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**Sent:** Thursday, 23 February 2023 12:08 PM  
**To:** Mirella Franceschini [Mirella.FRANCESCHINI@fwc.gov.au]  
**CC:** Amber Sharp [asharp@mccullough.com.au]; Grace Morgan-Cocks [gmorgancocks@raffwu.org.au]; Kane Murtagh [kanemurtagh@icloud.com]; Josh Cullinan [jcullinan@raffwu.org.au]  
**Subject:** AG2022/5615 - Application by Gusset (Directions Hearing on 24 February) [MCR-W.FID4282665]  
**Attachments:** Employer - Submissions in response to expedition application 23.02.2023.pdf

Dear Associate

As you know, we act for the employer in the above matter.

We **attach** to file short submissions on the issue of expedition in advance of tomorrow's directions hearing.

The Applicant's representatives are copied to this email, as is Mr Murtagh, by way of service.

Kind regards,

**Kerry O'Brien**

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## IN THE FAIR WORK COMMISSION

**Matter No.:** AG2022/5615

**Applicant:** Justin Gusset

### EMPLOYER'S SUBMISSIONS ON EXPEDITION

#### A. Overview

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- 1 On 23 December 2022, Mr Justin Gusset filed an application to terminate the *Apple Retail Enterprise Agreement 2014 (Retail EA)*, pursuant to s 226 of the *Fair Work Act 2009 (Cth) (FW Act) (Application)*. This would revert agreement-covered employees' conditions of employment to the *General Retail Industry Award 2020 (Retail Award)*.
- 2 Mr Gusset is represented in the Application by his bargaining representative, the Retail and Fast Food Workers Union (RAFFWU) who is acting as his paid agent / legal representative in these proceedings.<sup>1</sup>
- 3 The accompanying declaration filed by the Applicant states:

*In circumstances where workers are at times earning less than the relevant Award, I also ask that this matter be dealt with expeditiously by the Commission – please see paragraphs [23] – [25] in [2018] FWCFB 4344 on this point.*
- 4 On 17 January 2023, in advance of the first directions hearing in this matter on 19 January 2023, the Applicant filed short submissions in support of this request for expedition (**AS**).
- 5 The matter has since been referred to the Full Bench by reason of s 615B of the FW Act.
- 6 The employer, Apple Pty Limited, files these submissions on the understanding that the Applicant presses its application for expedition. For the reasons that follow, the Commission cannot be satisfied that expedition is appropriate.

#### B. Background

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- 7 The Retail EA covers approximately 3000 Apple employees.
- 8 In 2021, the Retail Award was significantly amended.<sup>2</sup>
- 9 In August 2022, the employer proactively initiated bargaining across its Australian business, including to replace the Retail EA.
- 10 RAFFWU was appointed as a bargaining representative at that time to represent the interests of around 74 Apple employees. The union bargaining representatives are the Shop, Distributive and Allied Employees Association (**SDA**) and the Australian Services Union (**ASU**) SDA and ASU. There are also approximately 100 other bargaining representatives.
- 11 In October 2022, a proposed enterprise agreement was put out to vote, which did not receive a majority of employees voting to approve it.

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<sup>1</sup> Both parties were granted permission to be legally represented in accordance with s 596 of the FW Act on the first directions hearing before Deputy President Gostencnik on 19 January 2023.

<sup>2</sup> Award flexibility–General Retail Industry Award 2020 [2021] FWCFB 3571

- 12 Apple expressed its desire to continue bargaining for a replacement agreement, and proposed resuming bargaining following the Christmas / January period. The SDA and ASU supported this approach. RAFFWU did not.
- 13 Since this time, the employer has been conducting consultation, training and preparation activities to recommence bargaining.
- 14 We are instructed that the first bargaining meeting in 2023 will be held on 27 and 28 February 2023, with a further timetable of meetings scheduled in the coming months.
- 15 In response to the entire Application, Apple submits that it is premature, a distraction from bargaining, and considers the Commission's resources could be better spent, to maximum benefit of the parties, in providing bargaining assistance if the process of agreeing a replacement enterprise agreement stalls. Apple respectfully submits that it would be appropriate to adjourn the matter for a number of months, with a scheduled report back, to enable bargaining to continue.
- 16 In response to the application for expedition, Apple opposes the application and says that the Applicant has demonstrated no basis for urgency, nor a prima facie case.

### **C. Expedition is inappropriate and cannot be granted**

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- 17 In support of the Application, the Applicant relies on the Full Bench decision of *Gangell v Lobethal Abattoirs Pty Ltd T/A Thomas Foods International* [2018] FWCFB 4344 (and in particular [23] to [25]) and the assertion that the Retail EA provisions "as a whole are less beneficial than those provided by the" Retail Award.

- 18 In the AS, the Applicant states at [9] (our emphasis):

*Finally, at [23] – [25] the Full Bench observed that 'the need to deal with an application expeditiously is particularly important in cases where, as here, there are assertions that employees to whom the agreement applies are at times earning less than under the relevant modern award.' The Full Bench held that, in taking into account the objects of the Act pursuant to s 578, which include ensuring the guaranteed safety net of fair, relevant and enforceable minimum terms set out in, among other things, modern awards,<sup>3</sup> and subject to application of relevant considerations, it would be 'prima facie contrary to the object of the Act to permit an Agreement that has passed nominal expiry date to continue to operate in circumstances where its provisions **as a whole** are less beneficial than those provided by the relevant modern award.'*

- 19 Accordingly, the AS seeks expedition because the Applicant alleges the Retail EA provisions "as a whole are less beneficial than those provided by the" Retail Award.

- 20 However:

- (a) there is no evidence before the Commission that provisions of the Retail EA as a whole are less beneficial than those provided by the Retail Award. Neither the Application, nor the Declaration, identify a single actual employee who would fall into that category. To the contrary:
- (i) on the Applicant's own evidence "I am currently paid more than the Agreement rates and wages will not substantially change for me" if the Retail EA is terminated: see [6] of the [insert] and at [32] of Annexure A, he concedes he is paid an hourly rate of \$37.05. His base hourly rate under the Retail Award would be \$24.76;

- (ii) the Commission has also received a declaration from Mr Kane Murtagh, a current employee, and employee bargaining representative. Mr Murtagh identifies key errors in the Applicant's Wage analysis and without limitation states:
  - (A) the data contained in The Analysis Spreadsheet is flawed as it relied on outdated rates which no longer apply to employees: [11];
  - (B) the Retail EA does not contain any age discriminatory clauses, unlike the Retail Award, which allows the payment of 'Junior Rates' for employees under 21: [17];
  - (C) the Analysis Spreadsheet is isolated only to hour-by-hour mapping of the late night premiums with no consideration as to whether an employee may be scheduled at those time: [19];
- (iii) at least one current employee covered by the Retail EA has notified the Commission that they oppose termination of the Retail EA (triggering referral to the Full Bench)
- (b) there is no sound basis to conclude, as alleged in the application, that "Apple employees have slipped below the guaranteed safety net". The minimum entitlements in the National Employment Standards and the base rate of pay in the Retail Award are met (and must be),<sup>3</sup> and exceeded for each employee covered by the Retail EA.

21 Leaving aside the paucity of evidence before the Commission, it is also not at all clear why the Applicant has elected at this stage of bargaining (and indeed on the eve of Christmas) to seek termination of the Retail EA on an urgent basis given the following uncontroversial chronology:

- (a) the Retail EA reached its nominal expiry date on 7 July 2018;
- (b) in August 2022, Apple initiated bargaining for a replacement agreement and is continuing to bargain in good faith;
- (c) RAFFWU has been a bargaining representative for a replacement enterprise agreement since August 2022;
- (d) the "no" vote on the replacement enterprise agreement occurred on 27 October 2022;
- (e) a meeting was held with all bargaining representatives on 7 December 2022 at which it was proposed that bargaining would resume after the summer holiday period, and no concerns were raised by any other bargaining representatives at that time;<sup>4</sup> and
- (f) the next bargaining meeting will occur next week, following significant efforts and resources being allocated to preparing for this meeting and bargaining in 2023.

#### **D. Conclusion**

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22 The application for expedition, if pressed, should be dismissed.

**Yaseen Shariff SC**  
**McCullough Robertson Lawyers**

<sup>3</sup> FW Act, ss 55 and 206; Retail EA, clause 3.7.

<sup>4</sup> To the extent the application and accompanying declaration state that there was disagreement from employees on this issue, that is disputed, and we note that there is no evidence before the Commission of this.