
Fair Work Commission: 4 yearly Review of modern awards

AM2014/196 & AM2014/197: CASUAL & PART TIME EMPLOYMENT

FINAL SUBMISSIONS

CHILDREN'S SERVICES AWARD 2010

EDUCATIONAL SERVICES (TEACHERS) AWARD 2010

Australian Childcare Association (ACA)

8 AUGUST 2016

1. INTRODUCTION

- 1.1 These submissions are filed on behalf of the Australian Childcare Alliance (**ACA**) in relation to proceedings AM2014/196 and AM2014/197 (**Proceedings**).
- 1.2 ACA is a not-for-profit, member-funded federal organisation that, through state associations, represents approximately 70% of all long day care owners and operators in Australia. Its membership base also includes out of school hours care, occasional care, preschool and family day care (together, services form the **Childcare Industry**).

2. BACKGROUND

- 2.1 By application dated 19 October 2015 (**ACTU Claims**) in the Proceedings, the Australian Council of Trade Unions (**ACTU**) sought to vary the *Children's Services Award 2010* and *Educational Services (Teachers) Award 2010* (**Awards**).
- 2.2 In ACA's experience, these two awards cover the majority of employers in the Childcare Industry, particularly those in long day care.
- 2.3 The ACTU Claims broadly seek the following variations to the two Awards:
- (a) a 4 hour minimum engagement for part-time employees;
 - (b) a 4 hour minimum engagement for casual employees;
(Minimum Engagement Claim)
 - (c) an obligation to convert casual employees who have worked regular hours for 6 months to permanent employment upon the employee's election (**Casual Conversion Claim**);
 - (d) certain notification obligations concerning:
 - (i) casual employees' conversion rights; and
 - (ii) casual employees' terms of engagement including their classification level, rate of pay, and the likely number of hours' work the employee will be required for each week; and
(Commencement Information Claim)
 - (e) a prohibition on employers increasing the number of part-time or casual employees unless the employer first provides existing employees working less than 38 hours per week and performing work of a similar nature with an opportunity to increase their ordinary working hours (**Engagement Restriction Claim**).
- 2.4 The ACTU rely on the statement of Narelle Jenks dated 15 October 2015 in relation to the *Children's Services Award 2010*. We have been unable to identify any specific evidence filed by the ACTU in relation to the *Educational Services (Teachers) Award 2010*.
- 2.5 The following evidence has been adduced by parties opposing the ACTU Claims in the both of the Awards:
- (a) Statement of Paul Alexander Mondo of ACA dated 24 February 2016 (**Mondo Statement**); and
 - (b) Statement of Kylie-Anne Brannelly dated 22 February 2016 (**Brannelly Statement**).

3. ACA PRIOR SUBMISSION

3.1 On 22 February 2016, ACA filed reply submissions outlining its opposition to the ACTU Claims (**February Submission**).

3.2 The February Submission outlines that:

- (a) the ACTU conducted no proper examination of the Childcare Industry and failed to consider the interaction of the ACTU Claims, the Awards and the regulatory environment that the industry must comply with;¹
- (b) the material before the Full Bench and the lack of industry-specific material put forward by the ACTU, means that the Mondo Statement and the Brannelly Statement collectively represent the probative evidence before the Full Bench relating to the Childcare Industry (with the potential exception of the survey evidence);²
- (c) the ACTU's Casual Conversion Claim is one which fails to recognise the fluctuating demand of casual employment as a response to regulatory requirements in the Childcare Industry;³
- (d) the ACTU's Casual Conversion Claim has not considered the need for employers to assess the capability and suitability of a casual employee to convert to a permanent role;⁴
- (e) there are compelling reasons why the 4 hour Minimum Engagement Claim is not appropriate in the Childcare Industry;⁵
- (f) the ACTU's Engagement Restriction Claim fails to understand the qualification requirements of the Childcare Industry and the way in which these qualifications are (or are not) linked to the type of work an employee undertakes;⁶
- (g) the ACTU's Compliance Claim, which implements notification requirements, is likely to increase administrative time and expenses for businesses, who are likely to pass these costs onto families thereby increasing the cost of childcare⁷.

3.3 ACA's position with respect to the ACTU Claims remains unchanged and ACA continues to oppose the ACTU Claims.

4. THE LEGISLATIVE FRAMEWORK OF THE 4 YEARLY REVIEW

4.1 The relevant legislative framework has been extensively outlined in the various submissions of the Australian Chamber in these Proceedings.

4.2 For the purpose of these submissions it is relevant to note:

- (a) Section 156(5) of the *Fair Work Act 2009* (Cth) (**FW Act**) requires the Full Bench to review the Awards "*in [their]... own right*".
- (b) In conducting such review the Full Bench is required to consider whether:

¹ See ACA Submissions dated 22 February 2016 at [3].

² See ACA Submissions dated 22 February 2016 at [5.5].

³ See ACA Submissions dated 22 February 2016 at [6].

⁴ See ACA Submissions dated 22 February 2016 at [8].

⁵ See ACA Submissions dated 22 February 2016 at [7].

⁶ See ACA Submissions dated 22 February 2016 at [9].

⁷ See ACA Submissions dated 22 February 2016 at [10].

- (i) the ACTU has advanced a case (as contemplated by the Preliminary Issues Decision), including the requirement for probative evidence properly directed to demonstrating the facts supporting the proposed variation⁸, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;
- (ii) any such exercise of discretion is consistent with s 134 of the FW Act; and
- (iii) the proposed changes would be consistent with s 138 of the FW Act.

5. INSUFFICIENT EVIDENCE TO SUPPORT ACTU CLAIMS

- 5.1 ACA is concerned that the ACTU is seeking to implement significant changes to modern awards on a broad brush, 'one size fits all' approach.
- 5.2 The Childcare Industry, and the Awards that are captured by this nature of work must be considered in their own specific context.
- 5.3 For the reasons below, ACA does not believe a sufficient case has been advanced by the ACTU with respect to the Awards.

Children's Services Award 2010

- 5.4 Ms Jenks' statement does not provide a sufficient basis to support the ACTU Claims in respect of the *Children's Services Award 2010*.
- 5.5 Her evidence provides little weight to the argument that casual employees in the Childcare Industry have unfavourable, short hours of work that should be extended in favour for permanency. In fact, Ms Jenks acknowledged under cross-examination that she entered the childcare industry because, "*the hours suited [her] more, because finding childcare on the weekend was too difficult.*"⁹
- 5.6 Ms Jenks' statement and her evidence under cross-examination provide no support for the Casual Conversion Claim and appear to be solely focussed on the issue of shift length.
- 5.7 Ms Jenks' preference to work longer shifts needs however to be assessed in the context of the conditions of the Childcare Industry as identified by the Mondo Statement and Brannelly Statement.
- 5.8 The Mondo Statement explains the unique nature of the Childcare Industry and the complex regulatory requirements that apply to it. It provides a forceful and legitimate response to the potential financial and logistical impacts that the ACTU Claims would have on the industry.
- 5.9 Furthermore, both the Mondo Statement and Brannelly Statement specifically identify:
 - (a) the requirements of legislative ratios and qualifications in the Childcare Industry;¹⁰
 - (b) the difficulties in rostering in accordance with the compliance requirements;¹¹
 - (c) the nature of the Childcare Industry, being a largely female, casual or part-time workforce¹²; and

⁸ *Preliminary Issues Decision* at [23] and [60].

⁹ PN7473

¹⁰ See Statement of Brannelly at [29]-[45], See Statement of Mondo [33] - [42]

¹¹ See Statement of Brannelly at [17]-[20], See Statement of Mondo [70]

- (d) in these employer's experience, their employee's desire for flexibility and work life balance¹³;
- 5.10 The statements provide evidence resisting the Engagement Restriction Claim¹⁴, and Commencement Information Claim¹⁵ advanced by the ACTU.
- 5.11 For the above reasons, the ACTU Claims should fail in respect of the *Children's Services Award 2010*.

Educational Services (Teachers) Award 2010

- 5.12 ACA considers that no evidentiary case has been made for the ACTU Claims in respect of the *Educational Services (Schools) General Staff Award 2010*. For that reason alone, the ACTU Claims should fail.
- 5.13 Notwithstanding this position, the evidentiary case advanced by employer parties outlined for the *Children's Services Award 2010*, is equally applicable to *Education Services (Teachers) Award 2010*, which covers qualified teachers working in the Childcare Industry.

6. CONCLUSION

- 6.1 When considering the ACTU Claims as they relate to the Awards, the Full Bench should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective outlined at section 134(1) of the FW Act.
- 6.2 Put simply, the ACTU Claims do not provide for a 'fair and relevant minimum safety net' for the Childcare Industry.
- 6.3 The ACTU Claims are not supported by probative evidence properly directed towards demonstrating the facts supporting the ACTU Claims. With respect, the filing of a single witness statement in relation to one award (*Children's Services Award 2010*) is not a sufficient basis upon which to vary conditions applying in the Childcare Industry.
- 6.4 For the above reasons, ACA submit that the ACTU Claims should be dismissed.

¹² See Statement of Brannelly at [37], See Statement of Mondo at [27] - [32]

¹³ See Statement of Mondo [27]-[32]

¹⁴ See Statement of Brannelly at [24] - [28], page 10

¹⁵ See Statement of Brannelly at [1] - [3], page 10