



Shop Distributive and Allied Employees' Association

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

AM2021/66 - General Retail Industry Award 2020

Date Submitted: 15 September 2021

Submitted by: Angelo Pardo
SDA National Office
Level 6
53 Queen Street
MELBOURNE VIC 3000

Telephone: (03) 8611 7000

Email: angelo@sda.org.au

I INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association ("SDA") refers to the above matter and the Statements of Commissioner Bissett dated 9 July 2021 and 10 August 2021.
2. The Commissioner poses four (4) questions for parties to respond to in her statement of 10 August 2021:
 - (i) Does clause 11 (and cl 11.4 in particular) of the GRI Award contain any ambiguity or uncertainty or an error which may be resolved by a variation of the GRI Award pursuant to s.160 of the Fair Work Act 2009 (FW Act)?
 - (ii) If clause 11 has changed from the provisions of the 2010 Award, how did the variation arise and was it intended?
 - (iii) If the answer to (i) is yes, what is the ambiguity, uncertainty of error, how does it arise and how should the clause be varied to resolve the issue?
 - (iv) Does the Australian Payroll Association have standing, in accordance with s.160(2) of the FW Act to make an application under s.160 of the FW Act. If not, should the Commission vary the GRI Award on its own motion?
3. The Newsagents Association of NSW & ACT Limited (Newsagents Association) on 6 September 2021 together with Australian Industry Group (Ai Group) on 3 September 2021 made submissions, the SDA makes these submissions in reply as follows.

II THE SUBMISSIONS OF THE NEWSAGENTS ASSOCIATION OF NSW & ACT LIMITED

- A. DOES CLAUSE 11 (AND CL 11.4 IN PARTICULAR) OF THE GRI AWARD CONTAIN ANY AMBIGUITY OR UNCERTAINTY OR AN ERROR WHICH MAY BE RESOLVED BY A VARIATION OF THE GRI AWARD PURSUANT TO S.160 OF THE FAIR WORK ACT 2009 (FW ACT)?
4. The Newsagents Association responded to this question as follows:

Clause 11.4 of the 2020 Award is not ambiguous; however, uncertainty surrounds the entitlements of casual employees who through their own choice

absent themselves from work before the conclusion of the minimum 3 hours' work. We submit the Commission is free to make a determination on its own motion under Section 160 (1) of the Fair Work Act 2009 to remove the uncertainty which we submit is attached the Clause 11.4 of the 2020 Award.

5. It is to be noted that the Newsagents Association accepts, along with the SDA, that there is no uncertainty arising from the terms of the Award. This is so because of the entirely unambiguous language employed by the Commission.
6. However, Newsagents Association submits that 'uncertainty surrounds the entitlements of casual employees who through their own choice absent themselves from work before the conclusion of the minimum 3 hours' work.'
7. The Newsagents Association does not support this submission with any evidence nor any cogent arguments but relies on the submission itself.
8. In response, the SDA notes that the clear wording of the Award provision, together with the lack of any contrary submissions by any party since its inception would seem to place a heavy onus against any variation of it on the basis of uncertainty or ambiguity.
9. This is further shown by the error of the original Applicant in its interpretation of both the 2010 and 2020 GRIA as noted in our earlier submissions.

B. IF CLAUSE 11 HAS CHANGED FROM THE PROVISIONS OF THE 2010 AWARD, HOW DID THE VARIATION ARISE AND WAS IT INTENDED?

10. The Newsagents Association responds to the Deputy President's question as follows:

We understand the 2020 version of the Award was the result of substantial rewording and formatting of the 2010 Award arising from the plain language conversion process. We do not believe the plain language conversion process was designed to create new Award entitlements.

Whilst the plain language changes which resulted in the wording of Clause 11.4 of the 2020 Award should have been identified by and resolved by the parties prior to finalisation of the plain language version of the Award, that did not occur. We submit that more than likely this outcome is a nonintended consequence of the proceedings in the plain language conversion matter.

11. It is accepted that the plain language process was not intended to create new Award entitlements. On the contrary, and consistent with our previous submissions, it is submitted that the change merely clarified a requirement that

casual employees be paid a minimum of three (3) hours.

12. Newsagents Association again makes an unsupported submission, that is that the wording of GRIA 11.4 was an unintended change. This could perhaps be understandable if the words were ambiguous or somehow unclear, or if some contention surrounded the new wording. However, this is not the case and the words of the provision are clear (as is universally accepted) and no party opposed the words subject of the present proceedings.

C. IF THE ANSWER TO (I) IS YES, WHAT IS THE AMBIGUITY, UNCERTAINTY OF ERROR, HOW DOES IT ARISE AND HOW SHOULD THE CLAUSE BE VARIED TO RESOLVE THE ISSUE?

13. The Newsagents Association proposes the following variation:

11.4 An employer must pay a casual employee for a minimum of 3 hours' work, or 1.5 hours' work in the circumstances set out in clause 11.5, on each occasion on which the casual employee is rostered to attend work and works, even if the employee, other than through absenting themselves from work, is required by the employer to work for a shorter time.

14. Given the SDA's response to the other questions above it follows that no variation is needed.

V THE SUBMISSIONS OF AI GROUP

A. Introduction

15. The Ai Group did not directly respond to the questions posed by the Deputy President, but made extensive submissions according to other criteria. The SDA responds to them as follows.

B. Standing

16. The Ai Group addresses the question of standing at paragraphs 4 to 11 of their submissions.

17. In that all parties do not cavil with the ability of the Commission to deal with issues on its own initiative, there seems little for the SDA to respond to other than to formally note that it objects to the implicit submission that the provision contains an ambiguity, uncertainty or error.

C. Provisions of the Award

18. Ai Group deals with the provisions in the Award from paragraphs 12 to 19 of their submissions.

19. The Ai Group highlights in its submissions the change of wording in the provision from 'minimum daily engagement' to a requirement that 'An employer must pay a casual employee for a minimum of 3 hours' of work...even if the employee works for a shorter time.'

D. The Plain Language Re-Drafting Process

20. At paragraphs 20 to 43 Ai Group helpfully summarises the issue as it was dealt with in the plain language process.

21. The Ai Group goes to significant lengths to highlight the SDA's submissions at the time concerning this change. In so doing, the Ai Group has highlighted two things:

- i. The lack of contradictor to the 3 hour minimum payment; and
- ii. That the Commission already dealt with the change in the provision and found that there was no substantive change.

22. The helpful summary made by Ai Group at paragraph 43 noted:

In summary, as demonstrated by the material cited above, during the course of the PLR process:

(a) The 2010 Clause was substantively redrafted in the PLED issued on 5 July 2017; namely, it removed the minimum daily engagement and replaced this with a minimum payment period.

(b) No party identified during the PLR process that the proposed clause 11.3 was substantively different to the operation of the comparable clause in the 2010 Award in the sense contemplated by the Application and Ai Group's earlier submissions.

(c) The PLR process was at all times conducted on the basis that it was not intended to change the legal effect of terms and conditions.

(d) The Commission did not at any stage expressly determine that it intended to change the substantive meaning of the relevant term.

(e) Therefore, it appears that the substantive change to the 2010 Clause was unintended.

23. It is unclear, what Ai Group intends to achieve by bringing to bear several not immediately relevant considerations. During the PLR process, the provision was

available for all interested parties, Ai Group included, to read and respond to. The issue the subject of these proceedings was not brought to light by any party.

24. The submissions made by the SDA (highlighted by the Ai Group) regarding the change from minimum daily engagement to minimum payment is one such consideration, not immediately relevant to the present Application. The concerns of the SDA were explicitly dealt with by the Commission in settling the plain language Award.
25. The submissions of Ai Group highlight the lack of authority available to support their position as well as the silence of employer parties regarding the issue at hand during the plain language process.
26. It is also noted that Ai Group was able to make submissions during the plain language process regarding this issue but did not. It also did not raise any issue in the time since the General Retail Industry Award 2020 coming into effect but has not. No party has led any evidence as to whether this provision is used to the detriment of employers.

E. Section 160 – Error

27. At paragraphs 44 to 51, Ai Group makes submissions as to why in their view the Award contains an error as under section 160 of the Act.
28. Ai Group cites a decision of the Full Bench as relevant to the present proceedings at paragraph 45 of their submissions:

[73] With respect to the SDA, this is not demonstrative of any error. It only demonstrates that a methodology was used which the SDA, with the benefit of hindsight, would prefer not to have been used. Nothing was placed before us to suggest that the AIRC did not intend to use that methodology, or that some mathematical error was made in calculating the rates in accordance with that methodology. We do not accept that disagreement - even a well-founded disagreement - with a previous decision concerning an award is sufficient to establish an error for the purpose of s.160. What is necessary is to show that some sort of mistake occurred, in that a provision of the award was made in a form which did not reflect the tribunal's intention. There is nothing to suggest that this occurred here. Accordingly the SDA's application under s.160 must be dismissed.¹

¹ 4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010 [2016] FWCFB 4418 at [73].

29. While the citation is useful, the submission of Ai Group that the Award contains an error does not flow from the authority cited. That is, Ai Group has not provided any proof, nor demonstrated beyond their own submissions that the Commission did not intend to draft the provision as it currently stands in the Award at 11.4. That is, as in the citation, nothing has been put before the Commission to suggest that the Commission did not intend the change. We note as in the above citation that:

We do not accept that disagreement - even a well-founded disagreement - with a previous decision concerning an award is sufficient to establish an error for the purpose of s.160. What is necessary is to show that some sort of mistake occurred, in that a provision of the award was made in a form which did not reflect the tribunal's intention. There is nothing to suggest that this occurred here.

30. On the contrary, the submissions of Ai Group show the great consideration the Commission put to the drafting of the Award as well as the lack of any contradictor to the provision at GRIA 11.4.

31. Similarly, at paragraph 47 Ai Group makes the following submissions:

As set out earlier in these submissions:

- (a) The legal effect of the 2020 Clause is different to the 2010 Clause.
- (b) The change is a product of the PLR process.
- (c) The Commission did not intend for the legal effect of the 2010 Clause to be varied during the PLR process. Rather, it intended for the legal effect to remain the same.

32. In response the SDA submits:

- (a) Ai Group has not shown how the legal effect is different to the 2010 clause, nor any evidence to this effect.
- (b) The change was a subject of the PLR process which allowed all interested parties to make submissions. The silence of all employer parties, and indeed of the Ai Group itself, as to the alleged change contradicts the Ai Group's present position.
- (c) The Ai Group has not shown that the legal effect is different nor has it shown a contrary intention on the part of the Commission.

33. Ai Group makes proposed changes to the Award provision at 11.4 at paragraph 51 of their submissions.

~~11.4 An employer must pay a casual employee for a minimum of 3 hours' work; The minimum daily engagement of a casual employee is 3 hours, or 1.5 hours' work in the circumstances set out in clause 11.5, ~~on each occasion on which the casual employee is rostered to attend work even if the employee works for a~~~~

shorter time.

34. As noted, the SDA's position is no such change is warranted.

35. It is also noted that the changes suggested by the Ai Group go further than the question raised by the Commission in the present proceedings.

36. If the Commission is minded, despite the submissions and matters raised by the SDA, to change GRIA 11.4, the SDA wishes to be heard on any proposed changes.

F. Should the Commission Exercise Its Discretion to Vary the Award?

37. At paragraphs 52 to 78 Ai Group makes submissions as to how an alleged error occurred.

38. In response to the submission made by Ai Group at 53 and 54 we say that the Ai Group has not brought any evidence that the provision is so used. On the contrary, the Commission is able to take notice of the practice of employers sending casual employees home 'because they are not needed'. It is submitted that the provision is making explicit what was previously implied, that an employer must pay a casual employee at least the minimum 3 hours. For lower paid employees, particularly those with fewer hours this creates the practical difficulties of their having already made arrangements and presenting for work (including spending money for transport) only to be sent home. The provision rightly deals with this.

39. Insofar as the submissions of Ai Group are premised on an alleged error and that the 'windfall' of being paid the minimum of 3 hours is somehow unjust the SDA formally objects to the submissions of Ai Group at paragraph 58.

40. In response to the matters raised by the Ai Group at paragraphs 59 to 61, the SDA refers to its submission above at paragraph 38.

41. The SDA notes the position of Ai Group at paragraph 62.

42. In response to the matters raised by Ai Group at paragraphs 63 and 64 of its submissions the SDA notes that the variation sought by Ai Group would decrease workforce participation in the sense that it could allow for employers to unilaterally send employees home without paying the minimum 3 hours.

43. This is borne out by the submissions of Ai Group at paragraph 66 which suggests that the proposed variation encourages flexible work practices as under section

134(1)(d) of the Act. The SDA notes that Ai Group's position, at paragraph 56 of its submissions, is that the considerations under section 134(1) have no particular primacy attached to them and that the Commission's task is to balance the various considerations. Weighing against the consideration is the clear and unambiguous wording of the provision, the intention of the Commission and the lack of any contradictor during the plain language process.

44. The matters raised at paragraphs 66 to 70 are not relevant and do not require a response from the SDA.
45. In response to the submissions of Ai Group at 71 to 73 the SDA queries that if the proposed variation will present such an advantage to employers, why has the Ai Group brought no evidence to this effect. It is also noted that 134(1)(f) is by the Ai Group's own submission a consideration which has no special primacy. Weighing against the consideration is the clear and unambiguous wording of the provision, the intention of the Commission and the lack of any contradictor during the plain language process.
46. The submissions at paragraph 74 to 76 of Ai Group deal with section 134(1)(g) of the Act. In response, the SDA notes that the proposed variation would create an anomaly in allowing employers to bypass the 3 hour minimum as well an ambiguity as to what the minimum entitlement to payment would be.
47. The SDA notes the position of the Ai Group at paragraphs 77 and 78 of its submissions.
48. The Ai Group at paragraph 80 summarises its position as

Furthermore, as set out in this section 6 of these submissions, the proposed variation is necessary in the sense contemplated by s.138 of the Act. In particular, we submit that:

- (a) There is no justification for requiring a minimum payment in circumstances where an employee does not perform work up to 3 hours or 1.5 hours, depending on the circumstance. Such an outcome is unfair and cannot be said to form a necessary part of the minimum safety net.
- (b) The proposed variation is fair. The extant term is unfair.
- (c) If the error is remedied in the terms proposed, the Award will be simple and easy to understand.
- (d) The grant of the proposed variation will have an overall positive impact on business.

49. In response the SDA submits that:

- a. The proposed variation would allow for employers to unilaterally alter the hours of casual employees to such an extent which would be contrary to section 134(1) of the Act and the principles of natural justice.
 - b. In that the submission of Ai Group is made without any supporting argumentation or evidence it does not require a response by the SDA except to refer to its above submissions.
 - c. The proposed variation would raise several ambiguities including those noted by the SDA in paragraph 46 above. Nevertheless, simplicity must be balanced against the other considerations of section 134(1) of the Act.
 - d. While it is Ai Group's submission that the proposed variation would have a positive impact on business, the SDA submits in reply that the anomalies (including the ambiguities the Commission tried to address) such a variation would result in weighs against the variation being made.
50. The submissions of Ai Group while comprehensive do not directly entirely deal with the questions raised by Commissioner Bisset.
51. In dealing with the plain language review process they highlight the lack of contradictor to the current provision (including their own silence) as well as the clear intention of the Commission in rendering the provision in the current terms at 11.4.
52. Furthermore, Ai Group's submissions regarding section 160 depend on its overturning the clear meaning of the provision and the stated intention of the Commission. They have the effect of allowing the Ai Group to make late submissions to matters already decided by the Commission. As shown the citation Ai Group makes use of at paragraph 45 of its own submissions clearly show the lack of weight to its own arguments.
53. The submissions made by Ai Group regarding section 134(1) of the Act are not immediately relevant to the question at hand and at best are only an interpretation of the modern award's objective. The submissions of Ai Group highlight that several considerations of the same weigh against the proposed variation, to say nothing of the lack of error as noted above.

V CONCLUSION

54. As noted in the statement of Commissioner Bisset dated 9 July 2021, in responding to the drafting of the GRIA PLED, neither the initial submissions of Australian Business Industrial and the NSW Business Chamber nor Business SA mention this issue. The issue does not appear to have been raised in any of the SDA's submissions nor in the entire process.

55. That such an important provision remained unchanged and (it appears) unchallenged over a process lasting some three years can only lead to the conclusion that the Commission rightly decided in its favour in respect of the provision in question. The Commission should so conclude now.
56. This differs fundamentally from extant wording in an Award remaining unchallenged. The entire PLED process hinges on the critical analysis and commentary of interested parties on the various drafts. This together with the clear and unambiguous wording of the provision in question places a heavy burden on a party seeking to show that the Award contains an error. It is submitted that no party has shown this to be the case.
57. In effect, the parties proposing a variation seek to make late submissions regarding a settled matter for a substantive change to the way casual employees are rostered in the retail industry. The Commission should reject such submissions.