IN THE FAIR WORK COMMISSION

Matter No: AM2014/196 and AM2014/197

Fair Work Act 2009

s. 156 – 4 yearly review of modern awards

4 yearly review of modern awards – Common issue – Casual and Part-time employment

Claim to vary the Higher Education Industry – General Staff – Award 2010 (MA000007)

Submissions in reply in relation to common claims

Introduction

1. This submission is made by the Australian Higher Education Industrial Association (**"AHEIA"**) in reply to the ACTU submission filed on 20 June 2016 (**"the ACTU submission"**). AHEIA also relies on its written submissions and evidence filed on 25 February 2016.

2. The variations sought to the *Higher Education General Staff Award 2010* (MA000007) (**"the GS Award"**) are significant. In particular, the ACTU claim:

    - seeks to vary the current industry-specific provisions in the GS Award to increase the minimum period of engagement from 3 to 4 hours and remove the current exemptions to the minimum engagement period;
    - singles the GS Award out as one of only a handful of awards that should be varied to include the "deeming with opt-out" provision rather than the "opt-in conversion" provision.

    Given the significance of the proposed changes, the ACTU needs to have supported its claim with "probative evidence properly directed to demonstrating the facts supporting the proposed variation", consistent with the *Preliminary Jurisdiction Issues Decision* [2014] FWCFB 1788 at [23].

3. Clearly, it has failed to do so. The only evidence provided by the ACTU is that of Linda Gale, who is a union official employed by the National Tertiary Education Industry Union (**"NTEU"**). The evidence in Ms Gale's witness statement (Exhibit 13) was of poor quality, consisting largely of assertions unsupported by evidence, including large amounts of hearsay. The ACTU continues to rely on this poor quality evidence: for example, in support of the argument for the "deeming" provision to be inserted into the GS Award, the ACTU Submission relies (at Paragraph 129) on Ms Gale's hearsay evidence that a number of casual workers had told her that they do not feel able to exercise their right to request conversion because of their insecurity in employment. No direct evidence has been provided by the ACTU or NTEU in support of this claim.

The Deeming Provision

4. As set out at Paragraph 126 of the ACTU submission, the GS Award is one of just 6 awards for which the ACTU proposes the insertion of the "opt-out" deeming clause. The ACTU submission then relies on the evidence of Linda Gale in support of this claim, asserting that the evidence shows that "higher education employers are strongly resistant to conversion and are often deferring and delaying, sometimes indefinitely, the process of converting applications on spurious grounds" (Paragraph 129). In fact there is no evidence before the Full Bench that this is the case.

5. Ms Gale's statement (at Paragraph 25) refers to the NTEU dealing with "a steady stream of disputes arising from employer refusals to convert fixed term employees". In cross-examination (PN1996-PN2001) Ms Gale agreed that her statement intentionally referred to fixed-term, rather than casual employees, and asserted that Universities had been "highly resistant" to applications for conversion for fixed-term staff and by analogy would have a similar attitude to applications for conversion for casual employees.

6. Ms Gale's assertions in relation to conversion of fixed-term employees are unsupported by any direct evidence. No figures are provided and, in fact, Ms Gale does not give even one actual example of the difficulty faced by the NTEU or its members in relation to requests for conversion of fixed-term employees.

7. In relation to disputes over conversion of casual employees, the unchallenged evidence of Stuart Andrews (Exhibit 49) is that in the time since casual conversion provisions were inserted into enterprise agreements in the higher education sector around a decade ago:

- there has only been one occasion on which a member university sought advice from AHEIA in regard to a request for casual conversion that had been refused (Paragraph 9);
- only 3 of AHEIA's 31 member universities had experienced a dispute over casual conversion (Paragraph 10),

and that all of the above matters had been resolved by consent.

8. Ms Gale stated in cross-examination that she was aware of "in the order of a dozen" refused applications for casual conversion (PN2003), and that she was aware of "a few" disputes (PN2006-2007). In her witness statement, she did not provide evidence of any actual disputes with the exception of one at Latrobe University (Paragraph 28) and one at Monash University (Paragraphs 29 -33). In relation to the matter at Latrobe, it was put to her that the University had accepted the employees' application for conversion shortly after it had been made, but that the employees had not elected to continue with their application. Ms Gale was unable to categorically state that this was not true, and further did not deny that the NTEU had not raised a dispute in respect of this matter until some 2 years after the application had been made (PN2117-PN2121).

9. The lack of direct evidence provided by the ACTU and NTEU in respect of the higher education industry is in sharp contrast with, for example, the direct evidence given by 2 employees covered by the Timber Industry Award, which is another of the small number of awards in which the ACTU is seeking to insert the deeming provision (ACTU submission paragraphs 132-133).

Exemptions from the minimum engagement period

10. Although Ms Gale's witness statement does not address the issue, she agreed in cross-examination that the NTEU has adopted a position in these proceedings that does not allow for any exemptions from the minimum engagement period (PN1807). It is not in contention that the exemptions to the minimum engagement period in the GS Award arose from an agreed settlement between the parties, later endorsed by a Full Bench of the Australian Industrial Relations Commission.

11. The ACTU submission (at Paragraph 89) asserts that the evidence led by AHEIA demonstrates that the granting of the ACTU claim would have "little effect" on universities. This assertion

appears to be made on the basis that the ACTU claims that few casual employees of universities are also students. In fact, the evidence demonstrates otherwise. The statement of Ken Greedy (at Paragraph 3 of Exhibit 51) refers to payroll data for the period from 1 July 2015 to 31 December 2005 for casuals who are either students or have a primary occupation elsewhere: that is, the 2 categories of casual employee exempted from the current minimum engagement period under the GS Award (clause 12.1(i) and (iii)). On nearly 40% of those occasions, engagements were for less than 4 hours, with an average minimum engagement of 2.21 hours.

12. Other evidence also demonstrates that the number of casual employees in these 2 categories is significant. The evidence of David Ward (paragraph 28 of Exhibit 44) was that at the University of New South Wales approximately 50% of casual professional (general) staff are also students of the University. Mr Ward was cross-examined as to the source of this data, and was able to explain its source as two reports run from University systems (PN4322-PN4324).

13. Ms Gale's own witness statement relied upon research on casual workers in universities which included results of a survey of general staff undertaken in around 2003 (Attachment 1 to Exhibit 13). Under cross-examination, Ms Gale agreed that:

    - around 50% of the respondents to the general staff survey were also students (PN1887);
    - it is a feature of the higher education industry that there is significant employment of students who are students of the universities who employ them (PN1888);
    - there is a significant proportion of casual employees in the higher education sector who have other full-time employment (PN1892).

The relevance of enterprise bargaining

14. The ACTU submission asserts that where an enterprise agreement is in place, the entire proceeding is moot in relation to the employer covered by the agreement (Paragraph 81) and that the granting or rejection of the claim could have only marginal importance to such employers (Paragraph 95).

15. This is not the case in respect of the higher education industry. If the ACTU claim is granted, history suggests that the NTEU will seek to have the new provisions flow on into enterprise

agreements and form part of the actual terms and conditions applying to general staff at universities.

16. The NTEU has not led evidence to deny that this is the case. Further, the evidence before the Full Bench demonstrates that after the relevant pre-reform awards were varied to give effect to the settlement in the 2002 "casuals case", the award provision flowed on into enterprise agreements in the next round of bargaining, and has been included in agreements negotiated in subsequent rounds: see witness statement of Stuart Andrews (Exhibit 49) at paragraph 43 and Attachment B; witness statement of David Ward (Exhibit 44) at Paragraph 38). Indeed, the provisions of the settlement were included in 3 enterprise agreements prior to the pre-reform awards being varied (see AHEIA submission of 25 February 2016 at paragraph 13).

17. In summary: the GS Award contains industry-specific provisions for casual minimum engagement and casual conversion that were negotiated by the parties by consent, endorsed by a Full Bench of the Australian Industrial Relations Commission, inserted into the relevant pre-reform awards, and then into the modern award. The provisions have since been included (with slight institutional variation) by consent in enterprise agreements applying across the sector in all the rounds of enterprise bargaining that have taken place over the last decade. Neither the ACTU nor the NTEU has provided any probative evidence that the provisions are not working and should be varied. The ACTU application, insofar as it relates to variation of the GS Award, should be rejected.