IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.157 – Application to vary the Fast Food Industry Award 2010

AM2020/20

SUBMISSIONS OF THE
Shop Distributive and Allied Employees' Association

Introduction

1. On 1 May, the Australian Industry Group (**Ai Group**) filed an application seeking to temporarily vary the *Fast Food Industry Award 2010* (**the Award**). The application followed a number of weeks of discussions between union and employer representatives directed at mitigating the impact of the COVID-19 pandemic on workers and businesses covered by the Award.

2. On 3 May, the Full Bench issued a provisional view that the proposed variation of the Award is necessary to achieve the modern awards objective. Submissions were invited from interested parties and a hearing was held by telephone on 5 May 2020. On 8 May, the Full Bench directed Ai Group to file additional evidence regarding the necessity for the proposed variations.

3. The SDA has reviewed the submissions and evidence filed by Ai Group. In negotiations with Ai Group in relation to the Award over the past weeks, the SDA has consistently stated that award variations will not be consented to unless they are genuinely necessary to protect job security and are supported by fair and appropriate minimum safeguards for workers' rights.

4. In particular, the SDA has been concerned to ensure that any clauses permitting variations to workers' conditions are:

   a) Time-limited;

   b) Reasonable in all the circumstances; and

   c) Provide access to arbitration.

5. The Full-Bench has confirmed the need for variations to be accompanied by appropriate and relevant safeguards:

In circumstances where an application to vary a modern award proposes flexibilities which are the same or analogous to those which apply to JobKeeper enabling directions and requests under Part 6-4C of the Act it is entirely appropriate that such a variation also incorporate the relevant safeguards provided in Part 6-4C. Indeed, in the context of this Application, we have given significant weight to the provision of the safeguards in Schedule J set out above at [91] in our consideration of whether the variation of the Vehicle Award in the manner proposed would ensure that the Award provides 'a fair and relevant minimum safety net of terms and conditions' within the meaning of s.134(1).[1]

6. The SDA proposes amendments to the draft determination (at **Annexure A**) which ensure that appropriate and relevant safeguards are included to protect workers. The SDA's support for the variations is conditional upon these changes to the proposed determination being made.

COVID-19

7. On 18 March 2020, the Commonwealth government declared a human biosecurity emergency under s 475 of the *Biosecurity Act 2015*, giving the Minister for Health expansive powers to issue directions, including banning cruise ships and international travel. These powers have never before been used. The Commonwealth government has also made a series of recommendations regarding which gatherings and 'non-essential' activities and businesses are to be ceased to limit the spread of COVID-19, based on advice from the Australian Health Protection Principal Committee. State and Territory Governments have issued public health directions under public health and/or emergency laws giving effect to these measures. The measures have had a range of very significant and varied impacts on workers and businesses.

8. In response to the acute impact of COVID-19 in certain sectors, variations were made by consent between relevant unions and employer groups to the Hospitality, Clerks and Restaurants Awards on 24, 28 and 31 March respectively providing for changes to workers' duties, hours of work and annual leave, subject to certain conditions and safeguards. On 8 April, the Commission varied 99 awards to include access to 2 weeks unpaid pandemic leave and the ability to access twice as much annual leave at half pay.

9. On 9 April, the *Fair Work Act 2009* (**FW Act**) was temporarily amended to help with the implementation of the 'JobKeeper' payment scheme, providing significant flexibility for

[1] [2020] FWCFB 2367 at [93]; See also Transcript of hearing before President Ross, DP Masson and C. Lee, 5 May 2020, Transcript PN 69 - PN 77, PN 85, PN 89 – PN 90 (President Ross)

eligible employers to reduce hours, change duties and location of work, and request changes to days and times of work and access to annual leave in relation to certain eligible employees. A number of safeguards are built into the legislation, including a minimum wage guarantee (equivalent to the JobKeeper subsidy payment), a requirement that directions be safe, reasonable and necessary to deal with COVID-19 impacts, a requirement to consult with workers and unions prior to directives being issued, and access to dispute settlement - including arbitration - through the Commission in relation to the operation of the FW Act amendments.

The Statutory Framework

10. Modern awards, together with the NES, form a 'safety net' of minimum terms and conditions of employment. The safety net is by its nature protective.[2] Section 157 of the FW Act empowers the Commission to make a determination varying a modern award only if the Commission is satisfied that it is 'necessary' to do so in order to achieve the modern awards objective.[3]

11. The Full Bench is required to form 'a value judgment' regarding necessity based on the considerations set out in s. 134(1) of the FW Act.[4] In addition, the objects of the FW Act (s. 3) and the general provisions relating to the performance of the Commission's functions and exercise of powers (ss. 577 and 578) are also relevant to the Commission's task. One of the overarching objectives of the FW Act (s 3(b)) is to ensure 'a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the NES, modern awards and national minimum wage orders'. Overall, the Commission's task is to 'balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.'[5]

12. In addition to being necessary, any variation must also be 'permitted' within the meaning of s 136(1)(a) of the FW Act, which provides that a modern award may include terms about any of the matters in s. 139(1). Section 136(2) provides that a modern award must only include terms permitted or required by s 55. Section 55(1) provides that a modern award must not exclude the NES or any provision of the NES. A term will not offend s 55(1) where it is permitted by s 55(4) of the Act. Section 55(4)(b) provides that a modern award may include terms that supplement the NES, to the extent that the effect of those terms is not detrimental to an employee when compared to the NES.

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[2] 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001 at [123]–[124]

[3] FW Act s. 134. 138, 157. See generally [2020] FWCFB 1690 at [33]-[39]

[4] Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [36]

[5] 4 Yearly Review of Modern Awards – Annual Leave [2015] FWCFB 3406 at [20].

13. These provisions are aimed at allowing necessary changes while protecting the integrity, fairness and stability of the minimum employment safety net.

Union amendments to the proposed determination

Temporary alternative part-time work arrangements

14. The proposed provision provides an alternative engagement method for part-time employees. The current award provision remains operative, but by agreement this alternative method may be utilised by employees and employers.

15. The proposed alternative can only be entered into by written agreement between the employee and the employer. An existing part-time employee cannot be changed to the alternative arrangement unless they agree in writing.

16. Further, if such an employee agrees to change, the change is temporary and at the conclusion of the schedule they must revert to their previous part-time arrangement. This is an automatic condition of the alternative clause which provides certainty to the employee as to their ongoing arrangement.

17. The proposed provision includes a significant increase in the minimum guaranteed hours. Any employee entering this arrangement must be provided with a minimum of 8 hours per week. Currently the award provision provides part-time contracts with a minimum of 3 hours per week. Such an increase could provide existing part-time employees who are on contracts for hours less than 8 with more guaranteed hours in a week.

18. An existing casual may also decide to enter into this part-time arrangement as it provides a guaranteed minimum of 8 hours per week. This removes the uncertainty casuals face regarding ongoing minimum hours which has increased during this pandemic.

19. The provision provides the employee the right to reject any additional hours offered on any occasion. There are no reasons needed to reject the additional hours. This is an important protection. Agreement can also be withdrawn on the provision of 14 days notice.

20. While significant safeguards are already included in this provision, the SDA considers that this clause could be strengthened further by requiring the agreement to be made without coercion or duress, and requiring an employer to consent to the arbitration of any dispute about whether the agreement was genuinely made.

Request to take annual leave

21. Where necessary to assist an employer to avoid or minimise loss of employment due to the COVID-19 pandemic, this clause permits an employer to request that an employee take annual leave, subject to considering the employee's personal circumstances, providing at least 72 hours notice, and ensuring that an employee would not be left with an annual leave balance of less than 2 weeks. If these conditions are met, an employee must consider and not unreasonably refuse such a request.

22. While significant safeguards are already included in this provision, the SDA considers that this clause could be strengthened further by:

    a) Requiring that any request under this clause be reasonable in all the circumstances;

    b) Requiring an employer to consent to the arbitration of a dispute about whether the employer's request is reasonable in all the circumstances.

23. The draft determination at Annexure A reflects the above changes.

Close down

24. Where an employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19, this clause enables an employee to require an employee to take annual leave (or unpaid leave if annual leave is not available) as part of a close down of its operations or part of its operations.

25. Where an employee is required to take unpaid leave under this clause, the period counts as service for the purposes of accrual of entitlements and an employee is permitted to request to undertake a secondary job or training, with an employer not permitted to unreasonably refuse such a request.

26. In addition, requirements under this clause are not valid unless the employer consents in writing to the arbitration of any dispute arising from the requirement.

27. While significant safeguards are already included in this provision, the SDA considers that this clause could be strengthened further by:

    a) Requiring that any requirement under this clause be reasonable in all the circumstances;

    b) Extending the notice period from 48 hours to one week (consistent with a similar variation made to the Restaurants Award);

    c) Requiring consultation with the affected worker.

28. The draft determination at Annexure A reflects the above changes.

Conclusion

29. The SDA has engaged in discussions regarding variations to the Award with the sole aim of ensuring that workers and businesses impacted by COVID-19 are able to access reasonable and temporary measures which ensure as much ongoing paid employment for as many workers as possible, where JobKeeper support is not available to the workers and businesses in question.

30. The SDA continues to strongly support fair protections for workers' rights in these circumstances, and further amendments to the determinations are proposed to address the matters raised by the Commission. Subject to these amendments, the SDA supports the proposed variations.

Without prejudice

DRAFT DETERMINATION

Fair Work Act 2009
s.157 – Application to vary a modern award to achieve the modern awards objective

Application by the Australian Industry Group
([insert matter number])

FAST FOOD INDUSTRY AWARD 2010
[MA000003]

[COMMISSION MEMBER(S)] [INSERT LOCATION AND DATE]

Application to vary the Fast Food Industry Award 2010

A. Further to the decision [insert citation] issued by the Full Bench on [insert date], the above award is varied as follows:

1. By inserting the following Schedule H:

Schedule H - Award flexibility during the COVID-19 Pandemic

H.1 The provisions of Schedule H are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

H.2 Schedule H operates from [insert date] (**Date of Operation**) until [insert date 3 months from the date of operation]. The period of operation can be extended on application to the Fair Work Commission.

H.3 Schedule H applies to:

(a) employers who do not qualify for Jobkeeper payments and their employees; and

(b) employees who do not qualify for Jobkeeper payments and their employers in relation to those employees.

H.4 If an employer or employee become eligible for Jobkeeper payments, the terms of Schedule H will not apply.

H.5 Schedule H is intended to assist in the continuing employment of employees.

H.6 During the operation of Schedule H, the following provisions apply.

H.7 Any requirement issued by an employer under Schedule H does not apply to the employee if the requirement is unreasonable.

H.8 Flexible part-time employment

While Schedule H is in operation and subject to written agreement between an employee and their employer in accordance with clause H.8.2, the following provisions will, in relation to that employee, operate instead of clause 12 of the award until [insert date 3 months from the Date of Operation]:

H.8.1 A part time employee is an employee who:

(a) Works at least 8 but less than 38 hours per week;

(b) Has reasonably predictable hours of work; and

(c) Receives on a pro-rata basis, equivalent pay and conditions to those of full-time employees.

H.8.2 The employer and the part-time employee will agree in writing upon:

(a) The number of hours of work which are guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which are guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed minimum hours**); and

(b) The days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed minimum hours (**the employee's agreed availability**).

H.8.3 The employer and the employee must have genuinely made the agreement mentioned in clause H.8.2 without coercion or duress.

H.8.4 An agreement made under clause H.8.2 is not valid unless the employee is also advised in writing that the employer consents to a dispute about whether the agreement was genuinely made being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

H.8.5 The employee must not be rostered to work less than 3 consecutive hours in any shift.

H.8.6 The guaranteed minimum hours shall not be less than 8 hours per week.

H.8.7 Any change to the guaranteed minimum hours may only occur with written consent of the part-time employee.

H.8.8 An employee may be offered ordinary hours in addition to the guaranteed minimum hours (**additional hours**) within the employee's agreed availability. The employee may agree to work those additional hours provided that:

(a) The additional hours are offered in accordance with clause 25 – Hours of work and clause 26 – Overtime;

(b) The employee may not be rostered for work outside of the employee's agreed availability;

(c) agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times);

(d) An employee will accrue entitlements such as annual leave and personal/carer's leave on agreed additional hours worked;

(e) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;

(f) The employee can refuse to work additional hours when offered on any occasion;

(g) Additional hours worked in accordance with this clause are not overtime; and

(h) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

H.8.9 A part-time employee who immediately prior to the Date of Operation has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause H.8.2. If a part-time employee agrees to such a change, they shall, beyond Schedule H ceasing operation, revert to the previously agreed regular pattern of hours.

H.8.10 If an employee is first employed as a part-time employee during the operation of Schedule H, their employment beyond Schedule H ceasing operation will be on a casual basis unless:

(a) the employer and employee agree that the employee will be engaged on a part-time basis beyond this period, and

(b) the employer and employee reach agreement in writing on the matters identified in with clause 12.

H.9 Annual leave

H.9.1 Subject to clause H.9.3 and H.9.7 and despite clauses 28.6, 28.7 and 28.8 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request the employee in writing to take paid annual leave. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.

H.9.2 If the employer gives the employee a request to take paid annual leave, and complying with the request will not result in the employee having a balance

of paid annual leave of fewer than 2 weeks, the employee must consider the request and must not unreasonably refuse the request.

H.9.3 An employer may only make a request under clause H.9.1 where it is reasonable in all the circumstances.

H.9.4 An employee is not required to take leave under clause H.9 unless the employee is advised in writing that the employer consents to a dispute about whether the employer's request is reasonable in all the circumstances being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

H.9.5 A period of leave under clause H.9 must start before [insert date 4 weeks from the Date of Operation] but may end after that date.

H.9.6 Clause H.9.1 does not prevent an employer and an employee from agreeing to the employee taking annual leave at any time.

H.9.7 An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment.

H.10 Close down

H.10.1 Subject to clauses H.10.2, H.10.3 and H.10.4, an employer may:

(a) Require an employee to take annual leave as part of a close down of its operation or part of its operation by giving at least 1 week's notice or any shorter period of notice that may be agreed; and

(b) Where an employee has not accrued sufficient leave to cover part or all of the close down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the closedown.

H.10.2 Clause H.10.1 applies if the employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19.

H.10.3 An employer must provide an employee with written notice of any requirement to take annual leave or unpaid leave in accordance with this clause.

H.10.4 An employee is not required to take leave under clause H.10.1 unless:

(a) The employer has consulted with the employee about the requirement to take the leave; and

(b) The employee is advised in writing that the employer consents to a dispute arising from the requirement being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

H.10.5 Clause H.10.1 only permits an employer to require an employee to take unpaid leave if it is in connection with a close down that commenced prior to [insert date 4 weeks from the Date of Operation] and the unpaid leave does not extend beyond [insert date 8 weeks from the Date of Operation].

H.10.6 Where an employee is placed on unpaid leave pursuant to H.10.1(b), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

H.10.7 If an employee is required to take unpaid leave pursuant to clause H.10.1(b) and the employee makes a request to engage in:

(a) reasonable secondary employment;

(b) training;

(c) professional development;

during the period of unpaid leave, the employer must consider and not unreasonably refuse the request.

H.11 Dispute resolution

Any dispute regarding the operation of Schedule H may be referred to the Fair Work Commission in accordance with clause 9 – Dispute resolution.

2. Insert the following in clause 3.1:

Jobkeeper payment means a jobkeeper payment payable to an entity under section 14 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

3. By updating the table of contents and cross-references accordingly.

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].

COMMISSION MEMBER