IN THE FAIR WORK COMMISSION

Matter No.: AM2014/196 and AM2014/197

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Common issue – Casual and Part-time employment

WRITTEN SUBMISSIONS FOR THE ACTU REGARDING AMWU V DONAU

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D No.: 96/2016

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A. Background

1. On 2 September 2016, the Australian Industry Group (**AIG**) filed submissions purportedly in reliance on leave granted during final submission in this proceeding. The Australian Manufacturing Workers' Union (**AMWU**) has filed a comprehensive submission in response. The ACTU supports and adopts the AMWU submission. The following observations are supplementary.

2. In summary, the ACTU contends that:

   (a) the decision in *AMWU v Donau Pty Ltd* [2016] FWCFB 3075 does not give rise to any fresh issue in the current proceedings but rather removes an issue by confirming that the ACTU claim for recognition of service does no more than reflect the existing NES standard;

   (b) the AIG's invitation to the Full Bench to overturn *Donau* is an abuse of process which should not be entertained;

   (c) *Donau* was in any case correctly decided; and

   (d) if *Donau* was incorrectly decided, merit considerations nonetheless favour the recognition of casual service as proposed by the ACTU.

B. Should the AIG submission be considered?

3. The ACTU claim, from its inception, included the following provisions regarding the election (opt in) and deeming (opt out) variants of its casual conversion claim[1]:

> *Model Casual Conversion Clause (Election)*
>
> X.9 A casual employee who converts to permanent employment shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, parental leave, right to request [flexible working arrangements], and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.
>
> …
>
> *Model Casual Conversion Clause (Deeming)*
>
> X.9 a casual employee who is deemed to be employed on a full or part-time bases shall have their service prior to conversion recognised and counted for the purpose of

[1] See Outline of Claim, filed by ACTU 11 November 2014; See also the updated Draft Determinations filed by the ACTU on 19 October 2016.

> unfair dismissal, as well as parental leave, right to request [flexible working arrangements], notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.

4. The AIG submissions addressed these provisions at great length in closing written submissions.[2] Although it did not lead evidence relevant to this issue, it had the opportunity to do so.

5. During final submissions, AIG sought leave to file a further submission. The stated impetus of the application for leave was the decision in *Donau*. Leave was subsequently granted to the AIG to file a submission "*in relation to the AMWU v Forgacs decision*".[3] The Full Bench did not invite AIG to repeat and expand upon its submissions already made and did not invite AIG to mount a collateral challenge to the *Donau* decision.

6. The submission filed by the AIG does not pretend to identify any fresh issue in the current proceedings arising from that decision. Rather it unabashedly invites the Commission to conduct a form of *ad hoc* further appeal of *Donau* and to reverse the decision. It does not appear to perceive any difficulty with this course; indeed its chief industrial officer has publicly stated that this Full Bench will determine the issues previously decided in *Donau*.[4]

7. The AIG submission is an attempt to re-agitate a matter recently determined by a Full Bench and to attack collaterally the earlier decision. It is to that extent an abuse of process which should be firmly discouraged. It is contrary to the public interest to allow a party which was unsuccessful in proceedings to immediately re-litigate the identical issue in another proceeding. To do so undermines certainty in decision making and potentially undermines public confidence in the tribunal. It would be appropriate for the Full Bench to expressly decline to consider the submission for those reasons.

C. The construction issue

8. Assuming, contrary to the foregoing, that the Full Bench takes up the AIG's invitation, it would in any case find that *Donau* was correctly decided. Given that the

[2] See paragraphs [811]–[890] of AIG's submission of 9 August 2016.
[3] PN 4830 (19 August 2016).
[4] http://blog.aigroup.com.au/full-bench-decide-casual-service-counts-redundancy-calculations/

AMWU submission deals comprehensively with the issue, it is necessary to make only brief observations.

9. **First**, and for the reasons set out in the AMWU's submissions, the textual analysis undertaken by the majority in *Donau* is correct. There is no real ambiguity in sections 12 and 22 of the *Fair Work Act 2009* (Cth) (**FW Act**). To the extent any ambiguity does exist, it is dispelled by sections 384(2), 65(2)(b) and 67(1) and (2), each of which assume that continuous service may consist of service as a casual. It is sufficient to point out that AIG's view cannot be accepted without leaving each of those sections otiose.

10. It might also be observed that it would have been a simple matter for Parliament to state that a period of casual service is not capable of constituting "*continuous service*" for the purposes of section 117 and 119 or at all. The fact that it did not do so, but instead identified particular circumstances where casual service would not be considered, demonstrates a legislative intention that the question of whether casual service might be continuous is to be assessed by reference to the facts and circumstances of the particular employment.

11. **Second**, appeals to alleged proper industrial practice and a historic bias against double dipping do not advance the debate very far, and claims of unfairness to employers even less so. Although it may be accepted that antecedent statutory and award regimes are not irrelevant, the focus of the construction exercise is necessarily on the text of the statute. The relevant inquiry begins and ends with the text.[5] Statutory purpose is relevant, but that purpose is to be discovered principally in the text and structure of the instrument itself, not from assumptions about appropriate industrial practice:

> The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions…
>
> In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.[6]

12. The AIG's submission—and to some extent the dissenting judgement of Cambridge C in *Donau*—proceeds from an *a priori* assumption that "*double dipping*" is industrially repugnant. That is fundamentally the wrong approach. If (and as to which see Part D

[5] *Cmr of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at [39]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].
[6] *Certain Lloyds Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at [26]; *Australian Education Union v Department of Education and Children's Services* (2012) 86 ALJR 217 at 224 [28]; [2012] HCA 3.

below) the effect of sections 12 and 22 is to allow for a degree of "*double dipping*", that is a matter within the prerogative of the legislature.

13. If the text of the statute were ambiguous, historical practice and other extrinsic considerations might be of assistance. That is not the case here.

14. **Third**, the AIG approbates and reprobates on the relationship between common law and statutory conceptions of casual employment. In the present context, it argues that the common law analysis of casual employment—broadly speaking that each shift is a separate contract of employment—is apt and that the employment of a casual should be regarded as ending at the end of each shift. In the context of assessing casual status and employment entitlements under the NES and modern awards, on the other hand, it contends that the common law analysis of casual employment status—focussed as it is on substance rather than labels—has no application. In that context it submits the terms of awards are conclusive.

15. The significance of this fact is that it highlights the incoherence of the AIG position in the proceeding generally. The AIG at once adopts a common law view of casual employment as wholly contingent and denies the common law view that employment which is regular and systematic is not casual. Such an intellectually incoherent view would not be adopted by the Commission.

D. The merit issue

16. If the Commission accepts the view that it is not available nor appropriate for it to reconsider *Donau*, the question of the merits of the ACTU claim for recognition of service dissipates. If *Donau* is correct, the legislative intention embodied in the FW Act is that casuals who become permanent employees should have casual service recognised for certain purposes. It is not appropriate to frustrate that legislative intention by taking any step to avoid that result.

17. It is only in the case that the Commission considers that it is available and appropriate for it to reconsider *Donau* and, having considered it, determines that it was wrongly decided, that the merits of the ACTU recognition of service clause remain to be decided. That matter has been previously canvassed and is addressed in the AMWU submissions and it is therefore necessary to do no more than make some brief observations about the AIG's latest submissions.

18. **First**, the AIG's claims of substantially increased costs are made in an evidentiary vacuum. Once again, AIG has eschewed evidence in favour of assertion. There is no basis on which the Commission could determine that consideration of prior service would in fact materially increase labour costs. Whether recognition of service would or would not have that result will vary substantially from case to case depending on the circumstance of the employer, employee and the employment. Knowledge of the details of those matters is within the purview of AIG and its members. It could have, but did not, lead evidence relevant to the issue.

19. **Second**, the entitlements potentially affected are access to unfair dismissal, the right to request flexible work arrangements, unpaid parental leave, notice of termination and redundancy pay. Early accrual of the first three rights does not involve an increase in direct employment costs. Recognition of casual service for the purposes of notice and redundancy potentially involves costs but they are contingent and likely to vest in a minority of cases. Costs associated with payment in lieu of notice in particular are likely to be marginal in virtually all cases.[7]

20. On the face of it, there is no reason to think that recognition of service for those purposes is likely to result in a substantial increase in employment costs. Claims of unfairness to employers as a result of cost increases must be considered in that context.

21. **Third**, and speaking more generally, references to "*double dipping*" oversimplify the issue. The casual loading is not a simple conversion of benefits into money.

22. It is unsafe and probably impossible to analyse the costs and benefits of casual employment in arithmetical or financial terms. In the *Metal Industry Award Case* the Full Bench accepted that differential entitlements to notice and severance should be taken into account in setting a loading, but simultaneously rejected the notion that the value of the entitlements could be mathematically assessed with a precise figure attached to each component.[8]

23. The loading is best understood as compensating for the basket of disabilities associated with casual work, including the insecurity derived in part from lack of notice and redundancy pay entitlements. Payment of the loading is appropriate for so

[7] The total increase associated with recognition of three years' casual service for notice purposes, for example, is two weeks' pay (assuming notice is unable to be given and payment in lieu is required).
[8] *Re Metal, Engineering and Associated Industries Award* (2000) 110 IR 24 especially paragraphs [181]–[182].

long as the insecurity associated with casual employment continues. Notice and severance entitlements, on the other hand, are directed to assist employees in dealing with the exigencies of termination. The consequences of severance for a long-term regular casual employee are likely to be the same or very similar as for long-term permanent employees and it is appropriate that they be assessed on the same or similar basis.

24. **Fourth**, the AMWU suggests that it may be appropriate that the casual recognition provision be converted to a note. Given that the provision would on a proper view be redundant, that is a sensible suggestion.

E. The section 139(1) issue

25. The AIG in its most recent submission contends that the recognition of service provision, insofar as it deals with eligibility for unfair dismissal protection, is not a matter allowable under s139 of the FW Act.

26. This submission, which could have been, but was not, made earlier in the piece, has no relationship to the *Donau* decision. Its inclusion in the AIG's latest submission confirms, if confirmation be needed, that AIG has simply taken the Commission's grant of leave as an opportunity to expand on the 550 page submission already filed.

27. In any case, the point is without merit. The conversion clause is plainly a provision dealing with the subject matter of types of employment. The recognition of service provision, dealing as it does with the consequences of change from one type of employment to another, is a provision dealing with the same subject matter or, at a minimum, is ancillary to the substantive conversion clause.

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