DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—*Fast Food Industry Award 2010*
(AM2017/49)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE MELBOURNE, 4 JULY 2019

Fast Food Industry Award 2010 – Award stage – substantive issues

1. Introduction

[1] On 20 February 2019 we issued a Decision[1] (the February 2019 Decision) in relation to the 4 yearly review of the *Fast Food Industry Award 2010* (the Fast Food Award). In that decision we rejected two award variations sought by the Australian Industry Group (Ai Group) and in doing so expressed two *provisional* views, namely that:

- there was merit in the provision of guaranteed minimum hours for part-time employees; and
- the current award places unwarranted restrictions on the capacity to vary part-time hours.

[2] Deputy President Masson convened conferences on 12 April and 21 May 2019, to provide interested parties with an opportunity to comment on these *provisional* views. On 27 May 2019 the Deputy President published a Report on the outcome of those conferences. All parties accept that the Report accurately summarises their respective positions

[3] Directions were issued on 28 May 2019 to provide interested parties with an opportunity to file final written submissions in relation to the *provisional* views expressed in the February 2019 Decision and the draft clause set out at Attachment B to the Report issued by DP Masson. Submissions were subsequently filed by the Retail and Fast Food Workers Union (RAFFWU); the Shop Distributive and Allied Employees' Association (SDA) and Ai Group.

[4] This decision determines the issues which were the subject of the two *provisional* views set out above and should be read in conjunction with the February 2019 Decision. We turn first to whether the Fast Food Award should provide guaranteed minimum weekly hours for part-time employees.

2. Consideration

2.1 Guaranteed minimum hours

[5] The February 2019 Decision rejected Ai Group's application for a new part-time clause which permits 'flexible part-time work', noting that:

> 'In our view the proposed variation lacks merit. If the award was varied in the manner proposed by Ai Group it would not provide 'a fair and relevant minimum safety net of terms and conditions'; it would not achieve the modern awards objective. In reaching this conclusion we have taken into account the s 134 considerations, insofar as they are relevant to the claim. We reject the claim for those reasons.'[2]

[6] We went on to observe that the rejection of Ai Group's claim was not the end of the matter and that 'we see merit in the provision of guaranteed minimum hours for part-time employees'.[3]

[7] Clause 12 of the Fast Food Award does not presently prescribe a minimum number of weekly hours for part-time employees, it states:

> **'12. Part-time employees**
>
> 12.1 A part-time employee is an employee who:
>
> (a) works less than 38 hours per week; and
>
> (b) has reasonably predictable hours of work.
>
> 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;
> - 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—Casual employment.
>
> 12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work

performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 26—Overtime.'

[8] Ai Group's claim sought to replace clause 12 and defined a part-time employee as an employee who, among other things, 'works at least 8 but less than 38 hours per week' (emphasis added).

[9] The proposed draft clause discussed at the conferences before Deputy President Masson was in the following terms:

> **12.6** An employer is required to roster a part-time employee for a minimum of 8 hours per week and a minimum of 3 consecutive hours on any shift.

[10] The SDA and RAFFWU support the provision of a minimum number of weekly hours for part-time employees. The SDA notes[4] that the provision of a minimum of 8 hours per week for part-time employees is consistent with the minimum hours provisions in the following modern awards:

- Hospitality Industry (General) Award 2010 (clause 12.2(a))
- Restaurant Industry Award 2010 (clause 12.2(a))
- Registered and Licenced Clubs Award 2010 (clause 10.4(b)(i))'

[11] RAFFWU also supports such a provision and submits that:

> 'the modern awards objective are met by stipulating 8 hours per week as a base – 32 hours over a four week cycle. This provides a floor of hours and:
>
> (a) Helps address the needs of the low paid and improve what might be otherwise poor living standards; and
>
> (b) Promotes social inclusion by increasing workforce participation.' [5]

[12] RAFFWU also contends that the evidence 'shows that the hours worked by part-time workers in the sector are 8 hours or more'[6] and references the McDonalds' enterprise agreement which provides that part-timers must be engaged for at least 10 hours per week. Finally, RAFFWU submits that an 8 hour minimum 'is acceptable to industry as identified by the application of Ai Group for the inclusion of such a minimum'.[7]

[13] Ai Group opposes the provision of guaranteed minimum weekly hours for part-time employees on two main bases. First, it is said that such a change is not necessary to meet the modern award objective and, second, it is submitted that a guarantee of minimum weekly hours for part-time employees is not a general feature of a traditional part-time arrangement.

[14] In relation to the submission advanced by RAFFWU, Ai Group accepts that a minimum weekly guarantee of 8 hours was a feature of the flexible part-time clause jointly proposed by the SDA and Ai Group for inclusion in the Fast Food Award as part of the review, but submits that this aspect of the proposed clause was put on a 'whole of package' basis, that is, the inclusion of the minimum weekly guarantee of 8 hours was an element of a package negotiated between Ai Group and the SDA with the assistance of the Commission in

private conference. Further, contrary to the submission advanced by RAFFWU, Ai Group submits that it did not advance a stand-alone proposition that a minimum weekly guarantee was needed in the Fast Food Award, in the absence of the other flexibilities being sought. We agree with Ai Group in respect of this point.

[15] Further, RAFFWU's reliance on the various enterprise agreements in the Fast Food sector is similarly misplaced. While a number of agreements provide a guaranteed number of weekly hours for part-time employees, that guarantee is in the context of part-time provisions which provide greater flexibility than the relevant clause in the Fast Food Award.

[16] Upon giving this issue further consideration, and having regard to the submissions put, we have decided to depart from our *provisional* view and have concluded that such a change is not *necessary* (within the meaning of s 138) to achieve the modern awards objective. It is not necessary to have a prescribed guaranteed minimum weekly engagement for part-time employees in the Fast Food Award because:

(i) the existing part-time clause provides part-time employees with 'some degree of regularity and certainty of employment' consistent with what the AIRC Full Bench in the *Award Modernisation Decision*[8] of 4 September 2009 described as the 'conventional characteristics of part-time employment.' In particular the existing clause provides a mechanism for a contractually guaranteed number of hours to be agreed between the employer and employee, in particular such an agreement must specify:

- the number of hours worked each day;
- which days of the week the employee will work;
- actual start and finish times each day; and
- the times of taking and the duration of meal breaks.

(ii) clause 12.5 provides a safeguard of a minimum duration of three consecutive hours on a shift; and

(iii) the characteristics of the Fast Food sector do not support the prescription of guaranteed minimum weekly hours for part-time employees, in particular, the profile of Fast Food employees differs from the profile of employees in 'All industries' in two important respects:

- over six in ten (60.7 per cent) Fast Food employees are aged between 15 and 19 years, and 79.5 per cent are aged between 15 and 24 years, compared with only 5.8 per cent and 16.5 per cent respectively of all employees; and

- almost two-thirds (63.9 per cent) of Fast Food employees are students (59.6 per cent are full time students and 4.3 per cent study part-time) compared to 13.7 per cent of all employees.

[17] In relation to point (iii) above, we note that during the course of oral argument Mr Cullinan, on behalf of RAFFWU acknowledged the particular features of the sector, while continuing to press for the provision of a guaranteed 8 hours of work per week for part-time employees:

> '… we would continue to press on the basis of our submissions the eight hour point, but we do acknowledge that the fast food industry at the moment is populated by a very young workforce largely at high school, and we acknowledge that there are difficulties with rostering some of those staff at times. If we were to encourage those staff to take up part-time employment if the employers were - rather than casual employment - and so we do understand the particular issues in this sector.'[9]

[18] As to the reliance of the SDA on the minimum hours provisions in the three modern awards mentioned at [10] above, it is important to appreciate that the minimum hours provisions in those awards are in the context of part-time provisions which provide greater flexibility than that available under the Fast Food Award. Further, the provision of minimum weekly hours (as opposed to minimum *engagement* terms) is not a feature of most modern awards – the parties were only able to identify three awards with such a term (the three mentioned at [10] above).

[19] Finally, RAFFWU submissions regarding the modern awards objective are unpersuasive. We accept that a substantial proportion of Fast Food industry employees are 'low paid', for the purpose of s.134(1)(a)[10]. But the provision of a guaranteed number of hours per week will only assist the low paid to meet their needs if they are able to avail themselves of such a guarantee.

[20] Given the age and circumstances of the majority of Fast Food industry employees (that is, aged between 15 and 19 years and in full-time study) the requirement to work a minimum of 8 hours per week may not suit them and hence they may prefer to work fewer hours and could only do so on a casual basis. Further, the provision of an 8 hour minimum may deter some employers from engaging part-time employees.

[21] The major Fast Food chains collectively employ about three quarters of all Fast Food industry employees and the vast majority of employees employed by the major chains are covered by enterprise agreements. A number of the major Fast Food chains have flexible part-time clauses in their enterprise agreements.[11] The Fast Food Award does not provide the same degree of flexibility. Hence, the fact that some major Fast Food chains currently engage a significant proportion of their employees on a part-time basis[12] does not support an inference that they would continue to employ a significant proportion of their employees on a part-time basis in the event that the Fast Food Award applied to their businesses.

[22] As to RAFFWU's contention that the provision of an 8 hour weekly minimum for part-time employees would 'promote social inclusion by increasing workforce participation', the submission put was not the subject of any elaboration or evidence.

[23] The focus of the consideration in s.134(1)(c) is on increasing employment (in terms of hours worked or the number of persons employed). An eight hour minimum for part-time employees would result in increased hours if:

(i) The number of part-time employees remained constant (or increased); and

(ii) Employers did not reduce the number of hours offered to full time or casual employees.

[24] The first assumption may be doubted, for reasons already given. As to the second, businesses require a certain number of 'labour hours' to operate. Within that quantum of hours a mixture of full time, part-time and casual employees are often employed. If the hours allocated to part-time employees are increased (by virtue of an award prescribed 8 hour minimum) then the likely outcome, at least in the short term, is a reduction in the hours offered to casual employees (as full time hours are fixed). Over time, there may also be a reduction in the number of employees engaged on a part-time basis.

[25] We now turn to the second of the *provisional* views set out in the February 2019 Decision.

2.2 A revised part-time clause

[26] In the February 2019 Decision, we expressed the *provisional* view that clause 12 of the current award (set out above at [7]) places 'unwarranted restrictions on the capacity to vary part-time hours'.[13] We also noted[14] that the evidence suggested that the requirement for the employer and the employee to agree in writing to variations and actual hours *before* they occur is impracticable and imposes an administrative burden upon employers.

[27] The existing award provisions which were the subject of our *provisional* view are 12.3 and 12.4:

'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.' (emphasis added)

[28] In the February 2019 Decision we expressed the *provisional* view that:

- agreed variations need not be recorded before the variation occurs – it should be sufficient to record the variation at the end of the relevant shift;
- it is unnecessary to provide a copy of the agreed variation to the employee, it is sufficient if a record is retained by the employer; and
- some clarification as to the meaning of 'in writing' may be appropriate.15

[29] Various draft clauses reflecting the above *provisional* views were discussed at the conferences before Deputy President Masson. Attachment C to the Report sets out the views of the SDA and Ai Group in respect of the draft clause provided for discussion.

[30] RAFFWU generally opposes the variation of clause 12 in accordance with the provisional views expressed in the February 2019 Decision and advanced two broad arguments in support of its position:

(i) *Principle of contract variation;* a term which provides that a contractual variation not be reduced to writing when the variation is of a written agreement 'greatly increases the likelihood of dispute and conflict in the future' because 'without written agreement *before* the working of hours, it is likely workers and their representatives will rely on the written documents which identifies agreement – the extant contract'. Further, 'Unscrupulous employers may simply insist agreement was reached and workers would be left with the unenviable task of litigating unpaid wages in the courts without the benefit of a written artefact'.

(ii) *Evidence does not identify an issue with the provision of the contract variation*: it is submitted that the evidence does not identify any issue with the provision of a copy of a variation to the agreed regular pattern of work and that 'Without evidence, there is no basis for the Full Bench to vary the Award to provide a circumstance where an employee is not given a copy of the variation as a matter of course'.

[31] RAFFWU submits that the effect of removing the right to be automatically given a copy of the contract variation and an agreement to vary not being distilled in writing prior to the work being performed, has 'a flavour of voluntary overtime at ordinary rates'. In sum it is submitted that the proposed variation of clause 12 is 'lacking in merit, is not borne out by the evidence and will not assist in meeting the modern awards objective'.

[32] RAFFWU also contends that the variation of clause 12 in the manner proposed would be contrary to the section 134 considerations at s.134(1)(da)(i); s.134(1)(f) (in that the increase in disputation will increase the regulatory burden) and s.134(1)(g) (in that it would result in the creation of a 'less simple, more difficult to understand system').

[33] In the event we do not accept RAFFWU's primary submission and vary clause 12 to remove the requirement that agreed variations be recorded *before* the variation occurs, then RAFFWU advances an alternative submission that:

> 'any instance where an agreed written contractual variation is not executed should explicitly entitle a worker to overtime rates for the relevant worker. This is so because the worker has not agreed in writing to a contractual variation.'[16]

[34] We return to RAFFWU's alternate submission shortly, but deal first with the proposition that clause 14 should not be varied in accordance with the *provisional* views expressed in the February 2019 Decision. At the outset we note that the SDA and Ai Group support the variation of clause 12 to remove unwarranted restrictions on the capacity to vary part-time hours.

[35] We have considered the submissions put by RAFFWU but have, in accordance with our *provisional* view, concluded that clause 12 places unwarranted restrictions on the capacity to vary part-time hours and that the clause should be varied to give effect to the *provisional* views set out at [28] above. We now turn to deal with each of RAFFWU's submissions.

[36] First, the proposition that a term which provides that a variation is not reduced to writing *before* the variation operates (i.e. before the varied hours are worked) will greatly increase the likelihood of disputes and conflict is speculative and, in our view, unsubstantiated. The submission put gives insufficient weight to four features of the variation we propose to make, namely:

- the relaxation of the requirement to record a variation to the agreed regular pattern of work before the variation occurs only applies to variation agreements in respect of a particular rostered shift. Any agreed variation which operates on an ongoing basis or for a specified period of time must be recorded in writing before the variation occurs;

- while an agreement to vary the regular pattern of work for a particular rostered shift does not need to be recorded in writing before the variation occurs, it must be recorded at or before the end of the affected shift (a point we address in more detail later);

- while the clause as varied removes the requirement that the employer must provide a copy of the agreed variation to the employee, in all cases, it provides that a copy must be provided upon request; and

- the varied clause will include an additional safeguard: that if no record of the variation agreement is retained then any additional hours worked will be paid at overtime rates.

[37] Second, we accept that the evidence does not identify any issue with the requirement that employers provide part-time employees with a copy of an agreed variation to their regular pattern of work in all cases. But RAFFWU is incorrect in asserting that absent such evidence there is no basis for the Commission to vary the award. As mentioned in the February 2019 Decision, in the context of the Review, variations must be justified on their merits, and further:

> 'Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation.'[17]

[38] In our view the relaxation of the requirement to provide a written copy of the variation in all cases is 'obvious as a matter of industrial merit,' having regard to the following:

- the requirement to provide a copy to the employee of any agreement made under clause 12.2 and any agreed variation under clause 12.4 will be retained, the relaxation of the existing requirement only applies to agreed variations relating to a particular rostered shift;

- a copy of an agreed variation to a particular rostered shift must be provided, upon request; and

- the failure to retain a copy of an agreed variation will result in any additional hours worked being paid at overtime rates.

[39] We deal later with the merits of these variations.

[40] Finally, RAFFWU's submissions regarding the modern awards objective are unpersuasive. The consideration at s134(1)(da)(i) ('employees working overtime') is not apposite in these circumstances as hours worked pursuant to an agreed variation to an employees' regular pattern of work are not 'overtime' hours.

[41] As to s134(1)(f) and the contention that the variation of clause 12 in the manner proposed would increase disputation and regulatory burden, we reject that contention. For the reasons set out above the posited increase in disputation is speculative and unsubstantiated. Contrary to the submission put the variations we propose to make will reduce the regulatory burden of the award term.

[42] We also reject the submission that the variations proposed would result in a 'less simple, more difficult to understand system.'

[43] As mentioned earlier, the SDA and Ai Group support our *provisional* view that the current award places unwarranted restrictions on the capacity to vary part-time hours. Both parties are in broad agreement that clause 12 be varied such that a variation to the agreed regular pattern of work:

- need not be recorded before the variation occurs (and the recording should be permitted to occur at a later time); and

- need not be provided to the employee (and that it is sufficient that a record be retained by the employer).

[44] Further, the SDA and Ai Group support a variation of clause 12 to clarify that the recording of a variation to agreed regular hours may occur by electronic means.

[45] The issues in dispute concern the translation of the agreed principles into practice, there are three contentious issues:

- the point at which a variation to the agreed regular pattern of work must be recorded;

- interaction with meal breaks; and

- whether overtime is payable in circumstances where there is no record of the agreed variation.

[46] We also note that the SDA had initially proposed a variation to clause 12.2(d) to insert the words 'commonly used' before the expression 'electronic means of communication.' But abandoned the proposal during the course of oral argument.[18] The inclusion of an example after the expression 'electronic means of communication' was not opposed by any party;[19] we

propose to adopt that course and insert '(for example, by text message),' after the expression 'electronic means of communication.'

(i) *Point at which the variation must be recorded*

[47] Ai Group submits that the Fast Food Award should permit an employer and employee to record the variation to an agreed regular pattern of work *beyond* the end of a shift and that the proposed re-drafted clause 12.3 should read:

> '(a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded by the end of the shift or as soon as reasonably practicable after the end of the shift but by no later than 24 hours after the end of the shift.'

[48] In support of the proposed variation Ai Group submitted that a practical difficulty associated with the recording of the variation (either at the time of agreeing the variation or subsequently) is 'the distraction of the employer and the employee from meeting customer demand, particularly in peak periods of trading' and that 'the need to meet customer demand may not cease at the end of a shift worked by the employee.'[20]

[49] On this basis it is submitted that it may not be practicable for the employer and employee to record the variation at the end of the shift worked by the employee; but it may be practicable for the employer to send the employee a text message, or an email soon after the end of the shift and for the employee to accept the record by text message or email. It may also be practicable for the employer to prepare the record during a non-busy period and to present the record to the employee at the start of the next shift.

[50] Ai Group makes it clear that it is not proposing that the employee wait during unpaid time at the end of the shift for the variation to be recorded.

[51] The SDA does not oppose the verbal agreement to a variation to the regular pattern of work *during* a shift but opposed any formal recording of that agreement *after* the shift has finished. The SDA proposed the following wording at clause 12.3(a):

> '(a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded at or by the end of the affected shift.'

[52] The proposal advanced by Ai Group is premised, in part, on the assertion that the need to meet customer demand may not cease at the end of a shift worked by the employee. During the course of oral argument, Mr Gotting, counsel for Ai Group, acknowledged that there was no evidence supporting the asserted impracticality of recording a variation at the end of the shift.[21]

[53] We are not persuaded that it is appropriate to extend the flexibility as to the recording of the agreed variation to a particular rostered shift beyond the end of the affected shift. We will adopt the wording proposed by the SDA.

(ii) *Interaction with meal breaks*

[54] Ai Group and the SDA both acknowledge that clause 27.1(d) requires amendment as a consequence of the proposed changes to clause 12, but disagree on the form of such an amendment.

[55] During the course of oral argument it emerged that the issue in dispute was quite limited and that one way of resolving that dispute would be to include an express reference to clause 12.2, as follows:

> '**27.1 Breaks during work periods**
>
> (c) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to any agreement reached under clause 12.2 regarding a part-time employees' regular pattern of work. An agreed variation pursuant to sub-clauses 12.3 or 12.4 may include a variation to the time of taking rest and meal breaks.'

[56] This issue (although not the precise form of words to be used) was put to the parties during the course of oral argument and no party opposed the variation of clause 27.1(d) to include an express reference to clause 12.2 instead of the existing words: 'subject to the roster provisions of this award.'[22] However it was evident from the exchanges during the hearing that the parties sought an opportunity to consider the issue further, and any proposed draft. We agree to such a course and will provide an opportunity to comment on the proposed variation of clause 27.1 as part of the process for settling the variation determination arising from these proceedings.

(iii) *Overtime payable*

[57] The SDA proposes variations to clauses 12.5 and 26.2 the effect of which is that in the absence of any record of an agreement to vary a part-time employees' hours in relation to a particular rostered shift, any time worked in excess of the hours agreed as part of the employees agreed regular patter of work are paid at overtime rates. It is submitted that the variations proposed 'provides a protection for employees who have not agreed to work the additional hours.'[23]

[58] Ai Group oppose the variations proposed by the SDA essentially on the basis that they are not necessary to achieve the modern awards objective and that the proposal would expose an employer to two forms of penalty – one for an award breach (for failing to retain a record of the agreement) and the other in the form of an overtime payment.[24]

[59] The variations proposed by the SDA need to be considered in the context of the other variations which we propose to make, in particular, the additional flexibility provided in relation to:

- when an agreement to vary the regular pattern of work for a particular rostered shift is required to be recorded;

- the requirement to provide a copy of such an agreement to the affected employee; and

- clarifying that the agreed variation may be recorded electronically.

[60] As Ms Biddlestone, on behalf of the SDA, put it during oral argument:

> 'allowing a mechanism for … an employer to ask an employee to work hours beyond their roster at ordinary rates instead of overtime is a significant concession in terms of what the employee is being asked to give up. So I think it is reasonable to expect that if that agreement has not been achieved in writing then they should be paid at overtime rates. That should be the default position.'[25]

[61] We agree with the above observation and, further, in our view Ai Group's 'double penalty' argument is overstated. In circumstances where no record is kept and overtime is paid it seems to us that related proceedings for an award breach (for failing to retain a record of the agreement) are inherently unlikely. In any event, even if such proceedings were taken the overtime payment would no doubt be taken into account in fixing a penalty in respect of the failure to retain the record as the award breach penalty and the overtime payment (the so called 'double penalties') arise from the same factual substratum. The issue is similar to (but we acknowledge not the same as) an issue considered in the Annual Leave common issue where the Full Bench said:

> 'We acknowledge that the retention of this provision means that an employer may find itself in breach of both an award term and Regulation 3.36(2)(a) in respect of the same conduct. However, it is important to appreciate that an employer will not face a double penalty for such a single course of conduct: see generally ss.556-557 and *R v Hoar* (1981) 148 CLR 32 at 38; *CFMEU v Director of the Fair Work Building Industry Inspectorate* (2014) 225 FCR 210 and *Director of the Fair Work Building Industry Inspectorate v CFMEU (No. 2)* [2015] FCA 407.'[26]

[62] For the reasons given, we are satisfied that, in the context of the package of other variations we intend to make, variations to give effect to the proposal put by the SDA are necessary to achieve the modern awards objective.

[63] While we have dealt with the contested issues regarding the revised clause 12 there is one further matter we need to address. Clause 12.5 of the proposed redrafted clause in Attachment C to the Report is in the following terms:

> 'The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clauses 12.3 and 12.4 and provide a copy to the employee, if requested to do so.'

[64] The effect of the proposed clause would be to remove the existing requirement that an employer provide a copy to the employee of:

- the agreement entered into at the time of first being employed regard the part-time employees' regular pattern of work (i.e. the clause 12.2 agreement); and

- any subsequent agreement (under clause 12.4) to vary the regular pattern of work on an ongoing basis or for a specified period of time.

[65] It was not our intention that these requirements be removed. The *provisional* views we expressed in the February 2019 Decision were directed at variation agreements in relation to a particular shift – not the initial agreement under clause 12.2 or a variation which would operate on an ongoing basis or for a specified period of time. We propose to amend the draft determination to give effect to that intention.

[66] We now turn to consider the variations as a whole – reflected in the draft determination at Attachment A – and the modern awards objective.

[67] As mentioned in the February 2019 Decision, before varying a modern award the Commission must be satisfied that if the modern award is varied in the manner proposed then it would only include terms necessary to achieve the modern awards objective. The essential issue is if the Fast Food Award is varied as proposed would it provide a 'fair and relevant safety net'? Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[68] We now turn to the s134 considerations.

[69] The matters mentioned in s134(1)(b), (e) and (h) are neutral considerations, no party contended to the contrary.

[70] Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. We accept that a substantial proportion of Fast Food industry employees are 'low paid'' within the meaning of s134(1)(a). In our view s134(1)(a) is a neutral consideration in relation to the proposed variations. There is no probative evidence which supports a finding that varying the Fast Food Award in the manner proposed would adversely affect the earnings of Fast Food industry part-time employees. There is no evidence to suggest that under the current provision part-time employees are engaged to perform additional hours, beyond their rostered hours, without agreement such that they are entitled to overtime pay. Further, there is no probative evidence of non-compliance with the existing requirement that an agreement to vary agreed hours be recorded in writing before the actual hours are worked. Rather, the evidence suggests that the existing requirement is administratively burdensome.

[71] Section 134(1)(c) requires we take into account 'the need to promote social inclusion through increased workforce participation.' As mentioned earlier, obtaining employment (either an increased number of employers or hours worked) is the focus of this consideration. There is no evidence before us going to the impact of the proposed variation on employment and we regard this as a neutral consideration.

[72] Section 134(1)(d) requires that we take into account 'the need to promote flexible modern work practices and the efficient and productive performance of work' and s.134(1)(f) requires that we take into account 'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'.

[73] In our view the flexibilities provided by the proposed variations will promote 'flexible modern work practices' and will reduce 'employment costs and the regulatory burden' on employers. The variations will relax the requirements as to *when* a record of an agreement to vary hours in respect of a particular rostered shift is made and will, subject to employee agreement, facilitate the engagement of part-time employees on ordinary hours rates rather than overtime rates or the engagement of casual employees.

[74] As we observed in the February 2019 decision, the evidence before us suggests that the requirement for the employer and the employee to agree in writing to ad hoc variations in actual hours *before* they occur imposes an administrative burden on employers, for example:

- Nicola Agostino (who, through Agostino Holdings, operates three franchised McDonald's restaurants in WA) said:

'where there is a sudden influx of people which then leads the managers to request that an employee stay back and work extra hours, I do not believe it is likely that a written agreement could be made before the employee continued to work the extra hours.'[27]

- John Chapman (CEO, Airport Retail Enterprises Pty Ltd) , :

'the requirement under the Award to agree in writing in advance any extra hours to be worked by a part-time employee is too cumbersome.'[28]

- Kate Swan (a Certified Restaurant Trainer working full time at the Hungry Jack's restaurant in Cabramatta) states:

'there are more pressing matters for a manager to deal with such as general managerial duties and food control. In such a fast paced environment, it is also easy to forget about attending to these administrative matters.'[29]

- Leesa Guilk (Restaurant Manager at Hungry Jacks in Glendenning) states:

'In relation to clause 12.2, variations to hours worked is difficult to put into writing as it can often be reactive and on very short notice. There are many reasons why a shift or the hours within a shift need to be varied including sick employees, no shows, unexpected increasing sales, unexpected decreasing sales or a last-minute cancellation of another crew members shift due to unforeseen personal circumstances.

In relation to clause 12.3, the requirement that variations to the regular pattern of work be recorded in writing is not really in touch with reality as staffing matters In the restaurant move very quickly and staffing decisions are made very quickly. In my experience, the restaurant often has to fill in for or replace shift members on no or short notice. I estimate that it would take a lot of time (sometimes as long as [30) minutes on one shift) to record all variations in writing. It mean I would have to Invest my time in administrative tasks associated with complying with this clause rather than being on the floor and managing.'[30]

[75] If the variations are made they will have a positive impact on business and this is a consideration which weighs in favour of varying the award in the manner proposed.

[76] Section 134(1)(da) is not relevant for the reasons given at [40] above.

[77] Section 134(1)(g) deals with, relevantly, 'the need to ensure a simple, easy to understand … modern award system.' In our view the proposed variations are simple and easy to understand.

[78] We have concluded that if the award was varied in the manner proposed it would provide 'a fair and relevant minimum safety net of terms and conditions' and the variations are necessary to achieve the modern awards objective. In reaching that conclusion we have taken into account the s134 considerations.

3. Next Steps

[79] The variations we propose to make are set out in the draft variation determination attached to this decision (see Attachment A). We propose to provide interested parties with a final opportunity to comment on the draft variation determination and, in particular, the variations referred to at [55] and [56] above. Any comments are to be made, in writing to amod@fwc.gov.au by no later than 18 July 2019. Any outstanding issues will be determined based on the written material filed unless a request for an oral hearing is received by 18 July 2019.

PRESIDENT

Appearances:

J. Cullinan for the Retail & Fast Food Workers Union

K. Biddlestone and M. Gailbraith for the Shop, Distributive and Allied Employees Association

A. Gotting of Counsel with K. O'Brien for Ai Group

Hearing details:

27 June 2019
Melbourne

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<PR710037>

ATTACHMENT A

DRAFT DETERMINATION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards
(AM2017/49)

FAST FOOD INDUSTRY AWARD 2010
[MA000003]

Fast food industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE

MELBOURNE, *** 2019

4 yearly review of modern awards – Fast Food Award 2010 (MA000003).

A. Further to the Full Bench decision issued on 4 July 2019[31] the *Fast Food Industry Award 2010*[32] is varied as follows:

1. By deleting clause 12 and inserting:

12.1 A part-time employee is an employee who:

(a) works less than 38 hours per week; and

(b) has reasonably predictable hours of work.

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:

(a) the number of hours worked each day;

(b) which days of the week the employee will work;

(c) the actual starting and finishing times of each day;

(d) that any variation will be in writing, including by any electronic means of communication (for example, by text message);

(e) that the daily engagement is a minimum of 3 consecutive hours; and

(f) the times of taking and the duration of meal breaks.

12.3 The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular rostered shift as follows:

(a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded at or by the end of the affected shift; and

(b) the employer must keep a copy of the agreed variation, in writing, including by any electronic means of communication and provide a copy to the employee, if requested to do so.

(c) In the event that no record of an agreed variation to a particular rostered shift is retained the employee is to be paid at overtime rates for any hours worked in excess of their regular pattern of work.

12.4 The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work, on an ongoing basis or for a specified period of time, as follows:

(a) any agreement to vary the regular pattern of work on an ongoing basis or for a specified period of time must be recorded before the variation occurs; and

(b) the agreed variation must be recorded in writing, including by any electronic means of communication.

12.5 The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clause 12.4 and provide a copy to the employee.

12.6 An employer is required to roster a part-time employee for a minimum of 3 consecutive hours on any shift.

12.7 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—Casual employment.

12.8 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the

hours as agreed under clause 12.2 or varied under clause 12.3 or 12.4 will be overtime and paid for at the rates prescribed in clause 26—Overtime.

2. By deleting clause 26.2 and inserting:

26.2 A full-time or part-time employee shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) Before an employee's rostered commencing time on any one day; or

(c) After an employee's rostered ceasing time on any one day; or

(d) Outside the ordinary hours of work; or

(e) Hours worked by part-time employees in excess of:

(i) the agreed hours in clause 12.2; or

(ii) in excess of the agreed hours as varied under clause 12.3 or 12.4.

(f) Any additional hours worked by a part-time employee in excess of their regular pattern of work in circumstances where there is no written record of an agreed variation to a particular rostered shift.

3. By deleting clause 27.1(d) and inserting:

'(d) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to any agreement reached under clause 12.2 regarding a part-time employees' regular pattern of work. An agreed variation pursuant to sub-clauses 12.3 or 12.4 may include a variation to the time of taking rest and meal breaks.'

B. This determination comes into operation on [insert date]. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after [insert date].

PRESIDENT

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[1] [2019] FWCFB 272

[2] Ibid at [148]

[3] Ibid at [151]

[4] SDA submission 20 June 2019 at [3]

[5] RAFFWU submission 20 June 2019 at [28]

[6] Ibid at [30]

[7] Ibid at [31]

[8] [2009] AIRCFB 826 at [144] – [145]

[9] Transcript 27 June 2019 at [56]

[10] [2019] FWCFB 272 at [64]

[11] Ibid at [110], [111], [122]-[126]

[12] For example, as at 6 February 2018, about 22% of employees in McDonalds' restaurants were employed on a part-time basis: Anderson affidavit, Exhibit Ai Group 3 at [23]-[24]

[13] [2019] FWCFB 272 at [151]

[14] [2019] FWCFB 272 at [152]

[15] [2019] FWCFB 272 at [154]

[16] RAFFWU submission 20 June 2019 at [14]

[17] [2019] FWCFB 272 at [20]

[18] Transcript 27 June 2019 at [167]

[19] Ibid at [152]-[155], [165] and [167]

[20] Ai Group submission 21 June 2019 at [21]-[22]

[21] Transcript 27 June 2019 at [100]-[103]

[22] Ibid at [140]-[146]

[23] SDA submissions 20 June 2019 at [14]

[24] Transcript 27 June 2019 at [156]-[163]

[25] Ibid at [181]

[26] [2015] FWCFB 5771 at [188]

[27] Agostino Affidavit, Exhibit Ai Group 6 at [46]

[28] Chapman Affidavit, Exhibit Ai Group 10 at [22], also see [28] and [29]

[29] Swan Affidavit, Exhibit Ai Group 12 at [51]

[30] Guilk Affidavit, Exhibit Ai Group 13 at [53]-[54]

[31] [2019] FWCFB 4679

[32] MA000003