Fair Work Commission

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Re 4 Yearly review of modern awards – Real Estate Industry Award 2010 (AM 2016/6)

Pursuant to the directions of the Full Bench in the abovementioned matter dated 30th May 2016, the Registered Real Estate Salespersons' Association of SA, attaches it's response to the submission of the Real Estate Employers' Federation dated 27th July 2016, concerning proposed clauses 9.6 (a) and 9.7 (c) (i) of the exposure draft Real Estate Industry Award 2015.

Regards

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IN THE FAIR WORK COMMISSION

IN THE MATTER OF;

4 YEARLY REVIEWS OF MODERN AWARDS

Matter No. 2016/6

Real Estate Award 2010.

Response to submission of REEF re Proposed Clause 9.6 (a) and 9.7 (c) (i) of the exposure draft Real Estate Industry Award 2015.

1. The Registered Real Estate Salespersons' Association of SA (RRESA) is opposed to REEF's proposed amendment to clause 9.6 (a) for reasons set out below, and supports REEF's submissions with respect to clause 9.7(c) (i) for the reasons put forward in their submission at paragraphs 3.1 – 3.5 inclusive.

2. REEF's proposed amendment to proposed clause 9.6 (a), detailed at paragraph 2.18 of their submission is contrary to the Fair Work Act, 2009, specifically ss 323 (1), 324 (1) (c), 324 (3), & 326 (1) (a) & (c).

3. REEF's submission in essence as RRESA understands it to be, is that where a commission only salesperson's share of the employer's commission is in excess of the award minimum of 35%, that excess can be used for debiting any payments made to the employee for annual leave or personal leave, or for other NES conditions such as payment in lieu of notice, against any future payment of commission due to the employee.

I understand an example of the operation of the proposed clause is that if an employee takes 2 weeks annual leave and the wages paid are $1,500 and on the next commission payment due to the employee was say $2,000, the employee would only receive $500 as the $1,500 annual leave payment would be "clawed back". If the future commission payment was only for say, $1,000, nothing would be paid to the employee and the $500 left over from the annual leave payment would be carried forward to the next commission payment.

RRESA is opposed to REEF's proposal for a number of reasons as stated below;

(a) Prior to the Canavan decision (FWC [2014] FWCFB 3202), it was common for employment agreements concerning commission only sales staff be paid an "all up" commission rate of say 60%, that included payment in advance for annual leave and carers/ personal paid leave. Whilst some of those agreements specified what the exact proportion of the 60% had been allocated to annual leave and carers/ personal leave, many also do not. Further they rarely if ever allocated in the agreements the proportion of the commission share that included the notice period under the NES.

In theory the employer was required under the existing award when a commission only sales person left their employ or took annual / personal/ leave, to do a reconciliation to ensure that when the employee took that leave or were owed accrued leave on termination

of employment, to ensure that the employee had been paid the minimum amount under the award, i.e. the minimum wage under clause 14.1 or the average of their weekly remuneration over the employee's last 12 months of service, which ever was the greater.

In reality it has been RRESA's experience that few if any employers actually did that reconciliation exercise. This failure to reconcile is not surprising given the vast majority of employers in the industry are small businesses with less than 15 employees' who have no dedicated HR staff, who either do not understand the workings of the award or frankly do not want to comply with it.

REEF's proposed amendment requires the employer to do the same reconciliation exercise and as they don't do it now, why would we expect them to do it under the revised proposal of REEF?

(b) REEF's proposed clause will create greater concern and uncertainty for employers. The clause creates two classes of commission only employees, one group who have entered into employment agreements prior to the date of operation of the clause, which provide for an "all up" commission payment and others employed post the variation date, who should have employment agreements which do not have the "all up" commission share, working side by side, in small businesses in the main with two different pay structures in place.

(c) REEF rationale for its claim is to not expose employers to underpayment of wages claims or for penalties to be imposed for breaches of the award, in light of the Canavan decision. The point is that following that decision and the decision of Gray J in the CFMEU v Jeld – Wen Glass Australia Pty Ltd Case [2012] FCA 45, employers generally and the Real Estate Industry have been on notice that the existing award (clause 17.5) allowing advance payment of NES provisions was unlawful and has been so since 1st January 2010.

The practical effect with respect to any underpayment of wages claim re pre paid annual leave / personal leave by an employee would, RRESA submits depend upon the findings of the relevant Court. RRESA believes that findings such as that made by Industrial Magistrate Ardlie of the Industrial Relations Court of SA , in the matter of Parsons and Ors v Pope Nitschke Pty Ltd [2016] SAIRC 17 dated 9TH June 2016 (copy of which is attached to RRESA submission dated 27th July 2016),in particular paragraphs 49-60 inclusive, would be followed.

His Honour found that the applicants had, had allocated in their collective agreement specific allowance for the advance payment of annual and personal leave amounting to 11.54% and that on reconciling the payments made to the employees, the employer was able to demonstrate that the employees had not suffered any financial detriment and therefore entitled to offset any payment due under the NES those

payments made to them by way of the advance payments, (refer to paragraph 58 of decision).

Given the employers in this industry have been aware of the Canavan decision since 29th May 2014, there has been more than enough time for them to have sought amendments to any of their employment agreements which may have offended the NES, with respect to advance payments. REEF's proposed clause simply extends even further this dual track approach to the payment of NES entitlements.

(d) RRESA further submits that the reasons advanced by Commissioner Cambridge in his dissenting decision to the majority in a decision of a Full Bench of the FWC, in Warren & Hull – Moody Finishes Pty Ltd [2011] FWAFB 6709, and cited in Canavan at paragraph 26 of that decision stated;

> *" The fundamental notion of paid annual leave is defeated if at around the commencement of or during the period of actual leave , there is no payment provided in respect of the period of absence from work. The redirection of the payment into an hourly rate creates such disconnection with the period of absence from work so as to effectively make the period of absence a period of unpaid leave. The obvious practical outcome is to establish financial disincentive for the taking of the period of leave. Thus the rationale for the establishment of paid annual leave involving annual rest and recuperation away from work is impugned and the*

protected benefits and safeguards intended by Division 6 are violated."

With respect, RRESA in light of its own witness's evidence concerning the practice of commission only employees, not willing or able to take their full 4 weeks annual leave because it is not paid at the time of it being taken, adopts Commissioner Cambridge's reasoning in full!

Whilst REEF proposed clause is "grand parented", RRESA says that for the reasons stated above, it should be rejected.

(e) RRESA rejects REEF's submission that their proposed clause is permitted under the Act, in particular s 324 (1), in that if a modern award allows for certain deductions from an employee's wage or commission it is lawful. The legislative Note 1 recorded in s 324 makes it clear that the type of award clause envisaged, is to allow some other form of payment of remuneration to the employee, such as salary sacrificing can be allowed where forgoing part of a wage on the part of an employee(s) is replaced by some other form of benefit or remuneration.

REEF's proposed award clause has nothing to do with the remuneration of a commission only salesperson, it relates to allowing the NES sections of the Act in relation to advance payments being subverted for a particular class of employees.

In addition s 324 (3) states; "*Any variation in the amount of the deduction must be authorised in writing by the employee".*

In RRESA submission, if REEF's clause was to be given effect to, the employer would have to, each time they sought a "claw back" of the annual/ personal leave paid to the employee, by way of deducting those amounts from a future commission to be paid to that employee, the said employee would have to separately authorise it in writing, as the amounts would vary each time they took annual/ personal leave. This would impose an onerous administrative duty on both the employee and employer and is not practicable given the overwhelming majority of employers are small businesses.

Further RRESA submits that s 326 (1) (c) (i) (ii) would void such an award clause should it be made, on the grounds that the deduction was for the benefit of the employer and is unreasonable. In particular in circumstances where, say an employee takes 4 weeks annual leave and is paid $3,000 which is then clawed back at the payment of the employee's next commission payment ,which might be $3,000 or less, leaving the employee with no income until other sales have settled and commission received by his employer from the vendor. The commission only salesperson could face any number of weeks without any payment of commission, whilst still incurring expenses such as the costs of providing their own motor vehicle for work.

4. For all of the above reasons RRESA submits that REEF's application with respect to proposed clause 9.6 (a) be rejected.

5. In relation to REEF's proposed clause 9.7 (c) (i) RRESA agrees with their submission at paragraphs 3.1 – 3.5 re the issue of there being a definition the award for the term "real estate sales".

Filed by Ralph Clarke
– Agent for RRESSA

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