that is covered by the Award, although no such restriction flows from the Award's coverage or classification structure.

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[8] [2010] FWA 8806.

[9] Which became clause 31.1(d).

[10] Ibid at [21].

[31] For the above reasons, I am satisfied that the variations to the Award agreed between the parties may be made in the context of the transitional review. The variations are appropriate in order to ensure that the Award is operating effectively and to achieve the modern awards objective.

Contested Matters

[32] A large number of variations initially fell into the second category, but the majority of the claims were withdrawn as a result of the conferences between the parties and the mention and programming proceedings in the Commission. Four variations were the subject of written submissions and oral submissions at the hearing on 13 June 2013, and evidence was heard in relation to one of these matters on 30 May 2013. In addition to the four matters on which submissions were made, there are two applications that are opposed by the SDA but which were not pursued by the respective applicants (BIAQ and P&P Holdings).

[33] I now turn to consider the applications in the transitional review which have not been agreed between the parties.

(i) SDA application to insert travelling allowance for airport workers

[34] The SDA seeks a new clause that would provide a travelling allowance for retail employees working at airports, in the following terms:

> "***Travelling allowance for employees working at airports***
>
> *All weekly employees shall be paid a travelling allowance of $6.30 per day or shift.*
>
> *Provided that where an employee is recalled to work overtime he or she shall be paid an additional $6.30 for each period or recall.*"

[35] The SDA submitted that from 1973 until the award modernisation process, travelling allowances were a common feature of awards covering the employment of retail airport employees. Immediately prior to award modernisation, clause 15.5 of the *Airport Retail Concessions Award 2003* contained a per-shift/per-day allowance of $5.90 for all weekly employees. During the award modernisation process, the SDA submitted draft awards for the retail industry that contained such an allowance. The Award as made did not contain the allowance, though as the SDA noted, a similar provision for airport catering employees was included in the *Hospitality Industry (General) Award 2010*.[11]

[36] It was submitted that airport travelling allowances are historically part of the pay of retail employees working at airports, and address the disabilities associated with working at airport locations. It was submitted that the Award Modernisation Full Bench did not adequately consider the exclusion of the allowance from the Award, and that it did not refer to

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[11] Currently at clause 21.1(i).

airport workers in the decision making the Award.[12] The SDA submitted that the clause is necessary to meet the modern awards objective, particularly taking into account relative living standards and the needs of the low paid (see s.134(1)(a) of the Act). It was said that most retail employees working at airports are forced to drive to work due to the remote location of most airports and the unavailability or inconvenience of public transport. It was said that parking and associated costs, such as transport by shuttle buses from employee car parking to terminals, are heavy financial burdens for low paid retail employees, and that as a consequence employees at airports receive less of a meaningful benefit from their wages than other retail employees who work at non-airport locations.

[37] The ARA and NRA opposed the SDA application. The ARA said that the SDA twice submitted to the Award Modernisation Full Bench that an airport travel allowance should be inserted into the Award, and that on neither occasion did the Full Bench insert such a clause. It was said that the SDA is merely re-agitating a claim that was denied during the award modernisation process. It was further said that the SDA has not presented any witness evidence in support of the application and that the material attached to its submissions does not set out or take into account what free parking is available to retail employees at airports. It was said that there was no compelling evidence of a gap in the minimum safety net.

[38] The NRA submitted that State awards covering the general retail industry and the transitional federal instruments preserving them did not contain airport travelling allowances. The *Airport Retail Concessions Award 2003* applied as a common rule in Victoria, and otherwise only applied to the employers named in Schedule 1 to the award. It was further submitted that the insertion of an equivalent provision into the *Hospitality Industry (General) Award 2010* is irrelevant to the determination of the present application.

[39] There is considerable force in the submission that employees who work at airports may incur higher travelling costs than other employees, and that this may have a significant financial impact upon low paid retail employees. However no evidence was presented by the SDA in support of its application. For example there was no evidence presented in relation to the provision of free or discounted employee parking at airports or the cost and availability of other transport options at different airports. In the absence of such evidence I am unable to conclude that, without an allowance such as that sought, the Award does not achieve the modern awards objective. Further, I am not persuaded that the issue of an airport travel allowance was not considered and determined in the context of the award modernisation process.

[40] The lack of an explicit statement by the Award Modernisation Full Bench that it had decided not to include such an allowance in the Award should not be construed as evidence of an oversight. The Full Bench was, at the time, in the process of making modern awards for 14 priority industries,[13] which involved the review of a large number of pre-modern awards and voluminous submissions from interested parties. The Full Bench did not give detailed reasons for the inclusion or exclusion of every clause proposed by the parties. The issue of an airport travel allowance was raised, but such an allowance was not included in the Award made by the Full Bench. There must be cogent reasons for departing from the previous Full Bench

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[12] [2008] AIRCFB 1000.

[13] See [2008] AIRCFB 550 at [15]-[98].

decision, such as a significant change in circumstances, which warrants a different outcome. The limited evidence and material before me does not support a conclusion that the Award does not achieve the modern awards objective as it does not contain an airport travel allowance. Further, the SDA has not established any cogent reason for altering the position determined by the Award Modernisation Full Bench, having regard to the circumstances of the retail industry and workers engaged at airports.

[41] For these reasons, the application is refused.

(ii) SDA application to make provision for reimbursement of parking fees

[42] The SDA seeks to insert a new clause into the Award providing for the reimbursement of parking fees paid by employees in regional shopping centres and other retail establishments. The proposed clause is in the following terms:

> "***Parking Fee Reimbursement***
>
> *Employees working in a retail establishment such as a shopping centre (other than one located in the central business district of a capital city) who are required by the owner of the retail establishment to pay a fee to park their motor vehicle when attending for work, shall be reimbursed all such fees.*"

[43] The background to the application to insert a parking fees reimbursement clause would seem to relate to developments with respect to two regional shopping centres in Brisbane.

[44] In support of its application the SDA called two retail employees who work at stores in Queensland shopping centres: Ms Margaret Stanton, who works at the Myer store in the Westfield Chermside Shopping Centre, which is located in Brisbane's inner northern suburbs; and Ms Pierina Jarrett, who works at the Big W store in the Westfield Carindale Shopping Centre, which is located in the suburb of Carindale, east of Brisbane. These witnesses gave evidence about the introduction of paid parking at the shopping centres, their need to drive to work, the impact of parking costs upon them, and perceived safety issues. The SDA also called Mr Christopher Ketter, the Queensland Branch Secretary of the union. Mr Ketter gave evidence about the implementation of paid parking for employees at several shopping centres and the SDA's campaign against it, and the costs and inconvenience to staff of paid parking generally.

[45] The SDA submitted that the variation sought is necessary in order for the Award to meet the modern awards objective. It was said that without provision for the reimbursement of parking fees, the Award does not adequately take into account the relative living standards and the needs of the low paid (see s.134(1)(a) of the Act). It was said that retail employees generally are low paid and that the imposition of parking fees is financially significant to them, making a particular difference to the take-home pay of part-time and casual employees. It was said that for various reasons retail employees are often required to drive to work. It was also said the introduction of paid parking where it had previously been free at shopping centres in Queensland was a significant change in circumstances since the award modernisation process was completed.

[46] The absence of a provision of this kind was also described as an anomaly or problem arising from the award modernisation process. It was said that the modernisation process was not intended to disadvantage employees, but that the Award Modernisation Full Bench did not review the imposition of parking fees by third parties or consider how parking fees affect retail employees. It was said that the Award therefore does not cover a matter of significant relevance and impact to the retail industry, and that it is open to the Commission to insert a parking fees reimbursement clause as part of the transitional review.

[47] The ARA, the NRA and MGA opposed the SDA application. Generally the employer parties submitted that the evidentiary case put by the SDA was inadequate. The ARA submitted that all employers would not necessarily be able to meet the costs involved, and suggested that the more appropriate route for the SDA to take would be the negotiation of parking reimbursement clauses in enterprise agreements. MGA submitted that there was no evidence presented of an actual need for the relevant employees to drive to work rather than use public transport. The NRA submitted that there was no evidence of a substantial change in circumstances since the award modernisation process, as the SDA had only presented evidence of the introduction of paid parking at two shopping centres operated by Westfield in Queensland.

[48] I do not consider that the case has been made out in the proceedings for the introduction of a parking fees reimbursement clause as part of the transitional review. Although the SDA submitted that the absence of a parking fees reimbursement clause could be described as an anomaly, the "deficiency" described is simply the absence of a term favourable to employees. This does not of itself establish that the Award contains an anomaly or technical difficulty arising from the award modernisation process.

[49] It cannot be concluded on the basis of the evidence presented that the Award is failing to meet the modern awards objective because it lacks a parking fees reimbursement clause. As submitted by the employers, evidence was only presented from two employees in one State, and by the SDA Branch Secretary in that State. Such evidence does not establish the existence of a problem that should be remedied by the insertion of an award entitlement with national application. Similar comments may be made in relation to the contention that the introduction of paid parking at the shopping centres in Queensland is a change of circumstances such as to justify the creation of such a national entitlement in the terms sought.

[50] The SDA submitted that the Award does not achieve the modern awards objective because it neglects the needs of the low paid (s.134(1)(a)), but did not address the other factors to which the Commission must have regard in making the relevant assessment. Section 134 of the Act requires the Commission to ensure that modern awards, together with the NES, provide a "fair and relevant minimum safety net of terms and conditions" taking into account the various factors specified in subsection (1). This involves an overall assessment of whether an award provides a fair and relevant minimum safety net. Apart from the consideration relating to low paid workers, the Commission would in the present matter need, for instance, to take into account the likely impact of any variation on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)), and on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)). The imposition of an obligation for employers to reimburse parking fees would

have impacts upon business, and may have broader implications, which were simply not addressed in the evidence and submissions presented.

[51] The evidence presented by the SDA was limited to two shopping centres in Queensland where parking fees have been introduced. In relation to those centres, the evidence included reference to the subsequent changes made by the management of the shopping centres as a result of representations by the SDA, including the provision of additional free parking for staff and the location of allocated staff parking spaces. This demonstrates the scope for the SDA to address issues of concern to its members through negotiations with the shopping centre owners and potentially with employers (see s.134(1)(b) of the Act).

[52] The award variation proposed by the SDA would have considerably wider application than the two shopping centres in Queensland. There was no evidence presented relating to the policy and practices at other shopping centres or retail establishments outside the CBD in relation to the provision of staff parking and in what circumstances employees might have to pay for such parking. It is not clear from the material before the Commission whether there is or is likely to develop a widespread practice of charging parking fees to employees working at regional shopping centres. The availability of suitable public transport to other centres would also be a relevant consideration. Without such evidence, it is not possible to make an overall assessment both as to the need for, and the application and impact of, the introduction of the proposed reimbursement provision.

[53] In these circumstances, and because of the limited evidentiary material presented, I am not persuaded that the variation sought by the SDA should be made as part of the transitional review. It has not been shown that the Award does not achieve the modern awards objective because it does not provide for the reimbursement of parking fees.

(iii) NRA application to make first aid allowance payable on an hourly basis

[54] The NRA seeks a variation to clause 20.9 of the Award (‘First aid allowance’) which would change the basis on which the allowance is paid to part-time and casual employees. The clause as varied would read as follows:

> “Where a~~n~~ *full time* employee who holds an appropriate first aid qualification is appointed by the employer to perform first aid duty they will be paid an extra of 1.3% of the standard rate each week. *Casual and part time employees who hold an appropriate first aid qualification who are appointed to perform first aid duties will receive this loading on a pro-rata basis for every hour worked.*”

[55] The NRA submitted that the first aid allowance in clause 20.9 provides a greater benefit to employees who work less than 38 hours per week than to full-time employees, as they receive the same allowance (currently $9.42 per week) despite being available for first aid duties for less time. It was said that the more hours worked by employees with first aid qualifications, the greater the potential that they will be required to use their first aid skills. It was submitted that it is therefore more appropriate for the allowance to be paid according to hours worked rather than on a weekly basis.

[56] The SDA opposed the variation. It submitted that there are no changed circumstances or cogent reasons to depart from the Award Modernisation Full Bench's adoption of a weekly allowance or the basis for its calculation. It was said that while the potential need to perform first aid duties increases with the hours worked, the actual need to provide such assistance is unpredictable and uncontrollable.

[57] The expression of a first aid allowance as a weekly amount for all employees appointed to perform such duties is a common feature of many modern awards across a variety of industries.[14] The NRA only referred to one modern award provision that refers specifically to a daily rate for full-time employees appointed to perform first aid duties, which would then apply to part-time employees on the basis of days worked.[15] I do not consider that the adoption in the Award of a common formulation for the payment of a first aid allowance represents an anomaly or technical difficulty arising from the award modernisation process, or that any variation to clause 20.9 is required to achieve the modern awards objective. It has also not been shown that there is any cogent reason for altering the provision determined by the Award Modernisation Full Bench in the circumstances of the general retail industry. I have therefore decided not to make the variation proposed by the NRA.

[58] As was acknowledged by the parties in the proceedings, if there is real concern by employers about the payment of the full first aid allowance to part-time or casual employees, employers may simply choose to appoint as first aid attendants only full-time employees or other employees who are engaged for a significant number of hours in each week. However such an approach may be contrary to the otherwise desirable objective of encouraging employees to undertake first aid training and to be available to provide first aid assistance at the workplace when required.

(iv) NRA application with respect to rest breaks

[59] The National Retail Association (NRA) seeks changes to paragraph (a) of clause 31.1 ('Breaks during work periods'). The effect of the variation sought is that employees will only be entitled to a rest break if they work for more than four hours. Presently the entitlement arises where employees work "4 hours or more".

[60] The NRA submitted that at the time of award modernisation, many State retail awards and NAPSAs[16] provided for paid rest breaks only where an employee worked for more than four hours. It was said that the Commission should align the Award provisions with those in the pre-modern retail awards. It was further submitted that the logic applied by the Commission in the decision referred to earlier[17] is also applicable to this application. The NRA application to vary clause 31.1(a) was supported by the ARA and Master Grocers Australia (MGA).

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[14] See e.g. clause 21.9 of the *Hair and Beauty Industry Award 2010* [MA000005], clause 21.2(b) of the *Hospitality Industry (General) Award 2010* [MA000009], clause 32.2(b) of the *Manufacturing and Associated Industries and Occupations Award 2010* [MA000010], and clause 16.2(a) of the *Storage Services and Wholesale Award 2010* [MA000084].

[15] See clauses 10.2 and 15.1 of the *Aquaculture Award 2010* [MA000114].

[16] Notional agreements preserving State awards (NAPSAs) are federal instruments preserving State awards the covered certain employees immediately before the commencement of the 'reformed' *Workplace Relations Act 1996* on 27 March 2006. See Part 3 of Schedule 8 to the *Workplace Relations Act 1996.*

[17] [2010] FWA 8806.

[61] The SDA opposed the variation. It was submitted that the NRA sought a fresh assessment of the entitlement to rest breaks. It was said that in four of the eight States and Territories, pre-modern awards covering the retail industry provided for a rest break when an employee worked for four hours. It was said that there was no anomaly or technical problem in the current Award provision, and it was adopted as part of the Award Modernisation Full Bench's general "swings and roundabouts" approach to differing provisions in pre-modern awards. It was said that the logic relating to the resolution of an ambiguity that supported the agreed ARA variation to clause 31.1(a) has no application to the NRA application.

[62] There is no evidence before me to suggest that the Award Modernisation Full Bench did not appropriately determine the entitlement of employees to rest breaks. Some pre-modern awards provided rest breaks to employees who worked four hours while others required employees to work more than four hours (or in South Australia, four and a half hours). The Full Bench determined to adopt a single benchmark for the entitlement and this is reflected in the award provision.

[63] Contrary to the NRA's submission, I do not consider that the logic underpinning the Commission's earlier decision assists its case. The decision in that matter was directed towards the resolution of an ambiguity relating to unpaid meal break entitlements where five hour shifts were worked.[18] It has no application to the provision dealing with rest breaks or four hour shifts, where there is no ambiguity in the entitlement.

[64] As such, I am not persuaded that there is an ambiguity or technical problem in the relevant part of clause 31.1(a) dealing with an employee who works for four hours but less than five hours, or that the clause is failing to meet the modern awards objective. The NRA has established no cogent reason for altering the provision as determined by the Award Modernisation Full Bench. I have therefore decided not to make the variation sought by the NRA.

(v) BIAQ application

[65] The BIAQ application seeks a number of variations to clauses of the Award relating to part-time employees, minimum daily engagement periods for casual employees, breaks provisions, breaks between shifts, notification and structuring of rosters, and provisions relating to employees who regularly work Sundays. It also sought the creation of an "Introductory Retail Employee" classification, and a cap on the special clothing allowance for part-time and casual employees. Other variations sought in the application concerning the award flexibility and apprenticeship provisions, ordinary hours, overtime and penalty rates, and cashing out of annual leave are before or have already been determined by Full Benches of the Commission constituted to consider common issues across multiple modern awards. The BIAQ also proposed changes to the breaks provisions and the first aid allowance similar to those sought by the ARA and the NRA respectively.

[66] The BIAQ did not appear in any of the mention, conference or hearing proceedings in relation to the parts of the transitional review of the Award before me. It did not advance any

[18] [2010] FWA 8806 at [21].

evidence or submissions in support of its application. In the proceedings on 13 and 14 June 2013, I sought the views of the parties as to how to deal with the BIAQ application. The employer parties generally submitted that I should consider the application on the basis of what was before me. The SDA opposed this course and submitted that the application should be dismissed.

[67] Many of the variations sought in the BIAQ application make substantial changes to existing provisions of the Award. Some also seek to make changes to provisions that are common to many modern awards. The BIAQ has not provided evidence or submissions to support the contention that the clauses it seeks to vary are not meeting the modern awards objective, or that they are not operating effectively. It has also not established any cogent reason as to why award provisions determined by the Award Modernisation Full Bench should be revisited.

[68] In these circumstances, I have decided to dismiss the BIAQ application, except insofar as it seeks similar changes in relation to rest breaks as those sought by the ARA.

(vi) P&P Holdings applications

[69] P&P Holdings made two applications in the transitional review seeking changes to clause 31 of the Award, which deals with breaks, and raising issues relating to the modern award coverage of the baking industry. The Company did not file written submissions or evidence in support of its applications, or appear in the hearings.[19] As with the BIAQ application, the employer parties were of the view that the applications should be determined on the basis of what is already before the Commission, while the SDA submitted that the application should be dismissed.

[70] The first application seeks to eliminate two paid rest breaks per shift and to pay a shift allowance for shifts "before 4 am on all days". The application also seeks to vary the ordinary hours provisions in the Award to allow bakeries to have ordinary hours from 4:00 am. This aspect of the application was considered and rejected by the Penalty Rates Full Bench.[20]

[71] In relation to meal breaks, the ground for the variation specified in the application was an assertion that removing paid rest breaks would put retail bakeries on the same footing as wholesalers in the same industry. However, the elimination of paid meal breaks would remove a significant condition of employees under the Award. In the absence of any submissions or evidence I do not see any basis for the change. It does not appear that the provision of paid rest breaks to employees represents an anomaly or technical difficulty arising from the award modernisation process, or that the removal of the entitlement is necessary in order to meet the modern awards objective.

[72] The other variation sought, to insert a shift allowance, seems to be related to the application for ordinary hours to begin at 4:00 am. Since the Penalty Rates Full Bench did not vary the ordinary span of hours for bakeries, early shifts will continue to attract either the reduced shiftwork rates of pay prescribed for baking production workers (see clause 30.4 of

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[19] However a representative of the Company did participate by telephone link in the mention and programming conference held on 13 May 2013.

[20] [2013] FWCFB at [68], [121], [245]-[250].

the Award), or overtime payments (clause 29.2(a)). The variation sought is therefore unnecessary.

[73] The second application was said to relate to the Award and the Food Manufacturing Award. In essence the Company is seeking the making of a new modern award to cover the bakery industry. No variation was proposed to the coverage clause of either award, although making a modern award to cover bakeries would require variations to clause 3.1 of both the Award and the Food Manufacturing Award. A new modern award can only be made by a Full Bench of the Commission (see s.616(1) of the Act). An appropriate application for the referral of the matter would need to be made by P&P Holdings.

[74] In these circumstances, and for the reasons given, the applications by P&P Holdings are refused.

Other Matters

[75] Business SA made an application to vary clause 29.4(b) of the Award, which was referred to the Full Bench of the Commission dealing with applications relating to penalty rates. In its decision, the Full Bench decided that the variation sought should be made.[21] The matter was subsequently referred to me in order to give effect to the Full Bench's decision.

[76] At the hearing on 13 June 2013, I gave the parties an opportunity to make any further submissions in relation to the form of the determination varying clause 29.4(b) of the Award. No further submissions were made. The Award will therefore be varied as set out in the Business SA application.

Conclusions

[77] The Award will be varied to make the changes agreed between the parties, and to give effect to the decision of the Penalty Rates Full Bench. None of the other variations sought by the parties will be made. The determination[22] giving effect to this decision will come into operation on the first full pay period commencing on or after 23 August 2013.

[78] The Award may be affected by applications made in the transitional review that are still before Full Benches of the Commission. However subject to the determination of these matters, the transitional review of the Award is now complete.

SENIOR DEPUTY PRESIDENT

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[21] [2013] FWCFB 1635 at [243]-[244].

[22] PR540640.

Appearances:

D De Martino, *J Fox*, *D Gaffy*, *J Willey* and *S Burnley* for the SDA
S Elliffe for the National Retail Association
N Tindley and *A Terrill* of the FCB Group for the Australian Retailers Association
H Wallgren and *S West* for Business SA
D Sztrajt, *G Rapthes* and *M Brown* for Master Grocers Australia
A Duc for the Baking Manufacturers Industry Association of Australia
P Elliott for P&P Holdings Pty Ltd
E Watt for VANA Ltd and the Australian Newsagents Federation
J Wimalaratna for the Australian Federation of Employers and Industries
S McIvor, *E Baxter* and *O Fagir*, solicitors, for Australian Business Industrial
J Nucifora for the Australian Municipal, Administrative, Clerical and Services Union
T Walton for the Transport Workers' Union of Australia

Hearing details:

2012.
Sydney and Melbourne (via video link):
November 14 (mention).

2013.
Melbourne (with video and telephone links to Adelaide, Brisbane, Sydney and Launceston):
February 7 (mention), April 9 (mention), May 13 (conference), June 13-14.

Brisbane:
May 30.

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