



DRAFT DECISION

Fair Work Act 2009

s.217 - Application to vary an agreement to remove an ambiguity or uncertainty

Australian Education Union; United Voice
(AG2017/3041)

VICTORIAN EARLY CHILDHOOD TEACHERS AND EDUCATORS AGREEMENT 2016

Children's services

COMMISSIONER WILSON

MELBOURNE, 17 AUGUST 2017

Application for variation of the Victorian Early Childhood Teachers and Educators Agreement 2016.

[1] This matter concerns an application made by the Australian Education Union (“AEU”), United Voice and Early Learning Association of Australia (“ELAA”) under section 217 of the Fair Work Act 2009 (“the Act”). The application seeks for the Fair Work Commission to remove an ambiguity or uncertainty in the *Victorian Early Childhood Teachers and Educators Agreement 2016*¹ (the Agreement).

[2] The Agreement was approved by Commissioner Roe on 22 June 2016² and was stated to operate from 29 June 2016, with a nominal expiry date of 31 July 2019³. The Employer of the persons to be covered by the Agreement was stated as ELAA, and the AEU and United Voice were indicated as bargaining representatives on behalf of employees⁴.

[3] The AEU, United Voice and ELAA have applied for certain amendments to be made to the Agreement pursuant to section 217 of the Act. The amendments principally go to the issue of pay rates for casual Educators under the Agreement. It is said these changes are needed to correct uncertainty in casual Educators pay rates so that these employees receive rates of pay that are not less than they would receive under relevant award, the *Children's Services Award 2010* (“the Award”).

Legislation

[4] Section 217 of the Act reads as follows:

¹ AE419502.

² [2016] FWCA 4060

³ Ibid [5].

“217 Variation of an enterprise agreement to remove an ambiguity or uncertainty

- (1) The FWC may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:
- (a) one or more of the employers covered by the agreement;
 - (b) an employee covered by the agreement;
 - (c) an employee organisation covered by the agreement.
- (2) If the FWC varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement.”

Background

[5] At the time of the approval of the Agreement cl 17.5 did not specify the rate of pay for an employee other than a Teacher to which a 25% casual loading applied. After approval, the Unions were concerned that if the 25% loading were applied to the Teachers rate of pay at cl 17.5 of the Agreement then casual Educators would be paid less than under the Award.

[6] As a result of this concern the AEU initiated proceedings in the Fair Work Commission on 16 December 2016 under s.739 of the Act to address this concern. During the course of these proceedings two conferences were held before Deputy President Hamilton whereby the Employer and the Unions reached an understanding as to how to address this issue.

[7] The changes agreed to by both parties include the following:

- Making payments to pay casual Educators at the rate of pay that would have been applied to them under the Award from the first full pay period on or after 29 June 2016 to the first full pay period that commenced on or before 30 June 2017. The payments will be in the form of back payments for the period; and
- Variation to the Agreement to make clear that casual Educators are to be paid using the 52/52 rates of pay at Schedule 2 plus the 25% loading at clause 17.5(c). The obligation to pay the 52/52 rates plus the 25% loading would commence on the first full pay period on or after 1 July 2017.⁵

[8] As a result of this agreement between the Employer and the Unions the AEU, United Voice and ELAA have made an application to vary the Agreement as follows:

- Insert new paragraph (d) at clause 17.5 in the following terms; for classifications where there are two different hourly rates of pay at Schedule 2, the additional

⁴ Ibid [4].

⁵ Statutory Declaration of Ben Redford, United Voice, 9 August 2017; Statutory Declaration of Martel Menz, Australian Education Union, 31 July 2017; Statutory Declaration Shane Lucas, Early Learning Association of Australian, August 2017.

loading of 25% is applied to the 52/52 hourly rate from the first full pay period on or after 1 July 2017.

- Rename paragraphs from (d)-(e) to (e)-(f).
- Variation to operate on and from 1 July 2017.⁶

[9] I agree that in all the circumstances there is ambiguity or uncertainty the casual Educators rates of pay which will be removed by a variation to the Agreement.

[10] I am satisfied that it is desirable to remove this ambiguity or uncertainty . Accordingly I will exercise my discretion to vary the Agreement as requested by the AEU, United Voice and ELAA.

[11] This variation shall operate from 1 July 2017.



COMMISSIONER

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⁶ Form F1 Application, 10 July 2017 Q2.1.