IN THE FAIR WORK COMMISSION

AM2017/49

IN THE MATTER OF:

FOUR YEARLY REVIEW OF THE FAST FOOD INDUSTRY AWARD 2010

(APPLICATION BY AUSTRALIAN INDUSTRY GROUP)

SUBMISSIONS OF RETAIL AND FAST FOOD WORKERS UNION (RAFFWU)

A. ISSSUES

1. RAFFWU does not concede the change identified at [154] in the earlier decision is required to meet the modern awards objective. RAFFWU does press for the provision of guaranteed minimum hours for part-time employees.

2. The first part of these submissions is directed to the variation by written agreement and provision of agreement issues:
   - (a) Principle of Contract Variation
     - (i) Later Contest of "Agreement"
     - (ii) Weight of contractual change should be respected
   - (b) Overtime should be default position
   - (c) Provision of varied contract as matter of course

3. The second part of these submissions is directed to the minimum contracted hours issue:
   - (a) Capacity for no guaranteed hours non-sensical
   - (b) Common sense minimum lower than current position at major outlets
   - (c) Common sense minimum set at level acceptable to industry

B NO WRITTEN AGREEMENT PRIOR TO WORK BEING UNDERTAKEN

B1.1 Principle of Contract Variation

4. We submit the principle behind the offering of additional hours at ordinary rates is technically described as contractual variations for a limited period.

5. That is, a worker and employer commit via contract variation to a new contract for a given period. This usually reverts to the earlier arrangement subsequent to that period.

6. The contract between worker and employer should be seen as the foundation of the relationship. Systems which undermine this foundation – whether through recording changes to the contract after they have been implemented or not providing a copy of the varied contract to one party, should be resisted.

7. A structure which provides that a contractual variation not be reduced to writing when the variation ***is of a written agreement*** greatly increases the likelihood of dispute and conflict in the future.

8. This is so because without written agreement ***before*** the working of hours, it is likely workers and their representatives will rely on the written document which identifies agreement – the extant contract.

9. In practice, workers will be asked to stay back and acceptance of staying back will be argued by employers as "agreement to vary the contractual arrangements for a particular shift." In truth, it is acceptance by a worker to work overtime. The same is said of a worker asked to attend and perform work on a non-work day. The written agreement to vary the contract dispels any misunderstanding as to what is being agreed.

10. There is no evidence before the Fair Work Commission that employees are asked to work additional time ***at ordinary rates rather than overtime rates***. That industrial discourse is simply not had in the fast food sector.

11. The proposed change will lead to greater disputation and greater conflict. Workers may rightfully withhold written agreement when demands are made to agree in writing subsequent to the work being performed. Such workers ought resist being paid less than they have rightfully earned as overtime. An employer may argue their offer and a worker's acceptance was clear in its mind but that can be disputed without a written artefact. We often have employer's fail to clearly communicate the nature of an offer to work additional hours.

12. Unscrupulous employers may simply insist agreement was reached and workers would be left with the unenviable task of litigating unpaid wages in the courts without the benefit of a written artefact.

13. The Award variation would create ambiguity for the courts, the Commission, employers and workers alike. It ought be resisted.

B1.2 Default Position Without Written Variation

14. In the alternative, RAFFWU submits any instance where an agreed written contractual variation is not executed should explicitly entitle a worker to overtime rates for the relevant worker. This is so because the worker has not agreed in writing to a contractual variation.

B1.3 Evidence Does Not Identify Extant Issue of Provision of Contract Variation

15. We submit the evidence does not identify any issue with the provision of a copy of a variation to the agreed regular pattern of work.

16. Without evidence, there is no basis for the Full Bench to vary the Award to provide a circumstance where an employee is not given a copy of the variation as a matter of course.

17. The proposed new term appears to infer the employer is some form of information repository on which a worker can rely for accurate, timely provision of materials without fear of recourse. There is no evidence of such a relationship. To the contrary, the employer derives benefit from the labour of workers and the relationship requires a

contract to give it foundation. Written contracts are used for very many good reasons, including to avoid disputation and to allow parties to obtain advice.

18. The reports of the work of the Fair Work Ombudsman identify a multitude of circumstances where employers have failed to keep accurate records – including in the Fast Food sector.

19. Further, the evidence shows many additional hours are rostered and agreed through electronic means. There should be no barrier to such electronic means being given to the employee at the point of agreement.

20. The elimination of the right to be automatically given a copy of the contract variation, and agreement not being distilled in writing prior to the work being performed, has a flavour of "voluntary overtime at ordinary rates."

21. This is not the purpose of these provisions and ought be resisted.

22. It also may permit the effective casualisation of part-time work whereas very low base hours – such as 3 hours per week or month – are complimented by weekly floating additional hours which would not even need to be documented in writing before being worked and a copy of the varied contract kept only by the employer. The result of requesting such a varied contract may be the non-offering of additional hours.

23. We submit the proposed variation to clause 12.4 (proposed to be clause 12.5) is lacking in merit, is not borne out by the evidence and will not assist in meeting the modern awards objective.

24. In particular, we note the potential diminution contrary to the modern awards objective at (da) (i), the increased regulatory burden at (f) flowing from increased disputation, and the creation of a less simple, more difficult to understand system at (g).

C. 8 HOUR MINIMUM

25. The AIG has raised objection to the proposed inclusion of an 8 hour weekly minimum for part-time employees.

C1.1 Capacity for No Guaranteed Hours Nonsensical

26. The evidence shows many employees wish to be engaged in part-time work. The evidence shows employers want to and do engage employees in part-time work. The evidence shows one of the benefits of part-time work is agreement between employers and workers as to the regular pattern of employment. It is sensible and fair that there be a clear reasonable base of hours to the regular pattern of employment.

27. Any argument that such a base is 3 hours per 4 week cycle is nonsensical. No enterprise operates on the basis of agreeing with a part-time employee that there will be a 3 hour shift worked once every four weeks as a "regular patter of employment".

28. We submit the modern awards objective are met by stipulating 8 hours per week as a base – 32 hours over a four week cycle. This provides a floor of hours and:

(a) Helps address the needs of the low paid and improve what might be otherwise poor living standards; and

(b) Promotes social inclusion by increasing workforce participation.

29. We submit the weight of evidence is in favour of such a change.

C1.2 Lower than Current Major Employers

30. The evidence shows that the hours worked by part-timer workers in the sector are 8 hours or more. For example, the part-time workforce at McDonald's (which makes up half the employees in the sector) must be engaged for at least 10 hours under the extant enterprise agreement.

C1.3 Level Acceptable to Industry

31. It is worth of note that the 8 hour minimum is acceptable to industry as identified by the application ***of AIG*** for the inclusion of such a minimum.

D. CONCLUSION

32. We submit the 8 hour minimum requirement variation should be made.

33. We submit the other variations should not be made. Such variations would be contrary to the modern awards objective.

34. We submit as a fundamental principle, employees should be given a copy of any agreed contract variation.

35. We submit as a fundamental principle, contract variations should be agreed in writing prior to the variation taking effect.

Retail and Fast Food Workers Union

20 June 2019