INDUSTRIAL RELATIONS UPDATE

July 2016

Supermarket agreement gets the BOOT

A major supermarket chain's enterprise agreement went 'down down' when the FWC Full Bench found, on appeal, that it failed the Better Off Overall Test (BOOT)

The agreement sought to cover approximately 77,000 employees at the employer's supermarkets around Australia, of which an overwhelming majority voted in support of the agreement being made. The main union covering the employer's workforce also supported the making of the agreement.

In order to pass the BOOT, the FWC must be satisfied that at the test time, each award covered employee, and each prospective award covered employee would be better off overall under the agreement when compared to the relevant award.

Like many agreements, the proposed agreement included some terms that were more beneficial, less beneficial and in line with award conditions.

It was in this context that concerns were raised by FWC at first instance about whether the proposed agreement passed the BOOT. The agreement was then approved by Commissioner Bull on the basis that it passed the BOOT following undertakings, which addressed these concerns.

On appeal to an FWC Full Bench, an employee covered by the agreement claimed that it did not pass the BOOT. This was because he and other casual/part-time employees, who were rostered to work a high proportion of shifts, weekends and public holidays that attracted lower penalty rates, were worse off under the agreement when compared to the award. He relied on typical rosters from two of the employer's stores to illustrate this financial disadvantage.

In response to this claim, the employer submitted that the Full Bench should take into account the higher hourly rate and contingent benefits including additional penalty rates, rest and meal breaks, and additional leave entitlements.

However, the Full Bench was not satisfied that the higher hourly rate and contingent benefits were sufficient to make up for the significant monetary loss for casual and part-time employees. This was, for the most part, because of the nature of contingent entitlements, the overstatement of non-monetary benefits by the employer when quantified, and the inability to quantify some of those benefits.

As such, the Full Bench found that the agreement did not pass the BOOT as it was not satisfied that a consideration of all benefits and detriments under the agreement resulted in each employee and each prospective employee being better off overall under the agreement compared the award.

The Bench then provided the employer with an opportunity to remedy the failure to pass the BOOT by providing an undertaking that adjusted the penalty/shift rates for those employees adversely affected.

However, the employer refused to provide such an undertaking and argued that quashing the agreement would mean that their employees would fall back to coverage by their earlier agreement. And that is what happened.
Since the birth of enterprise bargaining, employers have adopted strategies to offset high labour costs. For example, providing improved contingent/non-monetary entitlements to their employees or buying out award allowances with an all up rate of pay in their agreements amongst other things.

It has been a widely held belief among employers that these additional entitlements are of particular value and therefore of assistance when the Commission considers the BOOT. However, the approach taken by the Commission in this case demonstrates that while the BOOT is a 'big picture' test, it is a question of whether such entitlements, on balance, result in **each** employee and prospective employee being better off overall.

This decision also highlights that while parties may be in furious agreement about the making of an agreement, it is the FWC who ultimately assesses whether **each** employee and prospective employee will be better off overall under the agreement when compared to the award.

Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd[2016] FWCFB 2887 (31 May 2016)

Injured worker didn't resign by taking leave

Employers should be careful of the actions they take while an employee is on a period of authorised leave, as demonstrated in a recent FWC unfair dismissal case.

A 77 year old housekeeper' was on four weeks sick leave relating to a longstanding work-related injury when her employer notified that it was not going to renew her employment contract.

The housekeeper then claimed unfair dismissal and said that her employer told her she was too old to return to work.

She also told the FWC that she was employed on a one year fixed term contract in 2005, which was 'tacitly renewed' on each anniversary date of her contract taking effect. This meant that her dismissal took effect midway through her 2015-2016 contract.

Her employer submitted that it never terminated her employment. Instead, it argued that the contract expired when the housekeeper indicated that she couldn't resume her normal duties because of her injury. As such, it considered her period of leave as giving notice.

The FWC found there was no evidence to show the housekeeper resigned and that the housekeeper's employment was terminated at the initiative of the employer.

It also found that there was no valid reason for the dismissal. DP Kovacic noted that while the employer didn't contend that the worker's age or use of sick leave were reasons for dismissing her, neither of these factors would have constituted a valid reason.

The FWC ordered the employer to pay the housework eight months wages because it was likely she would have stayed employed until her 2015-2016 expired.

This decision is a reminder to employers that they can't treat an authorised absence such as sick leave as an intention to end the employment relationship.

Kim v Embassy of the People's Democratic Republic of Algeria [2016] FWC 4726 (15 July 2016)

FWC clarifies meaning of ' break' under union right of entry provisions

When two union officials attempted to enter an employer's premises before employees started their day shift, they were denied entry until the employees were on their normal break.

The employer told the officials they could only exercise their legislative right of entry in "breaks." It did not consider the time before a shift commencement, when employees were arriving for work and getting ready to start, a "break" and therefore denied them access to the premises.

Instead, the employer advised the officials of their member's break time and that these would be the only times they could enter the premises for the purposes of holding discussions.

The union then filed a claim in the FWC, contending that the meaning of "break" under section 490 of the Fair Work Act (2009) included periods before and after the worker's shifts. They relied on the Fair Work Act's Explanatory Memorandum to support their claim.

In handing down its decision to dismiss the claim, the FWC made it clear that it did not need to look beyond the words of the Act to find the ordinary meaning of the word "break." A break is a break, whether it be for a meal, rest or smoko. It does not include any time either side of a shift.

The FWC also noted that to interpret the right of entry as liberally as the union contended, would be contrary to very longstanding common law rights of an occupier of premises to go about their business without undue inconvenience.

This decision provides another win for employers, as it establishes a point of reference for employers to gain more control over the issue of union right of entry. In particular, it gives employers more grounding to resist union demands for unfettered access to workplaces.

Construction, Forestry, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd [2016] FWC 3829