DECISION

Fair Work Act 2009
s.158—Application to vary or revoke a modern award

Total Toning Fitness Pty Ltd
(AM2021/62)

Health and welfare services

DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE
COMMISSIONER O'NEILL

MELBOURNE, 23 DECEMBER 2021

Application to vary a modern award – Fitness Industry Award 2020 – span of hours when rostered to work a broken shift – clause 13.4(c).

INTRODUCTION

[1] On 10 May 2021, Total Toning Fitness Pty Ltd (**the Applicant**) filed an application to vary the *Fitness Industry Award 2020* (**the Award**) to increase the maximum span of hours over which an employee can be rostered to work a broken shift from 12 to 13 hours (**the Application**). The Full Bench issued a statement on 20 May 2021.

[2] An initial conference of interested parties was convened on 4 June 2021 to consider the variation sought by the Applicant. Mr Paul Rose attended for the Applicant, together with Ms Erin Keogh of the United Workers' Union (UWU) and Mr John Monroe representing Gymnastics Australia Limited. The transcript from the conference is available here.

[3] Clause 13.4(c) of the Award states:

> '**13.4** An employee may be rostered to work a broken shift on any day provided that:
>
> …
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> **(c)** the span of hours from the start of the first part of the shift to the end of the second part of the shift is not more than 12 hours.'

[4] In making the Application, the Applicant contends that in order for employers to offer full or part-time employment to a single trainer who can cover peak industry hours, the maximum span of hours over which an employee can be rostered to work a broken shift should be increased from 12 to 13 hours. The Applicant's proposition is that this would allow employees to gain more secure positions because a single trainer could work, for example, between the hours 6.00 am – 9.00 am and 4.00 pm – 7.00 pm. The Applicant submits that under

the current maximum 12-hour span for broken shifts, it is required to employ two casual employees to cover peak industry hours.

[5] In broad terms, the UWU opposes the application on the following grounds:

- Continuity of hours under awards appears to be a core expectation.
- In providing for broken shift arrangements, the Award provides an exceptionally broad entitlement with relatively low remuneration.
- The capacity to schedule employees for only three hours of work over a 12 hour duration is an exceptionally low bar for split shift arrangements.
- The compensation applicable to broken shifts in the Award is relatively low and fails to meet the modern award objective of appropriately compensating employees for working unsociable hours, and to be properly remunerated for that work.
- Any expansion of the span of hours applicable for a broken shift arrangement is not necessary to meet the modern award objectives and would fail to recognise the needs of low-paid workers.
- The requirement to be available for a 13 hour period would negatively impact on social inclusion and workforce participation.

[6] The Full Bench made directions in a further statement issued on 1 September 2021 which provided any interested party the opportunity to file material supporting or opposing the Application and to be heard. The directions were subsequently amended, and the only material received in response was from the Applicant (submissions and 4 witness statements) and the UWU (submissions, submissions in reply and 2 witness statements). The Application was then the subject of a hearing on 25 October 2021. The transcript of the hearing is available here.

Applicant's Evidence and Submissions

[7] Mr Paul Rose, the Director of the Applicant, prepared a document which was a combination of submissions and evidence.[1] The document outlines his motivation, being to create full time work for personal trainers, or at least more part time hours. A number of propositions can be extrapolated from it:

a) Personal trainers want to work more hours and have the security of good employment;
b) The current 12-hour span of ordinary hours in the Award limits the number of hours that can be offered using a broken shift arrangement;
c) This can have the effect of prompting employees to change their status to that of a contractor;
d) Operating as a contractor brings with it a raft of obligations in terms of accounting, taxation, insurance, work health and safety, marketing, business development and promotion which, in combination, overwhelm the trainer and force them to leave the industry;
e) The proposed 13-hour span of ordinary hours would enable gyms to offer working patterns of 6am - 10am and 3pm – 7pm or 6am – 9am and 4pm – 7pm.

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[1] Exhibit A1.

[8] At the hearing, Mr Rose confirmed the Application was made in response to the predominance of contractors in the Fitness industry and the high turnover of personal trainers.[2] He also alluded to various roster patterns in broken shifts that might be possible if the span of hours was increased from 12 to 13 hours and emphasised his belief that gymnasiums required the span to be able to cover both a 6.00am and a 6.00pm class.[3]

[9] Ms Janey Rose is employed as a Manager for the Applicant and testified in support of the business practices of Mr Rose. She offered the observation that the Applicant's retention of staff was improved by offering employment rather than contracting arrangements.

[10] Mr Jordan Del Medico-Lewis is an employee personal trainer of the Applicant and gave evidence that the current maximum 12-hour span for broken shifts prevents him from working both mornings and evenings, thereby covering the peak period of operation. He suggested the current maximum 12-hour span prevents him working between 10 and 15 additional hours per week and this factor might result in him leaving the Fitness industry because he does not want to work as a contractor.

[11] Mr Mark Haylock directs and owns his own gymnasium and gave evidence that the busiest times of operation in the Fitness industry are 5.00am - 8.00am and 5.00pm - 8.00pm and that this factor, combined with the current maximum 12-hour span for broken shifts, leads to personal trainers resigning as employees and working as contractors. Mr Haylock says that such a transition can often be premature for inexperienced personal trainers because they are not equipped to be self-employed and run a business. In Mr Haylock's opinion, inexperienced personal trainers require mentoring and exposure to good businesses. He says that in his business there is not a lot of scope for full time employment and that he mainly engages casual employees. Under cross-examination, Mr Haylock said the peak times of operation are 6.00am - 7.00pm and proffered that a 13-hour span would enable shift patterns such as 6.00am - 9.00am and 3.00pm-7.00pm to be offered. In terms of his own business, he said the opportunity to do this would be welcome even if he might not immediately implement it due to the arrangements he has with his current staff.

[12] The final submissions made for the Applicant at the hearing included:

a) The current maximum 12-hour span for broken shifts prevents gymnasium operators from offering decent hours to personal trainers;

b) The Application has been made so there is the capacity to offer personal trainers full time work;

c) While not all personal trainers may not wish to work broken shifts, many are willing to do so;

d) Contract work results in personal trainers suffering 'burnout'; and

e) Changing the span of hours for broken shifts will provide employees with the opportunity to be employed and mentored by established gymnasium owners.

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[2] Transcript 25 October 2021 at PN 225.

[3] Transcript 25 October 2021 at PN 230.

UWU's Evidence and Submissions

[13] Evidence for the UWU was adduced from Mr Anthony Garcia and Ms Kirsty Pepper, both of whom have previously worked broken shifts in the Fitness industry but now occupy full time roles at management levels. Neither Mr Garcia nor Ms Pepper gave a favourable account of their experience working broken shifts.

[14] Mr Garcia stated that working broken shifts left him exhausted and that he would leave the Fitness industry rather than return to working broken shifts.

[15] Ms Pepper cited an erosion of her quality of life, the imposition of travel back and forth between shifts and the interruption to her social and family life as a result of working broken shifts. She said that broken shift arrangements are not sustainable and eventually personal trainers choose between working mornings or evenings, but not both. Ms Pepper also gave evidence of her previous employment which included a role where she was engaged via a combination of part time and casual employment and another where she was engaged both as a part time employee and a contractor providing personal training services.

[16] In outlining its opposition to the Application, the UWU submits the Fitness industry in Australia is a highly casualised, low paid and insecure and it is common for employees to work unsociable and exhausting working hours.[4] The UWU submits that to grant the Application would be contrary to the modern award objectives because an expansion to the existing broken shift 'span of hours' would fail to recognise the needs of low-paid workers and would create even more unsustainable and unsociable work practices.

[17] The UWU submits that varying the Award as sought would result in it failing to achieve the modern awards objective because this would create 'even more unsociable hours' than the Award already does, without the provision of any extra remuneration or security of employment.

[18] The UWU proffers that predecessor State awards to the Award did not provide for broken shifts, with one in fact prohibiting them.[5] Noting that the Commission has identified 18 modern awards which deal with broken and/or split shift arrangements, the UWU refers to the *Cleaning Services Award 2020* as being the only one that provides for a 13-hour span. Accordingly, the UWU posits that working a broken shift is not a common working condition, and that the general expectation of workers is to have a singular continuous shift. Further, it submits there is a disutility in working a broken shift which presumably is the basis for the broken shift allowance in clause 17.2(b) of the Award (currently $14.16). The UWU submits an expansion to the span of hours over which an employee can be rostered to work a broken shift would only serve to disadvantage employees. This is because the Award allows for only 3 hours to be rostered over the current 12-hour duration and these are more than likely to be paid at the base rate of pay, given the span of ordinary hours is 5.00am - 11.00pm on weekdays. The

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[4] In support of these propositions, the UWU cited the *Deloitte Access Economics Pty Ltd,* 'Fitness Industry Workforce Report: 2010 – 2020' (Report, January 2012), v-vi commissioned by Fitness Australia, which it says detailed the reasons behind the high turnover of staff in the industry as being low wages, poor career path options, undesirable hours, and the inability to work in a full-time capacity.

[5] *Health Recreation and Fitness Award SA* (AN150063) at clause 6.1.4.

UWU asserts expanding the span of hours over which an employee can be rostered to work a broken shift would simply create longer days with no benefits to workers.

[19] The UWU challenges the proposition of the Applicant that more secure full time and part time positions could be offered if there was an expansion to the span of hours over which an employee can be rostered to work a broken shift. It relies on the 16-hour total range of opening hours of the Applicant in doing so (5.00am - 9.00pm on weekdays) and proffers that even with a 13-hour span over which an employee could be rostered to work a broken shift, more than one employee would be required to be rostered to provide coverage. The UWU submits that even if the Applicant was able to employ more people on a permanent basis if the span was increased, it does not follow that the whole Fitness industry will benefit.

[20] The UWU submits that on the evidence:

a) There is very little appetite in the industry to work broken shifts at all even under the current 12-hour span. It stands to reason then that there would be no appetite for a 13-hour span;

b) Working consistent broken shifts (as opposed to the occasional broken shift) under the existing 12-hour span leads to a breakdown of a healthy work/life balance and is viewed as unsustainable by workers in the industry. It would therefore be undesirable to work a full-time permanent position where broken shifts formed the bulk of the worker's roster; and

c) The existing 12-hour span should provide no barrier to the Applicant in offering permanent full time or permanent part time work.

[21] The UWU submits the Application fails to meet the modern awards objective or at the very least, is not necessary to meet it. In particular, the UWU submits that while expanding the span of hours may assist in meeting the modern awards objective of promoting flexible working practices, it would fail to promote social inclusion, it would fail to promote an efficient and productive performance of work, and it would fail to meet the needs of employees working unsocial, irregular or unpredictable hours by providing them with additional remuneration.

Consideration

[22] At the outset we make the observation that intuitively, the premise behind the Application makes sense. We accept the proposition that there will be peak periods during the course of a day where exercise, training and gym classes take place or at the very least, times during the day when activity levels are higher. We have also noted there is a tension between what smaller operators of gyms and fitness centres are able to offer in terms of hours of work and shift patterns, compared with larger enterprises. Certainly this was the basis of a large part of the case advanced by the Applicant and it formed part of the testimony of Ms Pepper in her evidence for the UWU.[6] Finally, we acknowledge that the Applicant is motivated for the Award conditions to be conducive to the engagement of more employees in the Fitness industry, as opposed to contractors. The Applicant considers the variation to the Award it proposes will

[6] Transcript 25 October 2021 at PN 505-506 and PN 554.

allow employers in the Fitness industry to offer working arrangements/shift patterns that will help retain personal trainers in structured environments where they can be mentored.

[23] Section 157 of the Act provides that the Commission may make a determination varying a modern award if it is satisfied that making the determination is necessary to achieve the modern awards objective.

[24] Section 134 of the Act outlines the modern awards objective:

"**134 The modern awards objective**

What is the modern awards objective?

134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***."

[25] The principles to be applied when considering whether or not a modern award should be varied were outlined by the Full Bench in *Variation of awards on the initiative of the Commission,*[7] as follows:

> "[112] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).
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> [113] The modern awards objective is very broadly expressed.[8] It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[9] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[10]
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> [114] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[11] No particular primacy is attached to any of the s.134 considerations[12] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.
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> [115] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[13] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[14] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.
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> [116] Section 138 of the Act emphasises the importance of the modern awards objective:
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>> '**Section 138 Achieving the modern awards objective**
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>> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve

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[7] [2020] FWCFB 1837.

[8] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

[9] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].

[10] [2018] FWCFB 3500 at [21]-[24].

[11] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

[12] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

[13] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

[14] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context.

> the modern awards objective and (to the extent applicable) the minimum wages objective.'
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> [117] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[15]"

[26] Accordingly, we now turn to the s.134 considerations. The Applicant did not make submissions that specifically engaged with the s.134 considerations. The UWU position is that the proposed variation would only create even more unsociable hours than it already does, without providing for any extra remuneration or security of employment. The UWU proffers that given the Fitness industry is already low-paid, it cannot be said that creating more unfavourable working conditions would meet the modern awards objective. The UWU did not appear to address ss.134(1)(b), (f) and (h) of the Act.

[27] It is convenient to deal with ss.134(1)(a) and 134(1)(c) together. Section 134(1)(a) of the Act requires that we consider 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). Section 134(1)(c) of the Act requires that we consider 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c).

[28] We consider that the employees covered by the Award who are likely to fall within the scope of the Application may be regarded as 'low paid' within the meaning of s.134(1)(a) of the Act. The Applicant considers the low paid will be better able to meet their needs if the proposed variation is made, as there will be more work available to them. The UWU argues that the change in the span would not be accompanied by any additional remuneration. The UWU also queried how a 13-hour span for broken shifts would result in more employment opportunities, proffering that a span of up to 15 hours might be required. The Applicant's position was that a 13-hour span for broken shifts would be an improvement. We understand its evidentiary case to be that it would facilitate a shift that would see a personal trainer commence at 6.00am in the morning, work some initial hours before a break and then resume in the afternoon, concluding at 7.00pm, thereby absorbing most of the peak hours of operation. Ultimately, we do not consider there is enough evidence before us to sustain a finding either way on the 'needs of the low paid'. Further, we are not persuaded the evidence of Mr Rose and Mr Haylock establishes that there will necessarily be increased workforce participation. The most that can be said is that there might be. Equally, we cannot conclude based solely on the testimony of Ms Pepper and Mr Garcia, who regard broken shifts unfavourably, that the proposed variation will be detrimental in terms of social inclusion. We regard the considerations in ss.134(1)(a) and 134(1)(c) as neutral. We are also conscious that if granted, the Application would not be confined to personal trainers and fitness instructors but would apply to all employees covered by the Award, including those at lower classification levels (and minimum wage rates).

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[15] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[29] Section 134(1)(b) requires us to consider 'the need to encourage collective bargaining'. We are not persuaded that the proposed variation would 'encourage collective bargaining' so it follows that this consideration does not provide any support for a change to the 12-hour span for broken shifts.

[30] We will deal with the considerations in ss.134(1)(d) and (f) together. While the UWU contends an increase to a 13-hour span for broken shifts would fail to promote an efficient and productive performance of work, the Applicant contends the proposed variation would aid retention of workers, enable them to be mentored and provide a source of motivation. We consider the proposed variation could result in a change in rostering practices for some employers and provide some flexibility in the rostering of employees but the sample of evidence before us is not sufficient to support firm conclusions to this effect.

[31] As to the consideration in s.134(1)(da) of the Act, the proposed variation will not provide additional remuneration for employees working broken shifts. This consideration does not provide any support for a change to the 12-hour span for broken shifts.

[32] We do not consider that the considerations in s.134(1) (e), (g) and (h) are relevant to the Application.

Conclusion

[33] As outlined above, the modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) of the Act. We have taken into account those considerations insofar as they are presently relevant and have decided not to vary the Award in the manner proposed by the Applicant. The classification structure in the Award extends well beyond personal trainers and fitness instructors and we are not satisfied based on the minimal evidence before us that making a determination to increase the maximum span of hours over which an employee can be rostered to work a broken shift from 12 to 13 hours is necessary for the Award to achieve the modern awards objective.

[34] We conclude by making the obvious observation that seeking a variation of the Award is not the only way in which the Applicant and others in the Fitness industry can pursue terms and conditions that differ from those currently contained in the Award. Different terms and conditions might be pursued through enterprise bargaining, a process currently being undertaken by Ms Pepper's employer, or the making of an individual flexibility arrangement pursuant to clause 5 of the Award.

[35] For the reasons given above, the Application is not granted.

DEPUTY PRESIDENT

Appearances

Mr P Rose for Total Toning Fitness Pty Ltd.
Ms H Miflin for the United Workers Union

Hearing details:

2021.

Melbourne (via Microsoft Teams):

October 25.

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