IN THE FAIR WORK COMMISSION

AM2021/7 – AWARD FLEXIBILITY – GENERAL RETAIL INDUSTRY AWARD 2020

IN THE MATTER OF:

APPLICATION TO VARY A MODERN AWARD BY:

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

AND

AUSTRALIAN WORKERS UNION

AND

MASTER GROCERS AUSTRALIA LIMITED

FOUR YEARLY REVIEW OF MODERN AWARDS
GENERAL RETAIL INDUSTRY AWARD 2010

OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN RETAILERS ASSOCIATION

1. These submissions:
    a. respond to the amended application of the Shop, Distributive and Allied Employees' Association (**SDA**), Australian Council of Trade Unions (**ACTU**) and Master Grocers Australia (**MGA**) (**Joint Application**) as filed with the Commission and served on the parties on 15 March 2021; and

    b. address the draft determination filed on behalf of the Australian Retailers Association (**ARA**), ABI and the New South Wales Business Chamber (**ABI**) and the National Retail Association (**NRA**) (**Joint Employer Determination**) on 15 March 2021.

Executive Summary

2. The Australian Retailers Association contends:

    a. the Commission should dismiss the Joint Application on the basis that it is not necessary for achievement of, and in a number of aspects is contrary to, the Modern Awards Objective; and

    b. the Commission should vary the *General Retail Industry Award 2020* (**GRIA**) consistent with the terms of the Joint Employer Determination.

Report of Commissioner Hampton

3. On 15 March 2021, Commissioner Hampton issued a report to the Full Bench (**Report**) following a series of conciliation conferences in which the various parties were given the opportunity to explore the nature of, and basis for, the differing proposals for addressing the broadly consistent view among the parties that improved flexibility in part-time employment under the GRIA would be appropriate at this time.

4. In relation to the Report, the ARA notes:

    a. the proponents of change agree that additional flexibility in respect of part-time employment arrangements is necessary and appropriate, and that this should enable additional ordinary hours to be provided to and worked by part-time employees beyond the existing arrangements in clause 10.5 and 10.6 of the GRIA;

    b. the proponents also agree that additional flexibility arrangements should come with some appropriate parameters and safeguards and that the procedural requirements should allow for recording of agreements to work additional hours via some electronic means; and

    c. the proponents agree that there should be a review mechanism to consider the potential conversion of additional hours to an ongoing arrangement under clause 10.5.

5. There are a number of issues in dispute between the Joint Application and the Joint Employer Determination. These are set out at pages 5 to 8 of the Report.

Effect of current clause 10.6

6. Clause 10.6 of the GRIA currently provides:

    10.6 *The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 with effect from a future date or time. Any such agreement must be in writing.*

7. The ARA contends that consideration of the effect of this provision is a key threshold issue in the Commission's consideration of this matter. The ARA is of the view that clause 10.6 allows for ad-hoc variations to part-time hours of work under the GRIA. The ARA's view in this regard is drawn from the history of the provision.

8. Prior to 29 January 2010, the *General Retail Industry Award 2010* (**2010 GRIA**) contained the following provisions in respect of part-time employment:

12. Part-time employees

12.1 A part-time employee is an employee who:

(a) works less than 38 hours per week; and

(b) has reasonably predictable hours of work.

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- *the hours worked each day;*
- *which days of the week the employee will work;*

- *the actual starting and finishing times of each day;*
- *that any variation will be in writing;*
- *minimum daily engagement is three hours; and*
- *the times of taking and the duration of meal breaks.*

12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

12.4 The agreement and variation to it will be retained by the employer and a copy given by the employer to the employee.

12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause ***Error! Reference source not found.****.*

12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. Overtime is payable for all hours worked in excess of the agreed number of hours.

13. By application filed with the Australian Industrial Relations Commission (**AIRC**) on 30 September 2009, the NRA sought to vary these provisions on the basis of an updated Award Modernisation Request (**Request**) provided by the then Minister to the AIRC. Subsequent to the AIRC making the 2010 GRIA, the Minister amended the Request to include paragraph 53 in the following terms:

    The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission considers as relevant do not operate so as to discourage employers from:

    • offering additional hours of work to part time employees;
    • employing part time employees rather than casual employees.

14. The NRA's application was determined by a Full Bench of Fair Work Australia on 29 January 2010.[1] The Full Bench said, at paragraphs 8 through 10:

*"**[8]** The Chamber of Commerce and Industry of Western Australia (CCIWA), Retail Traders Association of Western Australia (RTAWA) and the NRA seek changes to the part-time*

[1] [2010] FWAFB 305

employment provisions. They rely on the terms of cl.53 of the Minister for Employment and Workplace Relations' award modernisation request (the consolidated request).

[9] *Clause 53 of the request contains a requirement to ensure that the hours of work and associated overtime and penalty arrangements in the retail, pharmacy and any similar industries do not discourage employers from offering additional hours of work to part-time employees or from employing part-time employees rather than casual employees. Clause 53 was included in the consolidated request by an amendment made on 26 August 2009, after the modern retail award was made.*

[10] *We have generally agreed to amend part-time provisions regarding overtime, in the light of the change to the consolidated request, to make it clear that when variations to part-time hours are agreed in writing overtime is not payable for such agreed additional hours unless the total hours exceed 38 per week or the other limits on ordinary hours. Such changes assist in making additional hours available to part-time employees subject to their genuine agreement. We will vary the modern award to replace the second sentence of cl.2.7 to read as follows:*

"All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 28.2—Overtime(excluding shiftwork)."

15. It is apparent that the intention of the Full Bench was to enable ad-hoc agreements for part-time employees to work additional hours at ordinary rates of pay.

Impact on Joint Application

16. If the ARA's understanding of the relevant provision is correct, then the Joint Application provides no more flexibility than is currently available to employers and part-time employees under the terms of clause 10.6. Indeed, far from being a relaxation of restrictions placed on part-time employment arrangements, the Joint Application would further constrain these arrangements: imposing additional regulation, creating an inconsistency between GRIA provisions and imposing additional costs on employers.

17. The additional regulation imposed by the Joint Application, considered against the current GRIA provisions, is:

    a. the provisions only apply to employees who work more than 9 hours per week;[2]
    b. the parties to an agreement under the terms of the Joint Application need to provide 24 hours' notice of termination of the agreement, even where they both agree to this;[3]
    c. the provisions impose limits on when the agreement is required to be recorded, and these vary depending on whether the arrangement is for a single shift or a period of time;[4]
    d. it involves an administratively heavy process is required in relation to conversion of additional hours worked to new core hours for part-time employees;[5] and
    e. there is an obligation for an employer to agree to arbitration of disputes regarding the proposed provisions.[6]

[2] Joint Applicants Draft Determination at I.2
[3] ibid at I.4
[4] ibid at I.5
[5] ibid at I.7 to I.11
[6] ibid at I.12

18. The Joint Application also creates inconsistencies and ambiguities within the GRIA. An employer of a part-time employee working 9.5 hours per week who wishes to offer that employee an additional shift would have no understanding of which provisions apply to that offer. Currently that employer can make an offer in writing, including electronically, and the employee can accept that offer. The employer and employee can agree to walk away from that arrangement at any time. It is entirely unclear to the employer and employee in these circumstances which HRIA provisions they need to comply with.

19. Additionally, the Joint Application has the real potential to increase costs for employers. The obligation, as provided for at I.3 and considered in conjunction with I.4, that employers pay part-time employees for additional agreed hours even if they are not worked would result in employers being forced to pay employees if circumstances change meaning the work is no longer required.

20. The Joint Application provides no additional flexibility for part-time employees and retail employers. It creates ambiguity and inconsistency, and potentially increases employment costs.

Joint Employer Determination

21. The ARA contends that the Joint Employer Determination:

    a. provides an appropriate and comprehensive solution to the generally accepted need for greater part-time flexibility under the GRIA;
    b. implements workable and reasonable safeguards for part-time employees to ensure they are not disadvantaged;
    c. will promote the engagement of, and the provision of additional hours to, part-time employees;
    d. is no less beneficial to part-time employees than the current GRIA provisions;
    e. by refraining from including a date on which the provisions cease to operate, but rather providing for a review of those provisions to determine if they will continue to operate beyond an 18 month period, ensures a fair and relevant minimum safety net of conditions having regard to the need to ensure a simple, easy to understand, stable and sustainable modern award system.

22. ABI has filed a report from the University of Wollongong titled Employers and the use of casuals in the Australian Retail Sector (**UW Report**). The UW Report highlights the necessity of providing greater flexibility in part-time employment arrangements under the GRIA. Key themes from the UW Report include that the current GRIA part-time provisions are viewed as restrictive and act as a disincentive to employing more employees on a non-casual basis. This was particularly identified in respect of changes of rosters and overtime provisions.[7] The ARA contends that the consistency between these findings and the position of the proponents of changes in this matter establishes the basis for changes to be implemented.

23. The Joint Employer Determination is easy to understand and simple to implement. It allows an employer and a part-time employee to enter into a "standing consent" agreement to work additional hours at ordinary rates. Compared with the current provisions, which require written agreement every time a part-time employee and their employer wish to agree to work

[7] UW Report at pages 5 to 6

additional hours, it allows that administrative step to be taken once only, reducing the administrative burden.

24. Importantly, employees are afforded the following protections under the Joint Employer Determination:

    a. they can withdraw from the agreement at any time (save that if have already agreed to work additional hours during a roster period, the termination does not take effect until that roster period has ended);
    b. they have complete discretion as to whether they accept any additional hours offered to them under the agreement;
    c. the agreement is required to set out these critical rights so that an employee enters into the agreement freely and with a full understanding of their rights and the impact of the agreement;
    d. entry into such an agreement cannot be made a condition of employment;
    e. a part-time employee can request to have additional hours converted to become their standard hours under clause 10.5 of the GRIA in reasonable circumstances.

25. Given the nature of the provisions proposed and the protections afforded to employees, the ARA contends that the Joint Employer Determination is no less beneficial to part-time employees, and in many instances provides a benefit to those employees, when compared with the current provisions.

26. This contention is supported by evidence and submissions presented to the Commission in relation to the approval of the *Coles Supermarkets Enterprise Agreement 2017* and the Commission's Decision in relation to that approval.[8]

27. The provisions of that agreement, and a number of other retail agreements, include standing consent arrangements that are similar to the proposal within the Joint Employer Determination. In that matter, the SDA said, in relation to standing consent:

    [14] The SDA contends that the assertion by RAFFWU that the Agreement fails the BOOT because of clause 4.1.4(d) is "faint". It contends that the Award provides, inter alia, that a part-time employee and his or her employer must agree in writing on a regular pattern of work specifying the hours that are to be worked each day, the days to be worked and the commencing and finishing times on each of those days. Additionally, the Award provides that the regular pattern of work can be varied in writing and that a part-time employee is paid at ordinary time rates for hours worked that are agreed. The Award then provides that any time that is worked in excess of the hours that have been agreed to on commencement of employment or as varied, must be paid at overtime rates. In support of its contention, the SDA also refer to the Full Bench decision that determined to vary the part-time overtime provisions in 2010 to ensure that part-time employees do not miss out on the opportunity to work additional hours because the Award required them to be paid at overtime rates.

    [15] The SDA says that under clause 4.1.4(d), part-time employees are not required to work additional hours at ordinary time rates. They say that the effect of the clause is that if a part-time employee wishes to work additional hours at the appropriate ordinary time rate, then by virtue of clause 4.1.4(d), they can do so and that such a position is the same as the Award. The SDA contend that the only difference between the operation of the Agreement clause and the

[8] [2018] FWCA 2283

Award clause is administrative and allows Coles to implement a practical and logistically sound method of allowing part-time employees to work additional hours.

[16] The SDA contend that the standing consent provisions in the Agreement are a benefit to employees and provide a clear protection in that a formal record of an employee's wish to work additional hours must be maintained and that a part-time employee can refuse to work additional hours on any occasion. Furthermore, the SDA submit that clause 4.1.4(d) does not operate to circumvent the payment of overtime penalties, but affords a part-time employee the opportunity to agree to working additional hours in advance and to verbally withdraw such an agreement at any point in time.

28. The ARA agrees with the submissions of the SDA in that matter. The ARA also notes that in the matter the Commission received evidence from a bargaining representative, Ms Ann Wells, who was glowing in her support for the inclusion of standing consent arrangements.[9]

29. The ARA contends it is open to the Commission to vary the GRIA in the terms set out in the Joint Employer Determination, and that doing so would ensure that the GRIA, in conjunction with the National Employment Standards, provides a fair and relevant minimum safety net of conditions.

Australian Retailers Association
16 March 2021

[9] ibid at [18]