Shop Distributive and Allied Employees' Association

THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

AM2021/54 - Fair Work Act 2009
Casual terms award review 2021

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I. INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association ("SDA") makes these submissions in response to the 24 August 2021 Directions of Vice President Hatcher.

2. The SDA refers to its submissions of 18 August 2021, together with the Statement issued by the Full Bench on 11 August 2021, particularly the proposed alternate wording given at paragraph [62] of the Statement, namely:

> (c) The employer may then offer the employee, and the employee may undertake, a non-primary role (or roles) in any level or classification within Schedule A—Classification Definitions that they are qualified for, provided that any hours worked by an employee in a non-primary role do not count toward ordinary hours or overtime in the employee's primary role.

3. As noted at paragraph 6 of its previous submissions, the SDA has identified several serious issues with the proposed wording:

> It is the SDA's submission that this wording raises several serious issues. The proposed wording deletes the reference to casual employment and simultaneously stating that 'provided that any hours worked by an employee in a non-primary role do not count toward ordinary hours or overtime in the employee's primary role'. This creates the anomalous situation that the hours so worked are neither casual hours nor do they count towards overtime or ordinary hours.

II. ALPINE RESORTS AWARD 2020

A *Additional Hours under the Fair Work Act (2009)* (Cth)

4. Section 62 of the Act provides as follows (emphasis added):

> Maximum weekly hours of work
>
> (1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
>
> **(a) for a full-time employee--38 hours; or**
>
> **(b) for an employee who is not a full-time employee--the lesser of:**
>
> **(i) 38 hours; and**

(ii) the employee's ordinary hours of work in a week.

Employee may refuse to work unreasonable additional hours

(2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

Determining whether additional hours are reasonable

(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee's personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;

(j) any other relevant matter.

Authorised leave or absence treated as hours worked

(4) For the purposes of subsection (1), the hours an employee works in a week are taken to include any hours of leave, or absence, whether paid or unpaid, that the employee takes in the week and that are authorised:

(a) by the employee's employer; or

(b) by or under a term or condition of the employee's employment; or

(c) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law.

B *Additional Hours under the Award*

5. Similarly, clause 15.4 of the Alpine Resorts Award 2020 provides that 'The ordinary hours of casual employees will not exceed an average of 38 hours per week over a maximum work cycle of 4 weeks.'

6. The overtime provision in that Award provides at 23.1 that:

> An employee, other than a Snowsports Instructor, must be paid overtime rates for:
> (a) any hours in excess of the ordinary hours per week that the employee is engaged
> to work;
> (b) any hours in excess of 10 per day, excluding meal breaks; or
> (c) any hours in excess of an average of 38 per week over the length of the cycle.

C *The Current Provision*

7. The current Award provision provides that hours worked according to the multi-hiring arrangement is undertaken and paid for on a casual basis (that is with the accruing loading and relevant rostering requirements) at 20.3(c)(i) and that they do not count toward ordinary hours or overtime in the employee's primary role 20.3(c)(ii).

8. A plain English reading of the provision shows two main protections for employees who undertake work under 20.3 of the Award:
    i. It is undertaken and paid for on a casual basis, that is with the loading (11.2(a)(ii) and with the corresponding rostering arrangements (such as minimum engagement at clause 11.5) apply.
    ii. Such a role includes a casual employee's ability to refuse hours.

9. The clear delineation between the two roles allows a clarity to ensure that the requirements of section 62 of the Act and 23.1 of the Award are not violated.

D *Impact of the Proposed Wording*

10. The proposed wording of the Commission would result in the following:
    i. The loss of the casual loading on hours worked under clause 203.
    ii. The loss of rostering arrangements (particularly clause 11.5) for such hours.
    iii. The loss of ability to refuse hours.

11. The essence of the proposed wording would be analogous to that of an Individual Flexibility Arrangement (IFA) in which additional hours will be paid at the ordinary rate. However, it differs from an IFA in that there is no requirement that the employee be better off overall (as at clause 5.5 in the Alpine Award). It is submitted that this is neither the current industrial practice, nor the intention of the provision.

12. It is clear that the proposed wording by excluding the identified benefits of casual employment could leave an employee worse than under either the current provision or an IFA.

13. The current industrial practice has such hours being treated as casual employment. The Commission's proposed wording would allow for such hours to be worked as non-casual employment which would result in the accrual of annual leave as at section 87, together with personal leave at section 96 of the Act. This would be a significant change to current industrial practice. Although for the reasons identified, the SDA's position is that the current provision should be retained, were the Commission minded to so vary the current provision, this should be highlighted for compliance purposes.

14. The proposed wording would theoretically also allow for the secondary role to be engaged as a full-time employee. This could result in this could result in a conflict with section 62 of the Act.

III. PROVISIONAL VIEW OF THE COMMISSION

15. The provisional view of the Commission in its statement of 11 August 2021 at paragraph 62 states:

> Clause 20.3 of the Alpine Award in its current form allows an employer to offer two types of employment to a single employee – one primary role and a second,

non-primary role which must be a casual position. This is a relevant term as it deals with the engagement of casual employees. Our provisional view is that clause 20.3(c) is inconsistent with the Act because it requires the non-primary employment to be casual, regardless of whether it meets the definition of casual employment in s.15A of the Act. Our provisional view is that, in order to make the award operate consistently with the Act, clause 20.3(c) should be amended by deleting subparagraph (i), so that it would read;

"(c) The employer may then offer the employee, and the employee may undertake, a non-primary role (or roles) in any level or classification within Schedule A—Classification Definitions that they are qualified for, provided that any hours worked by an employee in a non-primary role do not count toward ordinary hours or overtime in the employee's primary role."

16. The issue the Commission takes with the provision is not with the provision in itself, but possible non-compliance on the part of an employer. It is submitted that this may be more easily addressed with a note such as:

"NOTE: A casual role must meet the definition of a casual employee as under the Act. Non-casual roles may not be offered under clause 20.3"

IV. CONCLUSION

17. Because of the lack of inconsistency or difficulty in the provision in itself, together with the above identified issues resulting from the proposed wording, it is the SDA's submission that the current provision should be retained.