**Legal advice in Australian Employment Law**

Fair Works Act, 2009 and Modern Award

**Advice to Carly**

BG has contravened multiple provisions of Fair Work Act 2009, which are outlined below:

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. Section 62 of the *Fair Wages Act, 2009*, requires the employer not to force unreasonable working hours (above 38 hours) on employees. To determine unreasonableness, Section 63(1) provides: 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.,

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. Grounds that can be used are: the employer is not paying compensation for additional hours and their level of responsibility does not warrant it. Additionally, they can use the other mentioned grounds applicable to them. 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?

Section 87 provides for 4 weeks of paid leave.BG violates the law by limiting the leaves to 3 weeks.

1. Sick Leaves

Did BG violate Section 96 by providing only 8 days’ sick accumulated only for 3 years?

Section 96, which is in tune with National Employment Standard, provides that the sick leaves be ten days without limitation to its accumulation.

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

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

1. 12% salary increase with 3% rise every year

The law does not explicitly address salary increment, but based on secondary research, a salary increases of 3% is reasonable. (Minimum wage was increased by 2.5% as of 1 July 2021). BG providing a slightly higher increase, makes this reasonable.

1. 2 days paid compassionate leave

BG is compliant with the above term stated in the Agreement as Section 104 entitles two days of compassionate leave.

1. 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. Employees be paid monthly in arrears

Section 323 mandates an employer to pay an employee at least on a 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 prevents its involvement. 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'). Carly should not worry as to the Agreement being approved as BG violates the law in the following way:

1. Notice of Employee Representational Rights

Did BG violate Section 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).

BG was obligated to give its employees notice of their right to representation, which it failed to do. Because of the ruling in the above case, BG will never be approved for its Agreement by Commission.

1. Approval by FWC

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

Requirements to approve enterprise agreement are enumerated under Section186&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 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 Section 351 by discriminating Carly 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 favourable 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 and attracts 60 penalty units.

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 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, it is a 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**

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 law taking place. Hence SU has the right to enter the premises of BG for inspection by applying for a 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 Commission, good faith bargaining can be enforced.

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

**Bibliography**

Books

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Legislation

Fair Works Act, 2009 (Cth)

Legal Authorities

*Fair Work Ombudsman v Yenida* (2017) FCCA 2299

*Hart v Coles Supermarket* (2016) FWCFB 2887

*Nulty v Blue Star Group* (2011) FWAFB 975

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*Re Mcdonalds* (2010) FWAFB 4602)

*Wintle v RUC Cementation Mining* (2014) FCCA 694