



# DECISION

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards – Overtime for casuals** (AM2017/51)

VICE PRESIDENT HATCHER  
VICE PRESIDENT CATANZARITI  
DEPUTY PRESIDENT BULL

SYDNEY, 5 MARCH 2021

*4 yearly review of modern awards – Hair and Beauty Industry Award 2010*

[1] This decision concerns a submission dated 7 December 2020 filed by the Shop Distributive and Allied Employees' Association (SDA) in relation to the *Hair and Beauty Industry Award 2010* (HB Award). That submission expressed concern about the deletion of the previous clause 13.3 of the Award as part of a number of variations made to the HB Award on 30 October 2020<sup>1</sup> to give effect to our decisions of 18 August 2020<sup>2</sup> and 30 October 2020.<sup>3</sup>

[2] The background to the matter may briefly be explained. On 18 August 2020, we published a decision<sup>4</sup> which sought to identify and resolve ambiguities in the provisions concerning the overtime entitlements of casual employees in some 96 modern awards. In respect of the HB Award, we noted in paragraph [300] of that decision that there was a consensus amongst the interested parties that, in respect of the calculation of the overtime rate for casual employees under that award, the casual loading and the overtime penalty rate are to be added separately to the minimum hourly rate. In paragraph [304] of the decision, we stated that in respect of the HB Award and a number of other awards about which there was a consensus interpretation of the casual overtime provisions, we would proceed on the basis of the consensus position, but the awards would be varied in a standardised way to remove any ambiguity in expression.

[3] At the time of the 18 August decision, clause 13.3 of the HB Award provided:

**13.3** For all work performed outside the hours in clause 28.2, except Sundays, a casual employee will be paid the hourly rate for a full-time employee in this award plus 50%. For Sundays, the additional loading will be 100%.

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<sup>1</sup> PR723908

<sup>2</sup> [2020] FWCFB 4350

<sup>3</sup> [2020] FWCFB 5636

<sup>4</sup> [2020] FWCFB 4350

[4] Clause 28.2, which was cross-referenced in the above provision, provided:

**28.2 Ordinary hours**

(a) Ordinary hours must not exceed an average of 38 per week and may be worked within the following spread of hours:

<b>Days</b>	<b>Spread of hours</b>
Monday to Friday, inclusive	7.00 am–9.00 pm
Saturday	7.00 am–6.00 pm
Sunday	10.00 am–5.00 pm

(b) Hours of work on any day will be continuous, except for rest periods and meal breaks.

[5] In conjunction with the 18 August 2020 decision, draft determinations that would give effect to the decision were published. The draft determination for the HB Award proposed that the award be varied as follows:

1. By deleting clause 13.3 and inserting the following:

13.3 For each overtime hour worked, a casual employee must be paid the rates prescribed by clause 31.2(b).

2. By deleting clause 31.2(a) and inserting the following:

(a) Overtime hours worked by full-time or part-time employees in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at 150% of the ordinary hourly rate of pay for the first three hours and 200% of the ordinary hourly rate of pay after three hours.

3. By deleting clause 31.2(b) and inserting the following:

(b) Overtime hours worked by casual employees:

(i) in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle; or

(ii) in excess of 10 ½ hours per day;

shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay after three hours.

NOTE: The overtime rates for casual employees have been calculated by adding the casual loading prescribed by clause 13.2 to the overtime rates for full-time and part-time employees prescribed by clause 31.2(a).

4. By deleting the words “double time” appearing at clause 31.2(e) and inserting the words “200% of the ordinary hourly rate of pay”.

5. By updating the cross-references accordingly.

[6] Interested parties were provided with a period of 21 days to respond to the draft determinations. The Australian Industry Group (Ai Group) sought and was granted an extension of time and, on 2 October 2020, it filed a submission responding to the draft determinations for some 27 awards. One of the awards addressed was the HB Award. The Ai Group submitted in relation to the proposed deletion and replacement of clause 13.3:

“154. In effect, the current provision requires that a casual will be paid at a higher rate for time worked outside the spread of hours contemplated by clause 28.2 (which sets certain outer limits on times between which ordinary hours can be worked). The provision does not actually deal with payment for overtime hours as the provisions of clause 28 do not apply to casual employees and as such, time worked outside such parameters is not actually overtime. Also, the rates prescribed by the proposed clause 13.3 will, in some instances be different to the typical overtime rates prescribed by the award. Neither the text nor operation of clause 13.3 should not be altered as an outcome of these proceedings.”

[7] The 30 October 2020 decision dealt with the various submissions filed in response to the draft determinations. In that decision, we inadvertently omitted to deal with the Ai Group’s submission concerning the HB Award. As a consequence, the HB Award was varied in the terms set out in the draft determination on 30 October 2020, with the variation taking effect on 20 November 2020.

[8] In its correspondence of 7 December 2020, the SDA submits:

“This variation has the effect that the award becomes silent on how hours worked outside the hours in clause 28.2 are treated. The SDA submits that the pre-varied clause treats these hours not as overtime but as hours that attract a penalty payment. As a consequence of the variation made by the Commission, casual employees are no longer entitled to the penalty that was previously prescribed by clause 13.3.

...

The SDA and Ai Group discussed the SDA’s concerns on 2 December 2020. I can confirm that the position of Ai Group remains that the variation made to the Award has resulted in a substantive and potentially unintended change. The SDA is also of the view that this variation should be rejected.

The SDA submits that current clause 13.3 should be replaced with the previous clause 13.3 to read:

13.3 For all work performed outside the hours in 28.2, except Sundays, a casual employee will be paid the hourly rate for a full time employee in this award plus 50%. For Sundays the additional loading will be 100%.”

[9] A conference in relation to the SDA’s correspondence was conducted by the presiding member of this bench on 26 February 2021. The SDA’s position concerning the deletion of the previous clause 13.3 was generally supported by the Ai Group and Hair and Beauty Australia (which were jointly represented). The relationship between the previous clause 13.3, clause 28.2, and clause 31.2 of the HB Award was discussed at that conference.

**[10]** We accept that the deletion of the previous clause 13.3, which was not concerned with overtime as such, was an error, and that as a result an entitlement to a penalty rate for ordinary hours worked outside the spread of hours on any day has been inadvertently removed. This needs to be rectified. However, we do not consider that the provision should simply be re-inserted in its previous form, since this would resurrect some drafting uncertainties as to how clause 13.3 relates to clauses 28.2 and 31.2. We consider that a better course would be to add the entitlement for which clause 13.3 formerly provided to clause 31.2, which sets out the payment regime for overtime and penalty rates, and to make other necessary consequential arrangements. Our *provisional* view is that clause 31.2 should be varied to provide as follows:

**31.2 Overtime and penalty rates**

**(a) Overtime - full time and part-time employees**

Hours worked by full-time or part-time employees in excess of the ordinary number of hours of work prescribed in clause 28.2 are overtime hours and are to be paid at **150%** of the ordinary hourly rate of pay for the first three hours and **200%** of the ordinary hourly rate of pay after three hours.

**(b) Overtime - casual employees**

Hours worked by casual employees:

- (i)** in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle; or
- (ii)** in excess of 10 ½ hours per day;

are overtime hours and shall be paid at **175%** of the ordinary hourly rate of pay for a full-time employee for the first three hours and **225%** of the ordinary hourly rate of pay for a full-time employee after three hours.

NOTE: The overtime rates for casual employees have been calculated by adding the casual loading prescribed by clause 13.2 to the overtime rates for full-time and part-time employees prescribed by clause 31.2(a).

**(c) Work outside the spread of hours – casual employees**

For all ordinary hours worked outside the spread of hours specified in clause 28.2(a) for any day except Sunday, a casual employee will be paid at **150%** of the ordinary hourly rate for a full-time employee.

**(d) Saturday work**

For all ordinary hours worked on a Saturday within the spread of hours specified in clause 28.2(a), a full-time, part-time and casual employee will be paid at **133%** of the ordinary hourly rate for a full-time employee.

**(e) Sunday work**

All ordinary and overtime hours of work for full-time, part-time and casual employees on a Sunday will be paid at the rate of **200%** of the ordinary hourly rate for a full-time employee.

**(f) Employment on rostered day off**

Where it is mutually agreed upon between the employer and the employee (such agreement to be evidenced in writing), an employee may be employed on their rostered day off at the rate of **200%** of the ordinary hourly rate of pay for a full-time employee for all time worked with a minimum payment as for four hours' work.

[11] We also *provisionally* consider that clause 13.3 should also be modified to provide:

**13.3** A casual employee must be paid the relevant rate specified in clause 31.2 when they work as follows:

- (a) overtime hours; or
- (b) ordinary hours outside the spread of hours on Monday to Saturday; or
- (c) ordinary hours within the spread of hours on a Saturday; or
- (d) any hours on a Sunday.

[12] We will allow interested parties a period of 14 days to file any submissions in response to the proposed variations set out above.

[13] We also note that clause 31 does not appear to prescribe a rate which applies when a full-time or part-time employee works outside the span of hours specified in clause 28.2(a) or in excess of the maximum daily hours specified in clause 28.3. Interested parties are also invited to file any submissions they wish to make concerning this issue within 14 days.



VICE PRESIDENT

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