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26 August 2016

The Associate to Vice President Hatcher
Fair Work Commission
Level 10
80 William Street
EAST SYDNEY NSW 2011

By email: *amod@fwc.gov.au*; *chambers.hatcher.vp@fwc.gov.au*

Dear Associate,

RE: FOUR YEARLY REVIEW OF MODERN AWARDS: PART-TIME AND CASUAL EMPLOYMENT COMMON ISSUE (AM2014/196 AND AM2014/197)

We refer to the above matters and the questions which were taken on notice during proceedings before the Fair Work Commission on 19 August 2016.

We provide the following responses.

What is the logic of the lack of alignment between the minimum engagement periods for casual and part-time employees covered by the *Hospitality Industry (General) Award 2010*?

1. This question arose at PN4553 of the transcript.

2. As far as we are able to ascertain there is no logic between the minimum engagement period for a casual employee and a part-time employee.

3. The minimum engagement period for a casual employee of two hours is an established practice that has been a feature of casual employment in the hospitality industry since at least the late 1960's (see Clause 10 (c) of the *Liquor Trades (Hotels and Wine Saloons) Award 1968* ("the 1968 Award").

4. The minimum engagement period for part-time employees under the 1968 Award was four hours and this continued into the 1980's. We understand that at some point between the mid-1980's and the early 1990's, the minimum engagement for part-time employees was reduced to three hours. We have not been able to clarify the precise date or the rationale, including whether or not it was by consent.

5. We note that while the minimum engagement periods for casual employees (two hours) and part-time employees (three hours) were retained in *Re Award Simplification Decision* (1997) 75 IR 272 ("the Simplification Decision") a Full Bench of the Australian Industrial Relations Commission did give consideration as to whether or not the minimum engagement period for part-time employees should be reduced. In retaining the existing minimum engagement periods, the Full Bench stated:

> *"... the employers' claim for reduction of the minimum period of engagement from three hours to two hours involves the reduction of an existing entitlement. Granting the claim may contribute to the productivity of at least some establishments covered by the award. On the other hand, we are compelled by Item 49 (7) (c) to have regard to fairness to employees. No doubt there would be some circumstances in which a two hour minimum period of engagement for part-time employees might be unfair, although we are unable to determine the extent to which this is so. Nor can we ignore the possibility that reduction in the minimum engagement might suit some employees. In light of the unsatisfactory state of the material before us, we do not grant the claim;"* (Simplification Decision at 284).

Does the minimum engagement of three hours for a part-time employee covered by the Hospitality Industry (General) Award 2010 apply to both parts of a broken shift?

6. This question arose at PN4567 of the transcript.

7. Clause 12.5 of the *Hospitality Industry (General) Award 2010* ("the Hospitality Award") provides that a part-time employee shall be rostered for a minimum of three consecutive hours.

8. The insertion of three 'consecutive' hours was an outcome of the Simplification Decision (see Simplification Decision at 357; clause 15.3.5 of the *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998* ("the 1998 Award")) and was with reference to the relevant statutory provisions at the time, specifically, s.89A (5) of the *Workplace Relations Act 1996* (repealed).

9. It is clear that a part-time employee is to be rostered for three consecutive hours as a minimum.

10. However, in our view, where the overall length of the shift is in excess of three hours, and in particular, where it triggers the application of other clauses, a '*broken*' shift for a part-time employee is not required to be structured so that each part of the shift has a minimum of three consecutive hours.

11. In other words, once the overall length of the shift is in excess of three hours, it is subject to the other relevant provisions in the Hospitality Award, for example, clause 29.2 hours of work conditions; clause 21.3(a) broken periods of work allowances; and clause 31 meal breaks.

12. The logic of this view can be tested against the interaction of the minimum of three consecutive hours with the meal breaks clause. For example, if a part-time employee's regular pattern of work provides for a shift from *12:00pm to 7:30pm*, a

meal break of no less than 30 minutes is required no earlier than two hours after starting work and no later than six hours of starting work (see clause 31.2 (a) of the Hospitality Award). In this example, the meal break could be given from *2:30pm to 3:00pm* or from *6:00pm to 6:30pm,* in which case both time-frames would comply with the relevant award provisions, notwithstanding that in both cases one part of the shift is less than three consecutive hours.

13. It is noted that upon commencement, the 1998 Award required a meal break be given no earlier than one hour after starting work and no later than six hours after starting work (see clause 27.1 of the 1998 Award). The operation and effect of the meal breaks clause was unaltered by the Simplification Decision notwithstanding the incorporation of a minimum of three consecutive hours for part-time employees (see Simplification Decision at 289).

14. Turning back to the specific issue of the broken periods of work and the part-time employment minimum engagement period, and applying the logic of the application of the meal breaks clause, it is our view that each part of a part-time employee's broken shift is not required to be a minimum of three hours provided the overall length of the shift is in excess of three hours. For example, if a part-time employee's regular pattern of work provides for a broken shift as follows: *12:00pm to 2:30pm followed by 5:00pm to 7:30pm* that would comply with the relevant award provisions.

15. If we are wrong in our interpretation, then the question arises as to whether the Hospitality Award meets the modern awards objective insofar as the meal breaks and broken periods of work provisions are simple and easy to understand as they apply to part-time employees.

16. If required, we can address this further as part of our award specific application final submissions.

Further example of reasonable business grounds

17. During the proceedings on 19 August 2016, there were some questions regarding examples of what would constitute a reasonable business grounds refusal in the context of a request by a casual employee for conversion to full-time or part-time employment.

18. While this was addressed on the day by reference to '*industrial*' examples, it may be of assistance to the Commission to highlight an industry specific example in the context of liquor licensing.

19. Licensed premises are subject to both a licensing regulatory scheme and a planning regulatory scheme. For example, in New South Wales the authorised trading hours for licensed premises are determined by the narrower range of the hours authorised by Liquor and Gaming NSW ***and*** the hours approved under the Development Consent issued by the Local Consent Authority.

20. From time to time, a licensed premise may seek to reduce their trading hours, either on an informal basis by closing early or opening later on particular day/s; or

more formally by application to the relevant body to reduce or surrender an extended trading authorisation.

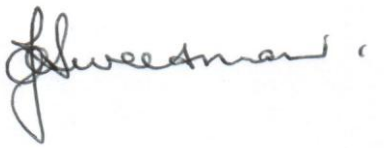
21. In other cases, a reduction in trading hours or the introduction of trading restrictions may be imposed on a business by the relevant authority or by the legislature e.g. the Newcastle Solution; Sydney CBD lockout laws; NSW State-wide restrictions on take-away liquor sales; Queensland Safe Night Precincts.

22. In our view, where the employee's regular and systematic hours fell within the affected time-frame, this would constitute a refusal on reasonable business grounds in response to a request for conversion.

23. The critical point of our submission on the retention of a reasonable business grounds refusal is that it would be difficult, if not impossible to create an exhaustive list as to what may constitute reasonable business grounds.

We thank the Commission for the opportunity to address these matters.

Yours faithfully,



JOHN SWEETMAN
National Workplace Relations Director