Shop Distributive and Allied Employees' Association

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

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards–Plain language project (AM2016/15)

Fast Food PLED

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INTRODUCTION

1. The SDA refers to its previous submissions and the further submission of AIG of 26 February 2021 and 8 March 2021.

2. The SDA makes these submissions in reply as per paragraph 14 of the recent Statement of the Full Bench and the amended Directions of 5 March 2021.

Classifications – Item 20

3. AIG at paragraph 4 of their February further submissions contends that the SDA agrees with the characterization of the 'change' in item 20 as a 'substantive change'.

4. The SDA rejects this submission and refers to its submissions of 9 December 2020 at paragraph 10 'It is submitted that this change aids in the clarity of the provision, without changing the fundamental meaning of the term.'

5. AIG further contend at paragraph 5 that the clearer and beneficial drafting at PLED clause 12 should be rejected as:
    i. The provision has 'existed in its current form for many years' and
    ii. 'The SDA had every opportunity to seek a substantive change to the clause…They have not done so, nor led any material in these proceedings that might support a variation being made.'

6. In response the SDA notes that the *Fast Food Industry Award* has existed since 2010 and that many items currently being considered under the PLED were never challenged.

7. Such a submission shows a lack of understanding of the Commission's purpose in undertaking the PLED, which is to ensure the Awards remain a relevant legal minimum by being readily understandable.

8. Furthermore, AIG has not led any material to show how a change more clearly identifying the objective test in classifications could result in negative outcomes for employers or employees. It must be inferred therefore that AIG seeks to maintain an ambiguous provision for its own sake.

9. It should be noted that the *General Retail Industry Award 2020* adopted wording matching the FFIA PLED provision:

> ***14.2*** *The classification by the employer must be based on the skill level as determined by the employer that the employee is required to exercise in order to carry out the principal functions of the employment.*

10. It is the SDA's submission that such wording should also be adopted in the FFIA PLED.

Breaks - Item 30

11. AIG characterizes the PLED requirement that breaks be given meaningfully as a 'new substantive requirement'.

12. It follows that AIG opposes the giving of breaks in a meaningful way.

13. Such a submission should be rejected outright. The requirement of breaks for work, health and safety reasons are well known. However, that even large employers with significant industrial and operational experience refusing to give breaks is also well known.

14. A common eventuality is that because of rostering requirements a fast-food employee is unable to take the full value of their break in a meaningful way. That is, they will begin the break but be interrupted several times to serve customers.

15. While it is unlikely that the provision as drafted will end perverse work practices, they at least clarify that a nominal break does not satisfy the requirements of the Award.

16. It is noted for completeness that the *General Retail Industry Award 2020* similarly gives the following provision:

> ***16.4*** *In rostering rest and meal breaks, the employer must seek to ensure that the employee has meaningful breaks during work hours.*

17. Given the above considerations and the lack of new substantive requirements, the provision as drafted should be retained.

Travelling Time - Item 39

18. The SDA notes paragraphs 9 to 11 of AIG's February further submissions.

19. It is noted that the *General Retail Industry Award 2020* gives the same wording which AIG opposes:

> ***19.5 Travelling time reimbursement***
>
> ***(a)*** *Clause 19.5 applies to an employee who on any day is required to work at a place other than their usual place of work.*
>
> ***(b)*** *The employer must pay the employee at their ordinary rate of pay (or at **150%** of that rate on a Sunday or public holiday) for time spent travelling both ways between the employee's residence (or, if the employer provides transport from a pick up point, between that pick up point) and the other place of work in excess of the time normally spent in travelling to and from their usual place of work.*
>
> ***(c)*** *The employer must also reimburse the employee any additional costs they incurred in travelling to and from the other place of work.*

20. It is to be noted that the previous iteration of the Award, the *General Retail Industry Award 2010* had the exact original wording as the current FFIA.

21. The Commission should so decide in this case.

Transport Reimbursement - Item 40

22. AIG at paragraph 14 of its February further submissions identifies several reasons for the rejection in the FFIA PLED of a provision currently extant in other Awards, namely:
    i. Taxi fares are regulated by state and territory governments while rideshare services are not;
    ii. Rideshare services often increase their fares; and
    iii. Different services are available in the same providers.

23. In response to point i. raised above, the SDA notes that the Commission has accepted the appropriateness of such services.

24. The different fares and services available through various rideshare providers can be comparable to the known variation in taxi fares which can be caused by things such as traffic or routes chosen. To a large extent the concerns AIG have articulated about 'premium services' being utilized is mitigated, perhaps entirely, by the SDA proposal to insert words to effect of 'equivalent to a taxi' at the end of PLED 17.7(b).

25. The SDA opposes the AIG proposal at paragraph 15 of their February further submissions as adding unnecessary complexity and subjectivity. Such a change may also give rise to a misunderstanding that the employer must agree for the employee to take a taxi. Such misunderstandings must be avoided.

26. The issue of 'commercial passenger vehicle' was dealt with comprehensively by the Commission in the *Plain language project – Pharmacy Industry Award 2010.* In that matter, [2017] FWCFB 1612, at paragraphs [75] to [77] the Full Bench relevantly noted:

> [75] We also amended clause 18.7(b) to account for the emergence of other transport operators such as Uber. The words 'commercial passenger vehicle' were adopted instead of naming a specific operator to ensure that the provision applies to any future services that become available.
>
> [76] Clause 18.7 of the further revised exposure draft states:
>
> '(a) Clause 18.7 applies to an employee to whom all of the following apply:
>
> (i) the employee starts work before 7.00 am or starts or finishes work after 10.00 pm; and
>
> (ii) the employee's regular means of transport is not available; and
>
> (iii) the employee is unable to arrange their own alternative means of transport; and
>
> (iv) a proper means of transport to or from the employee's usual place of residence is not provided to, or arranged for, the employee by the employer at no cost to the employee.
>
> (b) The employer must reimburse the employee the cost they reasonably incurred in taking a commercial passenger vehicle from the employee's usual place of residence to the place of employment or from the place of employment to the employee's usual place of residence, whichever is applicable.'

> [77] Parties were invited to comment on the proposed amendments to clause 18.7. The union parties 51 and the Pharmacy Guild support the proposed amendments. We will adopt the proposed amendments to clause 18.7.

27. For completeness, it is further noted that the *General Retail Industry Award 2020* adopted the provision as follows:

> *19.8 Transport reimbursement*
> *(a) Clause 19.8 applies to an employee (other than a shiftworker) to whom each of the following applies:*
>
> *(i) the employee starts work before 7.00 am or starts or finishes work after 10.00 pm; and*
> *(ii) the employee's regular means of transport is not available; and*
> *(iii) the employee is unable to arrange their own alternative means of transport; and*
> *(iv) a proper means of transport to or from the employee's usual place of residence is not provided to, or arranged for, the employee by the employer at no cost to the employee.*
>
> *(b) The employer must reimburse the employee the cost they reasonably incurred in taking a commercial passenger vehicle between the place of employment and the employee's usual place of residence.*

28. The Commission should so decide in this case.

Annual Leave and shiftworkers – Items 50, 51 and 55

29. The SDA notes the February submissions of AIG in respect of Item 51 at paragraphs 17 to 21.

30. The *General Retail Industry Award 2020* gives the following definition of shiftworker:

> *28.2 Additional paid annual leave for certain shiftworkers*
>
> *(a) Clause 28.2 applies to an employee who is a shiftworker regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for 7 days a week.*

31. The 25 November 2020 submissions of AIG at paragraphs 72 to 73 while rightly noting a change in the wording of the provision, are in fact misconceived. The reference to '7-day' in the definition of shiftworker refers to a time when work on certain days, particularly Sundays, was circumscribed by various legislative (and other) regulations.

32. The term is clearly in reference to the operation of the business and not, as could inadvertently be inferred, that the employee works 7-days a week.

33. Given that the proper reference to 7-days is retained in reference to the operation of the business as well as to maintain equanimity with the GRIA, the SDA opposes the insertion of '7-days' as proposed by AIG.

34. As such, the PLED provision as drafted should be retained.

Annual Leave - Items 52, 53 and 54

35. AIG by way of email dated 5 March 2021 applied for an extension of time to file submissions. The SDA notes that it was not copied to this correspondence, nor to the granting of extra time to parties.

36. AIG's further submissions of 8 March 2021 deal with its understanding of annual leave loading, which they state at paragraph 3 turns on the understanding of annual leave loading being judged in total at the end of the period.

37. Such an approach seems to presume that annual leave can only be taken as a specific period. However, such a requirement does not appear in the Award while the Act itself provides:

> **FAIR WORK ACT 2009 - SECT 88**
>
> **Taking paid annual leave**
> (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
>
> (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

38. This approach is not novel, as section 236(2) of the *Workplace Relations Act 1996* (Cth) states: "To avoid doubt, there is no maximum or minimum limit on the amount of annual leave that an employer may authorise an employee to take."

39. It follows that annual leave may be taken in any period agreed to between the employer and employee. The Commission is able to take notice that annual leave loading is often granted in hourly components. As a consequence, any loadings should also accrue hourly.

40. AIG at paragraph 8 submits that this is a substantive change, the SDA does not agree with this characterization of the Award. It must be noted that the provision the subject of AIG's challenge is also found in the *General Retail Industry Award 2020* as follows:

> **28.3 Additional payment for annual leave**
>
> **(a)** During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 28.3 for the employee's ordinary hours of work in the period.
>
> **(b)** The additional payment is payable on leave accrued.
>
> **(c)** For an employee other than a shiftworker the additional payment is the greater of:
>
> **(i) 17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or
>
> **(ii)** The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates as specified in clause 22—Penalty rates.
>
> **(d)** For a shiftworker the additional payment is the greater of:

(i) 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period; or

(ii) The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates for shiftwork as specified in clause 25—Rate of pay for shiftwork.

41. The provision remained unchanged from the initial Plain Language Exposure Draft – General Retail Industry Award 2017 which rendered the provision as:

> **32.3 Additional payment for annual leave**
>
> **(a)** During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 32.3 for the employee's ordinary hours of work in the period.
>
> **(b)** The additional payment is payable on leave accrued.
>
> **(c)** For an employee other than a shiftworker the additional payment is the greater of:
>
> **(i)** **17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or
>
> **(ii)** The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates as specified in clause 26—Penalty rates.
>
> **(d)** For a shiftworker the additional payment is the greater of:
>
> **(i)** **17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or
> **(ii)** The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates for shiftwork as specified in clause 29—Rate of pay for shiftwork.

42. In responding to the drafting of the GRIA PLED, neither the initial submissions of Australian Business Industrial and the NSW Business Chamber nor Business SA (of 2 and 3 August 2017 respectively) mention annual leave loading as an issue. The issue does not appear to have been raised in any of the Commission's summary documents nor in any of the SDA's submissions.

43. That such an important provision remained unchanged and (it appears) unchallenged over a process lasting some three years can only lead to the conclusion that the Commission rightly decided in its favour in respect of the Retail Industry. The Commission should so conclude in regard to the Fast Food Industry.

44. This differs fundamentally from extant wording in an Award remaining unchallenged as the entire PLED process hinges on the critical analysis and commentary of interested parties on the various drafts.

45. It should be noted that this approach is not, as is alleged, a novel one. The *Workplace Relations Act 1996* (Cth) at section 235 provides for payment of annual leave on the following basis:

> **Annual leave--payment rules**

(1) If an employee takes annual leave during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of annual leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).

(2) If the employment of an employee who has not taken an amount of accrued annual leave ends at a particular time, the employee must be paid a rate for each hour (pro-rated for part hours) of the employee's untaken accrued annual leave that is no less than the rate that, immediately before that time, is the employee's basic periodic rate of pay (expressed as an hourly rate).

46. In effect, AIG is seeking to make late submissions regarding a settled matter for a substantive change to the way annual leave loading is applied in the fast-food industry. The Commission should reject such submissions.

47. Annual Leave Loading was initially conceived as a mechanism to ensure that employees did not suffer a financial detriment while on leave. In this context it becomes clear that the purpose of the provision providing that either the weekend penalty rates, or the 17.5% loading apply is to ensure that employees do not suffer a detriment in respect of their weekend penalty rates. However, to exclude the 17.5% from other days or hours taken may result in an employee suffering a detriment on those days. As such, the submissions of AIG, together with their proposed wording, should be rejected.

48. At paragraph 10 AIG queries the SDA position regarding the annual leave loading provision in the FFIA PLED. The SDA favours the retention of the current PLED wording, noting that the retention of the word ‘loading’ rather than ‘additional payment’ would go some way to ameliorating the concerns of AIG.

49. Should this matter be further ventilated, the SDA would seek opportunity to reply to any further submissions.