

Vice President Hatcher

Fair Work Commission

Exhibition Street

Melbourne Victoria

By Email

10th December 2018.

RRESSA – Response to submission of QREIOE RE Part Time Commission – Only Sales Staff 4 Yearly Real Estate Award (2010) AM2016/6

Dear Mr Vice President

RRESSA response to QREIO submission to the Full Bench dated 23rd November 2018 is as follows;

1.The employer submission allowing for part time employment of commission – only sales staff has an average number of hours to be worked p.w. as less than 38 and that those average hours must be stated in writing in the written agreement between the employer and the employee (re their proposed sub - clause 16.10)

The suggested amendment is flawed in that it does not and cannot provide for an average number of hours to be worked in a given week or month when there is no requirement for the employer to maintain a time book which records the actual hours worked each day of the week by the part time sales commission – only salesperson. Nor is the employer required under the Fair Work Act, 2009 to maintain such a written record, (re Regulation 3.33.(3)) FWA 2009).

Further there is no specified minimum number of hours a part time commission – only sales person can work p.w. It could, at one extreme be 1 hour p.w. written into the agreement and the employee told by the employer if they want to work more hours they can but those hours will not count for the purpose of the NES entitlements or any additional payment as they are not being directed to work those additional hours. This may also impact on any worker's ability to claim worker's compensation for any injury sustained whilst working outside of approved hours and also with respect to "journey accidents" to and from work.

2.The employer's suggested sub - clauses 16.11, 16.12 and 16.13 provide that any hours worked in excess of the "average hours" in the written agreement must be approved by the employer before they are worked and if so the employee will be paid the minimum hourly rate for each hour worked that was approved.

This is a nonsense proposition to adopt, it in theory is a cross between a part time commission – only remunerated salesperson and a part time employed waged salesperson. In the former case only if the salesperson works approved additional hours beyond the “average hours” agreed upon.

Further is the QREIO seriously suggesting that if an employee does not get the employer’s approval to work in excess of the “average weekly hours”, and sells a property outside of the agreed hours and without the employer’s prior approval, that the salesperson would not be entitled to any payment in accordance with clause 16, i.e. no share of the employer’s commission?

The suggested sub clause 16.13 states, “*For the avoidance of doubt, where the employee works hours in excess of those average weekly hours stated in his or her written agreement at their own initiative(i.e. without any express instruction from the employer to do so) the employee will not be entitled to payment in accordance with this clause.*” The words, “*this clause*” is clause 16, which includes all sub clauses from 16.1 - to the suggested 16.15, in short the whole of clause 16 which sets out the entire basis and safeguards for remunerating a commission – only salesperson.

3. The proposed sub - clause 16.14 allows disputes to be referred to the FWC over what is a “specific direction” of the employer. The FWC has no arbitral powers to settle such a dispute and is meaningless in principle given the abovementioned critique of the proposed award amendments of the QREIO.

4. The proposed sub clause 16.5 allowing employers to wait 7 days before recording their specific direction to an employee to work additional hours beyond the agreed “average hours”. There is no justification for this delay and there is no requirement for an employee to witness and sign their agreement or otherwise as to the hours worked by them.

5. The QREIO proposed amendments to the award do not address the real concerns expressed by the Full Bench in its decision and provisional finding of the 6th July 2017 that part time and casual commission – only employees are “*neither useful nor relevant*”.

Until full time commission – only sales staff have an effective hours clause with 38 hours being the maximum allowable ordinary hours to be worked, with provision for overtime payments and the recording of accurate real time hours of work, any proposal to allow part time commission – only employment for sales staff is “*neither useful nor relevant*”, particularly as those employees’ and employers” who desire part time employment can be easily accommodated by the existing award which allows for payment of the hours worked by the employee concerned.

RRESSA restates its opposition to commission – only part time employment of sales staff as put to the Full Bench on the 12th November 2018 in Sydney and to the notion of allowing pro rating of the MITA for part time commission – only sales staff.

6. Correction to RRESSA Submission re Clause 16.3 (a) (iii) dated 22nd November 2018

I wish to correct the proposed subclause shown in point 3 of RRESSA above submission in that I incorrectly included “*the words*” preceding “*real estate business*” in the first line of the proposed

new sub clause. I note Mr Paterson of REEF has also picked up that error in his submission on the proposed new clause. I would ask that the Bench amend RRESSA suggested amendment in line with the above correction.

Regards

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