DECISION

Fair Work Act 2009
s.185—Enterprise agreement

kikki.K Pty Ltd T/A kikki.K
(AG2016/3550)

kikki.K Enterprise Agreement 2016

Retail industry

DEPUTY PRESIDENT BULL PERTH, 31 MARCH 2017

Application for approval of the kikki.K Enterprise Agreement 2016. BOOT issues considered and whether genuine agreement. Undertakings provided.

[1] An application was made by kikki.K Pty Ltd T/A kikki.K (the applicant/employer) for the approval of a single enterprise agreement known as the *kikki.K Enterprise Agreement 2016* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act).

[2] The Agreement purports to cover *Retail Team Members* engaged by the employer in the classifications listed in the Agreement. The Agreement does not cover Head Office Team Members.[1]

[3] The applicant's F17 *Statutory Declaration* indicated that at the time of the vote, 117 employees were covered by the Agreement and 51 of those employees were part time employees.

[4] The Agreement classifications at 4.6 of the Agreement are described as being:

- Store Team Member
- Assistant Store Manager
- Store Manager
- Cluster Manager

[5] The definitions for the above classifications are defined at clause 4 *Wages and Classifications* and further at Appendix 1 of the Agreement. The definition of a *Store Team Member* includes an employee who is primarily employed in a retail role to perform general duties within their knowledge and training. On 3 March 2017, in response to a Commission request for sample rosters applying to *Store Team Members* the applicant advised that it did

[1] See F17 at 2.2

not currently employ any *Store Team Members* as "these individuals are employed by a third party".

[6] Although the Agreement provides for the employment of casual employees there were no casual employees engaged by the applicant at the time of the vote.[2] On this basis it would appear that only managerial employees of the applicant in the classifications of Assistant Store Manager, Store Manager and Cluster Manager voted on the Agreement.

[7] The *General Retail Industry Award 2010* (the Award) is the relevant reference instrument for the purposes of applying the better off overall test (BOOT) as required under s.186 of the Act.

[8] In deciding whether to approve an enterprise agreement, the Commission is required to take into account the additional requirements of s.187 of the Act as well as s.193 of the Act to determine if the Agreement passes the BOOT.

Background

[9] The Agreement which was filed for approval contained base rates of pay that were 2.5% - 2.97% above the corresponding Award rates at test time.

[10] A number of Award entitlements are reduced under the Agreement. The Commission was concerned that the increased benefits including the wage rates under the Agreement were not sufficient to compensate employees for the less beneficial terms.

[11] The Commission wrote to the applicant on a number of occasions identifying concerns with the terms of the Agreement. The following concerns were raised:

- The Agreement at clause 3.3.2 appeared to exclude casual employees from parental leave, carer's leave and compassionate leave;[3]
- Unpaid carer's leave and compassionate leave appeared to be limited to 2 days in total rather than 2 days per occasion;
- The Agreement did not provide part time employees with overtime penalties for work in excess of their agreed or varied hours;
- The Agreement did not offer certain allowances which employees would be entitled to under the Award;
- The Agreement only provided evening penalties in certain circumstances, which would permit employees to be rostered up to 7.00pm Monday to Wednesday and 10.00pm Thursday to Friday without the payment of evening penalties;
- The Agreement did not afford part time employees the same protections as the Award;
- The Agreement allowed the employee and employer to mutually agree that at certain times employees could work hours or work patterns outside the ordinary hours of work at ordinary rates;
- The Agreement specified that any change to the Sunday or public holiday penalties of the Award will be mirrored in the Agreement and will take effect from the first full

[2] In correspondence of 9 November 2016 the applicant advised that the Agreement will allow the applicant to potentially directly employ casuals in the future under one Agreement

[3] Emails of 20 July, 3 and 12 August and 10 October 2016

pay period following the change in the Award taking effect and whether this term was explained to employees enabling genuine agreement to have occurred; and

- The consultation clause did not comply with the Act.

[12] The consultation term at clause 2.5 of the Agreement only requires consultation in relation to changes to regular rosters and ordinary hours of work which are not *mutually agreed*. This caveat is not contained in the model consultation term prescribed by the *Fair Work Regulations 2009* (the Regulations). Pursuant to s.205(2) of the Act, the model consultation term prescribed by the Regulations is required to be a term of the Agreement if approved.[4] The consultation requirements found under s.205 cannot be remedied by undertakings. Accordingly, pursuant to s.205(2) of the Act, the model consultation term at Schedule 2.3 of the *Fair Work Regulations 2009* will be taken to be a term of the Agreement.

[13] Undertakings were provided by the applicant confirming a casual employee's entitlement to parental, carers and compassionate leave in accordance with the National Employment Standards.

[14] An undertaking was also provided with respect to the period of carer's leave and compassionate leave that an employee may take being two days per occasion.

BOOT Considerations

[15] The applicant has been provided with a number of opportunities to remedy issues identified in the BOOT and other matters by way of undertakings. A number of the issues above were addressed through submissions of the applicant by providing additional detail with respect to the employer's business and by way of undertakings provided pursuant to s.190 of the Act.

[16] However the question of whether the Agreement was genuinely agreed to by employees and whether the Agreement satisfied the BOOT remained outstanding over a period of time.

Part time employees' ordinary hours

[17] The applicant acknowledges that the Agreement provides different conditions for part time employees when compared to the Award and submitted that the provisions are tailored to suit its operational requirements: "*these conditions are different than the Award but not necessarily worse.*"[5]

[18] The Award at clause 12.1 states that a part time employee is an employee who is engaged to work "less than 38 ordinary hours per week" and "has reasonably predictable hours of work." At subclause 12.2 it states:

"**12.2** At the time of first being employed, the employer and the part time employee will agree, in writing, on a regular pattern of work, specifying at least:

- the number of hours worked each day;

[4] See Commission advice to the applicant of 10 October 2016

[5] Response of 21 October 2016

- which days of the week the employee will work;
- the actual starting and finishing times of each day;
- that any variation will be in writing;
- that the minimum daily engagement is three hours; and
- the times of taking and the duration of meal breaks.

12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

12.4 The agreement and any variation to it will be retained by the employer and a copy given by the employer to the employee.

12.5 An employer is required to roster a part time employee for a minimum of three consecutive hours on any shift.

12.6 An employee who does not meet the definition of a part time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13."

[19] The overtime provisions in clause 29.2 of the Award state that overtime penalties will apply, in the case of part time employees, to all hours worked in excess of the agreed hours in clause 12.2, or as varied under clause 12.3.

[20] The provisions in the Award are clear and specific in regard to part time work. They require, firstly, that a regular pattern of work be agreed upon at the outset. Secondly, hours in excess of those agreed upon or agreed to be varied (in writing) will attract the payment of overtime.

[21] The Agreement at clause 3.2.1 states:

"**3.2. Part Time Employee**s

3.2.1 Part time employees are employees engaged to work <u>less than an average of 38 hours per week</u> and who have reasonably predictable hours of work. For the avoidance of doubt, these hours can be averaged over the relevant roster cycle (e.g. less than an average of 152 hours during a 4 week roster cycle, less than an average of 114 hours during a 3 week roster cycle, less than an average of 76 hours during a 2 week roster cycle or less than an average of 38 hours during a 1 week roster cycle).

3.2.2 In accordance with clause 2.1.3, at the time of a part time employee's commencement of employment, kikki.K will provide the employee with details of his or her expected Contract Hours. These hours may change in accordance with clause 5.1.2."

(My underline)

[22] As can be seen from the above, the Agreement does not require the employer and employee to agree in writing as per the Award on a regular pattern of work, specifying at least:

- the number of hours worked each day,
- which days of the week the employee will work,
- the actual starting and finishing times of each day,
- that any variation will be in writing; and
- the times of taking / and the duration of meal breaks.

[23] The Agreement at clause 5.2.3 provides that part time employees are to be engaged for no less than 3 hours per day.

[24] While clause 2.1.3 of the Agreement provides that a part time employee will be advised in writing of any change to their expected Contract Hours, this does not require agreement of the affected employee, although clause 5.1.2 of the Agreement provides that once posted, the employer may change an employee's roster with the agreement of the employee.

[25] The Commission raised the concern with the applicant that the part time terms in the Agreement appear to be less beneficial than the terms and conditions in the Award.[6] This was a particular concern as the applicant's F17 *Statutory Declaration* indicates that the Agreement at the time of the vote covered a significant proportion of employees engaged on a part time basis.

[26] In response the applicant initially proffered an undertaking which read:

> "**Contract Hours**
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> In relation to clause 3.2 of the Agreement, upon commencement of employment, kikki.K will also provide each part time employee with their expected working days and expected hours of work each day, including expected start and finish times and any variation to these hours will be in accordance with the Agreement."[7]
>
> (My underline)

[27] The undertaking proffered by the applicant does not provide the benefits given to part time employees under the Award as it refers to 'expected' working days and 'expected' working hours whereas the Award requires the (actual) days, hours and starting times to be specified.

[28] The Award provides further protection for part time employees in respect to their hours of work by requiring the employee to agree with the employer in writing to a regular pattern of work. Sub clause 12.7 of the Award provides that for part time employees, all hours worked in excess of the hours mutually agreed in writing on commencement or in excess of any further written agreement will be overtime hours paid as such.

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[6] Correspondence of 10 October 2016

[7] Undertakings dated 17 November 2016

[29] The Agreement dispenses with the necessity of requiring the agreement of the employee to any variation of regular hours and days of work. This enables the employer to determine and inform the part time employee of the days and hours that they will be expected or required to work as per clause 5.1.1 of the Agreement, which provides that the employer will notify employees of their rosters which may be up to 4 weeks in duration. The ability under the Agreement to vary the hours of part time employees each roster cycle is more a feature of casual employment.[8]

[30] These issues were raised by the Commission with the applicant's representatives at a telephone conference on 2 February 2017.

[31] Clause 3.2.1 of the Agreement provides that part time employees work less than an 'average' of 38 ordinary hours per week, compared to the Award which provides that part time employees work less than 38 hours per week. The effect of this is that the Agreement allows for a part time employee to work more than 38 hours in a week so long as the relevant roster average is less than 38 hours per week which may be over a 4 week cycle. The Award does not permit averaging so that part time employees can work 38 hours or more in a week.[9]

[32] Clause 5.4 **Overtime** of the Agreement provides that overtime is payable for any work outside the parameters of clause 5.2 **Working Hours** except where it is mutually agreed that an employee works outside the hours or work patterns described in 5.2 when:

- preparing a new store for opening;
- working during peak trading periods; or
- in the lead up to and following Christmas.

[33] The Agreement's *Overtime* clause does not require a part time employee working outside their mutually agreed hours to be paid at overtime rates, unless those hours are outside the conditions set out in clause 5.2,[10] except where they are worked in compliance with subclause 5.2.9 and clause 5.3.

[34] A part time employee may be rostered to work more ordinary hours in a roster than they would in accordance with their agreed ordinary hours under the Agreement. Under the Award an employee who works hours per week in excess of those hours initially agreed would be entitled to payment of overtime where there has been no agreed variation in writing as per clause 29.2(b).

[35] These are conditions which are less than the Award which were not identified or addressed in the application filed. This does not necessarily result in a failure to meet the BOOT as the totality of additional benefits under the Agreement for part time employees needs to be considered. As the applicant states in its correspondence of 21 October 2016, the BOOT is not a line by line comparison.

[36] On 2 March 2017, the Commission received undertakings which address the concerns raised. The undertakings are as follows:

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[8] See subclause 12.6 of the Award

[9] See decision of DP Asbury in *Link Mining Services Pty Ltd* at [12] [2016] FWC 8910

[10] See subclause 5.4.3 of the Agreement

"**Contract Hours**

In relation to clause 3.2 of the Agreement, upon commencement of employment, kikki.K will also provide each part time employee with their working days and hours of work each day, including start and finish times and any variation to these hours will be in accordance with the Agreement."

[37] It is noted that the Agreement's reference to 'expected' hours has been removed.

"Part Time Employees

For the avoidance of doubt, work performed by a part time employee:

(a) outside of his or her Contract Hours; and/or
(b) in excess of 38 hours in any rostered week,

will be paid at overtime rates."

[38] Therefore as per the undertaking, any part time employee working outside their agreed hours or more than 38 hours in a rostered week will be paid at overtime rates.

Evening rates

[39] Clause 5.3 **Extended Hours Stores Loading** of the Agreement provides that where a store's usual trading hours extend beyond the span of hours in the Agreement at clause 5.2.1, a permanent employee may work ordinary hours between 6am and midnight provided they are paid an additional loading of 25%. A similar term exists under the Award at clause 27.2(b)(iii), however the Award clause only allows ordinary hours to be worked between 7.00am and 11.00pm. Any hours worked under the Award in the circumstances prescribed between 6.00am and 7.00am and between 11.00pm and midnight would be paid at overtime rates. Further, under the Award the 25% evening work allowance is paid for all ordinary hours worked after 6pm excluding casuals.[11]

[40] The applicant points out that the Agreement's span of ordinary hours Monday to Wednesday of 8am to 7pm is shorter that the equivalent Award span of 7.00am to 9.00pm.

[41] An undertaking regarding permanent employees' evening rates was provided in the following terms:

"**Evening Rates**

In relation to clauses 5.2 and 5.3 of the Agreement, any permanent Employee who works Ordinary Hours after 6.00pm Monday to Friday (but within the span of hours set out in clause 5.2.1), will be paid an additional 25% of his or her Ordinary Hourly Rate for those hours."

[42] This undertaking is consistent with the Award entitlement at clause 29.4(a) *Evening work Monday to Friday.* Together with the undertaking, the applicant advised that it is not

[11] Award Clause 29.4 Penalty payments

kikki.K's practice to have staff working consistent evening hours and any concerns that employees would be rostered in this manner is not reflective of kikki.K's business.[12]

Rates of pay

[43] The Agreement at clause 4.8 **Wage Increases** states that "effective from 1 July 2017 and annually each year during the nominal life of the Agreement, kikki.K will pass on changes in each classification's Ordinary Hourly Rate in accordance with the decisions of the FWC in its annual wage review." The *2015-16 Annual Wage Review* increase to the Award of 2.4%, effective from 1 July 2016, is not passed on under the terms of the Agreement.

[44] The applicant submitted that it was confident it has set remuneration for each classification to ensure employees are better off overall under the Agreement when compared to the Award. It was submitted that the higher base rates of pay flow through to all other conditions in the Agreement including late night rates, overtime rates, weekend penalties, leave payments etc.[13]

[45] Despite the assertion made, no modelling of how the wage rates in the Agreement was provided with the application. It is noted that the Saturday, Sunday and public holiday penalties under the Agreement reflect those under the Award.

Mutual agreement to work outside ordinary hours at ordinary rates

[46] Clause 5.2.9 of the Agreement provides that an employer and employee may mutually agree, at certain times when preparing a new store for opening, during peak trading periods or in the lead up to and following Christmas, that employees will work hours or work patterns outside of the ordinary hours of work and that in circumstances of such mutual agreement, the employee will be paid their ordinary hourly rate. The clause then goes on to state:

> "Therefore, by way of example, kikki.K may agree with an employee that they will work:
>
> 5.2.9.1 more than 9 paid hours in one day;
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> 5.2.9.2 more than 20 days over a 4 week cycle;
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> 5.2.9.3 more than 6 consecutive days;
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> 5.2.9.4 such hours that do not allow the employee at least 2 consecutive days off over a two week roster cycle (or equivalent over any longer roster cycle);
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> 5.2.9.5 such hours that do not allow the employee 10 hours between shifts; or
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> 5.2.9.6 such hours that are different to the employee's usual hours of work (e.g. a change in their days of work or start or finish times on any day or to cover an absent employee).

[12] Correspondence of 21 October 2016

[13] Ibid

> kikki.K may otherwise give a part time employee the option of working additional hours (for example, during peak trading periods) and the employee and kikki.K may Mutually Agree on the employee working such hours of work.
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> In circumstances of such Mutual Agreement, the employee will be paid his or her Ordinary Hourly Rate."

[47] The Agreement does not contain any detail as to how many occasions an employee may work the hours in sub clauses 5.2.9.1 - 5.2.9.6 nor does it provide any limitations on the examples given. Without this, it is difficult to determine the extent to which the Agreement term could be a detriment to employees, and to balance it against the right for employees to be paid overtime as per the Award.

[48] The Commission wrote to the applicant noting its concern with clause 5.2.9,[14] and in particular that no equivalent clause exists in the Award under which employees would be entitled to payment of overtime and penalty rates if working the hours contained in sub clauses 5.2.9.1 - 5.2.9.6.

[49] There was no empirical demonstration provided by the applicant that the Agreement rates of pay are sufficiently high enough to compensate employees for the loss of overtime, as well the 17.5% annual leave loading and the first aid and meal allowance (where applicable) provided for under the Award.

[50] The Commission was concerned that, given clause 5.2.9 of the Agreement allows employees to agree to the working of hours or working patterns outside the ordinary hours contained in the Agreement, the BOOT may not be satisfied. As an example, using the roster provided by the employer[15] for a part time *Assistant Store Manager* based on the Agreement rates and the hours worked for the fortnight 16 January to 29 January 2016, the Assistant Store Manager would receive $5.88 more than the Award over a fortnight. The calculations are extracted below:

NSW Metropolitan Shopping Centre Assistant Store Manager working 76 hours per fortnight.

Agreement Ordinary Rate	**$20.69**		
	Hours	**Loading**	**weekly total**
Mon-Fri ordinary hours	57.25	100%	$1,184.50
Mon-Fri after 6pm	4.25	100%	$87.93
Saturday hours	14.5	125%	$375.01
Sunday hours	0	200%	$0.00
Annual Leave	Yes		$120.96
Leave Loading	No		$0.00
Totals	**76.00**	**Hours**	**$1,768.40**

Award Ordinary Rate	**$20.13**		
	Hours	**Loading**	**weekly total**
Mon-Fri ordinary hours	57.25	100%	$1,152.44
Mon-Fri after 6pm	4.25	125%	$106.94
Saturday hours	14.5	125%	$364.86
Sunday hours	0	200%	$0.00
Annual Leave	Yes		$117.68
Leave Loading	Yes		$20.59
Totals	**76.00**	**Hours**	**$1,762.52**

[14] Email of 20 July 2016

[15] Provided on 2 March 2017

Agreement Total Weekly Rate	$1,768.40
Award Total Weekly Rate	$1,762.52
Dollar Difference	$5.88

[51] As discussed above, clause 5.2.9 of the Agreement provides that an employer and employee may mutually agree that employees will work hours outside of the ordinary hours and be paid their ordinary hourly rate. The $5.88 per fortnight benefit over the Award rate would erode quickly for an Assistant Manager working hours or working patterns outside the ordinary hours at the ordinary hourly rate as provided for under clause 5.2.9 of the Agreement.

[52] Enterprise agreements containing clauses allowing employees to work overtime hours variously described as "voluntary overtime" or "agreed overtime" at the ordinary hourly rate have been addressed in Commission decisions in the past. In *Mondex Group Pty Ltd*[16] Senior Deputy President Harrison discussed various decisions relating to voluntary overtime, including:

> *"…Re MSA Security Officers Certified Agreement 2003* (MSA Security) Although the consideration there was whether the relevant agreement passed the then no-disadvantage test (NDT), the observations made remain relevant. The decision concerned an appeal against the certification of an agreement which contained a term providing for the parties to agree that extra hours or shifts could be paid at ordinary time rates of pay rather than overtime rates. The Full Bench said that, in applying the NDT, consideration is to be given to a comparison between the enterprise agreement terms and the relevant award terms. The award did not distinguish between hours worked on a voluntary basis or those as directed by an employer. All such hours were to be paid for at the applicable overtime rates. The application of the NDT did not involve an analysis of matters or considerations other than those between the enterprise agreement and the comparable terms and conditions of the award. It was not to the point that if employees had to be paid at overtime rates the employer may not offer them additional hours."

[53] More recently Deputy President Asbury in *Redlea Citrus*[17] stated:

> "[17] Under the relevant Award in the present case (and most if not all modern awards) while it is implicit that overtime is time that an employee is required to work, an employer cannot accept the benefit of work at times when an employee is entitled to payment at overtime rates, and avoid paying overtime rates for that work on the basis that the employer has not "*demanded*" or otherwise directed that the employee work.
>
> …

[16] [2015] FWC 1148 at [49]

[17] [2016] FWC 333

> [21] Quite simply, it is irrelevant for the purposes of the BOOT that an employee has volunteered, chosen or agreed to work hours that would attract a penalty payment, loading, allowance or additional payment under a relevant modern award or reference instrument.
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> …
>
> [22] It is equally irrelevant that the employee is working those hours in circumstances where the employer has not "demanded" that the employee work. If the employer obtains the benefit of the hours worked by an employee, and those hours are worked at times when the employee is entitled to be paid at overtime rates under an Award, then the Agreement must contain benefits that offset the loss of overtime payments so that the employee is better off overall under the Agreement"
>
> (My underline)

[54] Whether employees agree to work overtime hours at ordinary rates of pay, it is not a consideration for the purposes of the BOOT. Clause 5.2.9 is a detriment to employees when compared with the Award.

[55] To alleviate the concerns of the Commission, the applicant initially proffered an undertaking that, where an employee was concerned that over a roster cycle they were not receiving at least the Award rates of pay, they could request an Award/Agreement comparison. The initial period over which a request could be made was at least 6 months. [18] Following Commission concerns, the period of review was adjusted to each roster cycle. The undertaking was in the following terms[19]:

> "In relation to clause 4.6 of the Agreement, kikki.K has set remuneration for each classification to ensure Employees are better off overall under this Agreement than under the General Retail Industry Award 2010 ("**Award**") which would otherwise apply. Where an Employee considers that over a roster cycle (as stipulated in clause 5.1.1 of the Agreement), they are not better off overall under this Agreement than under the Award, they may request a comparison of the wages received for that roster cycle under this Agreement and the wages they would otherwise have been provided with under the Award. Any shortfall in wages which would otherwise be payable under the Award will be paid to the Employee in the next pay period after the review is completed. If the Employee and kikki.K cannot reach agreement on the wages which should be paid, the Grievance Procedure in clause 2.4 of the Agreement will be followed and the parties will agree to the Fair Work Commission arbitrating and making a binding determination to resolve the matter."

[56] On 2 November 2016, the Commission responded that it did not accept that the potential detriment to employees under subclause 5.2.9 of the Agreement, which provides that hours worked attracting an overtime penalty under the Award could be paid at the ordinary hour rate under the Agreement if mutually agreed to be worked, is cured by a reconciliation clause.[20]

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[18] Undertaking of 29 July 2016

[19] Undertaking of 8 August 2016

[20] Email dated 2 November 2016

[57] The Commission suggested that the issue should be rectified by limiting the number of additional hours an employee may work, or by increasing the base rates of pay or by paying overtime on hours which would be overtime under the Award.[21]

[58] The Commission notified the applicant that it would not accept the reconciliation undertaking in any event, because in its view the reconciliation clause is a detriment to employees. The clause requires employees to request on a monthly basis (if that is the employees' roster cycle) where employees are paid on a fortnightly basis and the onus lies with the employee to make the request for a comparison to be performed. Additionally the clause does not state that employees will be better off, but that employees will receive the payment that they would otherwise have received under the Award.[22]

[59] On 18 November 2016, the applicant provided a further undertaking to increase the Agreement rates of pay by between 0.71% and 1.02%. The increase applied to the rates already 2.50% to 2.97% above the Award at test time.

[60] The applicant also provided an undertaking that notwithstanding clause 5.2 of the Agreement, a permanent employee would not be required to work more than 2 hours of overtime per week averaged over a roster cycle at ordinary hourly rates of pay. Work performed outside of a part–time employee's contract hours will '*ordinarily*' be considered overtime.

[61] On this basis the applicant submitted that the proposed reconciliation undertaking would not be necessary although it would still be prepared to provide this undertaking if deemed necessary by the Commission.

[62] A telephone conference to address this issue and other matters was held on 2 February 2017. At the conclusion of the conference the kikki.K representatives undertook to provide to the Commission the wage modelling that the employer had undertaken to demonstrate that employees were better off under the Agreement than the Award. Responses to a number of other matters were also requested.

[63] A response was provided on 2 March 2017, but was missing some documents due to "technical difficulties" and the applicant's full response was received on 3 March 2017. While 3 rosters were attached to the correspondence and reference was again made to the applicant's modelling that demonstrated that the BOOT was satisfied, the wage modelling as requested on 2 February 2017 was not provided. Following a further request, this was subsequently provided.

[64] The rosters supplied by the applicant related to three stores for the fortnight commencing 16 January 2017. They included a Victorian roster and two NSW rosters, one from a metropolitan store and one from a regional store.

[65] The applicant provided additional submissions and new undertakings in its 2 March 2017 correspondence. Reference to a 'reconciliation' undertaking was withdrawn and an

[21] Email dated 2 November 2016

[22] Email dated 2 November 2016

undertaking limiting the amount of overtime that can be worked under the Agreement at the ordinary hourly rate to 50 hours in a year was provided.

[66] In addition the applicant provided an undertaking to further increase the wage rates under the Agreement by a further 2.4%. This further undertaking is equivalent to the *2015-16 Annual Wage Review* increase of 2.4% not automatically passed on under the terms of the Agreement.

[67] Together with the undertakings, the Agreement wage rates in comparison with the Award at test time are contained in the chart below:

Modern Award Classification	Agreement Classification	Modern Award Rate	Agreement Rate	Percentage Difference
Level 1	Store Team Member	$18.99	$20.19	6.34%
Level 4	Assistant Store Manager	$20.13	$21.36	6.12%
Level 6	Store Manager	$21.26	$22.52	5.92%
Level 8	Cluster Manager	$23.21	$24.54	5.73%
Casual Level 1	Casual Store Team Member	$23.74	$25.24	6.33%

[68] The applicant advised that it was never the intention to rely on the mutually agreed overtime provisions in subclause 5.2.9 on a regular or on-going basis but to make use of the provisions to facilitate overtime on infrequent occasions such as during the Christmas period or when a new store is opened. On this basis an undertaking to limit mutually agreed hours to 50 hours per annum was provided, which I assume is a calendar year. The undertaking is in the following terms:

> "kikki.K will not rely on clause 5.2.9 of the Agreement to the extent that it enables Permanent Employees to work more than a total of 50 hours in any year at Ordinary Hourly Rates."

[69] When averaging the 50 hours per annum to one hour per week (although the mutually agreed hours will be worked in a compressed manner, i.e. over Christmas or on opening of a new store) on the rostered hours provided for the *Assistant Store Manager* at the NSW Metropolitan Shopping Centre, the following comparison rates are produced:

Agreement Ordinary Rate	$21.36		
	Hours	Loading	weekly total
Mon-Fri ordinary hours	57.25	100%	$1,222.86

Award Ordinary Rate	$20.13		
	Hours	Loading	weekly total
Mon-Fri ordinary hours	57.25	100%	$1,152.44

Mon-Fri after 6pm	4.25	125%	$113.48
Saturday hours	14.5	125%	$387.15
Sunday hours	0	200%	$0.00
Overtime	2	100%	$42.72
Annual Leave	Yes		$124.87
Leave Loading	No		$0.00
Totals	**78.00 Hours**		**$1,891.08**

Mon-Fri after 6pm	4.25	125%	$106.94
Saturday hours	14.5	125%	$364.86
Sunday hours	0	200%	$0.00
Overtime	2	150%	$60.39
Annual Leave	Yes		$117.68
Leave Loading	Yes		$20.59
Totals	**78.00 Hours**		**$1,822.91**

Agreement Total Weekly Rate	$1,891.08
Award Total Weekly Rate	$1,822.91
Dollar Difference	$68.17

[70] With the higher hourly rate and the undertaking to pay the Award evening work loading of 25% for hours worked after 6:00pm, the employee's rate is $68.17 per fortnight higher than the Award equivalent.

[71] The Commission has undertaken a similar exercise for the other rosters and the classifications provided by the applicant which also demonstrate that the Agreement total weekly rates are higher than the Award using the sample rosters provided.

[72] The undertaking to limit the mutually agreed overtime hours to 50 hours in any year is in the following terms:

> **"Working Hours**
>
> kikki.K will not rely on clause 5.2.9 of the Agreement to the extent that it enables Permanent employees to work more than a total of 50 hours in any year at Ordinary Hourly Rates."[23]

Mirroring provisions

[73] The Commission wrote to the applicant seeking clarification of the intended operation of clause 4.9[24], which reads:

> "**4.9 Award Changes**
>
> During the term of the Agreement, any change to the 100% Sunday and/or 150% public holiday work penalty payments provided in clauses 29.4(c) and 29.4(d) of the Award will be mirrored in clauses 5.6 and 6.4.3 of the Agreement accordingly and will take effect in the Agreement from the first full pay period following the change in the Award taking effect."

[74] On 29 July 2016, the applicant submitted that the purpose of the clause was to ensure that the penalty rates for Sunday and public holiday work in the Agreement mirror the penalty

[23] Correspondence from 2 March 2017

[24] Correspondence dated 20 July 2016

rates applicable under the Award so that in the event that the penalty rates provided in the Award are varied, those changes will flow through to the Agreement.[25]

[75] The Commission was concerned with the clause in two respects. Firstly, in relation to whether employees had a full understanding of the effect that the clause may have on them, and thus whether there was genuine agreement and secondly, whether the clause may operate as a detriment to employees to be considered in assessing whether the Agreement passes the BOOT.

Genuine Agreement

[76] In considering the approval of an agreement, s.186(2)(a) of the Act requires that the Commission must be satisfied that the Agreement was 'genuinely agreed' to by the employees covered by the Agreement, having regard to s.188(c). Section 188, which explicates the "*genuinely agreed*" in s.186(2)(a), provides:

> **"188 When employees have genuinely agreed to an enterprise agreement**
>
> An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
>
> (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
>
> (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
>
> (b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and
>
> (c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees."

[77] Section 180(5) requires that:

> "180(5) The employer must take all reasonable steps to ensure that:
>
> (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
> (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

[25] Letter dated 29 July 2016

> (6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:
>
> (a) employees from culturally and linguistically diverse backgrounds;
> (b) young employees;
> (c) employees who did not have a bargaining representative for the agreement."

[78] The Commission sought information from the applicant detailing how clause 4.9 was explained to employees and how the Commission could be satisfied that employees genuinely agreed to the Agreement. It was noted that the applicant's Statutory Declaration in support of its application contained in the Form F17 did not identify this clause as a less beneficial term than the Award.[26]

[79] On 8 August 2016, the applicant responded by explaining that all employees were provided with ongoing access to the Agreement and that information sessions were held with employees during which the general content of the Agreement was discussed with employees. The applicant submitted that any questions that employees asked were answered and that there was also a further opportunity for employees to ask questions but that no questions in relation to clause 4.9 of the Agreement were asked.

[80] On 12 August 2016, the Commission noted to the applicant that the response did not specifically address whether clause 4.9 was explained to employees and that the Commission remained concerned that the mirroring provisions in clause 4.9 may result in reductions to employees' entitlements during the nominal term of the Agreement that employees were not made aware of in the information provided.

[81] On 19 August 2016, the applicant further advised that information packs were distributed to employees, which contained an explanation of key terms and their effect as well as a frequently asked questions document. The applicant provided submissions explaining the processes they undertook to explain the terms of the Agreement to employees. Notably, the applicant advised that there were no questions asked about clause 4.9 and that none of the material distributed to employees specifically addressed clause 4.9. The applicant, on request, provided copies of the information packs that were provided to its employees.[27] The information pack under the heading *of "What are some of the key changes under the proposed Enterprise Agreement?"* advises employees that they should review the terms of the proposed agreement and that many of the changes are essentially administrative in nature however, there are some changes to the base rates of pay. The advice then refers to the ability to enter into Individual Flexibility Arrangements.

[82] The applicant submitted that the meaning of the clause is clear on its face, and that the relevant employees did not include anyone who would require specific explanation of terms such as employees from a non-English speaking background. The applicant relies on the Full Bench decision in *McDonald's Australia Pty Ltd*[28] where the Full Bench stated that there is no requirement in the s180(5)(a) for there to be a full explanation of the terms of an

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[26] Correspondence dated 3 August 2016

[27] Correspondence dated 7 September 2016

[28] [2010] FWAFB 4602

agreement prior to the vote[29] and further, on Commissioner Asbury's (as she then was) decision in *Glen Eden Thoroughbreds Pty Ltd T/A Ray While Shailer Park*[30], where it was stated that where there are no employees in demographic groups who require more, it is reasonable that only major terms be explained to employees.[31] The applicant stated that being required to explain the meaning of the mirroring clause would be an additional test and would be in error.[32]

[83] In respect of the decision in *McDonald's*, I accept the view of the Full Bench that the Act does not require a full explanation of the terms of the Agreement. In relation to some, if not most terms in an agreement, more than a cursory explanation is unlikely to be required. However it does not follow that no explanation at all is required to be given, particularly in respect of the effect of terms which are likely to have a considerable effect on employees' financial entitlements. In respect of the decision in *Golden Thoroughbreds*, it is my view that the distinction can be made as occurred in that decision, between "major terms" of the Agreement on the one hand, and minor terms on the other. In my view, properly constituted, clause 4.9 is a major term or key term, in that it has the potential to reduce the payment that employees who work during penalty rate hours can expect to receive during the life of the Agreement.

[84] Further, the applicant's F16 *Application for approval of an enterprise agreement* indicates that there were no union or employee bargaining representatives involved in the Agreement making process, a circumstance to be taken into account pursuant to s.180(6)(c) when explaining the Agreement to employees. In its submissions, the applicant advised that this is the first enterprise agreement for kikki.K. I accept that the actions taken by the applicant to explain the terms of the Agreement were reasonable, and that a practical approach needs to be adopted in relation to the obligation in s.180(5)(a), although in the circumstances it would have been preferable for this provision to have been brought to the attention of employees in the applicant's information pack.

[85] Despite these reservations I am not prepared to conclude that the Agreement was not genuinely agreed by employees. The mirroring provision is clearly contained in the Agreement under the heading *Award Changes* and employees were provided with the opportunity to ask questions relating to the Agreement. I am therefore satisfied that s.180(5) was complied with and that the Agreement has been genuinely agreed to as per s.186(2).

[86] The applicant submitted that the provision does not pose any financial disadvantage to employees when compared to the underpinning Award, but seeks to align Sunday and public holiday penalty rates in the Agreement to the relevant Award penalty rates. The applicant submitted that depending on movements in the Award this may result in rates moving up or down, at test time, and all other times, the provision is identical to the Award.[33]

[87] In respect of the BOOT, I am required to be satisfied that each award covered employee and each prospective award covered employee would be better off overall under the Agreement than under the Award as at the test time, being the time when the application for

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[29] Ibid at [30]

[30] [2010] FWA 7217

[31] Ibid at [77]

[32] Correspondence of 7 September 2016

[33] Correspondence of 19 August 2016 at 2.13.3

approval was made.[34] The relevant Award penalty rates which I am to consider are the rates contained in the Award as at the time the application for approval was made. A term in the Agreement which may have the effect of reducing the Sunday and public holiday penalty rates from the existing Award rates is, in my view, a term that is potentially detrimental to employees and therefore, a matter I must take into consideration when assessing if the Agreement passes the BOOT.

Conclusion

[88] I have taken into consideration the applicant's submissions concerning the application of the BOOT to the Agreement and the undertakings provided by the applicant to address the Commission's concerns.

[89] I am satisfied that the beneficial terms afforded by the Agreement, including the higher base rates of pay when accepting the undertaking to increase the base rates, together with the undertakings relating to the working hours of part time employees, the payment of the evening work penalty after 6pm as per the Award and the limitation to the working of mutually agreed hours at ordinary rates outweigh the terms which may be considered detrimental to employees, such that current and prospective employees will be better off under the Agreement.

[90] The undertakings provided are not so substantial that if asked to vote again, the employees who voted would not approve the Agreement. I am therefore satisfied that the undertakings do not result in a substantial change to the Agreement as per s.190(3)(b) of the Act.

[91] The Agreement is approved and will operate from the first pay period occurring 7 days from the date of approval in accordance with the terms of the Agreement and s.54(1) of the Act.

[92] The nominal expiry date of the Agreement is 4 years from the date of approval.

[93] The undertakings provided by kikki.K are taken to be a term of the Agreement. A copy of the undertakings is attached at Annexure A.

[94] I am satisfied that each of the requirements of ss.186, 187 and 188 of the Act as are relevant to this application for approval have been met.

[95] This decision and undertakings should be brought to the attention of employees covered by the Agreement by the applicant.

[34] See s.193(6) *Fair Work Act 2009*

DEPUTY PRESIDENT

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ANNEXURE A

Deputy President Bull
C/- Ms Rachael Jones
Member Support Research Team
member.assist@fwc.gov.au

Dear Deputy President Bull,

AG2016/3550 – kikki.K Enterprise Agreement 2016

These undertakings are provided in relation to the kikki.K Enterprise Agreement 2016 (**"Agreement"**).

Parental Leave for Casuals

1. Nothing in clause 3.3.2 of the Agreement is intended to, or has the effect of, limiting in any way casual employees' rights with respect to parental leave, carer's leave and compassionate leave in accordance with the National Employment Standards set out in the *Fair Work Act 2009*.

Carer's and Compassionate Leave

2. The period of carer's leave under clause 6.1.10 and compassionate leave under clause 6.2.1 that an employee may take is 2 days per occasion it is required.

Contract Hours

3. In relation to clause 3.2 of the Agreement, upon commencement of employment, kikki.K will also provide each part time employee with their working days and hours of work each day, including start and finish times and any variation to these hours will be in accordance with the Agreement.

Part Time Employees

4. For the avoidance of doubt, work performed by a part time employee:

   (a) outside of his or her Contract Hours; and/or
   (b) in excess of 38 hours in any rostered week,

   will be paid at overtime rates.

Ordinary Hourly Rates

5. Notwithstanding clause 4.6 of the Agreement, kikki.K agrees that the following Ordinary Hourly Rates will apply:

	Permanent Employee Ordinary Hourly Rate	Casual Employee Ordinary Hourly Rate
Store Team Member	$20.19	$25.24
Assistant Store Manager	$21.36	
Store Manager	$22.52	
Cluster Manager	$24.54	

Working Hours

6. kikki.K will not rely on clause 5.2.9 of the Agreement to the extent that it enables Permanent Employees to work more than a total of 50 hours overtime in any year at Ordinary Hourly Rates.

Evening Rates

7. In relation to clauses 5.2 and 5.3 of the Agreement, any Permanent Employee who works Ordinary Hours after 6.00pm Monday to Friday (but within the span of hours set out in clause 5.2.1), will be paid an additional 25% of his or her Ordinary Hourly Rate for those hours.

kikki.K will provide a copy of this undertaking along with the Agreement to the Employees.

Signed for kikki.K Pty Ltd
ACN 092 563 249

	(Signature)	In the presence of: Fontella Hassing	(Signature)
2/3/17	(Date)	2/3/17	(Date)
Name: Robert Crafton		Name: FONTELLA HASSING	
Title: CFO		Title: EA To CEO + CFO	

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