**Legal advice in Australian Employment Law**

Fair Works Act, 2009 and Modern Award

The Burragorang Group Pty Ltd ('BG') employs Carly and her fellow employees. A modern award currently covers the employees (including Carly). BG has approached the employees and proposes that the employees and BG enter into an Enterprise Agreement ('Agreement'). BG has proposed that the Agreement will reflect their current terms of employment with a few exceptions. Carly is concerned about the exceptions and revised terms of the Agreement and feels that if she does not support the Agreement, BG may terminate her.

**Advice to Carly about her concerns:**

BG has contravened multiple provisions of Fair Work Act 2009, which are outlined below, with references to the Section in which BG has been non compliant:

1. Maximum Working hours

Did BG violate the modern award by proposing 41 hours/week of work?

As per the Modern Award applicable to employees of BG, the maximum hours are thirty-eight. As per Section 62 of the *Fair Wages Act, 2009*, an employer cannot require the employees to be working more than 38 hours if they are unreasonable. In order to determine unreasonableness, factors mentioned in Section. 63(1) such as employee's health &safety, personal circumstances, need of the workplace, overtime payment, level of responsibility, nature of work, a notice of request or refusal etc., are taken into consideration.

In the given facts, BG has violated the modern award by proposing 41 hours/week. The employees can refuse to work for the additional hours if they establish that these hours are unreasonable. Additionally, they can use the other mentioned grounds applicable to them. Grounds that can be used are: the employer is not paying compensation for additional hours and their level of responsibility does not warrant it. This may overpower the counter BG might raise as to the notice of additional hours they provided.

1. Casual Loading

Did BG violate the minimum wage order by reducing the casual loading from 25% to 20%?

The minimum wage order mandates casual loading to be at 25%. Section. 293 prohibits an employer from contravening the minimum wage order. This contravention attracts 60 penalty units under Section 539.

Thus, BG violates the law by reducing the casual loading to 20%

1. Annual Leaves

Did BG violate Section 87 by proposing 3 weeks of annual leave?

As per Section. 87, every employee is entitled to 4 weeks of paid leave.

BG violates the law, which mandates four weeks of paid leave to full-time employees.

1. Sick Leaves

Did BG violate Section 96 by providing only 8 days’ sick leaves which are allowed to be accumulated for 3 years?

As per Section. 96, which is in tune with National Employment Standard, the sick leaves should be ten days and should be allowed to be accumulated year after year without any limit.

BG violates this Section by limiting it to eight days and allowing its accumulation for three years only.

However, BG has been compliant with a few of the terms which are outlined below:

1. The Agreement will provide for a 12% salary increase made up of four increases of 3% from 1 July in each year of the Agreement's operation

The law does not explicitly address salary increment, but based on secondary research, a salary increase of 3% is reasonable given that the minimum wage was increased by 2.5% as of 1 July 2021 and since BG is providing a slightly higher increase, these terms can be considered reasonable.

1. The Agreement will provide for 2 days' paid compassionate leave

As per Section 104, an employee is entitled to two days of compassionate leave. Thus, BG is compliant with the above term stated in the Agreement.

1. The Agreement will provide for a 30 minute unpaid meal break each day

As per the modern award, a 30-minute unpaid meal break is reasonable. Thus, BG is compliant with the above term stated in the Agreement.

1. The Agreement will provide that employees will be paid monthly in arrears

As per Section 323, An employer must pay an employee amount payable to the employee about work performance at least monthly and since BG has proposed to pay arrears on a monthly basis, this term is reasonable.

Carly had sought the assistance of the Services Union ('Union') for negotiations; however, BG is not responding to the correspondences from the Union and has prevented its involvement. Furthermore, Carly is also concerned about whether she will continue to enjoy the conditions in her modern award if the BG Agreement is made and approved by the Fair Work Commission ('FWC'). In regards to this, below are some of the points BG violates as per the Fair Work Act, 2009:

1. Notice of Employee Representational Rights

Did BG violate s. 173 by not providing notice to employees about their right to representation?

As per Section. 173, an employer must notify each employee about the right to represent themselves for the enterprise agreement.

BG has failed to provide notice to its employees about their rights. The requirement of notice is of utmost importance and should be provided at the beginning of a negotiation and the failure of this loses not only the trust of its employees but also the Fair Work Commission does not approve the enterprise agreement making the employer start the whole process again (*Peabody v CFMEU* (2014) FWCFB 2042).

As per the above-stated rules, BG was obligated to give its employees notice of their right to representation, which it failed to do so. Because of the ruling in the above case, BG will never be approved for its Agreement by Commission. Carly should not worry as to the Agreement being approved.

1. Approval by FWC

Does BG’s enterprise agreement pass the requirement for being approved by FWC?

Requirements to approve enterprise agreement are enumerated under Section. 186&187. The relevant requirements are:

1. It is genuinely agreed between the employer and employees
2. Does not contravene Section. 55 (i.e., it should not contravene the NES)
3. Passes the better off overall test (BOOT). (Section. 193)
4. It is done in good faith bargaining.

BG's Agreement contravenes Section. 55 as it violates NES (Point (e)). It also will not pass the BOOT. To pass the BOOT, each award covered employee should be better off if the Agreement covered the employee than if the relevant modern award covered the employee. The test requires (*Hart v Coles Supermarket* (2016) FWCFB 2887) the identification of terms that are more beneficial for an employee, terms which are less beneficial for an employee, and an overall assessment of whether an employee would be better off under the Agreement. As established in the above issues, the Agreement contravenes significant provisions in the law and is framed in a manner that is disadvantageous to the employees. Hence, under no circumstance will it pass the BOOT.

If the Agreement does not pass the BOOT, the Commission can still pass the Agreement under Section 189 (Public interest) and Section 190 (with undertaking). Allowing the Agreement to come into force if it does not contravene Public Interest is very rare and this Agreement does not fall under that rare circumstance because there exist no exemptional or extraordinary circumstances which require such terms (*Nulty v Blue Star Group* (2011) FWAFB 975).

However, the employer can give an undertaking and get approval of the Agreement. As has been witnessed previously (Re Mcdonalds (2010) FWAFB 4602), the quashed Agreement was approved in appeal because the employer provided an undertaking.

In order to make this issue favourable to employees, the bargaining representative will need to highlight the disadvantages in terms of monetary and health.

1. Discrimination based on race

Did BG violate s. 351 by discriminating Carly based on her race?

Carly represents herself as an Indigenous Australian. Under Section 342, an adverse action is when the employer treats an employee differently from other employees. If such adverse action is due to race, it is discrimination under Section. 351 and is prohibited.

Adverse action can be in the form of refusal to hire, discriminating or injuring them or even altering their position detrimentally. Smith (2011) suggests that these provisions have seen a shift with Fair Works Act where the protection is granted at every level rather than just dismissal. In the first case of racial discrimination (*Fair Work Ombudsman v Yenida* (2017) FCCA 2299), the Court has laid out that in the context of the Fair Works Act, discrimination means treating a person in a "less favorable manner" and is something which is done deliberately.

BG preferred to keep the matters "in-house" with the indigenous race and denied them their right to be represented by the Union. This is discrimination under Section. 351 as it's treating Carly less favourably. BG could face 60 penalty units under this violation.

1. Undue Pressure

Is BG mounting undue pressure on Carly?

As per Section 344, an employer should not mount undue pressure on the employee regarding agreeing on an agreement.

Here, BG is in a position of authority and if Carly feels obliged to agree to the terms of the agreement or fears termination. This is the fit case of undue influence/pressure. Undue pressure can be interpreted from body language, conduct and tone (*Wintle v RUC Cementation Mining* (2014) FCCA 694). The conduct of BG by not allowing representation and ignoring the calls of SU can be interpreted as wrongful conduct and falls under undue pressure.

Carly has a strong case against BG as BG has violated multiple provisions and NES. Andrew Stewart (2021, p.121) says that no provision in FWA explicitly provides that "standard" prevails over any employment contract and that the Agreement in no way can exclude the standards laid down. The closest Section in law to this is Section 326 (employment contract 'has no effect' to the extent it permits certain unreasonable deductions to be made from wages). However, this has been the principle that the courts follow throughout and will prevail here as well.

Post-2006 (Tess, John & Sean 2013), the pattern has been towards civil remedy litigation by Fair Work Ombudsman. It is a solid way to enforce rights and order compliance as it tarnishes the public image. Alternatively, there are many enforcement tools available to the Fair Work Ombudsman in the Fair Works Act than litigation to further the cause of Carly more rapidly. (Hardy 2020).

**Advise to Union**

BG, by ignoring the calls of SU is contravening the good faith bargaining. It can resolve it by sending a strong message by entering the premises and investigating all the contraventions BG is doing before taking the following steps. Union's right to entry to date remains restricted in many senses. As observed by Harde & Howe (2009), even though union represents employees, they are not in actual sense the joint regulator of employment standards. This role can be characterized as representation and negotiation rather than monitoring and oversight.

1. Right to entry

Can SU enter the premises of BG?

Bargaining representatives have a right to enter the premises on any alleged contravention of law (Section. 481)

As established already, there are multiple violations of the Fair Works Act taking place. Hence SU has the right to enter the premises of BG for inspection. They can apply for the permit of Fair Work Commission under Section. 512. Under Section. 482(1)(c) SU can access documents and make a copy of the documents relevant to the contravention. This will send a solid message to BG about the seriousness of the situation.

1. Good faith bargaining

Is BG bargaining the agreement in good faith?

Section. 228 defines good faith bargaining as attending, participating in a meeting, responding to proposals, refraining from capricious conduct, recognizing bargaining representatives, etc. If this does not take place, the remedy is provided under Section. 229 where on an application to Fair Work Commission, good faith bargaining can be enforced upon.

Here, by not recognizing employees' bargaining representatives and engaging in capricious behaviour, BG is not bargaining in good faith. SU can approach Commission under Section. 229 for a bargaining order and get itself involved.

SU can easily exercise its rights of representing employees' interests by following the above steps

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Legislation

Fair Works Act, 2009 (Cth)

Legal Authorities

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*Hart v Coles Supermarket* (2016) FWCFB 2887

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