Fair Work Commission

s.156 – 4 yearly review of modern awards

Fast Food Industry Award 2010

AM 2014/49

Submissions

Shop Distributive and Allied Employees' Association

20 June 2019

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions in response to the Directions issued by Deputy President Massons' chambers dated 28 May 2019.

2. The SDA acknowledges and supports the provisional view of the Full Bench outlined in its Decision in its review of the *Fast Food Industry Award 2010*.[1] The Full Bench stated:

> *[151] But the rejection of Ai Group's proposed clause is not the end of the matter. We see merit in the provision of guaranteed minimum hours for part time employees and in the simplification of the requirements attaching to the variation of a part time employee's agreed regular pattern of work. It is our provisional view that the current award places unwarranted restrictions on the capacity to vary part time hours.*
>
> *[154] It is our provisional view that:*
>
> • *agreed variations need not be recorded before the variation occurs – it should be sufficient to record the variation at the end of the relevant shift.*
>
> • *it is unnecessary to provide a copy of the agreed variation to the employee, it is sufficient if a record is retained by the employer.*
>
> • *some clarification as to the meaning of 'in writing' may be appropriate.*

[1] [2019] FWCFB 272

Guaranteed Minimum Hours

3. The Full Bench has identified that there is merit in minimum guaranteed hours for part time employees. The SDA has long supported the principle of minimum hours for part time employees. At Attachment B of the Report[2], Background Paper, at 12.6 the proposed re-draft includes a provision for a minimum of 8 hours per week. A minimum of 8 hours per week for part time employees is consistent with the minimum hours provisions in the following modern awards:

    - Hospitality Industry (General) Award 2010 (clause 12.2(a))
    - Restaurant Industry Award 2010 (clause 12.2(a))
    - Registered and Licenced Clubs Award 2010 (clause 10.4(b)(i))

Agreed Variations to be Recorded

4. The provisional view of the Full bench is that agreed variations need not be recorded before the variation occurs; an agreed variation may instead be recorded at the end of the relevant shift. The SDA is of the view that any variation may be agreed to during the shift and recorded during the shift or at the end of the shift. Mindful of the practicalities of agreeing to such an arrangement during busy work periods, the SDA would not oppose a verbal agreement during the shift, but would oppose any formal recording of the arrangement after the shift has finished. The SDA does not agree that it is consistent with appropriate work practices that an employee is potentially required to remain at the workplace after the completion of a shift to record their agreement to a variation.

5. Ai Group has proposed the following wording at 12.3(a)[3]:

    (a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded ~~at or~~ by the end of the affected

[2] Report, (AM2017/49), 27 May 2019
[3] Report, (AM2017/49), 27 May 2019, Attachment C

shift or as soon as reasonably practicable after the end of the affected shift; and

6. The SDA opposes this suggested wording. The words "as soon as reasonably practicable" are imprecise. This wording has a number of possible consequences. Firstly, a young or vulnerable employee may be at a disadvantage when discussing with an employer what is "reasonably practicable". Furthermore "reasonably practicable" provides no guidance as to what is an acceptable period of time, following the end of a shift, during which an employee and employer may agree to a variation.

7. The SDA also submits that amending the wording to allow an agreement to be recorded by the end of the affected shift, provides suitable flexibility for the manager to get the agreement in writing and that extending this beyond the end of the shift is a detriment to the employee. It is not appropriate that an administrative function is conducted in an employee's unpaid time.

8. Were the clause to be worded in this way it would not satisfy the modern awards objective under section 134(1) of the Fair Work Act:

(da) the need to provide additional remuneration for:

(i) employees working overtime;

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

9. The SDA proposes the following wording at 12.3(a)

(a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded at or by the end of the affected shift; and

Overtime Payable Where There is No Record of the Agreed Variation

10. At clause 12.5[4], the SDA proposed the following variation (see underlined):

> *The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clauses 12.3 and 12.4 and provide a copy to the employee, if requested to do so. Where there is no record of such agreed variation, overtime is payable.*

11. The SDA sees merit in the ability for an employee to genuinely agree to vary a regular pattern of work or to vary an agreement in relation to a particular rostered shift. Where there is agreement the payment of overtime rates are not required. This provides a benefit to an employee who wants additional hours of work and a benefit to an employer who needs additional labour.

12. In the absence of a record of an agreement to vary the regular pattern of work, overtime rates are applicable.

13. The Fast Food Industry Award 2010 provides for overtime at clause 26. Part time employees are entitled to overtime rates in various circumstances, including at 26.2 (e)

> *Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3.*

14. The wording proposed by the SDA at 12.5 above provides a protection for employees who have not agreed to work the additional hours. The SDA submits that the current protections should be maintained.

15. Consistent with the suggested amendment above it is proposed that clause 26.2 (Overtime) be amended to include a new (f).

[4] Report, (AM2017/49), 27 May 2019, Attachment C

(f) any additional hours worked by a part time employee in excess of their agreed hours where there is no written or electronic record of agreement to work such hours.[5]

Breaks During Work Periods

16. The SDA acknowledges that where an employee agrees to additional hours, such a variation to the rostered shift may be incompatible with the current clause 27, Breaks. Current clause 27.1(d) reads:

> *The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to the roster provisions of this award.*

17. Ai Group have proposed the following variation[6]

> *(d) The time of taking rest and meal breaks and the duration of meal breaks ~~form part of the roster and~~ are subject to ~~the roster provisions of this award~~. agreements, and variations to those agreements, made pursuant to clauses 12.2, 12.3 and 12.4 of this Award.*

18. The SDA opposes this proposed variation by AiGroup. The times of taking and the duration of meal breaks form part of an employee's roster. It is unnecessary to disturb this provision. The SDA proposes the following variation to clause 27.1(d) (see underlined):

> *(d) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to the roster provisions of this award. <u>An agreed variation pursuant to sub-clauses 12.3 or 12.4 of this award may include a variation to the time of taking rest and meal breaks.</u>*

19. The SDA's proposed variation to clause 27.1(d) maintains the current award provision whereby breaks form part of an employee's roster, however, it permits the flexibility to alter the time of taking a break when an employee and employer agree to a variation.

[5] Report, (AM2017/49), 27 May 2019, Attachment C
[6] Report, (AM2017/49), 27 May 2019, Attachment C

Electronic Means of Communication

20. The SDA proposes that the words "commonly used" are included in clause 12.2(d) to read:

    (d) that any variation will be in writing, including by ~~any~~ commonly used electronic means of communication;

    The intention to include "commonly used" is to limit the forms of electronic means of communication to those generally and commonly used by both employees and employers.

Provision of Copy of Agreed Variation to Employee

21. The SDA submits that any copy of an agreed variation to a roster need only be provided to an employee when requested. The SDA understands that this is consistent with the position of Ai Group.