IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/2

SUBMISSIONS OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS

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INTRODUCTION

1. On 12 January 2018, the Commission issued a Statement[1] attaching three Background Papers and inviting interested parties to comment. The ACTU's comments on the Background Papers are set out below.

Background Paper 1

2. The Commission's summary of the approach to the review at Attachment C of Background Paper 1 is accurate. The Commission's summary of the ACTU's submissions on jurisdiction and merit are accurate.

3. The list of witnesses on pages 42 and 43 is accurate, except that Julia Johnson (who appears last on the list) is an ACTU witness whose statement was withdrawn on 13 December.[2] The ACTU has nothing further to add to the list of witnesses or references to the parties' submissions on the evidence at Attachment D.

Background Paper 2

4. Two conclusions can be drawn from the Commission's review of the frameworks in place in a number of other OECD countries. Firstly, that s 65 of the Fair Work Act is arguably one of the weaker provisions when compared to the provisions in place in a number of other jurisdictions considered. Secondly, that far from being "unique",[3] the position taken by the ACTU in this application is consistent in a number of important aspects with frameworks already operating in various other jurisdictions.

5. It is clear that different countries seek to assist employees to manage their work and caring responsibilities in different ways, and there is consequently some variation in the frameworks considered in Background Paper 2. For example, different provisions cover children of different ages (from up to 2 years to up to 15 years of age); require the employee to give different periods of written notice, ranging from 6 weeks[4] to 2 months[5] to 3 months[6]; and provide for differing qualifying periods. In some jurisdictions, government transfers aim to reduce the financial disadvantage suffered by parents and carers who reduce their hours.

[1] Statement [2018] FWCFB 99 dated 12 January 2018
[2] Transcript PN 1308
[3] ACCI Closing Submissions dated 19 December 2017 at [10.1]
[4] Ireland
[5] Finland, The Netherlands, Sweden
[6] Germany (for non-parent carers)

6. Significantly, there are some core features common to a number of the frameworks considered which closely reflect the ACTU's position in this application. In particular, a number of countries provide for:

    a. A *right* to reduced hours rather than merely a *right to request* reduced hours, and/or a presumption in favour of the employer granting the employee's proposal;[7]

    b. Access to dispute settlement in relation to the merits of an employee request and employer response (as opposed to simply the correctness of the process followed) if agreement cannot be reached;[8]

    c. A right to return to former hours, or preferential access to available full-time roles;[9]

    d. A qualifying period of less than 12 months service.[10]

7. The review also reveals some policy approaches not reflected in the ACTU's proposal, including limitations on repeat requests for reduced hours arrangements.

8. It is notable that where refusal of an employee's proposal is permitted, many countries adopt a stricter formulation than the 'reasonable business grounds' test in s 65, including the following:

    i. 'Serious operational reasons';[11]

    ii. 'Serious inconvenience to production or service operations that cannot be avoided through reasonable rearrangements of work' or 'Serious disadvantage' to the company;[12]

    iii. 'Harmful consequences for the company's operation';[13]

    iv. 'Urgent operational reasons' or 'fundamentally impairing the establishment's organisation, working process or safety';[14]

    v. 'Serious business or service interests';[15]

[7] E.g. Austria, Finland, Germany, Hungary, The Netherlands, Slovenia, Sweden
[8] E.g. Austria, Czech Republic, France, Germany, Norway, Portugal, Spain
[9] E.g. Finland, France, Germany, The Netherlands (an employer may only refuse a request for increased hours on serious financial or organisational grounds), Norway, Portugal, Slovakia, Spain, Sweden
[10] E.g. Finland, Germany, The Netherlands, Sweden, the UK
[11] Czech Republic
[12] Finland
[13] France
[14] Germany
[15] The Netherlands

vi. An inability to accommodate the request without 'major inconvenience';[16]

vii. 'Imperative entrepreneurial reasons';[17]

viii. 'Substantive operational reasons';[18]

ix. 'Compelling business grounds';[19]

x. 'Substantial disturbance to the employer's activity'.[20]

9. Terms such as 'serious', 'urgent', 'substantial', 'compelling', and 'imperative' place a greater obligation on an employer to accommodate an employee's proposal than the 'reasonable business grounds' formulation in s 65.

10. Despite differences in industrial relations systems and demographics, the need to assist employees to manage their work and caring responsibilities is common to many countries. A significant number of countries have acknowledged the seriousness of the problem and accepted that regulatory intervention is appropriate. Background Paper 2 shows that there are a number of key elements common to the jurisdictions considered which are consistent with the position the ACTU has taken in this application.

Background Paper 3

11. Background Paper 3 considers the framework in place in the UK in greater detail.

12. In the UK, all employees can request flexibility if they have completed at least 26 weeks of service. The framework establishes a *right to request*, rather than a *right* to reduced hours. A request can be rejected only on one or more of a series of specified grounds, and the application must be dealt with by the employer in a "reasonable" manner. An employee may appeal if they believe that the employer's decision was based on incorrect facts or that the notification did not meet requirements. While the right of review in the UK allows a tribunal to consider whether the employer has mistaken any of the facts (a slightly deeper level of review than s 65, which allows only consideration of whether the employer's response takes the appropriate form and complies with required timeframes) it is largely limited to a review of the adequacy of the process followed by the employer. It is clear from the decisions considered in Background Paper 3 that the UK tribunal lacks the ability to consider whether, in all the circumstances, an

[16] Norway
[17] Portugal
[18] Slovakia
[19] Spain
[20] Sweden

employer has acted fairly and reasonably in refusing an employee's request. In the ACTU's submission, the power to conduct such a merits review is an important aspect of a guaranteed and enforceable minimum safety net entitlement. The absence of a right to revert in the UK framework is also a significant omission, because access to increased hours after parenting and caring responsibilities cease or lessen is crucial to increased participation and the reduction of the 'penalty' incurred by parents and carers.

Conclusion

13. Background Papers 2 and 3 consider a number of different frameworks aimed at assisting employees to manage their work and caring responsibilities. In the ACTU's submission, the establishment of a *right* to reduced hours for parents and carers (as opposed to a mere *right to request* reduced hours) is an essential aspect of a meaningful minimum standard in relation to flexible working arrangements in Australia. The starting point should be that an employee who meets minimum eligibility and notice requirements is entitled to reduced hours. Discussion can then occur around the detail of an employee's proposal, including matters such as the days and hours of work and the duration of the arrangement. If a right of refusal is permitted at all, it should be permitted only at this later stage, with the bar for refusal appropriately high; consistent with the examples listed above at [8]. In addition, a right to revert to former hours, access to dispute settlement and a qualifying period which is not unduly onerous are also key aspects of an effective framework.

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