

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards

AM 2014/196 & AM 2014/197 - Casual Employment & Part Time Employment

HIGHER EDUCATION INDUSTRY - ACADEMIC STAFF - AWARD 2010 (MA000006)

Filed on Behalf of the Group of Eight Universities

University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland

A. Introduction

1. These submissions are made on behalf of the Group of Eight research intensive universities in Australia, comprising the University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland (**Group of Eight**)
2. In decision [2018] FWCFB 4695 (**2018 Decision**), in relation to the Higher Education – Academic Staff – Award 2010 (**Academic Staff Award**) the Full Bench stated:

[112] As submitted by the parties, casual employment under the Academic Staff Award has *some unique characteristics*. Clause 13.1 of the award provides for casual employment “by the hour and paid a rate on an hourly basis”, and clause 13.2 provides that “The minimum salary paid to academic staff employed on a casual basis will be at the rates provided for in clause 18.2...”. Clause 18.2 provides for hourly rates of pay, inclusive of the casual loading, for casual academics. The rates provided for are in 6 streams: Lecturing, Tutoring, Musical accompanying, Undergraduate clinical nurse education, Marking rate and “Other required academic activity”. The rates in the first 4 streams all incorporate payment for preparation or “associated working time” ranging from 0.5 hours at a minimum to 4 hours at a maximum. For example, the hourly rate of \$130.17 for a “Basic lecture” includes “1 hour of delivery and 2 hours of associated working time”, while the rate of \$50.79 for undergraduate clinical nurse education where there is “Little preparation required” incorporates “1 hour of delivery and 0.5 hours associated working time”. However the last 2 streams, (Marking and “Other required academic activity”) do not incorporate any additional working time, so that the hourly rate actually pays for one hour of work. The expression “Other required academic activity” is not defined, and presumably it covers any type of academic work under the award which is not encompassed by the other 5 streams.

[113] We do not consider that there is any reason in principle why the provisional view we have reached concerning a 2 hour minimum engagement would not be applicable to casual academic staff. Such staff face the same fundamental issue as other casual employees which was identified in the principal decision - that is, the need, in order to avoid unfairness and exploitation, to ensure that casual employees

are provided with sufficient work and income for each attendance at the workplace to justify the expense and inconvenience associated with the attendance. The precise circumstances of individual employees, including whether they have another primary occupation and the extent to which they have to travel to and from work in respect of each particular attendance, will of course vary widely, but the same fundamental issue arises. We consider that it is necessary, in order for the Academic Staff Award to meet the modern awards objective, that there be a 2 hour minimum engagement period for casual academic staff. In reaching that conclusion, we have had regard to the matters specified in paragraphs (a)-(h) of s 134 of the FW Act, and we have placed particular weight on paragraphs (a), (d), (da)(ii) and (f).

[114] However we accept that, in crafting a provision to implement a 2 hour minimum daily engagement period, it is necessary to take into account the incorporation into a number of the prescribed hourly rates in clause 18.2 of payments for preparatory and associated work. It would, we consider, constitute double counting if employees received the benefit of a 2 hour minimum payment in addition to the benefit of an hourly rate which was loaded for additional work. We also do not consider that the implementation of a 2 hour minimum engagement period should interfere with the autonomy of academic staff to determine how, when and where they perform any preparatory or associated work. Because preparation or associated time may occur non-consecutively with teaching time, we do not propose to require that the 2 hour minimum engagement period consist of 2 consecutive hours' work. Our provisional view as to how to implement these conclusions is to vary the Academic Staff Award to provide for a 2 hour minimum engagement period in the following terms:

13.2 A casual employee must be engaged and paid for at least 2 hours of work on each occasion they are required to attend work, inclusive of any allowance for preparation or associated working time provided for in clause 18.2.

3. The Full Bench stated that parties would have 7 days to comment upon a draft determination reflecting this provisional view. A draft determination reflecting the above terms varying the Academic Staff Award was issued dated 30 August 2018 (**Draft Determination**).

B. Proposed modifications

4. The Group of Eight submits that modifications should be made to the Draft Determination. The proposed modifications are sought to provide clarity and remove ambiguity and to give better effect to the Full Bench's determination expressed in the 2018 Decision.
5. The proposed modifications are as follows, with underline indicating additions and strike out indicating deletions:

13.2 The employee must be engaged and paid for at least 2 hours of work on each occasion they are required by the employer to attend for work, inclusive of any other required attendance that day and inclusive of any incorporated time and payment allowance for preparation or associated working time provided for in clause 18.2.

6. The rationale for each of these suggested modifications is set out below.

"Each occasion they are required to attend work"

7. As submitted in its previous written submissions, academic work is largely self-autonomous and the reference in the Draft Determination to "... on each occasion they are required to attend work" could give rise to confusion. An academic could choose to come into the University to attend the library because they prefer to undertake some of their preparation there and may choose to attend and leave the University to do other things on multiple occasions throughout the day, given the nature of the University environment. The Draft Determination could be read as the staff member being required to attend for work on multiple occasions.
8. It is implicit, but should be explicit that the reference to "required to attend work" is where this required by the employer.
9. This addition of the reference to attendance at work being required by the employer assists to provide clarity regarding the operation of the 2 hour minimum engagement period in the context of academic employment and gives effect to the Full Bench's view as expressed above.

"Incorporated time and payment"

10. The Group of Eight submits that the use of the word "allowance" in the Draft Determination should be clarified by replacing it with "incorporated time and payment". Whilst the term "allowance" in the draft determination appears to be used in a general sense to mean any "taking into account", the language of "allowance" could be misunderstood to reference allowances in the traditional sense.
11. The payments in clause 18.2 are not allowances, but rather are aggregated payments that reflect a certain amount of incorporated time for preparation or associated working time in relation to a particular activity. The phrase "incorporated time" is also more commonly used in the higher education sector in relation to the time for preparation and associated working time included in the rates of pay set out in clause 18.2, rather than "allowance".

"Inclusive of any other requirement to attend that day"

12. The Group of Eight notes that Full Bench's view in the 2017 Decision that the minimum engagement period would be a daily minimum engagement period. Further, at paragraph [114] of the 2018 Decision the Full Bench (extracted at paragraph 2 above), the Full Bench stated it was "crafting a provision to implement a 2 hour minimum daily engagement period" and also that it did not propose to require that the 2 hour minimum engagement period consist of 2 consecutive hours' work.

13. The Group of Eight considers that the Draft Determination does not clearly give effect to this finding and may lead to confusion. As currently drafted, the Group of Eight notes considers that a two hour minimum engagement period could apply to different activities and occasions on which the academic staff member is required to attend for work on the same day. For example, an academic might be required to attend a staff meeting at 10am for an hour, and then is scheduled to deliver a lecture at 2pm (for which there are incorporated preparation and associated working time of a further 2 hours).
14. As currently drafted, it is arguable that both the meeting and the lecture are separate "occasions" on which the staff member is required to attend for work. Accordingly the current Draft Determination could be interpreted to mean that the staff member is required to be paid for 2 hours for the meeting attendance, notwithstanding they are engaged to attend work on the same day to deliver an hour of lecture.
15. This would essentially result in a 5 hour payment in respect of the required attendance at work on that day.
16. The Group of Eight submits that inserting the words "inclusive of any other requirement to attend that day" better gives effect to the Full Bench's provisional view, by making it clear that occasions on which an employee is required to attend work in the same day are to be treated as one occasion for the purpose of calculating the minimum engagement period.

C. Conclusion

17. For the reasons set out above, the Group of Eight submits that the Draft Determination should be modified, in the form set out at **Attachment A**.

Clayton Utz
Solicitors for the Group of Eight
6 September 2017

Attachment A

MA000006 PRXXXXXX

DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Casual employment and Part-time employment

(AM2014/196 and AM2014/197)

HIGHER EDUCATION INDUSTRY—ACADEMIC STAFF AWARD 2010

[MA000006] Educational services

SYDNEY, XX MONTH 2018

VICE PRESIDENT HATCHER SENIOR
DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC DEPUTY
PRESIDENT BULL

4 yearly review of modern awards – Casual employment and Part-time employment – minimum engagement for casual employees – Higher Education—Academic Staff—Award 2010.

A. Further to the Full Bench decision issued by the Fair Work Commission on 9 August 2018 [[2018] FWCFB 4695]¹, the above award is varied as follows:

1. By renumbering clause 13.2 as 13.3.
2. By inserting a new clause 13.2 as follows:

13.2 The employee must be engaged and paid for at least 2 hours of work on each occasion they are required by the employer to attend for work, inclusive of any other required attendance that day and inclusive of any incorporated time and payment for preparation or associated working time provided for in clause 18.2.

3. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation from 1 October 2018. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period on or after 1 October 2018