

IN THE FAIR WORK COMMISSION

Matter No: AM2021/62
Applicant: Total Toning Fitness Pty Ltd

SUBMISSIONS IN REPLY - UNITED WORKERS UNION

Fitness Industry Award 2020

Background

1. On 20 May 2021, the Applicant made an F46 application to vary a modern award (**the Application**), specifically the *Fitness Industry Award 2020* (**the Award**).
2. On 22 September the United Workers Union (**UWU**) filed submissions opposing the application, in accordance with the Statement issued by the Fair Work Commission (**FWC**) dated 1 September 2021.¹
3. The Applicant did not provide any submissions in accordance with this Statement.
4. On 12 October 2021 a conference was held before Deputy President Clancy at which the Applicant was provided until 4pm on 13 October 2021 to provide any submissions. Directions were issued shortly after confirming these amended directions (**the amended directions**).²
5. On 13 October 2021 the Applicant complied with the amended directions.
6. These submissions in reply are prepared in accordance with the amended directions. The UWU continues to oppose the Application.

The Applicants submissions

General

7. The Applicant has filed six documents with the FWC:
 - a. Letter from Paul Rose, Director at Total Toning Fitness gym in Torrensville, SA, being the gym facility operated by the Applicant (**TTF gym**);
 - b. Letter from Janey Rose, an employee at TTF gym;
 - c. Statement from Jordan Del Medico-Lewis, fitness trainer at TTF gym;

¹ Statement [2021] FWCFB 5428 (1 September 2021, amended 9 September 2021)

² Email from FWC to Applicant and UWU, 12 October 2021

<<https://www.fwc.gov.au/documents/documents/awardmod/variations/2021/am202162-corr-fwc-121021.pdf>>

- d. Letter from Paul Stuart, Manager and Business Development Manager for RTO Fit College;
 - e. A resignation letter from Luke Robinson, a former employee of the Applicant; and
 - f. Letter from Mark Haylock, Director/Owner at 'Peak 24 Fitness and PT'.
8. It is unclear how the Applicant wishes the above documents to be categorised. For these submissions in reply, and acknowledging that the applicant is an unrepresented litigant, the UWU will treat the documents in the following way:
- a. The Letter from Mr Rose as both an outline of submissions, and a witness statement from Mr Rose;
 - b. The letter from Ms Rose, the Statement from Jordan Del Medico-Lewis, the letter from Mr Stuart, and the letter from Mr Haylock as witness statements; and
 - c. The resignation letter from Mr Robinson as further evidence/documentary material.
9. The UWU accepts that the Applicant has made this application with the best of intentions. The whole application appears to be premised on the idea that by increasing the span of hours, Mr Paul Rose, the director for the Applicants business 'Total Toning Fitness Pty Ltd' (**TTF**), will be able to employ more workers on a permanent basis rather than taking them on as contractors. The document titled 'TTF Letter for FWC application A2021-62' (**Applicant's submissions**) provides '...the purpose of the application is to protect & prevent employed Personal Trainers leaving/converting to contractors to side-step FWC laws.'³ This assumption must be challenged, as our understanding is that workers primarily choose to operate as a contractor due to the higher pay rate. Indeed, the Applicant even states that "[t]he conversion justification to contractor is always about money & stability & never lifestyle."⁴
10. It does not follow that expanding the span of hours in which a broken shift can be worked to 13 hours will result in the changes as contemplated by the Applicant, i.e., the employment of more people on a permanent basis. Moreover, even if the Applicant were able to do this should the span be increased, it also does not follow that the whole industry will benefit. Rather, the position of the UWU is that to grant the application would only create for longer working days for workers in the fitness industry (**the industry**) with no guarantee as to permanent work.

Modern Award Objective

11. Further, as outlined in our original submissions filed 22 September 2021 (**UWU original submissions**), the FWC may only vary an Award '...if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective' (**MA Objective**).⁵ Nothing in the Applicants submission or evidence provides how the variation sought is required to meet the MA Objective.

³ Total Toning Fitness Pty Ltd, 'TTF Letter for FWC application A2021-62', Submission in *Fitness Industry Award*, AM2021/62, 13 October 2021, 1 (**Applicant's submissions**)

⁴ *Ibid*, at 2

⁵ *Fair Work Act 2009*, s157(1)

12. The UWU continues to rely on the assertions we made in our submissions of 22 September 2021. That is, the variation sought would cause the Award to fail the MA Objective to provide a minimum safety net, by creating longer, more unsociable hours without any guarantee or permanent secure work.⁶

Broken shifts in the Fitness Industry

13. The Applicants submissions speaks to the inevitability of broken shifts in the industry, stating that "...many industries adopt [broken shifts] and they should not be treated as an enemy, some industries cannot avoid them"⁷. It is true that the peak times of the industry appear to be in the morning and again in the late afternoon and/or evening. It is also true that broken shifts are provided for in the Award. Indeed, as evidenced by Mr Kirsty Pepper in her statement dated 20 September 2021 and filed with the UWU original submissions, it is understood by workers entering the industry that the peak times that clients want to train is in the mornings and evenings⁸.
14. However, what has also been evidenced by the UWU is that these broken shifts, while expected, are not desirable. Ms Pepper confirmed that yes, while it is understood that mornings and evenings are peak times, she never expected to have to do them on a consistent, permanent basis – i.e., both mornings and evenings, every day.⁹
15. The Applicant claims that there is a conflict between Ms Peppers two statements that "It is understood when you start working in the fitness industry that the peak times people want to train are mornings and evenings"¹⁰ and "No one enters this industry expecting to have to always work broken shifts in order to have a career and nor should they have to."¹¹ There is no conflict here. Ms Pepper is acknowledging that those peak times exist, but is stating that no one, including herself, expect that they will have to *always* [emphasis own] work those broken shifts. As she states, when people are required to consistently work broken shifts, they tend to exit the industry¹².
16. The Applicant submits that "[g]yms generally don't have enough work to roster straight shifts like 5am-2pm or 12pm-9pm or 9-5pm, there's just not enough demand for business in our industry during those times"¹³ It may be the case that TTF gym doesn't have enough work for staff between peak training times; however the evidence from Ms Pepper and Mr Garcia indicate that work is available in between training clients at the centres they're employed at. The Application before the Commission will affect the whole industry, who may not be facing the same rostering problems as the Applicant.

⁶ United Workers Union, 'Outline of Submissions', Submission in *Fitness Industry Award*, AM2021/62, 22 September 2021, 11 (**UWU original submissions**)

⁷ Applicant's submissions, 5

⁸ Statement of Kirsty Pepper (UWU-KP), [11]

⁹ Ibid at [11]

¹⁰ Ibid at [11]

¹¹ Ibid at [15]

¹² Ibid at [14]

¹³ Applicant's submissions, 1

17. The Applicant further contends that “Trainers are passionate & motivated people & for them to work a 15-hour day straight or broken [shift] happy is far better for them to work a [sic] 8 hour day unhappy.”¹⁴ There is no evidence to provide any basis to this assertion and should be rejected by the FWC. Moreover, a 15-hour day is not what is being contemplated here, given the application is to expand the span to 13 hours, not 15.
18. The UWU concedes that the lifestyle of a sole trader in the industry would be difficult, as stated by the Applicant¹⁵. Indeed, the letter from Mr Stuart confirms that the lifestyle of a sole trader ‘takes its toll’¹⁶ and the letter from Mr Haylock confirms that workers new to the industry typically don’t have the skills to start running their own business as a sole trader¹⁷. This may be the case, but it is irrelevant to this application as it assumes that the existing 12-hour span is the cause behind people converting to work as a sole trader/contractor and that expanding the span to 13 hours would solve this problem.
19. The evidence provided by the Applicant demonstrates that the times required to be covered by fitness professionals is anywhere between 5.00am and 8.00pm¹⁸; 5.00am and 9.00pm¹⁹; and 5.00am and 10.00pm²⁰. A single permanent employee would still be unable to meet these hours across one broken shift, even if the span was increased to 13 hours. Indeed, Mr Del-Medico Lewis states that ‘...if I work the morning shift (5-9am) I am unable to work or cover a workmate that night (4-9pm) ...’²¹ This would still be the case even under an expanded 13 hour span.

UWU Evidence – Statements from Mr Anthony Garcia and Ms Kirsty Pepper

20. The Applicant makes several statements in response to the witness evidence of Ms Pepper and Mr Garcia. The UWU will provide a response to some of those statements below.
21. With respect to Mr Garcia:
 - 20.1 The UWU can confirm that Mr Garcia was employed directly by Virgin Active
 - 20.2 He has had a number of roles prior to his current management role and would therefore an understanding of the issues facing non-management workers.
 - 20.3 He has confirmed with the UWU that Virgin Active has sleep pods for customers, which were frequently used by the staff between shifts. When the management

¹⁴ Ibid, at 7

¹⁵ Ibid at 2 – “I can assure you the lifestyle of an employee personal trainer over 13 hour day is far greater than that of a contractor who ends up working more hours for less money & less support/mentoring, burning out, getting in debt or even bankruptcy.”

¹⁶ Total Toning Fitness Pty Ltd, ‘RTO Trainer Assessor reference’, Submission in *Fitness Industry Award*, AM2021/62, 13 October 2021, 2 (**Letter from Mr Stuart**)

¹⁷ Total Toning Fitness Pty Ltd, ‘Letter RE PT’s re PaulRose-converted’, Submission in *Fitness Industry Award*, AM2021/62, 13 October 2021, 1 (**Letter from Mr Haylock**)

¹⁸ Letter from Mr Haylock, 1

¹⁹ Total Toning Fitness Pty Ltd, ‘TTF Jordan statement’, Submission in *Fitness Industry Award*, AM2021/62, 13 October 2021, 1 (**Statement from Mr Del Medico-Lewis**); and Letter from Mr Stuart, 2

²⁰ Total Toning Fitness Pty Ltd, ‘Luke Robinson letter of resignation’, Submission in *Fitness Industry Award*, AM2021/62, 13 October 2021, 1 (**Resignation from Mr Robinson**)

²¹ Statement from Mr Del-Medico Lewis, 1

banned this practice, staff took to sleeping in the yoga studio; it is considered a very common practice in the industry to sleep on site between shifts.

22. With respect to Ms Pepper:

- 21.1 There is no conflict of interest in Ms Peppers both working for the UWU and providing a statement for this matter before the FWC. It is quite standard for workers in an industry to come on board as ‘member organisers’ with a union. The knowledge Ms Pepper can bring is as both an employee in the industry, and a union organiser working to help members in the industry.
- 21.2 As stated by Ms Pepper, she is now in a management position, but that is after working for 12 years in the industry in various capacities, as provided for her in statement at paragraphs 4 and 12.
- 21.3 Finally, the Applicant suggests that Ms Pepper is ‘clutching at straws’ when she references the physical nature of the role. Ms Pepper was simply providing some insight into her experience as a fitness instructor, to assist the Commission in understanding that there are many other aspects of her role which compound the difficulty of working broken shifts.
- 21.4 The question for the FWC to consider is whether making this variation is necessary to achieve the MA objectives. One of those objectives is ‘...the need to promote flexible modern work practices and the efficient and productive performance of work’.²² The picture that Ms Pepper paints in her statement, while working hours that may be seen as a ‘flexible modern work practice’ could not also be see as a ‘productive performance of work’, given how exhausting her routine became. Ms Pepper has provided the following example of a shift pattern to the UWU that she used to do as a group fitness instructor, which was:

- Monday:
 - 7.00am – step aerobics class
 - 8.00am – HIIT class
 - 5.00pm high impact aerobics class
- Tuesday:
 - 6.30am – body pump class (weightlifting)
 - 7.00am – spin (cycle) class
 - 5.30pm – high energy aerobics class

Other witness statements and evidentiary material from Applicant

Letter from Janey Rose

23. Ms Rose provides general evidence as to the type of employer that Mr Rose is, as well as the culture at the TTF gym which appears to be overall, a positive work environment. She also provides some evidence that since the Applicant moved from taking on contractors to

²² *Fair Work Act 2009* (s134(1)(d))

employing staff directly that "...our staff retention is far better, gym culture is amazing and it looks fantastic having all staff promoting the same brand over self-promotion contractor styles".²³

24. This may be the case, but it is unclear how this is relevant to the Application before the Commission. The Applicant has asserted that expanding the span of hours to 13 will enable him to employ more people directly and permanently, however according to the evidence of Ms Rose, Mr Rose is already employing people directly.
25. The UWU does acknowledge the scheduling difficulties faced by TTF gym when scheduling clients as evidenced by Ms Rose, when she states "...I've received cancellation forms from members cancelling their [sic] membership because they couldn't get the trainer they wanted so they left their gym all together. Fairly sure Paul has even caught employees soliciting members away from TTF to train in local parks just to get those same hours. Crazy."
26. Again, this may be the case, however the UWU presses our point that there is no clear evidence, especially given the extremely long span of hours operated by the Applicant at the TTF gym, how expanding the span to 13 hours would assist them with these scheduling difficulties.
27. Ultimately, the letter from Ms Rose offers no value to determining the question of whether increasing the span of hours is necessary and should therefore be given no weight by the Full Bench.

Statement from Jordan Del Medico-Lewis

28. The statement from Mr Medico-Lewis states "...if I work the morning shift (5-9am) I am unable to work or cover a workmate that night (4-9pm) ..."²⁴ As outlined at paragraph 18 of these submissions in reply, this would still be the case even under an expanded 13 hour span.
29. Further, Mr Medico-Lewis claims that "Young trainers want to work long hours while being safe and stable under a business name, the gym owners want the trainers to work as long or as little as they feel suit and the members want access to PT sessions with the trainers they choose."²⁵ The UWU is concerned by the lack of boundaries afforded by this hypothetical. No workplace should operate in this way, and certainly no changes to the Award, including expanding the span of hours to 13 would assist in allowing workplaces to operate this way.

Letter from Paul Stuart

30. Mr Stuart states that "A typical trainer will work very standard patterns of operation such as 5am to 10am, then return later in the evening to work 5pm to 8-9pm..."²⁶

²³ Total Toning Fitness Pty Ltd, 'Janey Rose Letter for TTF', Submission in *Fitness Industry Award*, AM2021/62, 13 October 2021, 1 (**Letter from Ms Rose**)

²⁴ Statement from Mr Del-Medico Lewis, 1

²⁵ *Ibid*, at 1

²⁶ Letter from Mr Stuart, 2

31. Again, changing the span of hours to 13 will not assist any provider in meeting these peak times by the same employee. Indeed, Mr Stuart also provides that "...employees in fitness need longer working days if they have full-time staff members"²⁷ A 'longer day' would theoretically need to be 16 hours to meet the peak times he has outlined. It would be irresponsible to vary any Award to this sort of span; nor is this span being sought in the application.

Resignation letter from Luke Robinson

32. Mr Robinson simply provides that "Due to the nature of the industry, it has proven difficult to gain full time employment and have decided to move away from the industry."²⁸
33. Given the span of hours that the TF gym operates, it is not clear how a 13-hour span would have assisted Mr Robinson in obtaining a full-time job.
34. The resignation letter from Mr Robinson offers no value to determining the question of whether increasing the span of hours is necessary and should be given no weight by the Full Bench.

Letter from Mark Haylock

35. As with much of the evidence provided by the Applicant, Mr Haylock's evidence primarily speaks to the staffing difficulties in the industry given the peak times required by clients, noting "Current award conditions in the industry make it impossible for 'employed' trainers to work these hours consistently because of restrictions around split shifts and ability to work longer than a 12-hour span in 2 split shifts."²⁹
36. The UWU acknowledges those challenges and posits that there is probably a great deal of change that could and should be made to the industry to ensure better working conditions for workers; a start, for example, could be to vary the one-hour minimum shift provided for in the Award for certain workers.³⁰
37. However, expanding the span to 13 hours should not be one of those changes. It would not assist the Applicant in engaging a single full-time worker to meet the full span required by the TTF gym, not would it address the issue posed by Stuart.

Conclusion

38. The FWC must determine whether expanding the span of hours in which a broken shift can be worked to 13 hours is necessary to meet the MA objectives.
39. The Applicant contends that

²⁷ Ibid, at 1

²⁸ Resignation from Mr Robinson, 1

²⁹ Letter from Mr Haylock, 1

³⁰ *Fitness Industry Award 2020*, clause 12.3(b)

“Fitness is a healthy/positive industry, with positive employees that are motivated people because of this I have always found workers in our industry far more capable of pulling bigger days if desired due to there [sic] strong mind set to that of other industries. We are unique and should be treated so.”³¹

40. It would be dangerous for the Full Bench to follow this kind of reasoning in their judgment, i.e., that because of some sort of attribute the Applicant suggests is true of all workers in the industry, they would be more capable of working ‘bigger days’. Mr Garcia and Ms Pepper both outlined in their statements the difficulties with working broken shifts. To expand the span to 13 hours would only exacerbate this problem.
41. Expanding the span of hours may assist in meeting the MA objective of promoting flexible working practices, but it would fail to promote social inclusion³², it would fail to promote an efficient and productive performance of work³³, and it would fail to meet the needs of employees working unsocial, irregular or unpredictable hours by providing them with additional remuneration.³⁴
42. The application should be dismissed.

21 October 2021

**Hannah Miflin
Industrial Officer
UNITED WORKERS UNION**

³¹ Applicant’s submissions, 6

³² *Fair Work Act*, s134(1)(c)

³³ *Ibid*, s134(1)(d)

³⁴ *Ibid*, s134(1)(da)(ii)