



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE
COMMISSIONER O'NEILL**

AM2021/62

s.158 - Application to vary or revoke a modern award

**Application by Total Toning Fitness
(AM2021/62)**

Fitness Industry Award 2020

Melbourne

10.22 AM, MONDAY, 25 OCTOBER 2021

Continued from 12/10/2021

PN154

THE ASSOCIATE: Matter AM2021/67, section 158 application (indistinct).

PN155

DEPUTY PRESIDENT CLANCY: Good morning. I'm getting some feedback here, so the usual way we deal with that is that whoever's not speaking, at any particular time, if they could put themselves on mute. But we'll get underway. I'll just confirm appearances, please?

PN156

I have Mr Rose?

PN157

MR ROSE: Hello, Deputy President.

PN158

DEPUTY PRESIDENT CLANCY: And Ms Miflin?

PN159

MS MIFLIN: Yes, thank you. Miflin, that's fine. Thank you, Deputy President.

PN160

DEPUTY PRESIDENT CLANCY: Thank you. All right. Now, the other members of the Full Bench, Lee C and O'Neill C. The members of the Full Bench have received all the information and documents that the parties have filed. They are in the digital court book and I'm assuming that, Mr Rose, you have a copy of the digital court book?

PN161

MR ROSE: Yes, I do, printed out and ready.

PN162

DEPUTY PRESIDENT CLANCY: And, Ms Miflin, you have as well?

PN163

MS MIFLIN: I do, thank you.

PN164

DEPUTY PRESIDENT CLANCY: Thank you. All right. Well, we'll be referring to that throughout the proceeding today. It's noted that there are a number of statements that have been submitted. At the directions hearing, that was held about two weeks ago, I mentioned that those individuals ought to be available.

PN165

The way we'll run, in terms of the order of things, is Mr Rose, as it's your application, you'll present your material first and then the union material will be presented after that.

PN166

So what we'll do now is deal with your witness evidence first. Now, that will require the witnesses to leave the hearing room until it's their turn to give evidence.

PN167

Mr Rose, the material that you've prepared has been largely in the first person and it goes to your experience, so there's not a separate witness statement, as such.

PN168

Ms Mifflin, to the extent you have questions for Mr Rose, are you comfortable working off the submissions that he has filed?

PN169

MS MIFLIN: Thank you, Deputy President.

PN170

Yes, as we noted in our reply submission, we weren't sure how Mr Rose wanted those documents to be categorised, so we took them as submissions, our submissions, and a witness statement from Mr Rose himself. We're happy for that evidence to be tendered in that way.

PN171

DEPUTY PRESIDENT CLANCY: All right. Look, what we'll do then is I'm going to ask Mr Janey Rose, Mr Stewart, sorry, it's just got Anthony Guest, I'm not sure who that is, but anyone who's a witness, I see also Ms Pepper, is hat Mr Garcia there as well.

PN172

MR GARCIA: Yes, I am here.

PN173

DEPUTY PRESIDENT CLANCY: Thank you. All right. Well, what I'll do is anyone who is giving evidence, I'll ask you to disconnect now and we'll be in contact with you when it's your turn to give your evidence. So if just Mr Rose and Ms Mifflin please could stay on the line, thank you.

PN174

Now, Mr Rose, you're in an office there, are you?

PN175

MR ROSE: Yes.

PN176

DEPUTY PRESIDENT CLANCY: And are you by yourself?

PN177

MR ROSE: I have Janey Rose next to me.

PN178

DEPUTY PRESIDENT CLANCY: She'll have to leave while you're giving your evidence.

PN179

MR ROSE: Did you hear that?

PN180

MS ROSE: No.

PN181

MR ROSE: You need to leave the room while - you might have to - - -

PN182

MS ROSE: Yes, I assumed that.

PN183

MR ROSE: Can you work off a front computer?

PN184

MS ROSE: Yes.

PN185

MR ROSE: Thanks.

PN186

DEPUTY PRESIDENT CLANCY: Thank you. Now, Mr Rose, we'll deal with your evidence this way. My associate will take an affirmation from you and then I'll just confirm the documents that you've prepared. Then Ms Miflin may have some questions for you, all right?

PN187

MR ROSE: Sure.

PN188

DEPUTY PRESIDENT CLANCY: Thank you.

PN189

THE ASSOCIATE: Mr Rose, please state your full name and address?

PN190

MR ROSE: Reginald Paul Rose, (address supplied).

<REGINALD PAUL ROSE, AFFIRMED

[10.28 AM]

EXAMINATION-IN-CHIEF BY MS MIFLIN

[10.28 AM]

PN191

DEPUTY PRESIDENT CLANCY: Mr Rose, what I'm going to do is just confirm the documents that you have prepared. As I mentioned before, they appear to be in the nature of submissions and evidence of your direct experience in the industry. So I'm going to receive them into evidence and then Ms Miflin may have some questions for you, arising out of what you've outlined in those documents, all right?---Sure.

*** REGINALD PAUL ROSE

XN MS MIFLIN

PN192

So if I could get you to refer to the digital court book, please?---Yes.

PN193

In that document, the digital court book that is, there's the original form F1 that you filed with the Commission, to commence this proceedings, and that runs a number of pages, through to page 8 of the court book, do you see that there?---Yes, I have it.

PN194

Then, from page 9, you have a form F46 application, which was the - largely a restatement of the application form, when you're making an application in relation to a modern award, such as you have done, and that runs from page 9 through to page 15, and that's, again, a document you completed?---Yes.

PN195

Then we have, from page 16, some correspondence between you and the Commission, but then from page 18 what you've described as your submissions and there you've made some responses to various matters that have been raised in material filed by the unions, do you see those there?---Which page are you on there, sorry, Mr Deputy President?

PN196

Well, in substance, it runs from page 18 of the digital court book and it runs through to page 24?---Yes, sure. Yes, I've got it.

PN197

So those three documents, that is, the form F1, the form F46 and the submissions are all documents you've completed?---Yes.

PN198

And they're a true and correct account?---Yes.

PN199

And you've reviewed them recently?---This morning, yes, I was about half an hour behind this morning's meeting, due to the time difference but, yes, I reviewed again this morning, briefly?---All right.

PN200

Are there any changes you need to make to any of those documents?---No. No, nothing significant. I perhaps could have reworded a few things but, no, I'm happy with what I've provided.

PN201

And you'd like those documents to form part - to the extent that they include witness evidence, you'd like them to form part of your evidence for this case?---Yes.

*** REGINALD PAUL ROSE

XN MS MIFLIN

PN202

Now, Ms Miflin, subject to any questions you might have, any objections to those documents forming part of Mr Rose's application?

PN203

MS MIFLIN: No, no objections, thank you.

PN204

DEPUTY PRESIDENT CLANCY: Thank you. Well, for the purposes of transcript, and the Full Bench's subsequent treatment of the documents and the evidence, the documents in the court book starting from page 1 and running through to page 24, meaning Mr Rose's form F1, form F46 and submissions, will be marked exhibit A1. Thank you.

EXHIBIT #A1 FROM F1, FORM F46 AND SUBMISSIONS OF PAUL ROSE (PAGES 1-24 OF COURT BOOK)

PN205

DEPUTY PRESIDENT CLANCY: Now, Mr Rose, at this point, and I've noted in your submissions that you've filed, you have responded to witness evidence that's proposed to be led by the United Workers Union, but what we'll do now is Ms Miflin may have some questions for you, so if you could just listen to those and answer them, to the best of your knowledge.

PN206

The only other requirement, at this stage, is you can have the court book there in front of you but no other material, while you're giving your evidence, all right?---Yes, sure.

PN207

Thank you.

PN208

Thanks, Ms Miflin.

PN209

MS MIFLIN: Thank you, Deputy President.

PN210

Hi, Mr Rose, how are you? I just have a few questions, regarding the hours of your gym and your rostering arrangements. This application is to seek to expand the span of hours across broken shifts, to 13 from 12. But looking at your rostering or, rather, your timetable for TTF Gym, if I can take you to page 40 of the court book, it's actually one of the attachments from the UWU's submissions, can you confirm that that is the timetable that TTF Gym runs, in - - - ?---Torrensville, yes.

*** REGINALD PAUL ROSE

XN MS MIFLIN

PN211

Torrensville, yes. My apologies, in Torrensville, it is. So Just looking at the roster here, the UWU, I suppose, is concerned that - rather, yes, concerned that a 13 hour span wouldn't assist with your rostering needs anyway. So on a Monday,

at 5.15 am, I see you've got, this is just by way of example, a kick and cardio class, running at 5.15 am, then on the same day, at 8 pm, or even 7 pm, you've got a kick and core and a PBs class, what's PBs?---It's personal bests.

PN212

So how would you roster - if there was a 13 hour span afforded, how would you roster a single employee anyway, across this day, for example?---Sure. Thank you for the question, Ms Miflin. I guess, first and foremost what I'd like to say is the application is not solely about me, it's about the industry that I've worked in for 16 years, and that I love, my - I'm in a fortunate position, with the timetable that we're looking, on page 40 of the court book, that timetable is actually the largest class timetable in Australia. I'm not necessarily doing this application for me solely. So that's the first thing I would like to say.

PN213

In regards to me rostering, I'm lucky, I don't - I can actually offer stable hours. When I say stable, probably 25 plus hours a week for permanent part-time employees, in the morning and of the evening, because my roster does, as you've pointed out, span over 16 hours. So the 13 hour span doesn't necessarily just help me, there's actually other Fair Work laws that would suit me better, but I'm not doing this for me.

PN214

So, yes, I would be rostering - well, I can tell you how I roster, my current roster is an employee will work in the morning, from 5 am through till nine. They have a shift changeover, the next employee will start at 9.30 and they work through to 1.30. Then there's a break where the next trainer doesn't come in until the evening, until 4 o'clock, and they work through till nine.

PN215

MS MIFLIN: Okay. So I just - I'd like to understand a bit more about the - when you've - I'll take you to, I suppose, your evidence, it's from court book 18. You've given some examples of a client asking for a personal trainer on a set day, so your example, on page 18, is:

PN216

Monday 6 am class, client asked for PT with trainer, but has set times they can do, like mornings only, as that's their routine. The trainer can't do Monday.

PN217

And you've gone on to give this example where they then can't be taken on as for that client, because of the 12 span. Is this a problem that face specifically at TTF in Torrensville?---This is an industry-wide issue. This happens everywhere. That's not just - I've faced it personally, myself, when I was on the floor as a trainer, and, yes, numerous employees and contractors over the years, that's a very common thing. Obviously the contractor is allowed to say, 'Yes', for the obvious reason, but the employee, when I see that go through the schedule, I have to decline that. That can't happen.

*** REGINALD PAUL ROSE

XN MS MIFLIN

PN218

But would I be right in saying, then, if the span was expanded to 13, it still wouldn't assist many scenarios, for example, a trainer who starts at 6 am, but they might have a client who wants them to work at 8 pm? I mean just a one hour span would be unlikely to assist many scenarios anyway, right? Given how broad the peak times are in the evening?---No. Well, it does, because what it does for the industry, as a whole, for me as an employer, when I see a trainer who is in demand, and I see them regularly being requested for personal training sessions in the evening, if they are only requested for one personal training session to start with, and remember trainers build rapport with clients and they get more and more popular as time goes on. But once I see stability there, for maybe five nights a week or even three nights a week, I'll actually roster them on for a whole shift. So I'll give them the other two hours where I can fill them up with other jobs, and then I can help build up their portfolio like that.

PN219

But it's sort of like right now, when you - when you have the span at 12 hours, why would we roster somebody on for, say, four hours in the morning, to run normal shifts, and then in the evening, to give them the top up of hours, to give them a stable employment package, we would have to roster - to stay under the 12 hours we would have to roster them on, what is that, two till six, to give them the other four hours, to make up an eight hour day. There's no demand for business in the - between two and four, there's no demand. If you could stretch it out to 7 pm finish, we could roster the person on at three, have them finish at seven, whereas right now we have to finish them at 6 pm, and who's supposed to take our 6 pm class? We have to then put on another casual to cover that 6 pm class. So, therefore, gyms don't do that, we wouldn't do that.

PN220

MS MIFLIN: But am I right in saying you have to roster - you've indicated that you've got three shifts running on any one day anyway, at your gym, for example, and I appreciate that you said this is an industry-wide application, but at your gym, for example, you've had to roster on three shifts across a day to meet your requirements anyway. So is that not what would have to happen - - -?---No. This would still apply for me, in this case. So, as an example, I have the trainer who is working in the evening, he's covering classes, if we look at my timetable as an example, and not all gyms have a timetable as bit as mine, mine is very big, but my guys are running classes from four till nine.

PN221

The person who worked in the morning, the employee who worked in the morning, from five till nine, if they get requested for personal trainings in the evening, which they do, I would roster them on, to give them extra hours, as everything I just said before in my previous statement. So, yes, I would absolutely give them more hours in the evening, and that's what they want. They want those hours.

*** REGINALD PAUL ROSE

XN MS MIFLIN

PN222

I can't give him the five till nine shift, because that span is far too big, and I wouldn't do that to anyone anyway, even if I could. My day is too big. My gym has a 16 hour span so, again, this application is not just about me. I have my rosters covered the way I need to cover them. But, yes, I'm prevented, right now, from giving more hours to that trainer who worked in the morning, because he can't say yes to those sessions in the evening, or I can't roster him on for longer than the 13 hour span.

PN223

So we must keep in mind that when I refer to this, the demand is the 6 pm timeslot. Everybody's still at work at 5 pm, so there's not that demand there, whereas that extra - extra demand is between six and seven.

PN224

MS MIFLIN: You've worked in gyms for a long time, 16 years, and do you think, in your opinion is this 12 hour span, that's allowed under the award, is it common knowledge among management staff or floor staff, that it even exists, that that's a law that has to be abided by?---No. To my knowledge I think most - no, not many people even understand the laws at all, no.

PN225

Would you agree then that there is a lot of gyms who are rostering outside of a 12 hour span?---I wouldn't know. It's so hard to know, which is why I sought some clarification from yourself, in respect of Mr Garcia and Ms Pepper, about the nature of their employment, because I know this industry is very contractor dominated and this was the whole reason of my application. Like I'm tired of seeing fantastic trainers just get burnt out. They go on and become contractors. They're great trainers but they do not know how to run a business. They take on way too much way too soon and I'm just - yes, it's sad to see it. From an employee's point of view, we get tired of seeing such a high turnover of trainers, and quality trainers too. We lose really, really good trainers because of this issue. So, yes.

PN226

I just have one more question then, with respect to, again with rostering, your example there, if you had someone on from five till nine and then you weren't able to put them on again, at a 6 pm shift, you stated in your application that, on page 18 again, of your submissions, that, to be clear, your application is to protect and prevent employed personal trainers leaving or converting to contractors and that your ideal is to be able to put more people on permanently. Is there anything, with the 12 hour broken shift, the current span that exists, that's preventing you - I can't understand why the existing 12 hour shift is preventing you from putting people on in a permanent capacity anyway?---I think I've stated this multiple times. It's just the 6 am and 6 pm, it's purely our peak times. The laws currently, around our award, just don't reflect our industry. That 12 span is not when we need people. We need people at 6 am and 6 pm. I'm bigger - again, my timetable is bigger, I know I've got classes at 8 pm and 9 pm and - again this application is not just about me.

*** REGINALD PAUL ROSE

XN MS MIFLIN

PN227

So, yes, it's - for me it's very simple, it's just the 6 am and 6 pm, I don't know how to make it any more simpler than that. That's what would help us and help employers create better employment packages, if we could get those covered. But, as I said earlier, right now, why would any employer offer full-time employment, they don't, they don't exist, not in the smaller gyms anyway, unless keep in mind that 80 per cent of the fitness industry is made up of smaller gyms, so we're not all talking big rec centres and stuff like that here, but you're not going to - you're not going to start a trainer at 6 am and then knock them off at 6 pm and offer that full-time package in that timeframe when you need to put on a casual to cover those shifts after. Because casuals, as Ms Pepper stated as well, there's a higher turnover of casual employees in that space too.

PN228

So we would be better off offering permanent part-time positions in the evening, permanent part-time positions in the morning, but those permanent part-time positions are only like three and four hour shifts, respectively. So all of a sudden you have two average positions which results in there's no real longevity for employees in this industry. They can't sink their teeth into it, they can't build a long-term career because they're only ever getting, at the best, 25 hours a week in a gym, and that would be at my gym, where I've got a lot of classes to offer.

PN229

MS MIFLIN: So would your suggestion be then, if you had somebody who could do, say, for example, a 6 am and a 6 pm class, ignoring the fact that your gym starts at 5 am anyway, what kind of full-time hours could be given to that worker?---Well, as I said, they - there's many different options. You could do a five till 10, so there's your five hours in the morning. In the evening you could give a three hour shift, from four till seven, there's your full-time day.

PN230

Is that not a 14 hour span though?---You could do a six. So, as I said, you could do - yes, sorry, that was. So you could do a 6 am start, or you could do - as I said, I'm bigger, I do the 5 am classes, so it doesn't really bother me, I've got to roster on multiple staff anyway. But for some of these smaller gyms who don't have that luxury, yes, they don't - a lot of gyms don't do a 5 am class, they do a six, so, yes, they're probably doing six till nine, probably, and then maybe the four hours in the evening, or maybe a six till 10 in the morning. Yes, either way they would have that extra hour. It just covers their 6 am class and their 6 pm class. How you want to build the hours either side of that, it can be however they want.

*** REGINALD PAUL ROSE

XN MS MIFLIN

PN231

I guess a concern of the UWU is that, for example, the picture you've just painted of the 6 am and 6 pm classes, there would need to be evidence put on to show that that is the requirement across the whole industry. Under the Fair Work Act, there's quite specific needs that have to be met for a variation to award to be made. The Deputy President and the Full Bench would understand this, obviously, and then I can go through this later, but my concern and the reason I've been asking these questions is that you're painting an image of quite a specific

timetabling concern, 'We have to meet this 6 am and 6 pm class', but is it not the case that there are gyms that run a whole gamut of hours and shifts? Your gym itself, you've said, start at 5 am and runs till 9 pm, is it not the case that there are gyms that operate quite varied hours that might not be assisted by a 13 hour span?---No, I wouldn't agree with that. As, again, regarding my timetable, keeping in my mind, is the biggest class timetable in the country at the moment, so I'm speaking for a lot of other people, not myself. I don't think you'll find a gym anywhere that doesn't offer a 6 am class and a 6 pm class, I do not think you'll find it. Have you found it?

PN232

I haven't looked, Mr Rose?---I know. But I'm just saying I think it's Kristy Pepper has already pointed out that it's common knowledge, these are our hours. We don't even determine these hours, this is just what it is. Everybody knows it's before work and after work, the nine to five, that's who we cater for. Much the same, I know my submission pointed out the whole cheffing factor, because that was my background before I got into this, it's the same. I mean people go out to dinner at 6 pm till 8 pm, that's the way it is. So, yes, again, I'll say it again, I highly doubt anybody will find a gym in the country that doesn't operate a 6 am class and a 6 pm class.

PN233

Deputy President and Commissioners, I'm not sure that there's any more questions - well, I know there's no more questions I have for Mr Rose. There are, certainly, concerns we have that I would like to go through, specifically with respect to the modern award objectives. I'm not sure - the reason I suppose - the reason I've been asking questions around rostering is because we are concerned that this application, essentially, is seeking to shift the award to something that is quite unusual, to fit in with the rostering arrangement that might not be - or that there's been no evidence put on to show, but also that might not be true of the whole industry. That's something that I think needs to be gone through. But I have no more questions for Mr Rose at this stage.

PN234

DEPUTY PRESIDENT CLANCY: Thank you.

PN235

Lee C, any questions for Mr Rose?

PN236

COMMISSIONER LEE: No, not from me, thanks Deputy President.

PN237

DEPUTY PRESIDENT CLANCY: Thank you. O'Neill C?

PN238

COMMISSIONER O'NEILL: No, thank you.

*** REGINALD PAUL ROSE

XN MS MIFLIN

PN239

DEPUTY PRESIDENT CLANCY: Thank you, Mr Rose. Of course we'll now continue with the rest of the case so your role now will switch from being a witness to advocate.

<THE WITNESS WITHDREW

[10.51 AM]

PN240

DEPUTY PRESIDENT CLANCY: In that vein, noting you've got a number of witnesses, who would you like to call first?

PN241

MR ROSE: Paul Stewart.

PN242

DEPUTY PRESIDENT CLANCY: Bear in mind, any witness, once they've given their evidence, can remain on line as an observer. All right, we'll get Mr Stewart in, please.

PN243

MR STEWART: G'day, how are you going? Can you hear me all right?

PN244

DEPUTY PRESIDENT CLANCY: Yes, good morning, Mr Stewart, it's Clancy DP here. Have you got a camera you can switch on, please, or how are you appearing? Are you doing it by phone, or something, are you?

PN245

MR STEWART: Yes, just on Teams, on my phone.

PN246

DEPUTY PRESIDENT CLANCY: All right. My name is Clancy DP, I'm sitting as a member of the Full Bench, along with Lee C and O'Neill C, and we're going to take your evidence now.

PN247

I have before me a document that is described as a reference of Paul Rose, but I note it sort of outlines some industry experience that you've had, is that correct?

PN248

MR STEWART: Yes, that's right. Yes, I still work for, but I used to work as the full-time RTO manager, I'm qualified (indistinct) fitness.

PN249

DEPUTY PRESIDENT CLANCY: I'm going to treat it as a statement. Have you got a copy of that in front of you, Mr Stewart?

PN250

MR STEWART: I don't, but I can remember what (indistinct) through though, that's okay.

PN251

DEPUTY PRESIDENT CLANCY: Well, I'll need to identify it. It was a document - can you just confirm you can recall these matters. It was a document that had the title 'RTO Trainer/Assessor Reference Paul Stewart, Fit College South Australia'. Mr Stewart?

PN252

MR STEWART: Sorry, I just dropped out there.

PN253

DEPUTY PRESIDENT CLANCY: You did. Can you recall that the document you prepared was a document with the title, 'RTO Trainer/Assessor Reference Paul Stewart, Fit College South Australia'?

PN254

MR STEWART: Correct.

PN255

DEPUTY PRESIDENT CLANCY: And that it was dated 26 June?

PN256

MR STEWART: Yes.

PN257

DEPUTY PRESIDENT CLANCY: It was a document of nearly three pages duration, or length?

PN258

MR STEWART: Correct.

PN259

DEPUTY PRESIDENT CLANCY: All right. So that was a document you prepared?

PN260

MR STEWART: Yes.

PN261

DEPUTY PRESIDENT CLANCY: And it was a true and accurate account?

PN262

MR STEWART: Yes.

PN263

DEPUTY PRESIDENT CLANCY: You don't have it with you at the moment, but have you reviewed it recently?

PN264

MR STEWART: Yes, I had a read through it over the weekend, yes.

PN265

DEPUTY PRESIDENT CLANCY: All right. Were there any changes you needed to make to that document?

PN266

MR STEWART: No. No, it's fine, as is.

PN267

DEPUTY PRESIDENT CLANCY: And you'd like that to form your - part of your evidence today, for this hearing?

PN268

MR STEWART: Yes.

PN269

DEPUTY PRESIDENT CLANCY: All right. Well, Ms Mifflin, subject to any questions you want to put to Mr Stewart, are there any objections to the reception of this statement of Mr Stewart?

PN270

MS MIFLIN: We have no objections to the tendering and no questions for Mr Stewart.

PN271

DEPUTY PRESIDENT CLANCY: Okay, thank you. We will receive Mr Stewart's statement in as evidence, it will be marked exhibit A2.

EXHIBIT #A2 WITNESS STATEMENT OF MR STEWART

PN272

DEPUTY PRESIDENT CLANCY: Mr Stewart, Ms Mifflin, who is from the United Workers Union, has indicated she doesn't have any questions for you. I'll just check whether any members of the Full Bench have any questions for you.

PN273

Lee C?

PN274

COMMISSIONER LEE: No, not from me, Deputy President.

PN275

DEPUTY PRESIDENT CLANCY: Thank you. O'Neill C?

PN276

COMMISSIONER O'NEILL: No, thank you.

PN277

DEPUTY PRESIDENT CLANCY: Thank you. Mr Rose, you didn't have any additional questions for Mr Stewart, did you?

PN278

MR ROSE: No.

PN279

DEPUTY PRESIDENT CLANCY: Thank you. Mr Stewart, thank you we've received your evidence, there's no questions - further questions to be put to you so

your evidence is completed, you're most welcome to stay on the line as an observer but equally you are excused from any further attendance.

PN280

MR STEWART: Okay, no problems.

PN281

DEPUTY PRESIDENT CLANCY: Thank you.

PN282

MR STEWART: Thanks a lot.

PN283

DEPUTY PRESIDENT CLANCY: Now, Mr Rose, your next witness, please?

PN284

MR ROSE: Janey Rose.

PN285

DEPUTY PRESIDENT CLANCY: All right. Perhaps if you could ask Ms Rose back into the room with you.

PN286

MR ROSE: Okay. Can I be excused to go get her?

PN287

DEPUTY PRESIDENT CLANCY: Yes, you can.

PN288

MR ROSE: She's just on her way now.

PN289

DEPUTY PRESIDENT CLANCY: If Ms Rose has the original link to the hearing, if she clicks on that she'll be admitted into the hearing room by my associate.

PN290

MR ROSE: I might just see if I can give her a hand for a minute.

PN291

DEPUTY PRESIDENT CLANCY: Yes. All right, thank you. While Ms Rose is in the room with you there, you better keep yourself on mute or else we'll have that feedback.

PN292

Thank you, Ms Rose, it's Clancy DP here, I'm sitting with Lee C and O'Neill C and we're going to receive your evidence now.

PN293

The evidence that you've provided is in a two page statement, or just over one page, have you got a copy of that in front of you?

PN294

MS ROSE: Not in front of me, no.

PN295

Maybe Mr Rose will be able to pass you a copy. Have you got a copy of it now?

PN296

MS ROSE: Yes, thank you.

PN297

DEPUTY PRESIDENT CLANCY: Thank you Now, the document there is just over a page long and that's your account. Is it a true and accurate account?

PN298

MS ROSE: Yes.

PN299

DEPUTY PRESIDENT CLANCY: Have you had the opportunity to review your statement recently?

PN300

MS ROSE: Not since I wrote it, not, but I do have some comments on that 12 hour thing. I'll let you lead, I'm not familiar with this.

PN301

DEPUTY PRESIDENT CLANCY: Okay. So, just in terms of the statement itself, are there any typographical changes or anything that's inaccurate there that you - - -

PN302

MS ROSE: No.

PN303

DEPUTY PRESIDENT CLANCY: You would like it for form part of your evidence for this hearing?

PN304

MS ROSE: Yes.

PN305

DEPUTY PRESIDENT CLANCY: You've mentioned there are some additional matters you wish to address, in relation to the 12 hours, is that right?

PN306

MS ROSE: Yes, I would, if that's all right?

PN307

DEPUTY PRESIDENT CLANCY: All right. Well, what we'll so is I'll take an affirmation now and we'll deal with your evidence. If you just listen to my associate, please.

PN308

THE ASSOCIATE: Ms Rose, please state your full name and address?

PN309

MS ROSE: Jane Doval(?) Rose, (address supplied).

<JANE DOVAL ROSE, AFFIRMED [11.02 AM]

EXAMINATION-IN-CHIEF BY THE DEPUTY PRESIDENT [11.02 AM]

PN310

DEPUTY PRESIDENT CLANCY: Thank you. Now, Ms Rose, I'll just confirm, you've prepared that statement, the statement is a page and a half, or a page and a quarter, correct?---Yes.

PN311

It's a true and accurate account?---Yes.

PN312

You haven't reviewed it recently but you don't believe there's any changes?---No.

PN313

You'd like it to form part of your evidence?---Yes.

PN314

I'll mark the statement of Ms Janey Rose, which is on pages 25 and 26 of the court book, as exhibit A3.

EXHIBIT #A3 WITNESS STATEMENT OF JANEY ROSE (PAGES 24-25 OF COURT BOOK)

PN315

DEPUTY PRESIDENT CLANCY: Now, there are some additional comments you wish to make, what are those?---Basically, it's about the 13 hour (indistinct). If you've got classes at 6 am and 6 pm, cutting the trainers off at the knees, at the 12 hour mark, I just think it's detrimental to the industry itself, because those are the busy hours.

PN316

Okay - - -?---Is 13 hours to include the 6 am and 6 pm, and that's standard across the industry. I think just about every gym tries to cover those classes.

PN317

Is there anything additional that you want to add before Ms Miflin might have some questions for you?---No, sir, that's it. Thank you.

PN318

Thank you. Now, Ms Miflin, who is a representative from the United Workers Union, might have some questions for you now, so if you could just listen to those, thank you.

*** JANE DOVAL ROSE

XN THE DEPUTY PRESIDENT

PN319

Ms Mifflin?

CROSS-EXAMINATION BY MS MIFLIN

[11.03 AM]

PN320

MS MIFLIN: Good morning, Ms Rose?---Good morning.

PN321

I just have a question about your statement, I'll just take you to - do you have it in front of you, page 25 of the court book?---Yes.

PN322

You've said here, at the middle paragraph:

PN323

I know Paul sometimes struggles with employees who want to cover a fellow workmate's shifts, but Paul cannot allow, due to the 10 hour break rule.

PN324

Can I just confirm what the rule is that you're referring to there?---The 10 hours, like you can't work - you have to have at least a 10 hour break, is that right. I'm not - look, I'm memberships manager, I don't employ people so I'm not that fully versed in it, but that's from what I understand.

PN325

That's okay?---So many of these trainers want to work, they come in, they're passionate and their team spirit with it, the wonderful part about having employees, is that they do cover each other. That's kind of what I meant.

PN326

Okay. It might be that you're referring to the minimum break that's required between the end of a shift and the start of another shift?---Yes, I (indistinct).

PN327

That's fine. So this application is looking to expand the span of hours in which a broken shift could be worked. Now, the example you've given there is that an employee who works four till nine cannot cover a workmate's shift, because it starts at 5 am the next day. This application would be unlikely to effect that scenario. But am I right in saying, if a worker started at 5 am they would not then be able to cover that afternoon shift anyway, right, under the existing 12 hour span?---I don't do the roster. I'm here for the 13 hour thing, because I believe very strongly in it.

PN328

Okay. All right. That's okay, I just wanted to clarify what rule it is you're referring to there, as I'm not sure that this particular application - that it's relevant to this particular application.

*** JANE DOVAL ROSE

XXN MS MIFLIN

PN329

I have no further questions. Thank you, Ms Rose.

PN330

DEPUTY PRESIDENT CLANCY: All right, thank you.

PN331

Mr Rose, any questions arising out of that evidence?

PN332

MR ROSE: Yes, I do have some questions. Can I ask them to Ms Rose now?

PN333

DEPUTY PRESIDENT CLANCY: Yes, but what we'll do is perhaps if you could both just talk loudly so that we don't have the two microphones going.

PN334

MR ROSE: Sorry.

RE-EXAMINATION BY MR ROSE

[11.06 AM]

PN335

MR ROSE: Regarding the request of trainers to work these extra shifts, Ms Rose, how important do you feel it is for them to do this, in order of gaining stable hours within the industry, as we've been discussing it's hard to give stable hours, under the current laws. So how will this - if we do increase it to 13 hours, or if the Fair Work Commission increases it to 13 hours, how is that going to change the way that we can offer more hours to our trainers?

PN336

DEPUTY PRESIDENT CLANCY: Ms Rose, if you could put yourself on - that's it?---Okay. I will answer that by saying these guys are very passionate. They come in with what - they want to work and they're being thwarted. Just - it's not a one size fits all, so if they come in as employees and they want to do personal training, under the one roof kind of thing, they're just - they're just - they're over regulated, I think. There are too many rules for these guys. They've paid a lot of money for their training certificates, their personal training certificates and their qualifications and they're - most of them have to go to other industries, it doesn't make any sense to me. I don't know if that's - I don't know if that's addressing the question.

PN337

MR ROSE: Yes, that's fine, thank you.

PN338

DEPUTY PRESIDENT CLANCY: All right, is there anything further, Mr Rose?

PN339

MR ROSE: Yes, one more question.

*** JANE DOVAL ROSE

RXN MR ROSE

PN340

Ms Rose, how many, out of all the workers, I'll say, that you have seen over the years, since 2014 I think you started, how many of those workers converted to become contractors, due to some of these rules that we're discussing today? Ballpark?---Well, all of the ones that I know of, except our current employees. A lot of them have just dropped out completely and gone back to building or hospitality or whatever. They try to do the personal training, you know, contractor personal training, but they're not - they fall by the wayside there too because they don't realise that - they've got to (indistinct), they've got to pay their taxes, they've got to get their gear, they've got to schedule, you know. Whereas in here, under our blanket and under any gyms blanket, I guess, most of - all of that stuff's done for them. They just pay a little bit of rent thing. But these guys just don't realise how hard it is to do both. It's common for lots of people to have two jobs, but these guys actually want to work in the industry and I think they just find it too hard.

PN341

With the workers that become contractors, how many hours are we talking about that they're pulling when this happens? They're no longer employees, they opt to become contractors, how many hours a day are some of these people working?---I would say, just from - just from what I hear them talking about, they'll be lucky to pull a living wage, where they're actually getting paid from their clients, but the rest of the time is trying to get clients and do their advertising and do all the other stuff that they need to do, as a small business, but they're not qualified as a small business but they're trying to get into it. One guy there, he said he was doing at least 18 hours a day, you know. I don't know how that's physically possible, but you don't turn your brain off. You're sitting there, you're trying to relax, but you're still thinking, 'How can I do this? How can I do this? How can I do this?' He - yes, he burned out real quick.

PN342

Do you think that these people want to become contractors, or if I was in a position where I could offer more stable permanent part-time hours, or even full-time hours, would they prefer to just be trainers on the floor, or do you think they actually like doing more of the contractor work? It seems that they're being pushed in to being contractors prematurely. I know that you've worked with a lot of these people, so what's your opinion on are they being pushed into the contractor model because of the employment laws?---I think so. I think when they come here they love the shelter of it, they love the umbrella, they love the security, but there's just not enough hours for them. Being pushed in to - I think a lot of people have high ideals of, 'Yes, I'll be my own business' and everything but, inevitably, they love the employment element of it where they're - the bosses pay their super, they've got reliable hours. It's a set - they can build their lifestyle around it, whereas if they're just a contractor you've got more hours trying to survive doing that and then, as I said, supplementing with another job, outside the field. It gets really messy for these guys.

*** JANE DOVAL ROSE

RXN MR ROSE

PN343

My last question is regarding, obviously in your position of memberships manager, how many members are contacting you, on, let's say, a weekly basis

wanting to train with trainers, but you're having to say no, or you can't adjust their schedule to fit them in, because of mainly the peak hour issue that we're discussing today. How many of these types of conversations would we be having a week?---That's really hard to judge, because I have passed a lot of it off onto the trainers themselves to do, like to schedule - they're on a set schedule and they know what they can work and stuff. But the inquiries are incidental in emails, I would say minimum 20 a week, just general, and then I will pass them on to the trainers and then the trainers deal with their own schedules. But the PTs aren't happening because of it. I see the schedule up on my computer and I just see the PTs weren't happening.

PN344

If I was to break that down, if we're talking 20 a week - - -?---That's a guess, that's an average.

PN345

Let's just say it's 20 and the average personal training session is an hour, and we, at TTF, as an example, we have three trainers working per day, on the shifts already outlined earlier, we're talking 20 hours a week, spread across three different trainers, so that's on average, if we were to break it down, around 6.3 hours a week these trainers would be missing out on if we were to - if we were allowed to (indistinct).

PN346

THE WITNESS: Sorry. The question - sorry, question?

PN347

DEPUTY PRESIDENT CLANCY: I think it was really in the nature of a submission, rather than a question, so we might leave it at that. Ms Rose gave some evidence about how many inquiries she might field, and if you want to extrapolate that out into a proposition, Mr Rose, you can do that when you make final submissions.

PN348

THE WITNESS: Excuse me, can I just say that that is a ballpark. I mean on one email I might cover three different topics, so I haven't - I haven't paid too much attention to the PTs because I do hand it back over to the trainers. But I just know that there - they want to do it. They want to do it, they want to work. As I said before, with the spread, which I - the 13 hours, extending it to 13 hours, just takes the red tape off of the industry that, you know, that's what it is in the industry. It would be similar, I don't know, you out feeding cattle, so you're halfway done and you run out of time so you stop feeding cows. Forget it, it doesn't work that way, you've got to get the job done. I know that these guys would love to be offered full-time employment, they would love it. That's the biggest sadness that I have is seeing these guys come in as casual, without - they would do it in a heartbeat. The employees love it the employer's hands are tied. They can't. So it doesn't make any sense to me. It's like cutting everybody off at the knees. I'm sorry, I went on a little tangent there, but that's it.

*** JANE DOVAL ROSE

RXN MR ROSE

PN349

DEPUTY PRESIDENT CLANCY: All right, thank you.

PN350

Ms Mifflin, noting that you'll have the opportunity to make submissions, was there anything arising out of that series of questions that you need to re-address?

FURTHER CROSS-EXAMINATION BY MS MIFLIN

[11.18 AM]

PN351

MS MIFLIN: Just one question, Ms Rose. In TTF gym, is that the only gym you've worked at?---Yes.

PN352

So when you talk about clients calling about wanting certain hours or certain personal trainers, your reference point is TTF gym?---My reference point is much bigger than that. From locker rooms at other places that I have worked that are talking about gyms and from the members themselves, who come in to trial, that talk about other gyms and talk about trainers and, yes, like I'm not really under a mushroom here but, yes, absolutely TTF, I actually don't want to go anywhere else, the culture here is really good and the fact that these guys are employees is a huge - and it's a really great team spirit that we've got. We'd love to be able to offer more of it and help other trainers hours and stuff. Does that address your question?

PN353

Yes, it does, but I just - I guess you speak about - you said, earlier, that people want permanent full-time employment and you would love to be able to give it, you're talking there, specifically, about the workers then at TTF gym?---I'm talking about the people, trainers or - like I don't just go to work and come home. Like I've talked to the trainers that have come through here as well, they've gone off and done other things. I've talked to people who are no longer in the industry who come in to do a trail with us. A lot of them are PTs, you'd be surprised. They're personal trainers, they're coming in to do classes with us and join as members, and they said they got out of the industry, they couldn't get the hours.

PN354

Great?---Yes. So it's a bit bigger than just TTF perspective, it's all around, going from what I hear.

PN355

Okay. I have no further questions, thank you.

PN356

DEPUTY PRESIDENT CLANCY: Thank you. Lee C, any questions?

PN357

COMMISSIONER LEE: No, nothing for me, thanks.

*** JANE DOVAL ROSE

FXXN MS MIFLIN

PN358

DEPUTY PRESIDENT CLANCY: Thank you. O'Neill C?

PN359

COMMISSIONER O'NEILL: No, thank you.

PN360

DEPUTY PRESIDENT CLANCY: Thank you. Ms Rose, thank you for your evidence this morning. You are welcome to continue to observe the proceedings but you're also, equally, you're excused from further attendance. If you do stay on, please keep yourself on mute so we don't have those feedback issues. Thank you.

<THE WITNESS WITHDREW

[11.20 AM]

PN361

DEPUTY PRESIDENT CLANCY: Thank you. Now, Mr Rose, your next witness, please?

PN362

MR ROSE: Thank you, Deputy President. Is Mr Mark Haylock in the - - -

PN363

DEPUTY PRESIDENT CLANCY: He is in the lobby, so we'll admit Mr Haylock in, thank you.

PN364

Mr Haylock, are you there, please? If you are there you look as though you're on mute.

PN365

I'm not sure what's happening with Mr Haylock. I'll just ask my associate to confirm. Have we got Mr Haylock admitted, or has his connection dropped out, please?

PN366

THE ASSOCIATE: He's been admitted. I'll just try dialling him in now.

PN367

DEPUTY PRESIDENT CLANCY: Thank you.

PN368

Have we got anyone else in the lobby at the moment? Is Mr Medico-Lewis giving evidence today, or are you just relying on his statement?

PN369

MR ROSE: No, he wanted to. He sent me a text earlier saying he wasn't allowed in. He clicked the link to try to get in but apparently somebody wouldn't let him in because he didn't send his information in, on Friday, so I'm not sure what's going on there.

*** JANE DOVAL ROSE

FXXN MS MIFLIN

PN370

DEPUTY PRESIDENT CLANCY: It sounds like he didn't send his information in on Friday, so it wasn't clear who he was. Perhaps if, while we're dealing with - or after we've dealt with Mr Haylock we'll come back to Mr Medico-Lewis.

PN371

Good morning, Mr Haylock, you're on mute there. My name is Clancy DP, can you hear and see me?

PN372

MR HAYLOCK: Yes, good morning, sir. Thank you.

PN373

DEPUTY PRESIDENT CLANCY: I'm a member of a Full Bench that's hearing this application, sitting with Lee C and O'Neill C. We're going to take your evidence now. The first thing we'll do is my associate will take an affirmation from you, all right?

PN374

MR HAYCOCK: Yes, thank you.

PN375

DEPUTY PRESIDENT CLANCY: Thank you.

PN376

THE ASSOCIATE: Mr Haylock, please state your full name and address?

PN377

MR HAYLOCK: Mark Geoffrey Haylock, (address supplied).

<MARK GEOFFREY HAYLOCK, AFFIRMED [11.24 AM]

EXAMINATION-IN-CHIEF BY THE DEPUTY PRESIDENT [11.24 AM]

PN378

DEPUTY PRESIDENT CLANCY: Thank you. Mr Haylock, you have prepared a statement for this hearing, is that correct?---Yes, sir.

PN379

Do you have a copy of it in front of you?---No, I don't.

PN380

All right. Do you have a copy of the digital court book in front of you?---One moment. Yes, I have now, thank you.

PN381

Thank you. If you could go to page 28 of that document, please? The red number 28, at the bottom of the page?---Yes.

*** MARK GEOFFREY HAYLOCK

XN THE DEPUTY PRESIDENT

PN382

Tell me when you're there, please?---Yes.

PN383

You've got it?---Yes, I am there.

PN384

So that's the statement you have completed?---Yes, that's correct.

PN385

Thank you. You have reviewed that recently?---Yes.

PN386

Is it a true and accurate account?---Yes, sir.

PN387

Do you need to make any changes to it?---No, I'm happy with that.

PN388

Thank you. And you'd like it to form part of your evidence for this hearing today?---Yes, thank you.

PN389

Ms Mifflin, subject to any questions you might have in cross-examination, any objections to the reception of this statement?

PN390

MS MIFLIN: No objections, thank you, Deputy President.

PN391

DEPUTY PRESIDENT CLANCY: Thank you. Mr Haylock's statement, which appears at page 28 of the court book, will be marked exhibit A4.

**EXHIBIT #A4 WITNESS STATEMENT OF MARK HAYLOCK
(PAGE 28 OF COURT BOOK)**

PN392

DEPUTY PRESIDENT CLANCY: Mr Rose, are there any additional questions that you are going to put to Mr Haylock, in addition to that which is contained in his statement?

EXAMINATION-IN-CHIEF BY MR ROSE

[11.26 AM]

PN393

MR ROSE: Yes.

PN394

Hi, Mark?---Hi, Paul.

*** MARK GEOFFREY HAYLOCK

XN MR ROSE

PN395

Mark, in your opinion, how do you feel this increase from 12 hours to 13 hours is going to benefit workers in our industry, mainly obviously employees and - what's your opinion on this application, Mark?---Well, Paul, I think the extension will help enable young PTs to stay employees within the business. Because what I see the tendency is for young PTs to get out of employment and go into self-employment, sole trader, subcontracts, to allow themselves to work the hours that they're clients are demanding, which is before and after work. That's the main reason. Sorry, it's quite a deep argument, but what I see is young people moving out of employment to work the hours that they need to work. Usually prematurely, when they don't know how to run their own business and, unfortunately it ends up poorly for them and the industry.

PN396

Absolutely. Across the board there seems to be some confusion, possibly, from the UWU, in regards to what peak hours are, in our industry, and they're not sure if 6 am and 6 pm are, in fact, peak hours in all gyms. So I'd like your opinion on what peak hours are of not just my gym and not just your gym, just the industry as a whole, what's the general consensus as to what peak hours are, in our industry?---It's before and after business hours, 9 am to 5 pm, so it's before that and after that. In the morning it's earlier, people like to be out of the gyms by 7.30, 8 o'clock, so they can get to work on time, and after work people are rushing to get there, at best, by six. That's why all the classes are at 6 pm and later.

PN397

With current laws the way they are, Mark, are you able to offer full-time employment to employees?---Within my business it's not a lot of scope for full-time employees. We're pushed towards employing more casuals.

PN398

What's the - sorry, did you have anything to add there, sorry to interrupt?---No, not really. It's just that they work - have to work either the morning or the evening.

PN399

Do you find that because you're forced to do more casuals, is that resulting in - I don't want to say happy employment, but do you have a higher turnover because of casuals?---Young PTs will have to have another job because they don't get enough hours out of a gym, when they're first starting out, because they're still learning their way. They're not an asset while they're still basically in an apprenticeship, they come out of a three month PT course and, you know, they've got to learn on the job.

PN400

So, essentially, they end up - they end up working far more than a 13 hour span anyway, by the time you factor in their second job, right?---Well, yes, probably. Yes.

*** MARK GEOFFREY HAYLOCK

XN MR ROSE

PN401

Whereas if we could potentially have a shift in the industry and move towards having the support of our award, back up our industry needs, we might be - employers, such as yourself and myself, we might be in a better position to offer better employment packages to these types of people, so we can pay, instead of offering casual hours, one or two hours in the morning - - -

PN402

MS MIFLIN: Your Honour, there appears to be a proposition being put to the witness here that is leading in nature that we'd object to.

PN403

DEPUTY PRESIDENT CLANCY: Is there a question there, Mr Rose?

PN404

MR ROSE: Can you offer better employment packages to workers, if we have a 13 hour span day?---Yes, they'd definitely be able to get more hours, they'll be able to work when there is the need for them to work, by their clients, by the customer. It would enable us to, you know, have mentor type roles and, ideally, apprenticeships, in the long term. So, yes.

PN405

No further question.

PN406

DEPUTY PRESIDENT CLANCY: Thank you. Mr Haylock, Ms Miflin, from the United Workers Union may have some questions for you now, please.

CROSS-EXAMINATION BY MS MIFLIN

[11.32 AM]

PN407

MS MIFLIN: Thank you, Mr Haylock. Mr Haylock, you've just said, in response to Mr Rose's question, would you be able to offer more hours, you've just said, 'Yes, we could get more hours if the 13 hour span was awarded', what would be the nature, if you were to be granted a 13 hour span, what would be the nature of those extra hours you could offer? Would you continue to employ people as subcontractors, or would you then be able to put them on as permanent full-timers?---We'd be able to put people on more full-time. At the moment they can't work both morning and evening, so we have more people doing the roles, if that makes sense. So we have more - let's say we might have six casuals instead of two or three full-time people. The casuals work at other places as well.

PN408

Mr Haylock, you own and manage your own gym, that's right, Peak 24 Fitness?---Yes.

PN409

Do you have any permanent full-timers on?---No.

*** MARK GEOFFREY HAYLOCK

XXN MS MIFLIN

PN410

How are your workers employed?---We have three subcontractors, one of which is about to change back to casual employee, because she found it too stressful to have a rent situation over her head, and she's going to go back and study part-time. Then we have four casuals that work their shifts and do some classes, and we have one - two sub-contractors that just come in and do PT classes, sorry, group classes for us.

PN411

Okay. If I can take you to page 28 of the court book, which is your statement, Mr Haylock, you've said, in the second paragraph:

PN412

The busiest time in health and fitness is, by far, five till 8 am and five till 8 pm.

PN413

You've then gone on, in the fourth paragraph, to say that:

PN414

Personal trainers quit, as employees, to work as subcontractors so they can work two shifts, both five till 8 am.

PN415

And then you've said 'pm'. Can I confirm that you there mean five till 8 pm?---Yes, that's right. That's correct.

PN416

So am I right in saying that if a span of hours is increased to 13, that a sole worker, a singular worker, would not be able to take on a shift starting at 5 am anyway, and finishing at 8 pm?---Yes, that's right.

PN417

So how would a 13 hour span then assist you in your rostering?---So that 5 am to 8 pm, that's the floor times, when people first start and they - you know, last finish. But the majority would be 6 am to 7 pm. They are the peak times.

PN418

A 7 pm class?---Finish. A 6 pm class, yes.

PN419

MR ROSE: Am I able to jump in there, or not?

PN420

DEPUTY PRESIDENT CLANCY: No, no. Not that this point.

PN421

MR ROSE: Okay, sorry.

PN422

DEPUTY PRESIDENT CLANCY: You may have the opportunity to re-examine after cross-examination is completed.

*** MARK GEOFFREY HAYLOCK

XXN MS MIFLIN

PN423

MS MIFLIN: Would you, if a 13 hour span was granted, how would it effect your employment? How would you employ workers? Rather, I'll re-word the question. What type of shift would you offer to a full-time worker, if you were to put them on as full-time permanent?---6 am to 7 pm. For example, on a Monday we run a 6 am and 6.30 am, two classes back-to-back and we - the identical two classes are run at 6 pm as well. Ideally, the same person runs those classes, because they're exactly the same and that's what they would like to do. But - - -

PN424

So how many hours would they be given, on a singular shift, then?---Probably three or four in the morning and three or definitely four in the evening.

PN425

What time would they shift - sorry, I'm just confused. What time would their shift be then?---6 am till 9 am and, in the evening, 3 pm till 7 pm.

PN426

So that's seven hour days?---Yes.

PN427

Did you say three till 7 pm?---Yes, that's right.

PN428

So that would be seven hour days?---Yes.

PN429

How many days a week could you offer that?---I would have to really drill down in to that, because at the moment I've got six or seven people, casuals, doing the work. So I couldn't, you know, guarantee anything here right now. But that's the sort of hours we'd be talking on.

PN430

So you would - but it's not necessarily the case then that you would be able to employ people in a more full-time permanent position, if this was offered, given you've got six or seven casual employees and if you did seven hour days they would need to be making up a full working week, and I'm not sure they could do that?---It would give me the opportunity to do that, if the business required it, yes.

PN431

Does your business require it?---That'd be something for us to manage and to work out between us, between the owners, as to how we managed our staff then, if that was the case.

*** MARK GEOFFREY HAYLOCK

XXN MS MIFLIN

PN432

Well, given your answer then, I guess what I want to put to you is that it's not necessarily something that you would be implementing at your gym, if a 13 hour span were awarded anyway?---Well, right now it's out of the question. But to be able to have that opportunity would be great for our business and for the employee.

PN433

In what way, if you've just said you might not do it anyway?

PN434

MR ROSE: He didn't say that.

PN435

THE WITNESS: Well, I've got some loyal employees, at the minute. If this comes in I'm not going to sack them all if I can get two full-timers in. It would take some time to evolve, this sort of change.

PN436

MS MIFLIN: All right. I have no further questions, thanks.

PN437

DEPUTY PRESIDENT CLANCY: Thank you. Anything in re-examination, Mr Rose? And when I say re-examination, it has to be anything arising out of the questions and answers that came from Ms Miflin's cross-examination.

PN438

MR ROSE: Yes, sure.

RE-EXAMINATION BY MR ROSE

[11.40 AM]

PN439

MR ROSE: Just in respect to the questions, I can't remember exactly how she poised it to Mr Haylock, but just in respect suggesting that he won't offer it anyway, if this rule was to get passed. Mark, would I be right in assuming that if this did get passed, the increase of 12 to 13 hours, it would be only obvious that you'd be in a position to offer better hours to your existing employees, which is only going to result in a better employment package to those staff, is that right?---Yes, that's true. But it's not just about me, it's about the industry and it's not because it suits my business it's because what - it's my opinion of what I think is the best thing for the industry.

PN440

Absolutely. With the - in respects to the industry as well, because that is one thing I pointed before you came on was that this application is not actually about TTF, this is about the industry as a whole as well, and I agree with you on that, that's how we should be treating it. Would we be right in assuming that the - about I believe it's around 80 per cent of all the gyms, Australia-wide, are small businesses, we're not all large?

PN441

MS MIFLIN: Is there a question - - -

PN442

MR ROSE: That was a question.

MARK GEOFFREY HAYLOCK

RXN MR ROSE

PN443

DEPUTY PRESIDENT CLANCY: Mr Rose, again, that didn't arise out of cross-examination.

PN444

MR ROSE: Okay. No further questions.

PN445

DEPUTY PRESIDENT CLANCY: Thank you.

PN446

Lee C, any questions from you?

PN447

COMMISSIONER LEE: No, nothing from me.

PN448

DEPUTY PRESIDENT CLANCY: Thank you. O'Neill C?

PN449

COMMISSIONER O'NEILL: No, thank you.

PN450

DEPUTY PRESIDENT CLANCY: Thank you. Mr Haylock, thank you very much for your evidence this morning. You are welcome to stay online, as an observer, for the rest of the hearing but equally, if you need to go, you're excused from further attendance?---Thank you very much, panel.

PN451

Thank you.

<THE WITNESS WITHDREW

[11.42 AM]

PN452

DEPUTY PRESIDENT CLANCY: Mr Rose, the - can I take it that your final witness is Mr Medico-Lewis?

PN453

MR ROSE: Yes.

PN454

DEPUTY PRESIDENT CLANCY: Yes, if we can get him online. All right. Well, I'll just see if we can do that now. I'll check with my associate whether we have Mr Medico-Lewis's contact details.

PN455

THE ASSOCIATE: He hasn't sent through his contact details. I've just sent you through the link, Mr Rose, if that could be forwarded to his email.

PN456

MR ROSE: Sure.

*** MARK GEOFFREY HAYLOCK

RXN MR ROSE

PN457

DEPUTY PRESIDENT CLANCY: What we might do is we'll adjourn for a short period so that Mr Rose can contact Mr Medico-Lewis and he can then connect onto that link, rather than waiting for it to happen now. So we'll come back online at 10 minutes to 12.

PN458

MR ROSE: Sure. And just to confirm, I haven't received any email links.

PN459

THE ASSOCIATE: Okay. I'll send that through again, Mr Rose.

PN460

MR ROSE: No worries.

PN461

DEPUTY PRESIDENT CLANCY: All right, thank you. We'll adjourn till 10 to 12.

SHORT ADJOURNMENT

[11.43 AM]

RESUMED

[11.55 AM]

PN462

MR ROSE: Hello, can you hear me?

PN463

DEPUTY PRESIDENT CLANCY: Yes.

PN464

MR ROSE: Hello. Sorry, I'm late.

PN465

DEPUTY PRESIDENT CLANCY: How did you get on with Mr Del Medico-Lewis?

PN466

MR ROSE: He was out. He assumed he wasn't in when they rejected him the first time, so he went out, but he's rushing back. He said that he'd be back in 20 minutes, to log on, which was about 15 minutes ago, so we're not ready for him.

PN467

DEPUTY PRESIDENT CLANCY: All right. What are you doing with this letter of resignation? Is the person who submitted that going to be giving - or is it just going to be just part of your documentary material?

PN468

MR ROSE: Just part of the documentary, yes.

PN469

DEPUTY PRESIDENT CLANCY: All right.

PN470

Ms Mifflin, one option might be to, if you're comfortable with this, is to interpose Mr Del Medico-Lewis, when he does get online, and proceed with one of your witnesses. Are you comfortable doing that?

PN471

MS MIFLIN: Yes, that's fine, thank you, Deputy President. Both my witnesses are available to log on when you're ready.

PN472

DEPUTY PRESIDENT CLANCY: All right. Well, who would you like to call first?

PN473

MS MIFLIN: We'll commence with Ms Kirsty Pepper.

PN474

DEPUTY PRESIDENT CLANCY: All right, thank you.

PN475

Mr Rose, we'll hear from Ms Pepper first, before Mr Del Medico-Lewis, and that way we can keep moving along, all right?

PN476

MR ROSE: Yes, sure.

PN477

DEPUTY PRESIDENT CLANCY: All right, thank you. If we could admit Ms Pepper into the hearing room, please?

PN478

Good morning, Ms Pepper, it's Clancy DP, can you hear and see me?

PN479

MS PEPPER: Yes, I can.

PN480

DEPUTY PRESIDENT CLANCY: Thank you. I'm a member of the Full Bench that's hearing this application, together with Lee C and O'Neill C. We're going to receive your evidence now. So the first thing that we'll do is my associate will take an affirmation from you now.

PN481

THE ASSOCIATE: Ms Pepper, please state your full name and address?

PN482

MS PEPPER: Kirsty Lee Pepper, (address supplied).

<KIRSTIE LEE PEPPER, AFFIRMED

[11.58 AM]

PN483

DEPUTY PRESIDENT CLANCY: Thank you. Ms Miflin, do you want to take Ms Pepper through the reception of her witness statement - - -

PN484

MS MIFLIN: I will.

PN485

DEPUTY PRESIDENT CLANCY: - - - or would you like me to? Okay, thank you.

PN486

MS MIFLIN: Sorry.

PN487

DEPUTY PRESIDENT CLANCY: You're welcome to do so. No, you can do that.

PN488

MS MIFLIN: Hi, Ms Pepper, can I just confirm that you have a copy of your statement in front of you? It's at court book page 43?---Yes, I'll just bring that up. Yes.

PN489

Can I confirm that this is a true and accurate statement?---Yes, that's correct.

PN490

Are there any changes that you would like to make for today?---No.

PN491

Thank you. Could I have that statement tendered, please, your Honours?

PN492

DEPUTY PRESIDENT CLANCY: Yes. Mr Rose, subject to any questions you might have for Ms Pepper, do you have any objection to the reception of her witness statement into evidence?

PN493

MR ROSE: No, Deputy Commissioner.

PN494

DEPUTY PRESIDENT CLANCY: Thank you. I'll mark the witness statement of Ms Kirsty Pepper, which appears in the court book from pages 43 to 45, as exhibit R1.

**EXHIBIT #R1 WITNESS STATEMENT OF KIRSTY PEPPER
(PAGES 43-45 OF COURT BOOK)**

*** KIRSTIE LEE PEPPER

XN MS MIFLIN

PN495

DEPUTY PRESIDENT CLANCY: Thank you. Any additional questions, Ms Miflin?

PN496

MS MIFLIN: Thank you, Deputy President, just a few questions today, specifically, with respect to an email that was received, from the applicant, regarding the nature of Ms Pepper's employment.

PN497

So for the benefit of the applicant and the Full Bench, I might just take you to your statement, Ms Pepper. On page 43, paragraph 2, you stated that you were employed by [REDACTED], I'll refer to it as [REDACTED], the [REDACTED], [REDACTED], can I confirm how you are employed by [REDACTED]?---Yes, I'm a full-time employee.

PN498

Employed directly by [REDACTED], or by the trust that operates [REDACTED]? Okay, thank you. And you've stated, in paragraph 3 and 4 that you also have worked for numerous centres, including [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], that's quite a list, and in various roles. Can I confirm the type of employment that you have - or, rather, how you have been employed, in the past, by these types of organisations?---Yes. A variety of different employment types. So I've had, obviously, full-time employment, part-time employment, casual and as a contractor.

PN499

So I will just specifically ask you about one of your previous roles. In paragraph 12 of your statement, which is on page 44, for the benefit of those present, you've stated that you've previously worked as a personal trainer, doing broken shifts. What type of employment was that, and who was it for?---That was for [REDACTED] [REDACTED]. That was - I actually had to do a dual role there, so I was a group fitness coordinator, which was part-time and then as a personal trainer, that was contractor.

PN500

So the part-time role you were employed directly?---Yes.

PN501

So they're my questions with respect to the nature of Ms Pepper's employment, which was requested by the applicant. Ms Pepper, if it's okay, I might just ask you a couple more questions about your statement, for the benefit of the Full Bench. On page - sorry, I had my old reference. That's okay. On page 43 you have stated that you - sorry, you've listed that you've worked in a lot of big gyms and then on page - I'll take you to the applicant's submissions, which, in the digital court book, are on page 18. The applicant has responded to a number of things in your statement, and on page 18 has stated that - Mr Rose, apologies, has stated that:

*** KIRSTIE LEE PEPPER

XN MS MIFLIN

PN502

Gyms generally don't have enough work to roster straight shifts, like 5 am till 2 pm, or 12 pm till 9 pm, or nine till 5 pm, there's just not enough demand for businesses in our industry, during those times so basically everybody misses out, until the employee converts to contractor to side-step the law and doing it anyway but, inevitably, suffering burnout -

PN503

I believe in respect to taking on a sole contractor role:

PN504

because they then take on other work that the gym usually does.

PN505

You've listed a lot of roles that you've had in big sorts of gyms, what sort of shifts are typically available for staff, in the gyms that you've worked - I suppose what I'm asking is, can non-management staff get continuous shifts?---Yes. As you've mentioned, a lot of the centres that I've worked in are sort of big health clubs or like council leisure centres, so aside from management roles, you would also have gym floor staff. There's always someone on the gym floor, or there's membership sales consultants, reception and admin staff and they're there across the board, whenever the clubs are open. So we would have normally had people working from, in a big centre, six in the morning, there at six in the morning. So, like I had mentioned in my submission, you'd have someone from six until two. You'd have then a cross-over for maybe someone 12 till eight. Someone on from later in the afternoon through until the evening. So any centre I've worked in, there was usually someone there (indistinct).

PN506

Okay. So it's possible to roster on a non management staff in continuous shifts then, in your opinion, given the experience you've had?---Certainly in my role right now, at [REDACTED], we have - the gym can't be unattended, so if the gym is open there is someone on the gym floor. So our staff, again, could start prior to 6 o'clock in the morning and they'd work through until two in the afternoon, and then someone else would come on until the evening, until close, six till 10.

PN507

Thanks. So speaking about your current role at [REDACTED], on page 21 of the court book the applicant, referring to your statement, has stated that, 'She', being yourself:

PN508

was lucky enough to be offered a management position that allowed her to do multitasks -

PN509

as you stated:

*** KIRSTIE LEE PEPPER

XN MS MIFLIN

PN510

admin, instructing, thus she -

PN511

being yourself:

PN512

enjoyed straight shifts while casuals covered the morning ones for her. Those casuals, no doubt, had a high turnover, for lack of stability. I bet very few, if any, staff she managed could ever be offered full-time work, with current laws.

PN513

Can you give a picture to the Full Bench about the types of shifts that non management staff do, at [REDACTED], where you currently work?---Yes, sure. We do - there are casual group fitness instructors, for example, who, like if it's one aerobics class in the morning, they would be casual, so they would come in to do that. I should probably highlight that I don't do mornings, because I've chosen not to. Like I probably made pretty clear, in my submission, that I think working 6 am and 6 pm is insane, it just destroys your quality of life, so I made the decision that I want to work evenings, not mornings. The other staff - I'm sort of repeating myself from before, most of them are part-time, on the gym floor. The reason that they are part-time as well, to give you a bit more insight into my role, I'm full-time and because I'm full-time I can't do any personal training, even if I wanted to, because I have a 38 hour week role. So, based on the award, if I wanted to do personal training, that would then put me into overtime. So I'm actually not allowed to take on any additional hours. So for people working on the gym floor, if we were to give them full-time gym floor hours, then they can't do any personal training and they can't teach any classes, which is what the majority of them want to do. So there's certainly opportunities there for them, if they wanted to work just on the gym floor full-time, they could. Most of them are employed part-time, on shifts, so that they can then take on the more fitness work as well. But for people who aren't specifically in the gym, like the sales staff, the reception staff, yes, they're full-time employees.

PN514

Could you explain a little bit further, you've said that people prefer to do part-time roles so that they can do personal training work. Why that arrangement? How would they do the personal training work? As a sole contractor that would be under their own name, is that right?---No. Well, at [REDACTED], for example, they're employees. Just reiterating what I said before, if we gave them 38 hours a week on the gym floor they wouldn't be able to do personal training as well, because that would put them into overtime. However, if they have a 20 hour a week permanent part-time contract working gym floor hours, as a gym instructor, they can then also do personal training clients, they can teach group fitness classes and all that sort of stuff as well. So they could have full-time hours, but it would be a mixture of different roles, if that makes sense.

PN515

That makes sense. So both options are available to them?---Yes. I mean that's what I did when I was at [REDACTED], I had 20 hour a week group fitness management role and I taught 20 group fitness classes as well. It was permanent part-time and casual, but it added up into full-time hours.

*** KIRSTIE LEE PEPPER

XN MS MIFLIN

PN516

Can I just now ask you some questions about the broken shifts that you used to work. On page 44 of the court book, at paragraph 12, you worked mornings and evenings, as a personal trainer, and that was at [REDACTED], is that right?---Yes.

PN517

That was at [REDACTED]. Okay. So what sort of shifts would you typically do? What sort of broken shifts did you typically do?---Again, I was literally - it catered to the clients. So I was relatively new as a personal trainer then and I mean when you're new in this industry you just want clients, so you tend to work insane hours. So I mean I would start at 5.30 in the morning sometimes and train clients until mid-morning. Then I would go home pretty much fall asleep or walk my dog or do errands or whatever, and then come back at 4 o'clock and train people again, into the evening. That was just pretty much a cycle every day.

PN518

Were you employed direction by [REDACTED], or were you a sole contractor?---I was both.

PN519

Both. How did that work? How did you work two types of employment?---Yes. So, again, I had a group fitness management role there, which was 10 hours a week permanent part-time, and then as a personal trainer, that was contracted.

PN520

That would be under your own ABN?---That's correct.

PN521

Okay. So what type of shifts would you work then, if you were doing a broken shift? You would start as early as?---5.30 in the morning.

PN522

And finish as late as?---Sometimes - again, this was as a contractor, I would go through until (indistinct) at night.

PN523

Okay. So if you were employed, I suppose, permanently, you wouldn't have been able to do those hours anyway, because of the 12 hour span, is that right?---Legally, that's correct, yes. But, in my experience, certainly in [REDACTED] in any gym that I've been in, people just do it anyway.

PN524

Work even beyond a 13 hour span, is that right?---Pretty much. In [REDACTED], as an example, they're all permanent employees but they're in charge of booking their own clients. So they could book them at six in the morning, they could book them at 8 o'clock at night.

*** KIRSTIE LEE PEPPER

XN MS MIFLIN

PN525

Do you think there's an appetite - no, I'll start again. In your statement, on page - sorry, apologies, 45 of the court book, you've said that:

PN526

Nearly every trainer I know has lived like this at some point.

PN527

That is, working broken shifts:

PN528

Eventually they choose between mornings or evenings, but not both, as I have done.

PN529

Yourself have chosen not to work mornings.

PN530

Alternatively, they will leave the industry. The turnover of people within the fitness industry is extremely high and I believe working broken shifts is one of the reasons why.

PN531

In your opinion, do you think that there is an appetite to be working broken shifts consistently, every day?---Definitely not, no. I mean my experience, I'm just thinking when I looked after the personal trainers, at [REDACTED], which was one of my previous roles, I know all the trainers there would choose mornings or evenings. So when someone would inquire for personal training, if they said they wanted to train at 6 o'clock at night, I knew that there were certain trainers who might have fit that client, but there was no point asking them because they're not going to work that hour. They would either want to work in the evenings, and just do solid evenings across the week, or they would do mornings across the week, but no one wants to do both.

PN532

No one wants to do both. Okay. Just one more question, you are working in a management role now, do you have any role in rostering, or is that not part of your role?---I roster the group fitness instructors.

PN533

So then do you think that there is an issue with the existing 12 hour span, in terms of people being able to access full-time permanent work?---No, I don't.

PN534

I have no further questions, thank you.

PN535

DEPUTY PRESIDENT CLANCY: Question of clarification, please, Ms Pepper. You gave some evidence about some employees working on a permanent part-time hours basis, fulfilling one particular role and then for the same employer then doing some casual hours, as a personal trainer?---Yes.

*** KIRSTIE LEE PEPPER

XN MS MIFLIN

PN536

So are you saying that they've got both part-time and casual status with the same employer?---Yes, that's pretty common in my experience. That was the status that I had with [REDACTED]. I had a 20 hour a week permanent part-time contract and I was also a casual group fitness instructor.

PN537

In both modes of employment you were engaged by [REDACTED]?---Yes.

PN538

Then you gave other evidence to say that you've worked - when you were working as a personal trainer, as a contractor, you - you did some personal training as a contractor, but you also had some part-time hours, is that what you said?---Yes. I mean there's a pretty - it depends on what facility you're working at. I mean some facilities, for example, [REDACTED], [REDACTED], will only have contracted personal trainers, they don't have any employees, whereas a [REDACTED] or an [REDACTED] only have employed personal trainers. So depending what business you're working for will depend whether you're a casual or a contractor, which is why when I was at [REDACTED], I was a casual group fitness instructor, but when I was at [REDACTED], I was a contracted personal trainer, if that makes sense.

PN539

Right. But you said you had part-time hours at [REDACTED]?---Yes. Yes. So I had two roles. I had a permanent part-time 20 hour a week management and a casual group fitness instructor role.

PN540

Okay, thank you?---That's okay.

PN541

Sorry, anything arising out of that, Ms Miflin, before I go to Mr Rose?

PN542

MS MIFLIN: No, nothing, thank you, Deputy President.

PN543

DEPUTY PRESIDENT CLANCY: Thank you. Mr Rose, do you have any questions for Ms Pepper?

CROSS-EXAMINATION BY MR ROSE

[12.14 PM]

PN544

MR ROSE: Yes, thank you, Deputy President.

PN545

Yes, a couple of questions, if you don't mind, Ms Pepper.

*** KIRSTIE LEE PEPPER

XXN MR ROSE

PN546

You've said there that people - trainers in the industry shouldn't be expected to work the split shifts, based off of your experience, is everyone of the same, or can people not have to do that, if that's what they like to do, if people choose to do that?---Yes, certainly they can have the option. I mean going back to when I was looking after the trainers at [REDACTED], if people wanted to train a client at 6 am and then come back and train another client at 5 pm, they were welcome to do that. But, in my experience, nobody chose to.

PN547

Sure. So if we were to assume that nobody wants to work those broken shifts, which seems to be your point, in terms of it not being good or not being good for the employees, how would you suggest workers in the industry stay in the industry working full-time hours? How are they supposed to get the hours if they don't do broken shifts?---I guess it would depend on the facility. I mean all of the facilities I've ever worked at were able to provide those hours across the board. Like I said, they can train clients all across the mornings or the afternoons. They can do classes early mornings, mid-mornings, lunch times, and they can work shifts throughout those times. So you can work a 6 am till two shift, you could work a nine till five shift, you could work a 2 pm till 10 pm shift.

PN548

Thank you. A lot of big recreational centres and gyms have that span of day to be able to offer those sorts of hours, not necessarily all to a trainer, because the demand is not there during the day, as I think has already been pointed out. But I'd also like to state at this point too that 80 per cent of the fitness industry is small business. So there's a huge gap there, that I'm referring to, in terms of only the trainers. I'm here to speak for the trainers, not the people on phone calls making sales calls, not the gym managers, not the sales consultants, I understand that they can get hours during the nine to five ideal - - -

PN549

MS MIFLIN: Your Honour, can I confirm that there's a question here?

PN550

DEPUTY PRESIDENT CLANCY: I'm just waiting to hear if there is one.

PN551

MS MIFLIN: Apologies.

PN552

MR ROSE: Sorry, I've lost my train of thought there.

PN553

DEPUTY PRESIDENT CLANCY: The point of this current phase is if you've got questions for Ms Pepper, that arise out of her evidence, you can put those. If you want to make submissions, you'll be given an opportunity when all the evidence is finished. So is there questions you've got for Ms Pepper, arising out of her evidence, you can put those now.

*** KIRSTIE LEE PEPPER

XXN MR ROSE

PN554

MR ROSE: Yes. Just similar to my first question. How would you suggest people gain full-time employment in the industry, if they're not working in some of those larger centres, trainers?---Yes. I mean if you're solely doing one-on-one personal training, I think that would be really difficult, for a lot of trainers I know it's really difficult anyway to get - I mean if you're doing a one-on-one client, you would need at least 38 clients or, you know, 20-odd clients doing two sessions a week with you, just to get full-time hours solely as a trainer. There's not many people that I know who work full-time as a personal trainer, without doing some other form of work, such as hours on the gym floor or teaching group fitness classes or some form of admin to make it up to the full-time hours, if that answers your question.

PN555

Yes, sort of, and that's absolutely my point is to have the backup of the gym giving those extra hours to make up the shortfall of the personal training sessions, because it is very hard - I think we all know it is very hard to make up 38 hours a week of personal training clients, solely, so the gym acts as the umbrella, or the safety net, rather, to top up those hours. So my question is, if this was to expand into a 13 hour span, don't you think that would allow employers to package better employment offers, instead of workers inevitably becoming contractors, which tends to happen, because they can't get the hours from employment so they end up being contractors anyway?---In my experience people become contractors because they can't make the money. So, for example, I had trainers at [REDACTED] who were very busy and the clients were paying \$100 to \$120 a session, but the trainer was getting paid \$30 to \$40. So if I was a trainer, to be honest, in that setting, I would look at what my clients were paying and what the gym was taking, as opposed to what I was earning, and I would become a contractor because I would then get 100 per cent of that income myself, rather than the gym taking such a huge chunk of it. In my experience, that's why people become contractors, not because they're trying to sidestep hours.

PN556

I've provided a breakdown of such, where you've suggested that, in your submission, that gyms take 70 per cent and employees get 30 per cent. That's certainly not true for myself, I have no idea what all the arrangements are nationwide, obviously, I don't think any of us do, but I'm actually the opposite of that, and that obviously will effect the going rates and I think the point is - the point is, when you actually get down to the nitty - and I can break this down for anyone, if I need to - - -

PN557

DEPUTY PRESIDENT CLANCY: Are we getting to a question or is it, again, something you want to put in your final submissions?

PN558

MR ROSE: I'll put it in my final submission.

*** KIRSTIE LEE PEPPER

XXN MR ROSE

PN559

DEPUTY PRESIDENT CLANCY: All right. Are there any further questions for Ms Pepper?

PN560

MR ROSE: No.

PN561

DEPUTY PRESIDENT CLANCY: Thank you. Anything arising, Ms Mifflin?

PN562

MS MIFFLIN: No. No, thank you, Deputy President.

PN563

Thanks, Ms Pepper.

PN564

DEPUTY PRESIDENT CLANCY: Thank you. Sorry, Ms Pepper, I'll just check. Lee C, do you have any questions?

PN565

COMMISSIONER LEE: Yes, just one query, Ms Pepper. In your employment at [REDACTED], do you understand that your employment is regulated by the Fitness Industry Award, or is it regulated by an enterprise agreement?---We did have an EBA that expired in 2009 and there's actually being a new EBA negotiated right now. They're in the negotiation process. But, actually, I'm not part of the EBA, because I'm in a management role, so mine is under the Fitness Industry Award, which is why I've got the 38 hours. But, again, if I wanted to do personal training on top of that, I wouldn't be allowed to because, based on the award, it would push me into overtime.

PN566

All right. So your understanding is that there was an enterprise agreement that applied, that it no longer applies but, in any case, in your current role you were never covered by that particular enterprise agreement?---That's correct. The enterprise agreement didn't cover management. It covered (indistinct) downwards.

PN567

All right. Okay, thanks.

PN568

DEPUTY PRESIDENT CLANCY: Thank you. O'Neill C?

PN569

COMMISSIONER O'NEILL: Nothing from me, thanks.

*** KIRSTIE LEE PEPPER

XXN MR ROSE

PN570

DEPUTY PRESIDENT CLANCY: Thank you. Ms Pepper, thank you for your evidence. You're excused from further attendance but if you want to remain

online and observe you're also welcome to do so, so it's up to you?---No, that's okay, I'll step out. Thank you.

<THE WITNESS WITHDREW

[12.22 PM]

PN571

DEPUTY PRESIDENT CLANCY: Now, where are we at with Mr Del Medico-Lewis?

PN572

MR ROSE: He ha sent me a screenshot saying that the page can't be opened, the link that he's got. He's attempted to but - - -

PN573

DEPUTY PRESIDENT CLANCY: Have you got a mobile phone number for him?

PN574

MR ROSE: Yes.

PN575

DEPUTY PRESIDENT CLANCY: All right. We might take his evidence by phone, I think. Could you email that mobile phone number through to my associate, please, at chambers.clancy.dp@fwc? You've been receiving the correspondence via that, please.

PN576

MR ROSE: chambers.clancy.dp?

PN577

DEPUTY PRESIDENT CLANCY: @fwc.gov.au.

PN578

MR ROSE: Yes. I've just emailed his mobile then.

PN579

DEPUTY PRESIDENT CLANCY: Thank you. When you receive that, could you please place a call and we'll move straight to Mr Del Medico-Lewis, if that's possible.

PN580

THE ASSOCIATE: Yes, thanks DP.

PN581

DEPUTY PRESIDENT CLANCY: Good afternoon, Mr Del Medico-Lewis, are you there?

PN582

MR DEL MEDICO-LEWIS: Yes, I am.

*** KIRSTIE LEE PEPPER

XXN MR ROSE

PN583

DEPUTY PRESIDENT CLANCY: Thank you. Mr Del Medico-Lewis, my name is Clancy DP, I'm a member of the Fair Work Commission and I'm sitting on this case with Lee C and O'Neill C. We're going to take your evidence now, over the phone, are you able to do that?

PN584

MR DEL MEDICO-LEWIS: Yes, not a problem.

PN585

DEPUTY PRESIDENT CLANCY: Thank you. The first thing we will do is my associate will take an affirmation from you, so if you could just listen to that part please.

PN586

THE ASSOCIATE: Mr Del Medico-Lewis, please state your full name and address?

PN587

MR DEL MEDICO-LEWIS: My name is Jordan Wayne Del Medico-Lewis, (address supplied).

<JORDAN WAYNE DEL MEDICO-LEWIS, AFFIRMED [12.25 PM]

EXAMINATION-IN-CHIEF BY THE DEPUTY PRESIDENT [12.25 PM]

PN588

DEPUTY PRESIDENT CLANCY: Thank you. Mr Del Medico-Lewis, it's Clancy DP. You have prepared a statement for this hearing, is that correct?---I have written up a statement, yes, I have. I can get that prepared for you now, if you'd like it?

PN589

Yes, if you could just have it there in front of you, please?---Yes, I'll get that sorted now. So you guys are going to be asking me questions, I assume, and I just answer the questions, or do you want me to read out the statement?

PN590

No, I don't want you to read the statement, I just want to confirm you've got it there with you. Have you?---Yes, it's on my laptop, which I'm loading up now.

PN591

Okay. Just let me know when it's there, please?---Yes. I have it now.

PN592

Thank you. Now, that's a statement you have prepared, is that correct?---Yes.

PN593

It says, in its top line, 'Statement for extension of a 12 hour work day'?---Yes.

*** JORDAN WAYNE DEL MEDICO-LEWIS

XN THE DEPUTY PRESIDENT

PN594

Your statement is true and accurate?---Yes. True and accurate, yes.

PN595

You've had the opportunity to review it recently?---Yes, I reviewed it yesterday.

PN596

Are there any changes you wish to make to that statement?---None. Not at all.

PN597

Thank you. You'd like that to form part of your evidence for this hearing today?---Yes, please.

PN598

Thank you. Ms Miflin, subject to any questions, in cross-examination, are there any objections to the reception of this statement?

PN599

MS MIFLIN: No objections, thank you.

PN600

DEPUTY PRESIDENT CLANCY: Thank you. I'll mark the statement of Mr Jordan Del Medico-Lewis, which is on page 27 of the digital court book, as exhibit A5.

EXHIBIT #A5 WITNESS STATEMENT OF JORDAN DEL MEDICO-LEWIS (PAGE 27 OF COURT BOOK)

PN601

DEPUTY PRESIDENT CLANCY: Thank you. Mr Rose, are there any questions that you want to put to Mr Del Medico-Lewis, please?

PN602

MR ROSE: Yes, please, Deputy Commissioner.

EXAMINATION-IN-CHIEF BY MR ROSE

[12.28 PM]

PN603

MR ROSE: Hi, Jordan. Just in respect to your statement, Jordan, how do you feel increasing the 13 hour span will benefit you, in your employment within the industry?---Well, I see it as a massive opportunity because there's a lot of young trainers out there, like myself, that are looking to build on their own personal trainer profile and by opening that 12 hour work day I'm able to work the morning as well as the night time, which are the peak hours, instead of being restricted to half the morning and then the full night.

*** JORDAN WAYNE DEL MEDICO-LEWIS

XN MR ROSE

PN604

Have you been asked to work, directly by members of the gym, outside of those hours?---Yes, multiple, multiple times, and I've also been asked by work

colleagues that want their shifts covered, but I'm actually unable to assist them in that, because I'm working that night.

PN605

So do you think - how many hours a week do you feel that you're possibly missing out on, because of his law?---It could go anywhere - honestly, it could go anywhere between 10 to 20 hours. PTs can take up a decent amount. So, yes, maybe 10, 15.

PN606

Do you feel, right now, the amount of hours that you're getting, which I believe, and correct me if I'm wrong, I believe I have you rostered on for an approximate 25 hours per week, is that correct?---Yes. Yes, you have.

PN607

How long can you, pardon the pun, but survive on 20 hours a week, in a long-term basis, within this industry?---Well, I'm only young, so everything only goes upwards from here. If I - I plan on getting my own house and stuff like that, it's not free, it costs a lot of money and by me upping my hours or getting this thing changed so I can, you know, work outside of that 12 hour break, I'm not going to be able to survive very long unless (indistinct) changes.

PN608

So if your - if your hours don't increase, would it be safe to say you may consider leaving the industry?---Definitely. Yes, definitely. If I'm not getting what I need in one thing, I'm forced to find something else, which has been seen in a lot of past trainers that have gone through the industry.

PN609

If you choose to end your employment would you consider becoming a contractor?---It's too much of a hassle and I'm forced to get an ABN and start my own business and design (indistinct) myself. I'm then forking out more money to then make, roughly, the same amount that I'm making now. Yes, I've considered it, but a lot of thought has gone into it and it's a lot more a hassle than what it is - -

PN610

Isn't it true that if you were to become a contractor you would get a higher rate, so you would actually earn more money as a contractor, wouldn't you?---Well, I would, but I'd also be putting in double the hours to make that extra money.

PN611

Are you aware of the extra - - ?---(Indistinct) insurance.

PN612

Thank you, that was my next question. Are you aware of the expenses involved in becoming a contractor?---Most definitely. You've got rent, you've got insurance, even it can come down to getting your own equipment and setting up your own station. It can, yes, definitely take a toll on the bank account.

*** JORDAN WAYNE DEL MEDICO-LEWIS

XN MR ROSE

PN613

Thank you, Jordan. No further questions, Deputy Commissioner.

PN614

DEPUTY PRESIDENT CLANCY: Thank you. Ms Miflin, do you have any questions for Mr Del Medico-Lewis?

CROSS-EXAMINATION BY MS MIFLIN

[12.31 PM]

PN615

MS MIFLIN: Yes, thank you. Mr Del - - -

PN616

DEPUTY PRESIDENT CLANCY: Sorry, I'll just introduce you. Mr Del Medico-Lewis, Ms Miflin, who is representing the United Workers Union, has some questions for you now. So if you could just listen to those and give your answers, please?---Yes.

PN617

Thank you.

PN618

MS MIFLIN: Good afternoon, Mr Del Medico-Lewis. I just want to take you to your statement. Do you have your statement in front of you?---Yes, I do.

PN619

Good. So on page 27 of the court book, which is your one page statement, you've stated, in the second paragraph, that - my apologies, sorry, no not the second paragraph. You've stated, in the third paragraph, that:

PN620

We all do our bit and we help one another, but if I work the morning shift, five till 9 am, I am unable to work or cover a workmate that night, being four till 9 pm.

PN621

Am I right in saying that if you were to be able to work that shift, that would then be a 16 hour workday?---Yes, but I'd have that massive break in the middle.

PN622

So do you understand the nature of this application is to expand the span of hours in which a broken shift could be worked, from 12 hours to 13 hours?---Yes, but - I'm okay to talk now, yes?

PN623

Yes, please?---Okay. The way we actually - with the gym we've got our very peak hours, and they're usually between six, or five to six in the morning and then five to six at night time. So the way I've sort of thought about it, is if I clock on at six I can then clock off at six, but I could still cover those main hours, at the start of the day and at the end of the day.

*** JORDAN WAYNE DEL MEDICO-LEWIS

XXN MS MIFLIN

PN624

How would that be, Mr Del Medico-Lewis, how could you still cover those hours?---Well, see, if I'm working - if it's extended to a 13 hour work day I'm then - my boss, as well as other bosses at different gyms, can then offer a full-time contract, because a lot of gyms have part-time trainers. And with us going into a full-time contract, we can work that big 10 hour day, or 12 hour day, and cover the peak times in the gym, which is, yes, six in the morning, or 6 am and 6 pm. So I'm really trying to - the reason I'm in on this is I really want to push that because a young guy like me, getting into the full-time industry is a bit of a struggle, but I believe that with these slight rule changes and the work day being opened up that extra hour, it will definitely, you know, benefit me and also benefit employers.

PN625

So when you talk about working a longer shift, what kind of shift time would you imagine that would be? Starting when and finishing when?---Well, I'd personally want it like a 5 am start and a 5 pm finish, or it could be an even earlier finish, or a later start.

PN626

Okay. So I'll just take you to one more part of your statement. You've said, again it's on - well, it's a one page statement, 27, that:

PN627

Young trainers want to work long hours while being safe and stable under a business name. Gym owners want the trainers to work as long or as little as they feel suit.

PN628

Can you explain what you mean by that sentence:

PN629

The gym owners want the trainers to work as long or as little as they feel suit.

PN630

?---Well, I find my bosses very, very supportive. Like if I need a shift covered I can have it covered, or if I want to get more hours, he's got extra hours to give me. So I find that with young - like young trainers, like myself, hour lives are up and down, up and down. And by having the option to open it up, as well as have shorter hours if I need to, I feel like that would really benefit not only myself but a lot of other trainers in the industry.

PN631

So if you were to be offered a full-time role, what kind of hours or shift would that then be, at this TTF gym?---Well, I would want around 40 or 50 hours a week.

PN632

So if - - ?---(Indistinct) some times on the weekend.

*** JORDAN WAYNE DEL MEDICO-LEWIS

XXN MS MIFLIN

PN633

So a full-time role would typically be 38 hours a week, or 37 and a half hour week in Australia, so you're saying that you would like to do a full-time role plus overtime hours. Given the span of hours that this gym operates, and given that your current working shifts start at 5 am, what type of shifts would you be able to do, to be able to get those sorts of hours?---Well, some days I could do 10 or 12 hour says, or I could drop them back to eight your days, some days, work. So I'm really all for the eight hour, 10 hour, 12 hour days that I can put in. But then fluctuate for that week.

PN634

So if you were to do an eight hour - you know what, I won't ask that question. I don't have any further questions for Mr Del Medico-Lewis, thank you.

PN635

DEPUTY PRESIDENT CLANCY: Thank you. Anything arising, Mr Rose, from that?

PN636

MR ROSE: No. Just the fact that what Jordan is saying, it's very common. He's young and he's excited and he wants to work. Obviously I would be preventing him from working such large hours, I would not let that happen, and he knows that. But, yes, this is very common. These guys want to work.

PN637

DEPUTY PRESIDENT CLANCY: Okay. Again, you can address these matters in submissions.

PN638

Lee C, any questions for you?

PN639

COMMISSIONER LEE: No, thanks, Deputy President.

PN640

DEPUTY PRESIDENT CLANCY: Thank you. O'Neill C?

PN641

COMMISSIONER O'NEILL: Not from me, thank you.

PN642

DEPUTY PRESIDENT CLANCY: Thank you. Mr Del Medico-Lewis, thank you for your attendance today to give evidence. You're now excused from further attendance. You can stay on the line if you want to continue observing, but you're equally free to go now?---Thank you so much.

<THE WITNESS WITHDREW

[12.38 PM]

*** JORDAN WAYNE DEL MEDICO-LEWIS

XXN MS MIFLIN

PN643

DEPUTY PRESIDENT CLANCY: All right, thank you. Ms Miflin, shall we move to Mr Garcia?

PN644

MS MIFLIN: Yes, that's fine, thanks. He's ready to go.

PN645

DEPUTY PRESIDENT CLANCY: Thank you. If we could admit Mr Garcia into the hearing room, please?

PN646

Good afternoon, Mr Garcia, it's Clancy DP, can you hear and see me?

PN647

MR GARCIA: I can, thank you, Deputy President.

PN648

DEPUTY PRESIDENT CLANCY: Thank you. I'm sitting on this Full Bench for this case with Lee C and O'Neill C. We're going to receive your evidence now. The first thing we'll do is take an affirmation. My associate will attend to that now, thank you.

PN649

MR GARCIA: Certainly.

PN650

THE ASSOCIATE: Mr Garcia, please state your full name and address?

PN651

MR GARCIA: Anthony Michael Garcia, (address supplied).

<ANTHONY MICHAEL GARCIA, AFFIRMED [12.40 PM]

EXAMINATION-IN-CHIEF BY MS MIFLIN [12.40 PM]

PN652

DEPUTY PRESIDENT CLANCY: Thank you. Mr Garcia, Ms Miflin will just take you through your evidence now, and then there may be some questions from Mr Rose, who's the applicant in this proceeding, thank you?---Certainly.

PN653

MS MIFLIN: Thank you, Mr Garcia. Can I confirm that you have your statement in front of you?---I do, yes.

PN654

Can I confirm that the contents are true and accurate?---Yes.

PN655

Is there any changes that you want to make to that statement today?---No.

*** ANTHONY MICHAEL GARCIA

XN MS MIFLIN

PN656

Great. I'd seek to have that statement tendered, through the Commission.

PN657

DEPUTY PRESIDENT CLANCY: Thank you. Mr Rose, subject to any questions that you have for Mr Garcia, is there any objection to the statement?

PN658

MR ROSE: No objection, Deputy President.

PN659

DEPUTY PRESIDENT CLANCY: Thank you. I'll mark the witness statement of Mr Anthony Garcia, which is at the court book pages 41 and 42, as exhibit R2. Thank you.

**EXHIBIT #R2 WITNESS STATEMENT OF ANTHONY GARCIA
(PAGES 41-42 OF COURT BOOK)**

PN660

DEPUTY PRESIDENT CLANCY: Yes, Ms Miflin, any additional questions?

PN661

MS MIFLIN: Thank you, Deputy President.

PN662

Mr Garcia, I just have a couple of questions. For the benefit of the applicant and the Full Bench, before today's proceedings the applicant sent an email asking about the nature of your employment that you've referred to in your statement, so I'm just going to ask you a few questions about that, for the benefit of the applicant, and there may be a couple of more questions. So you state, at page 41 of the court book, that you're employed by Genesis. Are you employed permanently or as a contractor?---So Genesis is permanently.

PN663

Permanent direct, okay. Then you spoke about your time at BPM Fitness, how were you employed there?---That was also on a full-time permanent.

PN664

Then, lastly, you spoke about your experience working at Virgin Active, what was your employment relationship there?---That was also on a - I think it was a part-time - part-time permanent role.

PN665

Employed directly by Virgin?---Yes.

PN666

So I'm just going to take you to page 19 of the court book, which is the applicant's response to some of the things you said in your statement. At page 19 of the court book, the applicant is referring to your current role, at Genesis, you're working as a manager. The applicant states:

*** ANTHONY MICHAEL GARCIA

XN MS MIFLIN

PN667

Unfortunately not everybody can be a manager. For every manager there are about 10 employees working part-time or casually, or as contractors. I am trying to create full-time employment, or at least more part-time hours.

PN668

You're a manager now, working full-time consistent hours, but can you explain or, rather, describe some of the roles you've done before this current management role? Have you worked in non management roles?---Yes, certainly. So I've been a contractor, self-employed business owner, run my own gym, self-contracted for Good Life Health Clubs, as a personal trainer, as well as a class instructor, which is also as a contractor.

PN669

So before you started working as a manager, in those previous roles you've just explained, what type of shifts did you typically do, noting that you, I think, were mainly contracting?---They were still split shifts.

PN670

So what kind of hours would you do those broken shifts?---They would be between six and 10 am and 4.30 till about 8.30, 9 pm.

PN671

Long days. What was your experience working split shifts, broken shifts?---I haven't had a good experience with working splits. As a result, I've pretty much tried to design my hours as structured as possible.

PN672

I just want to talk to you about one of your experiences when you were working broken shifts, at Virgin. So on page 20 of the court book the applicant has responded to something you've said in your statement and the applicant has said, well, first of all, asked whether you were an employee or a contractor at that time. Now, this is with respect to your time at Virgin. You've just confirmed that you were an employee. Then he's gone on to say - Mr Rose has gone on to say:

PN673

A company such as Virgin, I would imagine, would be well across the laws, so I find it hard to believe that Mr Garcia was forced to work excessive hours or to sleep in staff rooms.

PN674

He goes on to say:

PN675

If other employers could offer better positions more locally, to Mr Garcia, such as what my application proposes, he may have gained a position closer.

PN676

He's talking there about the need to travel backwards and forwards?---Certainly.

*** ANTHONY MICHAEL GARCIA

XN MS MIFLIN

PN677

So that description you gave there, about sleeping in staff rooms, in your opinion, is it common for personal trainers to sleep between shifts?---The majority of the trainers there would.

PN678

Where would they sleep?---So Virgin had sleep pods, for members mostly, but they were getting used by the trainers and, unfortunately, as a result, the trainers were told that they weren't allowed to sleep there, so we had either the staff room or the yoga studio.

PN679

So why would they sleep? I mean you were involved, you did this as well? Why would you sleep between shifts?---So for myself, and the position that I wanted, Virgin seemed like a really good opportunity. I was living (indistinct).

PN680

DEPUTY PRESIDENT CLANCY: Sorry, Mr Rose, could you just put yourself on mute?

PN681

MR ROSE: Yes, sure.

PN682

DEPUTY PRESIDENT CLANCY: Thank you.

PN683

THE WITNESS: I said, at the time of working at Virgin and where I really wanted to work, I was living around an hour away, so I was living down in Safety Beach and the commute from my home there and back was just too excessive and especially if I did have a short break between when I start my next client or session. It all varied on the day, but the drive itself and the commute was way too long. The other reason why it was also - sometimes our shifts weren't always going to be back-to-back, so while I did and while I was employed to have a certain amount of hours with Virgin, I would perhaps have a PT scheduled in two hours after I finished my shift. So for me to try and make it home and back wasn't going to happen. Yes, a lot of trainers found that as well.

PN684

MS MIFLIN: So did you see this kind of practice happen at anywhere else? You've worked at lots of gyms, or just at Virgin?---So for myself it's happened a few times. Also when I was a contractor at Genesis. We would start sometimes even earlier, 4.30, 5 am. At that time you would be pretty tired, especially if you'd finished the night before at 9 pm, by the time you actually had dinner, fell asleep and came back to work. So there were trainers that would just sleep on the couch there.

*** ANTHONY MICHAEL GARCIA

XN MS MIFLIN

PN685

So you have worked as a sole contractor, when you were working broken shifts, and if a 13 hour span was allowed for, under the award, and let's say that would

then lead you to being able to be offered a full-time permanent contract, would you have taken it, if doing so would have meant working constant broken shifts, across the 13 hour span?---I wouldn't have, no. I mean I can say, personally for me, my whole purpose now has been to try and get those straight blocks of hours and even if they were four or five hours, I'd rather do less than try and make an eight hour day, over a 13 hour split, or even a 10 hour split was still ridiculous.

PN686

Okay. Thank you, Mr Garcia, I don't have any further questions.

PN687

DEPUTY PRESIDENT CLANCY: Thank you. Mr Rose, do you have any questions for Mr Garcia? You're on mute, Mr Rose.

CROSS-EXAMINATION BY MR ROSE

[12.48 PM]

PN688

MR ROSE: Sorry. Thanks, Deputy President.

PN689

Mr Garcia, just in respect to your statement, are you still in the fitness industry now?---I am, yes.

PN690

Okay. As a gym owner, did you say before, you own your own gym now?---Previously. At the moment, no, I'm working for Genesis, one of the Genesis Health Clubs, as a manager and trainer.

PN691

How many trainers are you managing?---We have, currently, eight personal trainers.

PN692

How many of those personal trainers would be getting decent hours, say upwards of 30 hours a week?---There are five full-time. They have - and, again, I can only speak on behalf of some of them that I know because, at the moment, obviously, the last couple of years hasn't been ideal and I've only just gone into the role. So at the moment, though, it's been building back up and they would have consistent hours, at least a week, maybe not to the degree of 30 though, at this stage.

PN693

Okay. So it would be less than 30 hours a week, as employees?---At the moment I would say for some of them, yes.

PN694

Are there any contractors that you manage?---So they are all contractors at Genesis, not one has a full-time.

*** ANTHONY MICHAEL GARCIA

XXN MR ROSE

PN695

Okay. So can we just confirm if these people are employees or contractors?---Contractors.

PN696

Okay, so they're contractors. Okay. Are you aware of how many - I'm assuming you are, if you've managed your own gym before, are you aware of how many hours they would be doing outside of the gym, in terms of the social media marketing, the insurance and all that side of managing their own business? How many hours would that be adding on top of - - -?---I'd only be able to speak for myself, being in that role previous. As they are contractors it's up to them how much they want to decide on doing.

PN697

So if we use you as an example then, how many were you doing?---So when I was a contractor I probably would have done about two to four hours, maybe, on the social media side of things. For me, it wasn't a big part of my business.

PN698

Sure. Was your day, as a contractor, spanning over the 12 hours?---Over the day, no.

PN699

No?---No. So as a contractor I would do my PTs in the morning or the evening, dedicated to purely what I wanted to work. So if I only wanted to do six hours that day, I'd do six hours that day.

PN700

You're sure about that? That, as a contractor, when you were running your own gym, you weren't spanning - when you were running your own business you weren't spanning your day over 12 hours?---When I ran my PT business, yes. When I ran my gym, a very different story. I wanted to manage, PT, do it all.

PN701

Do it all?---Yes.

PN702

Was that hard work? That was pretty stressful?---I believe you have your gym there too, so you might know but, yes.

PN703

I do?---It is. It is very hard.

*** ANTHONY MICHAEL GARCIA

XXN MR ROSE

PN704

It's hard work. So would say a new student, coming through the RTO, such as AIF and AIPT as such, coming through, I believe it's about a six week course these days, I think, to get their qualification. They're coming through, encouraged to be contractors, and then manage their own business and get their own insurance and build their own websites and understand everything with running your own business, do you think that's a lot to take on, as a new employee into the industry, given they don't have any experience as trainers at all, they've just done the theory

course?---Again, I can purely speak for myself. When I came through I decided that I would go through a different style. So, for me, I went to a gym and I pretty much asked to learn the ropes there first, do some work experience.

PN705

Absolutely?---But, again, it kind of does depend on the person in that question.

PN706

Yes, some people enjoy working big days and some don't. Do you think it's fair that people should have the option?---With, I guess, a couple of business that I've worked with the option hasn't always been there. Even at Virgin, to be offered - so as a personal trainer we are charged out at \$120. I pay no rent, but I only keep \$40 out of that \$120. When I'm my own personal trainer, I can charge well above, especially now, now that I've been in the industry a lot longer. But I mean, even at a basic rate of \$60 when I first started, was still more than what I was getting on a contract somewhere.

PN707

Sure. Then my point would be there is that your expenses would be increased phenomenally, your GST would be one that has to come out of that \$140. I won't go on about all the costs involved, but your hourly rate would significantly be coming down from the \$140 as a contractor, would that be right?---The GST would only be applicable after a certain amount, but I'd still be, I guess, trying to pay my own super, for sure.

PN708

WorkCover, insurances?---Yes. I can only say, for my state, but the insurances that we get provided are very decent and they were affordable. My only biggest overhead started to come when I tried to find my own studio. So that would be the lease.

PN709

Sure. Did you - were you aware that when you, in your statement you were, I can't recall exactly, but you were working 18 hour days?---Yes, that would have come out - - -

PN710

Were you aware that that's illegal?---So it's only been since I've been further into this industry and I can't, I guess, discuss too much onto that legality part, but I ended up did - taking my employer through an action, just regarding the underpayment, because of all those split shifts.

PN711

Are you aware that my application is only increasing it to 13 hours, not 18 hours?---To be honest, this happened on a 10 hour one.

*** ANTHONY MICHAEL GARCIA

XXN MR ROSE

PN712

I'm just asking you if you're aware that my application proposes it's only increasing the current law from 12 hours to 13 hours, which is only a one hour

increase?---I do understand what your application is for. It might work well at your gym.

PN713

Thank you, that wasn't my question though.

PN714

Deputy President, I have no further questions.

PN715

DEPUTY PRESIDENT CLANCY: Thank you. Any matters arising, Ms Miflin?

PN716

MS MIFLIN: No, thank you, Deputy President.

PN717

DEPUTY PRESIDENT CLANCY: Thank you. Lee C, any questions from you?

PN718

COMMISSIONER LEE: No, thank you.

PN719

DEPUTY PRESIDENT CLANCY: Thank you. O'Neill C?

PN720

COMMISSIONER O'NEILL: No, thanks.

PN721

DEPUTY PRESIDENT CLANCY: Thank you.

PN722

Mr Garcia, thank you for your evidence, you're now excused but you're also welcome to remain online as an observer, if you'd like. Thank you very much?---Sure thing. Thank you very much, Deputy President, and thank you all.

<THE WITNESS WITHDREW

[12.57 PM]

PN723

DEPUTY PRESIDENT CLANCY: All right. Mr Rose, I've received all your evidence and, Ms Miflin, can I confirm that's all the evidence for the UWU?

PN724

MS MIFLIN: That's correct, that's all the evidence, thank you.

PN725

DEPUTY PRESIDENT CLANCY: All right, thank you. We'll now take any final oral submissions that either party wants to make, having gone through the evidence today. So he way we'll do it, Mr Rose, is you'll have the opportunity to make your final oral submissions then Ms Miflin. Then, after that, you'll be able to make some points in reply to the points made by Ms Miflin. All right?

*** ANTHONY MICHAEL GARCIA

XXN MR ROSE

PN726

MR ROSE: Yes.

PN727

DEPUTY PRESIDENT CLANCY: Okay, so we'll hear from you first, Mr Rose.

PN728

MR ROSE: Sure, thank you.

PN729

So in closing, I guess, I just want to point out that I don't think the increase of one hour is a huge issue, and it's certainly not, in any way, impacting anywhere near some of the things that the witnesses from the UWU have stated, in terms of pulling 18 hour days and their comments about travelling one hour commute, for Mr Garcia, to and from his work. That was his choice and that shouldn't be factored into this decision as to what an employee chooses to travel or not to travel, that should be made irrelevant. That's a personal decision that he choose to do.

PN730

They also weren't forced to work those hours, they obviously agreed to work those hours and if they weren't happy with those hours they're obviously free to resign. I think there's far more employees around in this industry that I have experienced, in my 16 years, which would be significant, are people who do want to work the hours to stay in this industry.

PN731

I do agree with overworking long hours leading to trainers existing the industry, and it's usually based off of contractors doing so. I'd also like to point out that both of the witnesses were mainly working in big gyms, large organisations, and that's a very small percentage of gyms within Australia. As I've stated numerous times throughout this hearing, 80 per cent of the gyms in Australia are small businesses.

PN732

DEPUTY PRESIDENT CLANCY: What do you base that on, the 80 per cent?

PN733

MR ROSE: I base - I think - I don't - I base that on sheer experience, I guess, from what I know within the industry and other gyms that I know that are all small businesses, in terms of turnover and employees. It just takes a look around the industry to see what these big gyms are. So we're talking like Good Lifes and some of these big rec centres.

PN734

I'm not aware of some of the businesses Ms Pepper worked for, obviously I'm not from that state, so I have no idea who they are. But, from my understanding, they're quite big organisations, so they have the power to offer more stable type roles and phone call type work. But a lot of gyms don't do that and I'm trying to speak for the smaller trainers who are trying to gain, like Mr Del Medico-Lewis

earlier, he's trying to gain full-time employment in this industry because he loves being a trainer. He doesn't want to make phone calls.

PN735

I think that needs to be really understood here, we're talking for trainers in the industry and trainers are - they are the industry. You can have all the phone call reps you want and all the sales reps you want and all the managers you want, but trainers are what make this industry go around. If we don't start looking after them, we just keep going round and round. We turn them over and I'm - it's heartbreaking to see so many good, quality trainers leave this industry because the laws are preventing us employees from offering decent hours to them.

PN736

To finish off, I would ask if you don't increase the hours to 13 hours, I would just ask everyone to think about it logically. How are we supposed to give trainers full-time work? I understand there are people that don't want to work broken shifts, and that's okay, they don't need to accept the position. When it gets advertised they don't need to apply. But there are hundreds of people that do want to apply and they do want to stay in this industry because they love it. Split shifts are not a problem.

PN737

So that's my overall closing statement is, if it doesn't get changed, how are you supposed to look after trainers. Because my overall application is actually doing the right thing by workers, it's doing the right thing by employees and giving them an umbrella to stay safe under, with the mentorship of a gym owner who has been in the industry, who can look after them, who can pay the insurances, who can do all of that stuff that they don't know how to do. That's all I have.

PN738

DEPUTY PRESIDENT CLANCY: Thank you. Bear in mind you have the opportunity to make any reply comments once Ms Mifflin has made her submissions, okay?

PN739

MR ROSE: Thank you.

PN740

DEPUTY PRESIDENT CLANCY: Thank you.

PN741

Thank you, Ms Mifflin.

PN742

MS MIFFLIN: Thank you to the full Bench, and thank you Mr Rose.

PN743

The union's opposition to this application, it arises, primarily, because the application fails to meet the modern award objectives, required under the Act. Or, at the very least, the applicant has failed to show how the variation is necessary to

meet the modern award objectives. So section - sorry, for the benefit of the applicant, section 157 of the Fair Work Act states that:

PN744

The Fair Work Commission can only vary an award of the Fair Work Commission is satisfied that making the determination or modern award is necessary to achieve the modern award objectives.

PN745

So if we go to section 134 of the Fair Work Act, it outlines what those modern award objectives are. Relevant to this application we say that that requirement for modern awards to provide a fair and relevant minimum safety net has to take into account, and this is what we say is relevant:

PN746

Has to take into account the relative living standards and the needs of the low paid.

PN747

Our evidence goes to the fact that this is a low paid industry:

PN748

The need to promote social inclusion, through increased workforce participation.

PN749

The evidence from our two statements go to the fact that working broken shifts works against the idea of social inclusion.

PN750

The need to promote flexible modern work practices -

PN751

That may be done, perhaps the 13 hour span would do that, but that needs to be upheld with the efficient and productive:

PN752

for the efficient and productive performance of the work.

PN753

Now, the evidence put on today, by the UUU, shows that working broken shifts that the fatigue that working a broken shift does, under the existing 12 hour span, would not lead to that effective, productive performance of work. Finally:

PN754

The need to provide additional remuneration for employees working unsocial, irregular or unpredictable hours.

PN755

Broken shifts certainly are that. Under the award it's about \$14, which is provided for doing so. We say that this application just wouldn't meet those requirements.

PN756

So, largely, the legal requirements haven't been met, but quite apart from that, the applicant appears to be making this application premised on the idea that he would then be able to employ more people permanently, or on a permanent full-time basis if the 12 hour span was expanded.

PN757

This is problematic for a few reasons. First, Mr Rose's rostering problems, while valid, the way he's categorised rostering problems, while valid, aren't necessarily true of the whole industry, which would be effected if this application was granted.

PN758

He has said today, Mr Rose has said today, that this application is not just about his gym, that he can offer long hours, that he has a long span, that he can give continuous work. He's said that it's not about his gym, it's about the whole industry. But then if we go to, say, Ms Rose's evidence, she went to the fact that Mr Rose's previous workers left because he couldn't offer them permanent work. On that basis it does appear to be, in part, about Mr Rose's gym, in Torrensville. She stated that they want to work, she said they want to work but because of the 12 hour limit that they can't.

PN759

Again, given the long hours required by many gyms, indeed, the gym in Torrensville has hours running from 5 am through to 9 pm, it's unclear how a 13 hour span would assist anyway, in terms of providing more full-time permanent jobs.

PN760

Mr Rose, today, has also stated, a number of times, that the peak times are 6 am and 6 pm. There is no evidence put on today, by the applicant, as to that being the peak time across the industry.

PN761

Finally, he's also provided evidence, and you phrased this earlier, Deputy President, that 80 per cent of gyms are small gyms and, again, there's been no evidence put on today to prove that assertion.

PN762

Rather, the evidence provided by Ms Pepper, who has worked across many gyms, is that permanent full-time work is available to people in this industry, not just management roles but that permanent full-time work is available, it's not just, I suppose - it wouldn't just be up to the 13 hour span to be able to do that, it can be done now, under the 12 hour span, if they want it. So it stands to reason that a 13 hour span would provide no utility.

PN763

Secondly, Mr Rose is conflating the problems of a sole trader, which we undoubtedly agree with. There are absolutely problems with working as a sole trader. It appears to be incredibly difficulty, incredibly costly and time consuming to work as a sole trader, but he has been conflating those problems with the

existing 12 hour span. But, again, there's no evidence put on today that the reason people across the industry take on sole trader work is solely because of this 12 span and it also doesn't stand to reason that if a 13 hour span was provided that it would ameliorate those problems that sole traders face.

PN764

Finally, to counter - on account that there is evidence, provided by Ms Pepper and Mr Garcia, that broken shifts are not desirable, even if they stay under a 12 hour span. The problems associated with that would only be exacerbated if a 13 hour span was awarded under this application.

PN765

So, I'll take you - just before I finish, I'll just take you to page 23 of the court book, which is Mr Rose's submission and statement. He has stated, at page 23, that:

PN766

Fitness is a healthy, positive industry with positive employees that are motivated people. Because of this I have always found workers in our industry far more capable of pulling bigger days, if desired, due to their strong mindset to that of other industries. We are unique and should be treated so.

PN767

He's then gone on, on the next page, page 24, to say:

PN768

Trainers are passionate and motivated people and for them to work a 15 hour day straight, or broken happy is far better than for them to work an eight your day unhappy.

PN769

Ultimately, the union posits it would be very dangerous for the Full Bench to follow this kind of reasoning in their judgment that there is something - some sort of attribute about workers in this industry that is true of all workers, that makes them more capable of being able to longer, bigger days. Mr Garcia and Ms Pepper both outlined, in their statements, the difficulties of working broken shifts and we say that a 13 hour span would only exacerbate that. It is a unique - it is unique, there are only four awards that provide for 13 hour spans and very serious consideration should be given to creating bigger days.

PN770

There are, undoubtedly, problems with this industry, problematic work practices in this industry. We've heard today, from Mr Garcia, about the sorts of long days he used to pull, as a sole trader, and no doubt the applicant can attest to those problems. But we suggest that there are various changes that could and should be made to this award that we may consider down the track to improve working conditions for fitness workers, but expanding the span of hours is not one of them.

PN771

On that basis, we say the application should be dismissed.

PN772

DEPUTY PRESIDENT CLANCY: Thank you.

PN773

Mr Rose, anything in response?

PN774

MR ROSE: No, just other than Ms Mifflin has constantly referred to there being no evidence given today. There was plenty of evidence given today of the things she's saying there wasn't, but, yes, I have said everything I need to say, but, yes, I think enough evidence has been given today and I'm happy with it. I think our industry is - we really need to make the award suit our industry and right now I don't feel it is. I think the one hour increase, it's going to open up a huge amount of doors for employment to be offered, rather than contract work. Contract work is where it ultimately results in burnout, as we've been referring to.

PN775

I think I'll put the rest in my reply.

PN776

DEPUTY PRESIDENT CLANCY: All right. Thank you, very much.

PN777

The Full Bench will now reserve its decision, which means we'll go away and review the evidence that's been given today, the submissions that have been made and the written material that's previously been put, and we'll issue a decision, in writing, once we've had the opportunity to do that. So that decision will be - you'll be notified of that when it's published.

PN778

Apart from that, can I thank the parties for their assistance today, for the preparation that they've put in to the presentation of their cases. And, if there's nothing further, we will now adjourn. Thank you very much.

PN779

MS MIFFLIN: Thank you, your Honours.

PN780

MR ROSE: Thank you.

ADJOURNED INDEFINITELY

[1.12 PM]

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