Australian Retailers Association

MODERN AWARDS REVIEW 2014

AM2014/197

SUBMISSIONS ON COMMON ISSUE – CASUAL EMPLOYMENT

1. The Australian Retailers Association (**ARA**) is the peak industry body for Australia's retail sector, and is an incorporated employer body under the *Fair Work (Registered Organisations) Act 2009*. The ARA represents the interests of over 5,000 independent and national retailers throughout Australia.

2. These submissions address the submissions filed by the Shop, Distributive and Allied Employees Association (**SDA**) on 13 May 2016, which we have only recently become aware of, as they relate to the *General Retail Industry Award 2010* (**GRIA**).

Commission should decline to extend time for filing

3. The SDA's submissions were filed on 13 May 2016. Directions issued by the Fair Work Commission (**Commission**) on 29 June 2015 required the SDA to file those submissions on or before 12 October 2015. This is a delay of more than seven months. The SDA appears to assert in a covering email to its submissions that the delay is due to technological issues with the electronic filing of its submission. In the ARA's submission this is insufficient to cause the Commission to extend the date for filing by such a significant period because:

    a. all documents filed electronically with the Commission come with an electronic receipt advising that the document has been received by the Commission. The SDA has filed a significant number of documents with the Commission during these and other Award Review proceedings. The SDA ought to have identified, due to an absence of a receipt from the Commission, that the document had not been received, and therefore taken steps to address this;

    b. the SDA fails to identify when and how it became aware of its failure to file its submissions in accordance with the Directions, what steps it took in response to this and, if there was a delay in taking any steps, what the reason for this delay is;

    c. the ARA filed submissions, in accordance with its obligations under the Directions issued by the Commission, on 22 February 2016. At paragraph 25(b), (d) and (e) of those submissions the ARA called out the SDA's failure to:

        i. advance any merit argument in support of their Draft Determination;
        ii. file a submission directed to the relevant legislative provisions; or
        iii. file any probative evidence supporting the proposed variation.

        The SDA was, therefore, on notice at that time that no submissions had been filed by it, yet it failed to act on this for almost three months.

    d. there is significant prejudice, and undue delay, associated with the SDA's failure to comply with the Directions. The ARA rightly concluded, in February 2016, that the SDA, in failing to file any materials in support of its claims, was abandoning those claims. The ARA is now in a position where it must prepare a response to those submissions, and will require time to do so;

    e. the SDA, despite being aware their claim was opposed, failed to notify the ARA directly of its intention to file submissions significantly outside the time prescribed by the Directions. Had the SDA done this the ARA may have had time to prepare its case in opposition to the SDA's claims. The SDA's failure to do this meant that the ARA only became aware of the late submission on 11 July 2016;

f. accepting the SDA's submission would be in conflict with both the Commission and the President's obligations in performing their functions under the *Fair Work Act 2009* (Cth). Accepting the SDA's submission would not be fair and just (s577(a)), would not ensure the exercise of the Commission's functions in relation to the Award Review are quick (s577(b)) nor would it ensure the Commission's functions are efficient (s581(a)); and

g. the case being argued by the SDA, at least as it relates to the GRIA, has no reasonable prospects of success.

No reasonable prospects of success

4. In its submission the SDA extracts, at paragraph 10, the "Preliminary Jurisdiction Issues Decision". This decision set out the requirements the ARA has set out in paragraph 3(c) above. The SDA, relying on the Preliminary Jurisdiction Issues Decision at paragraph [60], asserts the changes proposed are *"self-evident and can be determined with little formality"*, and also asserts that they *"should be relatively uncontroversial"*. This is absurd.

5. The SDA's Draft Determination seeks to fundamentally shift the safety net under the GRIA in relation to casual employees, and it is fanciful to suggest that this means the changes proposed are self-evident or relatively uncontroversial. We have set out in the table below the impact the changes proposed by the SDA would have on the hourly rates employers would be required to pay adult casual shop assistants under the GRIA.

Time	Current	SDA proposed	Difference
Weekday evenings	$24.30	$29.16	$4.86
Saturdays	$26.24	$29.16	$2.92
Sundays	$38.88	$43.74	$4.86
Overtime	$24.30	$34.02/$43.74	$9.72/$19.44

6. There is evidence before the Commission in relation to the Penalty Rates case which supports the following contentions:

a. a significant proportion of retail workers (35.2%) are engaged on a casual basis – see *Industry profile – Retail Trade*[1] (**IPRT**) at Table 5.6;

b. the significant majority of retail businesses operate on weekends (81.1%) – see IPRT at Table 4.4;

c. an even more significant majority of award reliant retail businesses operate on weekends (93.6%) – see IPRT at Table 7.1;

d. the combination of the high incidence of casual employment in the retail industry and the very high proportion of retail businesses operating on weekends means the proposed increase to casual rates of pay on weekends (and for evening work and overtime) are highly likely to have a significant impact on labour costs for retail businesses operating under the GRIA. As an example of this, in the Penalty Rates case Belinda Daggett gave unchallenged evidence about the hours worked in her business, a Baker's Delight franchise, in June 2015[2]. Ms Daggett's unchallenged evidence is that in the month of June 2015, 198.5 hours were worked on Saturday, and 207.5 hours on Sunday, in her

[1] Workplace and Economic Research Section, Tribunal Services Branch March 2016

[2] See "BD2" of Exhibit Retail 7

business. Assuming 35.2% of those hours are worked by casual employees, and using the adult rates set out above, the SDA's proposed variations (just in relation to Saturday and Sunday) would result in an increase in labour costs of $559.27 per week, or $6711.24 per annum;

e. retail businesses are highly likely to reduce labour hours offered, both short term and long term, in response to substantial increases in labour costs – see IPRT at Tables 7.4, 7.5 and 7.6, with reducing casual hours being the most common short term strategy (76.4% of businesses); and

f. the variations proposed by the SDA are highly likely to have a significant negative impact on employment levels and aggregate hours worked in the retail industry. Evidence before the Commission in the Penalty Rates case identifies that the increase in the Sunday penalty rate applying to award reliant businesses in New South Wales after the commencement of the GRIA, from an additional 50% to an additional 100%, resulted in a statistically significant and enduring reduction in both employment and hours worked in the retail industry in New South Wales[3]. Even if the alternative contention of the SDA in the Penalty Rates case is accepted, in 2010/11 the increase in the Sunday penalty rate resulted in a 7.7% reduction in retail employment and a 7.1% reduction in aggregate hours in New South Wales[4].

7. The ARA submits that the Commission should approach the acceptance of the SDA's submission in a manner similar to its power to dismiss applications. While the 2014 Award Review requires the Commission to review awards regardless of whether applications have been made[5], the SDA's filing of a submission seeking the proposed changes and a Draft Determination reflecting those changes is in the nature of an application. As such, the Commission is empowered to dismiss the application in accordance with section 587 of the *Fair Work Act 2009* (Cth) (**FW Act**) on the basis that the application has no reasonable prospects of success.

8. In *Deane v Paper Australia Pty Ltd*[6] a Full Bench of the Australian Industrial Relations Commission considered the meaning of "no reasonable prospects of success" in the context of a costs application under section 170CJ of the *Workplace Relations Act 1996* (Cth). The Full Bench said:

   "unless upon the facts apparent to the applicant at the time of instituting the [application] the proceeding in question was manifestly untenable or groundless, the relevant requirement in s.170CJ(1) is not fulfilled and the discretion to make an order for costs is not available."

9. In this matter the SDA "instituted" its application by filing an "Outline of Variations" on 2 March 2015. At that time the SDA would have been aware of the Preliminary Jurisdiction Issues Decision, and the requirements in terms of materials to be filed, as set out in paragraph 60 of that decision. The SDA communicated on 29 April 2015 that it did not intend to call any evidence in support of the variations.[7] It is reasonable to conclude, absent anything to the contrary from the SDA, that at the time of filing its "Outline of Variations" the SDA, despite being aware that a significant change of the nature proposed required an evidentiary basis, had determined it was not going to file any evidence. It therefore follows that at the time the SDA elected not to file any evidence

[3] See Exhibit Retail 13 para 2.1(a) and Transcript at PN25835
[4] See Exhibit SDA55 at para 13
[5] *Fair Work Act 2009* (Cth) at section 156(2)
[6] PR932454
[7] See Transcript AM2014/270 at PN47 and 48

their case was manifestly untenable and groundless, and as such the Commission should refuse to accept their out of time submission and should dismiss their proposed variations to the GRIA.

10. The SDA's submission does not address the Modern Awards Objective, as set out in section 134(1) of the FW Act, save that it relies solely on section 134(1)(da), which deals with the need to provide additional remuneration in certain circumstances. The SDA does not provide any submissions on what impact its proposed variations are likely to have on:

    a. the needs of the low paid;
    b. the need to encourage collective bargaining;
    c. the need to promote social inclusion through increased workforce participation;
    d. the need to promote flexible modern work practices and the efficient and productive performance of work;
    e. the principle of equal remuneration for work of equal or comparable value;
    f. business, including on productivity, employment costs and the regulatory burden;
    g. the need to ensure a simple, easy to understand, stable and sustainable modern award system; or
    h. employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

11. In relation to these factors it is the ARA's submission that:

    a. matters b, d, e and g are neutral factors in relation to the SDA's proposed variations;

    b. there is no evidence of any positive impact on the low paid. The only mention the SDA makes of "low paid" in its submission is at paragraph 39, where it, absent any justification, characterises casual employees as "relatively low paid". While it may be argued that an increase in the rates payable to casual employees may have a positive impact on those casual employees, it is also likely (as set out in paragraph 6e above) that those casual employees will experience a reduction in hours which offsets any notional benefit; and

    c. matters c, f and h of paragraph 10 above weigh strongly against the SDA's application, having regard to the ARA's submissions at paragraph 6 regarding the significant labour cost increases that will flow if the SDA's variations are granted, and the highly likely reduction in employment as a result of these increases.

12. In relation to section 134(1)(da) of the FW Act:

    a. this factor does not support the SDA's variation in relation to work performed on weekday evenings. There is no specific requirement under 134(1)(da) to provide additional remuneration for work performed on weekday evenings, and there is no evidence or submissions from the SDA to the effect that weekday evening work is unsocial;

    b. this factor does not support the SDA's variation in relation to Saturday and Sunday work. It cannot be contested that casual employees under the GRIA currently receive additional remuneration for Saturday and Sunday work. Section 134(1)(da) does not require a particular level of additional remuneration for Saturday or Sunday work;

    c. irrespective of this, the SDA has asserted from the time it proposed these variations that they were not directed to penalty rates. The question of additional remuneration for

work at particular times is clearly a question about a penalty rate applying to those times, and is not about the level of the casual loading; and

d. it is a matter of logic that casual employees would not be entitled to the same benefits for working what, for permanent employees, would constitute overtime. Any work performed by a casual employee at any time is voluntary, and the right of casual employees to reject hours which, for permanent employees might constitute overtime, is confirmed at clause 29(1)(a) of the GRIA. The SDA relies on the Reasonable Hours Test Case, at paragraph 41 of its submission, and refers to that case as acknowledging an employer's right to require reasonable overtime. That is the case for permanent employees under the GRIA. For casuals, however, the situation is different, and the inability for an employer under the GRIA to compel a casual employee to work additional hours justifies the differential treatment of permanent and casual employees. It is not a matter of the GRIA being deficient, in that it does not provide additional remuneration for overtime which casual employees are compelled by their employer to work. It is a matter that there is no overtime applicable to casual employees under the GRIA. As such, section 134(1)(da) has no application.

13. It is noted the SDA, at paragraph 7 of its submission, asserts that the absence of "overtime" rates of pay for casual employees for work performed in excess of 38 hours per week "promotes increased casualization". Were that the case it is reasonable to assume the SDA would be able to present evidence of this increased casualization, at least from the commencement of the GRIA. It has not done so, and it is reasonable to conclude it has not done so because the evidence does not support this assertion.

CONCLUSION

14. The SDA's submission should not be accepted by the Commission taking into account:
    a. the extensive delay in its filing;
    b. the impact of the delay on the timely conduct of the matter;
    c. the absence of a reasonable explanation for the such a lengthy delay; and
    d. the extremely poor prospects of success of the SDA's proposed variation.

15. If the Commission is minded to accept the SDA's submission, the proposed variations should be rejected given the complete absence of evidence, and the scant submissions, put forward by the SDA.

AUSTRALIAN RETAILERS ASSOCIATION

18 July 2016