



Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSIONS IN REPLY:

RESTAURANT INDUSTRY AWARD 2010

HOSPITALITY INDUSTRY (GENERAL) AWARD 2010

SUBSTANTIVE CLAIMS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

5 NOVEMBER 2018

1. INTRODUCTION

1.1 These reply submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). ABI is a registered organisation under the Fair Work (Registered Organisations) Act 2009. NSWBC is a recognised State registered association pursuant to Schedule 2 of the Fair Work (Registered Organisation) Act 2009.

1.2 ABI and NSWBC have a material interest in these proceedings and appreciate the opportunity to provide this submission.

2. THE APPLICATION BY UNITED VOICE

2.1 These submissions are in reply to the United Voice Submission dated 24 July 2018 (**Submission**) in support of the substantive claims it is pursuing in respect of both the Hospitality Industry (General) Award 2010 (**Hospitality Award**) and the Restaurant Industry Award 2010 (**Restaurant Award**).

2.2 United Voice is pursuing claims relating to:

- (a) The deletion of a portion of clause 21.1(h) of the current Hospitality Award, which permits an employer to recover amounts paid as reimbursement for fares incurred when an employee is working away from their usual work location if his or her employment ceases in certain circumstances thereafter;
- (b) An increase in the tool allowance payable pursuant to clause 21.1(b) of the Hospitality Award, linkage of adjustments in the amount of the allowance to a different CPI group, and an extension of the payment of the allowance to apprentice cooks; and
- (c) An increase in the tool allowance payable pursuant to clause 24.3(a) of the Restaurant Award, and an extension of the payment of the allowance to qualified cooks.

2.3 These reply submissions will deal with:

- (a) the relevant legislative framework;
- (b) the first United Voice claim (at (a) above); and
- (c) the second and third United Voice claims ((b) and (c)) together.

3. LEGISLATIVE FRAMEWORK

- 3.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**).
- 3.2 Given the publication of the Preliminary Issues Decision, it is unnecessary to outline the legislative framework applicable to the present proceedings in detail. However, for the purposes of these submissions, there are three relevant categories of principles which arise from the Preliminary Issues Decision.

Modern awards objective must be considered

- 3.3 The Preliminary Issues Decision confirms (at [23]) that the Fair Work Commission (**Commission**) remains at all times obliged to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
- (a) relative living standards and the needs of the low paid;
 - (b) the need to encourage collective bargaining;
 - (c) the need to promote social inclusion through increased workforce participation;
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work;
 - (e) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts;
 - (f) the principle of equal remuneration for work of equal or comparable value;
 - (g) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
 - (h) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

- (i) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

(This is the modern awards objective).

3.4 This means that, when considering any variation, the Commission should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective and that the award comprises terms only to the extent necessary to achieve the objective of a fair and relevant safety net.

Merit based evidence required

3.5 The discretion to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation (Preliminary Issues Decision at [60]).

3.6 When considering the merit basis to make variations, the Commission held in the Preliminary Issues Decision that:

- (a) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality (at [23] and [60]);
- (b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation (at [23] and [60]); and
- (c) in conducting the Review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue and the particular context in which those decisions were made (at [27]).

Provisions included in a modern award may only go so far as to meet the modern awards objective

3.7 Section 138 of the *Fair Work Act 2009 (FW Act)* (which is relevant to the Review) does not require a party to prove that a variation is necessary for the award to meet the modern awards objective.

- 3.8 However, what section 138 of the FW Act does require is that the terms included in a modern award go only as far as is necessary so as to meet the modern awards objective:

In the Review, the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (at [36]).

- 3.9 Accordingly, for the United Voice claims to succeed, each must be necessary to achieve the modern awards objective and have a merit basis which is supported by submissions and evidence (if necessary).

4. CLAUSE 21.1(H) OF THE HOSPITALITY AWARD

- 4.1 Clause 21.1(h) of the Hospitality Award currently provides for the payment of an expense-related allowance where:

... an employer requires an employee other than a casual to work at a place more than 80 kilometres from the employee's usual place of work. In these circumstances the employer must pay the employee an amount equal to the cost of fares reasonably spent by the employee in travelling from the employee's usual place of work to the new place of work. However, the employer may recover any amount paid to an employee under this clause if the employee concerned leaves their employment or is dismissed for misconduct within three months of receiving such a payment. [emphasis added]

- 4.2 The United Voice claim relates to the portion of the clause emphasised **above**.
- 4.3 Our clients filed a submission dated 8 June 2017 in respect of the plain language exposure draft of the Hospitality Award, which dealt briefly with this clause at [9]. In short, our clients expressed the view that the provision may require review but otherwise reserved their position.
- 4.4 The relevant enquiry is firstly whether or not the FW Act contains a source of power which permits the Commission to include the last sentence of this clause in a modern award. Our clients do not accept the position advanced by United Voice that the Commission has no jurisdiction to include the term, for the reasons set out below.

4.5 Section 139

4.6 Section 139 of the FW Act provides a general list of terms which may be included in modern awards.

4.7 Clause 21.1(h) is a term which is about “allowances” for the purpose of subsection 139(g); specifically, allowances in respect of “expenses occurred in the course of employment” (subsection 139(g)(i)). Relevantly:

- (a) the substantive portion of the clause - that is, providing for reimbursement of fares when an employee is required to work away from their usual place of work - confers the allowance (the **entitlement provision**); and
- (b) the last sentence of the clause permits the recovery of the allowance from an employee in certain circumstances (the **recovery provision**).

4.8 There does not appear to be any controversy as to whether the Commission has the power to include the entitlement provision in the Hospitality Award, as it is evidently ‘about’ an allowance which is payable in circumstances contemplated by subsection 139(g)(i).

4.9 The recovery provision only has work to do if an allowance has been paid to an employee in accordance with the entitlement provision. If the allowance is not paid, there is no entitlement to recovery. Accordingly, our clients consider that it is also ‘about’ the allowance in the manner contemplated by section 139.

4.10 On this basis, the Commission is empowered to include the clause in the Hospitality Award.

Permitted deduction

4.11 As our clients consider that the Commission has jurisdiction to include the clause in its entirety is permitted to be in the Hospitality Award, the next question is whether the recovery provision falls foul of section 326 of the FW Act. The relevant test is:

- (a) is it directly or indirectly for the benefit of the employer or a party related to the employer; and
- (b) is it unreasonable in the circumstances.

4.12 Our clients submit that the answer to the first of these queries is in the affirmative, as the ability to recover an amount previously paid to an employee is clearly beneficial in the employer’s favour.

- 4.13 Our clients also submit that the recovery of amounts paid will not be unreasonable in all circumstances. However, it is acknowledged that the amount of the deduction is also not referable to the actual loss or cost incurred by the employer when an employee's employment ceases for the reasons specified in the clause.
- 4.14 On this basis, our clients concede that the recovery provision may be unreasonable in some circumstances, and its removal is not opposed if the Commission is so minded.

5. THE TOOL ALLOWANCE CLAIMS

5.1 United Voice is seeking the following substantive amendments:

- (a) An increase in the amount of tool allowance payable to employees covered by both Awards to \$2.25 per day or part thereof, up to a maximum of \$11.20 per week;
- (b) The linkage of the Hospitality Award tool allowance to a different CPI group than that which is currently used to calculate adjustments;
- (c) The extension of the Hospitality Award tool allowance clause to be payable to apprentice cooks, as well as cooks; and
- (d) The extension of the Restaurant Award tool allowance clause to be payable to cooks, as well as apprentice cooks.

The relevant Award provisions

5.2 The relevant entitlements under the Hospitality Award are as follows:

- (a) Clause 21.1(b)(i) - where a cook is required to use their own tools, the employer must pay an allowance of \$1.55 per day or part thereof up to a maximum of \$7.60 per week;
- (b) Clause 21.1(ix) - where the employer requires an employee to provide and use their own tools and equipment the employer must reimburse the employee for the cost of purchasing such equipment (but not where these items are paid for by the employer); and
- (c) Clause 21.1(j) - the amount of the allowance payable under clause 21.1(b)(i) will be increased by the Consumer Price Index Figure for the ABS 'clothing and footwear group'.

- 5.3 The interaction of these two clauses means that a cook who is required to use their own tools will receive tool allowance, but an apprentice cook will not. Both groups will receive reimbursement for the cost of tools if they are required to provide their own.
- 5.4 Presumably, because it is located in a clause which also deals with allowances for clothing and footwear, adjustments to the tool allowance are determined by reference to the ABS 'clothing and footwear group', rather than the 'tools and equipment group' as is the case in numerous other Awards (including the Restaurant Award).
- 5.5 The relevant entitlements under the Restaurant Award are as follows:
- (a) Clause 24.3(a) - an employer is required to reimburse an apprentice cook who is required to use their own tools and is not in receipt of a tool allowance an allowance of \$1.73 per day or part thereof up to a maximum of \$8.49 per week;
 - (b) Clause 24.3(i) - an employer is required to reimburse an employee who is required to provide and use tools and equipment for the cost of purchase; and
 - (c) Clause 24.5- the amount of the allowance payable under clause 24.3(a) will be increased by the Consumer Price Index Figure for the ABS 'tools and equipment for house and garden component of the household appliances, utensils and tools sub-group'.
- 5.6 This means that, unlike a cook covered by the Hospitality Award, a qualified cook who is required to use their own tools will not receive tool allowance, but an apprentice cook will. However, both groups will receive reimbursement for the cost of tools if they are required to provide their own.

History of the relevant Award provisions

- 5.7 To identify whether there is any historical basis for the differing entitlements and method of adjustment between the two Awards, it is useful to have regard to the Award Modernisation process (**AMOD**).
- 5.8 Clause 21.1(b)(i) of the Hospitality Award is substantively the same as clause 5.4.1(a)(i) of the draft *Hospitality Industry Modern Award 2010* filed by United Voice during AMOD. These entitlements reflect those found in the main precursor instrument (*The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998*). This wording was reflected at Clause 20.1(b) of the various Hospitality Award exposure drafts subsequently published. However, as indicated by United Voice at [40] of its submission, the initial exposure draft published on 12 September 2008 did contain a note which read:

[Note: this allowance appears out of date. It is intended that it be brought up to date and converted to a percentage of the standard rate.]

- 5.9 During the exposure draft stage of AMOD, the Hospitality Award was also intended to cover employers and employees now covered by the Restaurant Award. As a result of submissions by restaurant and catering industry employers, the award modernisation request was varied on 28 May 2009 to provide for the creation of an award specifically to cover the restaurant and catering industry.
- 5.10 Accordingly, due to the lateness of the amendment, the exposure draft process for the Restaurant Award was somewhat limited, but the document published on 4 December 2009 contains a clause 24.3(a) and (i) which provide the same entitlements as the current clause. Unlike the Hospitality Award and the draft of the Restaurant Award filed by the Restaurant and Catering Association on 24 July 2009, the exposure draft linked adjustments in the allowance to the CPI 'tools and equipment group'.
- 5.11 The entitlement to tool allowance for apprentices appears to derive from the pre-modern *Restaurants, &c., Employees (State) Award*.

Lack of merit basis

- 5.12 United Voice has not filed any evidence in support of its claims. In accordance with the Preliminary Issues Decision, the Commission must therefore be satisfied that the claims would not result in significant changes to the respective Awards and that the need for the variations is self-evident. Our clients submit that this is not the case in respect of:
- (a) the claims relating to extending the payment of the tool allowance to employees who do not currently receive it; and
 - (b) the claims relating to an increase in the amount of the allowances.
- 5.13 Extending the entitlement to, and amount of, the allowances would have a significant and untold financial impact on employers. Relevantly:
- (a) Employees entitled to the allowance who are covered by the Hospitality Award would receive a \$0.70 increase per day, up to a maximum increase of \$3.60 per week; and
 - (b) Employees entitled to the allowance who are covered by the Restaurant Award would receive a \$0.52 increase per day, up to a maximum increase of \$2.71 per week.

- 5.14 Further, in the absence of probative evidence demonstrating the current failure of the Awards to provide a fair and relevant minimum safety net, it is open to the Commission to conclude that the Awards currently meet the modern awards objective.
- 5.15 Our submissions in this regard are further supported by the following observations:
- (a) United Voice was a key participant in the development of the Hospitality Award during AMOD;
 - (b) The tool allowance entitlement in that Award reflects the wording in a draft award filed by United Voice;
 - (c) Had there been an issue with the application of the entitlement at the time of modernisation, United Voice could have agitated the issue at that time, but did not do so;
 - (d) United Voice also had the opportunity (albeit relatively curtailed) to agitate the same issue in respect of the Restaurant Award entitlement at the time of modernisation, and did not do so;
 - (e) The Commission is entitled to conclude that both Awards fulfilled the modern awards objective at the time they were made, which is supported by the historical basis for the different entitlements from the relevant precursor instruments;
 - (f) It does not appear that the clauses were the subject of any variation application during the 2012 review; and
 - (g) Some six years have passed before United Voice considered it necessary to file applications to vary the tool allowance clauses.
- 5.16 For these reasons, our clients submit that the claims in respect of the application and increasing the quantum of the allowances should fail.
- 5.17 Our clients do not oppose the claim relating to the linkage of the Hospitality Award tool allowance to the 'tools and equipment group' for the purpose of adjustments.

5.18 Please contact Kate Thomson on 0249891003 if you have any questions in respect of these submissions.



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