Summary of Decision

23 December 2013

Consultation about changes to regular rosters and ordinary hours of work

AM2013/24

[1] The *Fair Work Amendment Act* 2013 (the 2013 *Amendment Act*) amends the *Fair Work Act 2009* (the FW Act) by inserting a new provision, s.145A, which provides that all modern awards must include a term requiring employers to consult employees about a change to their regular roster or ordinary hours of work. For convenience we refer to this term as the 'relevant term'. The 2013 *Amendment Act* also inserts a new schedule (Schedule 4) into the FW Act. Schedule 4 requires the Commission to make a determination varying modern awards by 31 December 2013, to include a term of the kind mentioned in s.145A.

[2] In order to facilitate the variation of modern awards consistent with the Commission's new statutory obligations, the Commission issued a Statement [1] on 7 November 2013 setting out a draft relevant term. The Statement made it clear that the draft relevant term did not represent the concluded view of the Commission regarding the nature of the variation necessary to give effect to the requirement to insert the relevant term in all modern awards by 31 December 2013.

[3] All interested parties were provided with an opportunity to make submissions in respect of the draft consultation term, in relation to any modern award. Thirty-nine written submissions were received and posted on the Commission's website. We also conducted an oral hearing on 13 December, 2013 to provide interested parties with a further opportunity to make submissions.

[4] It is important to note that in these proceedings the Full Bench was *not* varying modern awards pursuant to s.145A, as that provision has not yet commenced operation (s.145A commences operation on 1 January 2014). Rather, the power being exercised was conferred by Schedule 4 of the FW Act, in particular:

> **5. Part 4 of Schedule 1 to the amending Act**
>
> ***... Transitional provision***
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> "(3) If:
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> (a) a modern award is made before 1 January 2014; and
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> (b) the modern award is in operation on that day; and
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> (c) immediately before that day, the modern award does not include a term (the relevant term) of the kind mentioned in section 145A (as inserted by item 19 of Schedule 1 to the amending Act);
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> then the FWC must, by 31 December 2013, make a determination varying the modern award to include the relevant term.

(4) A determination made under subclause (3) comes into operation on (and takes effect from) 1 January 2014.

(5) Section 168 applies to a determination made under subclause (3) as if it were a determination made under Part 2-3."

[5] These transitional provisions were inserted into a new schedule to the FW Act by Schedule 7 of the 2013 *Amendment Act*. The transitional provision commenced on the date the 2013 *Amendment Act* received Royal Assent, 28 June 2013.

[6] The transitional provision requires the Commission to make a determination varying certain modern awards by 31 December 2013, to include a term of the kind mentioned in s.145A. The modern awards which are to be so varied are those made before 1 January 2014, in operation on that day and immediately before that day do not include a term of the kind mentioned in s.145A. The Full Bench concluded that all 122 modern awards meet the prerequisites in the transitional provision and no party contended to the contrary. It followed that the Full Bench was obliged to make determinations varying all 122 modern awards.

[7] The Full Bench accepted the submission by Australian Business Industrial that while the Commission is not required to create a model relevant term to be inserted in all modern awards 'it would be desirable for a reasonable degree of comity between modern awards on this issue'.[2] Given the time constraint imposed by the transitional provisions and the limited material before the Commission the Full Bench concluded that the development of a model clause was the most practical way of discharging its statutory obligations.

[8] A number of parties sought to tailor the draft relevant term to the circumstances of a particular modern award. All of the proposals were contested and in some instances interested parties had not had a sufficient opportunity to consider the proposal. The Full Bench decided that these issues should be the subject of further consideration in the context of the 4 yearly review of modern awards which is to start early next year. Any party seeking to have such matters dealt with as a matter of urgency should advise the President's chambers (chambers.ross.j@fwc.gov.au). In the event that disputes arise regarding the practical operation of the relevant term they can be dealt with in accordance with the dispute settlement term in the relevant modern award.

[9] The transitional provision requires the Commission to make determinations varying modern awards to include a term 'of the kind mentioned in s.145A'. Section 145A provides as follows:

145A Consultation about changes to rosters or hours of work

(1) Without limiting paragraph 139(1)(j), a modern award must include a term that:

(a) requires the employer to consult employees about a change to their regular roster or ordinary hours of work; and

(b) allows for the representation of those employees for the purposes of that consultation.

(2) The term must require the employer:

(a) to provide information to the employees about the change; and

(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views about the impact of the change that are given by the employees.

[10] The Full Bench made a number of variations to the draft model clause set out in its Statement of 7 November 2013. In particular:

- An illustrative example of the information required to be provided to affected employees and their representatives was included in draft sub-clause X.2(b)(i) and the reference to 'all relevant' before the word 'information' was deleted.

- Draft sub-clause X.2(b)(ii) was amended to extend the invitation to provide views about the impact of proposed changes to an employee's representative, if any.

- The reference in the draft clause to employers being required to give 'prompt consideration to any views about the impact of the proposed change' was amended to remove the word 'prompt'.

- The requirement in the draft clause to commence the consultation 'as early as practicable' was deleted.

- It was made clear that the requirement to consult under the clause does not apply where an employee has irregular, sporadic or unpredictable working hours.

[11] At paragraphs [28] to [38] of the decision the Full Bench discussed the meaning of the words 'to consult' in s.145A(1)(a). Based on the ordinary meaning of the word 'consult' and the legislative context and purpose the Full Bench concluded that the requirement in s.145A is to consult employees about *proposed* changes to their regular roster or ordinary hours of work.

[12] The Full Bench decided to make a determination varying all modern awards to insert a clause in the following terms:

Consultation about changes to rosters or hours of work

(a) Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.

(b) The employer must:

(i) provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary hours of work and when that change is proposed to commence);

(ii) invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and

(iii) give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives, if any.

(c) The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.

(d) These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.

[13] The Full Bench was satisfied that such a determination meets the Commission's obligation under the transitional provision in Schedule 4 of the FW Act to vary relevant modern awards to include a term of the kind mentioned in s.145A and is consistent with the achievement of the modern awards objective.

[14] To the extent that the determination includes matters beyond the express terms of s.145A the Full Bench was satisfied that such matters are incidental to a term of the kind mentioned in s.145A and essential for the purpose of making that term operate in a practical way, within the scope of s.142(1) and the implied power.

[2013] FWCFB 10165

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

- ENDS -

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[1] [2013] FWCFB 8728

[2] ABI written submission at paragraph [17]