FOUR-YEARLY REVIEW OF MODERN AWARDS

AM2017/49 – Fast Food Industry Award 2010

July 2019

National Retail Association

1. Introduction

1.1. The National Retail Association, Union of Employers (**the NRA**) is an industrial organisation representing the interests of employers in the retail, fast food, and associated industries and is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

1.2. The NRA has fulfilled this function, under one name or another, since its formation as a non-corporatised entity in the 1920s and then as a formally registered union of employers since 1931.

1.3. Since that time, the NRA has grown and now represents the interests of over 6,000 retailers, encompassing over 29,000 shop fronts and their associated employees nationwide.

2. Background

2.1. On 4 July 2019 the Full Bench of the Fair Work Commission (**the Full Bench**) issued a decision in matter AM2017/49 *4 yearly review of modern awards – Fast Food Industry Award 2010* (**the Award**) (**the July Decision**).

2.2. The July Decision followed a decision of the Full Bench in the same matter on 20 February 2019 (**the February Decision**). In the February Decision the Full Bench rejected two award variations proposed by AI Group and expressed two provisional views that:

(a) there was merit in the provision of guaranteed minimum hours for part-time employees; and

(b) the current award places unwarranted restrictions on the capacity to vary part-time hours.

2.3. In the July Decision, the Full Bench decided to depart from the first of the provisional views noted above, largely due to the existence of a minimum number of hours per shift (and thus, a natural minimum number of hours per week) and because the profile of workers in the fast food industry did not support minimum weekly hours for part-time employees.

2.4. However, the Full Bench in the July Decision maintained the second of the provisional views noted above, and proposed a draft determination varying clause 12 of the Award in an effort to allow for greater flexibility in the variation of part-time employees' hours of work.

2.5. The NRA has perused the proposed variations to the Award arising from the July Decision and have concerns with the utility and effectiveness of some elements of the proposed variation. These submissions will discuss these concerns.

3. The concept of a "pattern of work"

3.1. The proposed variations to clause 12 of the Award include two variations to sub-clauses 12.3 and 12.4 to allow for the variation of the "pattern of work" of a part-time employee.

3.2. The proposed new sub-clause 12.3 relevantly reads as follows:

> **12.3** The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular rostered shift as follows:
>
> (a) any agreement to vary the <u>regular pattern of work</u> for a particular rostered shift must be recorded at or by the end of the affected shift …(our emphasis)

3.3. The proposed new sub-clause 12.4 relevantly reads:

> **12.4** The employer and employee may agree to vary an agreement made under clause 12.2, <u>in respect of the regular pattern of work</u>, on an ongoing basis or for a specified period of time, as follows …

3.4. The expression "regular pattern of work" appears to be derived from clause 12.2 which provides that:

> **12.2** At the time of first being employed, the employer and the part-time employee will agree, in writing, on a <u>regular pattern of work</u>, specifying at least …

3.5. However, the expression “regular pattern of work” is not a defined term in the legislative sense; its meaning is instead inferred from the surrounding text.

3.6. Sub-clause 12.2 specifies the items which must be included in the agreement entered into under that sub-clause which includes the regular pattern of work. The first three of these items are:

(a) the number of hours worked each day;

(b) which days of the week the employee will work;

(c) the actual starting and finishing times each day.

3.7. It is not clear, on the face of sub-clause 12.2, whether the expression “regular pattern of work” means paragraphs (a), (b) and (c) of that sub-clause, paragraphs (b) and (c) only, or all six paragraphs listed under sub-clause 12.2.

3.8. In the absence of a concrete definition, the expression “regular pattern of work” is susceptible to taking its ordinary, natural meaning, this being the days and times within which the part-time employee performs work.

3.9. This therefore means it is possible that, in the absence of further clarification, the expression “regular patter of work” in the proposed new sub-clauses 12.3 and 12.4 refers only to the items specified at paragraphs (b) and (c) of sub-clause 12.2.

3.10. Such an interpretation would still allow for flexibility in that the roster of a part-time employee may be varied, however may generate an obstacle to a part-time employee agreeing to increase or decrease the total number of hours that they are to work as contemplated by paragraph (a) of sub-clause 12.2.

3.11. The NRA notes a media release by the Australian Council of Trade Unions (**ACTU**) on 8 July 2019 which opened with the following statement:

> “More than one million Australians want more hours but can’t get them, ABS data released today shows.
>
> The Participation, Job Search and Mobility figures released by the bureau today show that nearly one-in-ten working Australians – 8.2 percent of the labour force – are unable to get the hours they want.”

3.12. The NRA acknowledges that the *Fast Food Industry Award 2010* in particular among the modern awards is highly inflexible in its treatment of part-time employees, and it is appropriate that structural impediments which prohibit employers from effectively providing additional hours to part-time employees ought to be minimized.

3.13. With this in mind, the NRA proposes that clauses 12.3 and 12.4 be amended to include the words “(including the total number of hours worked)” after each incidence of the expression “the regular pattern of work”.

3.14. These, and other amendments proposed by the NRA, are included in mark-up in the Schedule to these submissions.

4. Redundant specification of electronic forms of writing

4.1. The proposed new sub-clauses 12.3 and 12.4 include specific reference to electronic communication as a valid means of recording an agreement made in accordance with those sub-clauses. A similar variation appears at sub-clause 12.2(d).

4.2. Specifically, sub-clause 12.2(d) provides as follows:

> (d) that any variation will be in writing, <u>including by electronic means of communication (for example, by text message)</u>; (our emphasis)

4.3. The proposed new sub-clause 12.3 provides:

> (a) …

(b) the employer must keep a copy of the agreed variation, in writing, including by any electronic means of communication and provide a copy to the employee, if requested to do so. (Our emphasis)

4.4. The proposed new sub-clause 12.4 provides:

(a) …

(b) the agreed variation must be recorded in writing, including by any electronic means of communication. (Our emphasis)

4.5. In the NRA's view, the expression "any electronic means of communication" is redundant having regard for applicable legislation and what is intended to be achieved by the inclusion of this expression in the proposed new sub-clauses.

4.6. The modern awards are industrial instruments made under power conferred on the Fair Work Commission and its predecessors by legislation, and as such fall within the ambit of section 46 of the *Acts Interpretation Act 1901* (Cth) to cause that Act to apply to the interpretation of modern awards.

4.7. Section 2B of the *Acts Interpretation Act 1901* (Cth) defines ***writing***, as it appears in any Act or other instrument which that Act applies, as follows:

> ***writing*** includes any mode of representing or reproducing words, figures, drawings or symbols in visible form.

4.8. This means that the expression "in writing" as it appears in clause 12 of the Award currently includes writing in an electronic format. As such, the utility of including an express reference to electronic communication is largely redundant.

4.9. The NRA is also concerned that expressly validating electronic communications in one modern award, without similar express validation in other modern awards, may result in a conclusion among business operators that in the absence of such an express validation in their own applicable award, electronic communication is not an effective means of managing their business.

4.10. Considering the specific example of a "text message" in the proposed variation to sub-clause 12.2(d), it appears to the NRA that the intention behind the proposed variation is not to validate electronic forms of communication *per se*, but to make it clear that there is no particular formality required in order to make or vary an agreement under the various sub-clauses of clause 12.

4.11. The NRA is aware that it is reasonably common practice for rosters and shifts in the fast food industry to be varied on the basis of various forms of electronic communication, including through SMS, Facebook Messenger, and WhatsApp.

4.12. These communications are often informal in nature, and agreement to a variation to the pattern of hours contemplated by sub-clauses 12.2(d), 12.3 and 12.4 would in the ordinary course be evidenced by the totality of the communications between the employee and their relevant manager, rather than in a single document.

4.13. If, as the NRA understands, the intention of the Full Bench is not to (unnecessarily) validate electronic communication in and of itself, but rather to validate the informality often inherent in such communications, then any reference to electronic communication as a form of writing is not necessary.

4.14. Taking this into consideration, the NRA proposes the following amendments to the proposed variation to clause 12:

(a) that the words ", including by any electronic means of communication (for example, by text message)" be removed from sub-clause 12.2(d);

(b) that the words ", including by any electronic means of communication" be removed from sub-clause 12.3(b);

(c) that the words ", including by any electronic means of communication" be removed from sub-clause 12.4(a);

(d) that a new sub-clause 12.9 be inserted as follows:

12.9 A variation to an agreement entered into under clause 12.2, howsoever made, may be formal or informal and may be evidenced by:

(a) a single written record; or

(b) a series of written records demonstrating the nature of the variation agreed to (for example, a series of SMS messages or emails).

4.15. The NRA submits that the amendments proposed above give better effect to the outcomes it believes were intended by the Full Bench in the proposed draft determination.

4.16. These, and other amendments proposed by the NRA, are included in mark-up in the Schedule to these submissions.

5. Other consequential amendments

Prescription of circumstances in which overtime arises

5.1. In addition to the above matters, the NRA proposes that the proposed sub-clause 12.8 be varied to include an express reference to a variation made in accordance with sub-clause 12.2(d).

5.2. At present, sub-clause 12.8 specifies that overtime will be payable for all hours of work in excess of those agreed under clause 12.2 or varied under clause 12.3 or 12.4.

5.3. This appears to indicate that the only means by which an agreement under clause 12.2 can be varied is by the mechanisms provided in clauses 12.3 and 12.4.

5.4. Clauses 12.3 and 12.4 contemplate changes to the pattern of work only. However, they do not strictly contemplate a circumstance where the matters required by clause 12.2 are addressed in the employee’s contract of employment and, for whatever reason, the employee enters into a new contract of employment with the employer (for example, to accommodate a promotion).

5.5. Clause 12.2(d) itself contemplates a wider scope of mechanisms by which an agreement to the totality of matters specified in clause 12.2 can be varied than merely by clauses 12.3 or 12.4.

5.6. In its current form, clause 12.8 entitles an employee to overtime if their pattern of work is varied in accordance with clause 12.2(d), but not strictly in accordance with clauses 12.3 or 12.4. This is a plainly unjust scenario.

5.7. As such, the NRA proposes that clauses 12.8 be amended to include reference to clause 12.2(d) in addition to clauses 12.3 and 12.4.

5.8. This also requires a consequential amendment to the proposed new clauses 26.2(e)(ii) to include a similar reference to clause 12.2(d).

5.9. These, and other amendments proposed by the NRA, are included in mark-up in the Schedule to these submissions.

Treatment of meal breaks

5.10. In similar vein to the reasoning at paragraphs 5.1 to 5.8 above, the NRA submits that the proposed form as clause 27.1(d) be revised by including an express reference to clause 12.2(d).

5.11. These, and other amendments proposed by the NRA, are included in mark-up in the Schedule to these submissions.

Restructure of provisions with respect to variation agreement

5.12. We note that the paragraph structure of the proposed new clause 12.3 is inconsistent with drafting practices, in that paragraphs (a) and (b) to that clause are related, whilst paragraph (c) of that clause is independent of the preceding two paragraphs.

5.13. Further, the subject matter of clause 12.3(b) is substantially the same subject matter as is dealt with by clause 12.5 in respect to clause 12.4.

5.14. In the NRA’s view, clause 12.3 could be streamlined by removing clauses 12.3(b) and (c) and amending clause 12.5 appropriately, and moving the contents of clause 12.3(a) to the body of clause 12.3.

5.15. The NRA also believes that the current wording of clause 12.4 utilises excessive redundancy of language, and proposes what it believes to be a more streamlined form of words.

5.16. The NRA also proposes various grammatical amendments to the draft determination. This includes removing reference to the expression “additional hours” at the proposed new clause 26.2(f), as this expression has technical meaning under section 62 of the *Fair Work Act 2009* and, in the context of the remainder of that clause, is redundant.

5.17. These, and other amendments proposed by the NRA, are included in mark-up in the Schedule to these submissions.

Schedule

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards

(AM2017/49)

FAST FOOD INDUSTRY AWARD 2010

[MA000003]

Fast food industry

JUSTICE ROSS, PRESIDENT — MELBOURNE, *** 2019

DEPUTY PRESIDENT MASSON

COMMISSIONER LEE

4 yearly review of modern awards – Fast Food Award 2010 (MA000003)

A. Further to the Full Bench decision issued on 4 July 2019 the *Fast Food Industry Award 2010* is varied as follows:

1. By deleting clause 12 and inserting:

12. Part-time employees

12.1 A part-time employee is an employee who:

(a) works less than 38 hours per week; and

(b) has reasonably predictable hours of work.

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work specifying at least:

(a) the number of hours worked each day;

(b) which days of the week the employee will work;

(c) the actual starting and finishing times each day;

(d) that any variation will be in writing~~, including by any electronic means of communication (for example, by text message)~~;

(e) that the daily engagement is a minimum of 3 consecutive hours; and

(f) the times of taking and the duration of meal breaks.

12.3 The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular shift ~~as follows:~~ provided that any agreement to vary the regular pattern of work (including the total number of hours) for a rostered shift must be recorded in writing at or by the end of the affected shift.~~; and~~

~~(b) the employer must keep a copy of the agreed variation, in writing, including by any electronic means of communication and provide a copy to the employee, if requested to do so.~~

~~(c) In the event that no record of an agreed variation to a particular rostered shift is retained the employee is to be paid at overtime rates for any hours worked in excess of their regular pattern of work.~~

12.4 The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work (including the total number of hours), on an ongoing basis or for a specified period of time, provided that any such agreement is recorded in writing before the variation occurs. ~~as follows:~~

~~(a) any agreement to vary the regular pattern of work on an ongoing basis or for a specified period of time must be recorded before the variation occurs; and~~

(b) ~~the agreed variation must be recorded in writing, including by any electronic means of communication~~.

12.5 The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clause 12.2(d), 12.3 or 12.4 and:

(a) in the case of a variation agreed under clause 12.3 – provide a copy of the agreement to the employee if requested; and

(b) in all other cases – provide a copy of the agreement to the employee; and

(c) if a copy of a variation made under clause 12.2(d), 12.3 or 12.4 is not kept by the employer, the employee is to be paid overtime rates worked in excess of their regular pattern of work.

12.6 An employer is required to roster a part-time employee for a minimum of 3 consecutive hours on any shift.

12.7 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13 – Casual employment.

12.8 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.2(d), 12.3 or 12.4 will be overtime and paid for at the rates prescribed in clause 26 – Overtime.

12.9 A variation to an agreement entered into under clause 12.2, howsoever made, may be formal or informal and may be evidenced by:

(a) a single written record; or

(b) a series of written records demonstrating the nature of the variation agreed to (for example, a series of SMS messages or emails).

2. By deleting clause 26.2 and inserting:

26.2 A full-time or part-time employee shall be paid overtime for all work as follows:

(a) ~~I~~in excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) ~~B~~before an employee's rostered commencing time on any one day; or

(c) ~~A~~after an employee's rostered ceasing time on any one day; or

(d) ~~O~~outside the ordinary hours of work; or

(e) ~~H~~hours worked by part-time employees in excess of:

(i) the hours agreed in accordance with clause 12.2; or

(ii) in excess of the agreed hours as varied under clause 12.2(d), 12.3 or 12.4; or

(f) any ~~additional~~ hours worked by a part-time employee in excess of their regular pattern of work as agreed in accordance with clause 12.2 in circumstances where there is no written record of an agreed variation in relation to a particular rostered shift.

3. By deleting clause 27.1(d) and inserting:

(d) The time of taking rest and meal breaks and the duration of meal breaks for part of the roster and are subject to any agreement reached under clause 12.2 regarding a part-time employee's regular pattern of work. An agreed variation pursuant to sub-clauses 12.2(d), 12.3 or 12.4 may include a variation to the time of taking rest and meal breaks.

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].

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