

IN THE FAIR WORK COMMISSION

Matter No: AM2017/57

Section 156 - Four Yearly Review of Modern Awards –*Restaurant Industry Award 2010*

SUBMISSION IN REPLY OF UNITED VOICE

16 October 2018

1. This submission is made pursuant to the amended Directions of the Fair Work Commission dated 27 September 2018 and in response to the submission of Restaurant and Catering Industry Association (RCI) filed 5 October 2018.
2. In an application dated 20 September 2018, RCI have sought confidentiality orders in respect of three out of their five witnesses in the substantive review of the *Restaurant Industry Award 2010* ('Restaurant Award'). RCI have sought the orders in respect of the '*name, business name, business address and any other identifying information of the witnesses*'.
3. United Voice opposes RCI's application for confidentiality orders.
4. Section 594(1) of the *Fair Work Act 2009* ('the Act') provides the Commission with the power to make an order prohibiting or restricting the publication of certain material in relation to matters before the Commission '*if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason.*'
5. Section 593 of the Act is also relevant as this matter will shortly be listed for a hearing. Section 593(2) states that '*If the FWC holds a hearing in relation to a matter, the hearing must be held in public, except as provided by subsection (3).*'
6. Section 593(3) sets out the orders that the Commission may make in respect of confidential evidence in hearings. Similar to section 594(1), the Commission may make such orders '*if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason.*'
7. In this matter, the Commission should uphold the primacy of the principle of '*open justice*' and dismiss the application of RCI for confidentiality orders.
8. The circumstances of this matter do not justify the making of a confidentiality order as the nature of the evidence is not confidential, and RCI have not established any reason as to why confidentiality orders should be made in this matter.

9. The suppression of the identity of witnesses to a proceeding is a serious matter. Knowledge of the identity of witnesses to litigation is part of the long standing principle of ‘open justice’. As the then Chief Justice French noted in *Hogan v Hinch*¹:

An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the Constitution courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.

...

*It is a common law corollary of the open-court principle that, absent any restriction ordered by the court, anybody may publish a fair and accurate report of the proceedings, including the names of the parties and witnesses, and the evidence, testimonial, documentary or physical, that has been given in the proceedings.*²

10. For proceedings before the Commission, the principle of ‘open justice’ has been held repeatedly to apply.³ In *Corfield*⁴, Commissioner Bissett stated:

[21] The principle of open justice applies to the Commission just as much to the Courts. Section 593 above is testament to this. There are, as has been identified above, some legislative exceptions where they are some limitations. These exceptions, however, should not be seen to distract from the application of the principal in general.

11. Further, in *Worker A, Worker B, Worker C, Worker D and Worker E*⁵ where the names of parties were suppressed for publication but not hidden generally from legal practitioners for a party to the proceeding⁶ Deputy President Gostencnik noted:

¹ (2011) 243 CLR 506.

² As above at [20] and [22]. See also *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs CJ.

³ See, for example: *CFMEU v Ron Southon Pty Ltd* [2015] FWC 4542.

⁴ [2014] FWC 4887.

⁵ [2016] FWC 6524.

⁶ Order, *Worker A, Worker B, Worker C, Worker D and Worker E*, 15 August 2016, PR584235.

[20] The principle that Commission proceedings conducted by way of a hearing, subject of a contrary order, must be held in public enshrined in ss.593(2) is calculated to ensure that public confidence in proceedings to administer justice is both warranted and maintained. It is a principle of particular importance to the Commission, which is given broad powers, for the forum in which those powers are to be exercised not to be a cloistered process. Hearings held in public and the publication of decisions arising there from properly exposes the Commission to public scrutiny, which in turn is calculated to enhance greater public confidence in the Commission, and the exercise by the Commission of certain of its powers.

[21] That said, the powers to make orders under ss.593 (3) or 594(1) are not intended to lie dormant. The powers are there to be exercised, albeit infrequently and with caution. The purpose of their exercise is to secure to the Commission the availability of as much relevant information as possible, without violating the confidentiality which a party, a witness or a person affected by a proceeding is either properly entitled to preserve or should be permitted to preserve in order that that person may effectively participate in the proceeding. The capacity of a person to effectively participate in a proceeding before the Commission may be affected, for example, by a well-founded or reasonable concern held by the person that the disclosure and publication of that person's name or address might result in some form of retribution, harassment or intimidation.

12. This matter is party of the 4 yearly review of a modern award conducted under section 156 of the Act. The 4 yearly review is not an *inter partes* process but a public review. The fact that the 4 yearly review is not 'owned' in any sense by those who participate in it but is intended as a wide ranging review of modern awards that have the quality of delegated legislation further militates in favour of the process being open and not cloistered.
13. RCI is pursuing three claims in the review:
 - Item 4 – Junior employees. RCI seek to remove the requirement to pay junior employees at the full adult rate of pay for working as liquor service employees in clause 15.1 of the award.
 - Item 6 – Payment of Wages. RCI seek to amend clause 27 of the award to permit payment of wages to be made on any day of the week.
 - Item 9 – Meal breaks. RCI seek to vary clause 32 to enable meal breaks to be the subject of the award flexibility clause.
14. The three witnesses who are the subject of the application each provide evidence in relation to all three RCI claims.

15. None of the claims relate to subject matter which is sensitive or personal. The evidence given is not of a confidential nature, and does not justify the making of a confidential order.
16. Further, RCI have not established any reason why a confidentiality order should be made in this matter.
17. A confidentiality order was made in *Worker A, Worker B, Worker C, Worker D and Worker E*⁷. In this case there had been a history of alleged bullying and the applicants for the confidentiality order were concerned that there would be an escalation in the bullying if their names were published. As noted earlier, Deputy President Gostencnik stated in making the order that *'The capacity of a person to effectively participate in a proceeding before the Commission may be affected, for example, by a well-founded or reasonable concern held by the person that the disclosure and publication of that person's name or address might result in some form of retribution, harassment or intimidation.'*⁸
18. In paragraph [5] of RCI's submission filed 5 October 2018, RCI states that *'the witnesses have expressed a concern that publication of their details poses a significant risk to their business through the potential for negative media implications, targeted harassment and bullying from unions and lobby groups and harming their relationship with their employees'*.
19. In paragraph [6] of their submission RCI further state that *'the witnesses concerns are not unreasonable in the circumstances.'* RCI do not identify what these particular circumstances are.
20. No evidence is provided to support these two statements.
21. There is no evidence that publishing the names and business names of the three witnesses in this review of the Restaurant Award would lead to the negative consequences alleged. In respect of the alleged negative consequences we make the following comments:
 - a) The consequences alleged are very serious and suggest that United Voice would engage in what could generally be considered criminal or illegal conduct.
 - b) That the media may publish some report which may be adverse or critical on the matter should not be considered a reason to make a confidentiality order. A union may also want to publish some report of what occurs in a process such as the 4 yearly review and being critical of a position it formally opposes is not something that should lead to matters of legitimate public interest being made confidential.
 - c) There is no basis for RCI's allegation that this union, or others, would harass or bully the witnesses. There is absolutely no history of United Voice in anyway contacting or intimidating witnesses of our opponents. The insinuation that we would in effect suborn

⁷ [2016] FWC 6524.

⁸ As above, paragraph [21].

perjury is a very serious allegation that should only be made on the basis of some evidence.

- d) It is common for employers and employees to have different views regarding industrial relations in matters before the Commission. This is not a special circumstance that would result in particular harm to the employer/employee relationship in respect of these three witnesses.
22. It is not uncommon for potential witnesses to have some hesitancy about appearing before the Commission, and about having their name on a witness statement that is publicly available. Some United Voice members who have been witnesses or potential witnesses for claims in the 4 yearly review have expressed concerns in relation to this. However, this in and of itself does not constitute a sufficient reason for the making of a confidentiality order.
23. RCI have not established that the witnesses have well-founded or reasonable concerns that publishing their names and business names might result in some form of retribution, harassment or intimidation towards them, or that there is any proper reason why a confidentiality order should be made in this case.
24. In *Worker A, Worker B, Worker C, Worker D and Worker E*⁹ Deputy President Gostencnik stated '*I consider that the risk of escalating conduct is not merely theoretical*'.¹⁰ In contrast, the alleged risks raised by RCI are merely theoretical.
25. The application for a confidentiality order by RCI should be characterised as an attempt to avoid negative publicity and public scrutiny for the three employer witnesses.
26. This is not a proper basis for the making of a confidentiality order.
27. The Commission has held on numerous occasions that '*mere embarrassment, distress or damage by publicity is not a sufficient basis to grant such an application*'¹¹.
28. In *Bowker*¹², in which a confidentiality order was made in respect of certain annexures to a witness statement, it was made clear that the confidentiality order was not made to shield a party or witness to the case from public scrutiny.
29. It was stated by Deputy President Gostencnik in *Bowker*¹³ that:

[18] In my view, making an order of the kind of sought by DP World does not undermine the principle of open justice. As I have already indicated, the order sought is not directed to preventing the publication of the identity of the party to these proceedings or any witness to the proceedings. The order sought does not

⁹ [2016] FWC 6524.

¹⁰ As above, at paragraph [22].

¹¹ *Corfield* [2014] FWC 4887, paragraph [32]. See also: *Hankin* [2014] FWC 8402, *Bowker* [2015] FWC 4542.

¹² *Bowker* [2015] FWC 4542.

¹³ As above.

seek to shield DP World from disclosure of the allegations made against it by the applicants or from any embarrassment, discomfort or inconvenience that might arise from the public scrutiny of the allegations made. Nor does the order seek to limit disclosure or scrutiny of DP World's workplace behaviour policy.

30. In this matter, the interests of open justice should prevail. The principle of open justice holds primacy, and exceptions to this principle should only be made infrequently and with caution. RCI have not established any proper reasons for the making of a confidentiality order and their application should be dismissed.

**United Voice
16 October 2018**