IN THE FAIR WORK COMMISSION

2014 Award Review

(AM2016/13)

Community and Public Sector Union (CPSU) (PSU Group)

Submissions re: Annualised Salaries common matter Decision in [2018] FWCFB 154 and Model Clauses in reply

Introduction

1. On 20 February 2018, the Full Bench of the Fair Work Commission issued a decision [2018] FWCFB 154 in the annualised salary common matter as part of the 2014 Modern Award Review. In that decision interested parties were invited to make further submissions by 20 March 2018 on certain matters and a reply by 3 April 2018. These submissions are made in reply to the submissions filed by parties in accordance with those directions and pursuant to a grant of leave to the CPSU allowing an extension to file after 3 April 2018 by Vice President Hatcher.

General issues – Model provisions in Awards

2. The CPSU notes the submissions of the ACTU of 20 March 2018 and supports those submissions.

3. The CPSU notes the submissions of the ASU of 20 March 2018. In those submissions at [9], [15] and [25] the ASU challenge assumptions regarding clerical awards and unilateral or agreed annualised salary clauses and stable v unstable hours. The CPSU support those submissions.

4. The CPSU notes the submissions of the Ai Group of 27 March 2018. At [76]-[79] of those submissions the Ai Group says it does not see the need for a model annualised salary term and does not seek any current term be varied as part of this process, while at the same time contending there may be benefit of such terms being included in a wider range of awards. The AI Group do not identify any other modern awards which should include such terms. The CPSU says the ambivalence of the Ai Group's approach illustrates the concerns the parties to this process have about the impact of annualised salary model terms on modern awards.

5. The ACTU submissions of 20 March 2018 at [7] urge caution at allowing annualised salary clauses to proliferate across the award system due to existing established non-compliance problems with award provisions. The AMWU in their submissions of 20 March 2018 at [7] also oppose an annualised salary clause being adopted across the award system. Australian Business Lawyers and Advisors in their 26 March 2018 submissions at 4.1 say they do not propose to extend annualised salary arrangements into other awards at this stage.

6. The SDA in their submissions of 6 April 2018 refer to these earlier submissions and at [9] say annualised salaries clauses should not be extended to other modern awards without a specific process and examination of the industry. The CPSU supports these submissions.

7. The CPSU supports the views which seem common to parties participating in this process. We do not believe it appropriate for model terms to be extended to other awards. However, contrary to the Ai Group submissions, the CPSU does believe the model terms are appropriate to consider including in awards which currently do have such provisions.

General issues – appropriate safeguards – s139(1)(f)(iii)

8. The CPSU notes the Ai Group's 27 March 2018 submissions at [23] and [30] where they argue record keeping obligations proposed under the model terms would be unworkable and [84-85] where they say the safeguards of the model terms are inappropriate and administratively onerous. Australian Business Lawyers and Advisors in their 26 March 2018 submissions at 2.31 similarly say the Fair Work Commission has gone beyond what is needed as appropriate safeguards. The CPSU rejects these submissions. The safeguards proposed are important to ensure employees are not disadvantaged by an annualised salary arrangement which by its nature is opaque when compared to the primary hours of work and penalty clauses of the terms of an award.

Definition of 'disadvantage'

9. The Ai Group in their 27 March 2018 submissions at [37] say the definition of 'disadvantaged' in s139(1)(f)(iii) should not be unduly narrowly interpreted. The CPSU agree a narrow interpretation should not be preferred. However we do not agree with the Ai Groups analysis of disadvantage at [36] of their submissions. They solely deal with disadvantage in terms of employees being disadvantaged by too onerous safeguards that could cause employers not to offer such arrangement. The CPSU does not agree with this characterisation. The model terms contain important safeguards, and they are not so onerous as to dissuade employers from utilising them if there are advantages to such an approach. To say the disadvantage from which employees need to be protected are the safeguards themselves is not supported by the words of s139(1)(f)(iii) or the s134(1) modern awards objectives which deals with a 'fair and relevant safety net of minimum terms and conditions'.

10. The Ai Group in their 27 March 2018 submissions at [41-42] say that for the purpose of identifying what the disadvantage is in s139(1)(f)(iii), a comparison must be made to applicable awards provisions, which in some awards, does not include penalties and overtime for certain higher classifications. The CPSU disagrees with this submission, which included reference to the *Contract Call Centres Award 2010* and the *Telecommunications Services Award* 2010. The purpose of establishing whether safeguards are appropriate is to ensure an employee is not disadvantaged by an annualised salary arrangement. As such reference must be made between that annualised salary provision and the ordinary terms of the award that would otherwise apply. It would not be appropriate an comparision to the

pre-existing annualised salary style clauses which apply to higher classifications in some awards, including the above mentioned awards.

Annual salary reconciliation

11. The Ai Group in their 27 March 2018 submissions at [55] say they do support an annual salary review but do not support an annual reconciliation, which would require record keeping of hours, etc. Australian Business Lawyers and Advisors in their 26 March 2018 submissions at 2.39 and 2.41 reject the need for a reconciliation safeguard, saying it is dealt with by award compliance and thereby redundant. The CPSU disagree.

12. The annual review contemplated in the modern *Contract Call Centres Award 2010,* which is the example given by the Ai Group, goes to the requirement of being up to date and ensuring an annualised salary reflects any changes to wages or work practices that have occurred. The safeguards proposed in the model term go to compliance with award provisions and attempt to ensure an employee has received at least the amounts payable for those hours worked under the award provisions. Such a reconciliation is an important safeguard that any employee is not disadvantaged during the previous 12 months of the arrangement when compared to applicable award provisions.

'Outer limit' of hours

13. Australian Business Lawyers and Advisors in their 26 March 2018 submissions oppose the requirement of a model term that states the 'outer limit' of hours an employee can work before the usual penalties or overtime applies at 2.43. They say this could give an employee a 'windfall'. The CPSU disagree. Placing a limit upon how many additional hours can be worked under an annualised salary arrangement is an important protection, not just against overwork or underpayment, but upon transparency as to what is being compensated for in the arrangement. Calling it a 'windfall' is only correct if the roles were reversed. Would the employer not be receiving a windfall of free labour if because of the annualised salary arrangement it didn't need to pay workers for hours worked in excess of those paid for under the arrangement?

'Unreasonable administrative burdens'

14. Australian Business Lawyers and Advisors in their 26 March 2018 submissions say the safeguards almost entirely undermine the utility and purpose of an annualised salary arrangement at 2.42. The Ai Group submissions say the same at [85], that multiple safeguards would pose cumulatively unreasonable administrative burdens. This includes the requirement to advise in writing, keep records, identify outer limits, undertake reconciliation and the right to terminate. These are not administratively onerous safeguards. The CPSU notes no evidence has been supplied to support this statement. From the CPSU's view, these are important are safeguards for an arrangement which is by nature opaque and makes it difficult for an employee to easily identify if the arrangement is better off for them or not when compared to otherwise applicable award provisions. They appear the minimum necessary transparency measures to ensure an employee is not disadvantaged.

15. The Ai Group submission of 20 March 2018 says at [106-110] that any annualised salary provision should only be confined to award payments and should not capture or regulate over-award payments or other contractual arrangements such as set-off. They say this on the basis of concerns that such a clause may disturb existing arrangements or impose additional administrative steps. Australian Business Lawyers and Advisors in their 26 March 2018 submissions say something similar at [2.20] concerned at how termination of an annualised salary arrangement may interact with common law contracts.

16. The CPSU believes these concerns are misplaced. The record keeping and other obligations such as termination or reconciliation are steps of transparency to ensure the arrangement leaves the worker better off, and can be easily established as better off. Such obligations should not disturb a contractually based set-off style salary. This is because to enter and maintain such an arrangement at common law should ordinarily mean the employer has done due diligence to ensure the arrangement exceeds award obligations. An award clause that clearly spells transparent practices around annualised salaries makes it clear to employers and employees not just what good practice is, but what the minimum safeguards are to ensure employees are not disadvantaged.

Contract Call Centres Award and Telecommunications Services Award

17. The Ai Group submission of 20 March 2018 says at [125] that the *Contract Call Centres Award* should not be altered to include a model term. They also say at [62] that the Contract Call Centres Award was a consent award reached after much negotiation between the unions and the Ai Group. The CPSU accepts that the *Contract Call Centres Award* and its accompanying annualised salary clause is the result of a negotiated outcome. However, this is an outcome measured against a different legislative context. This Full Bench has looked anew at annualised salary clauses in the context of the *Fair Work Act*, and modern awards as regulatory instruments, not made by registered organisations as parties to interstate industrial disputes. This is a point made by United Voice in their submissions in reply of 5 April 2018 at [3]. It is on that basis the CPSU says the consent outcome of awards like the *Contract Call Centres Award* while relevant are not determinative of the appropriateness or consistency with the *Fair Work Act* of clauses like annualised salaries.

Conclusion

18. The CPSU agrees with many other parties involved in this Full Bench common matter that model terms for annualised salaries provisions should not proliferate across the award system. The CPSU says such terms should not be included in modern awards that do no currently provide for them. However, the CPSU believes the model terms contain important protections against employee disadvantage and on the whole those clauses represent more appropriate annualised salary provisions than existing annualised salary provisions.