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The Associate to his Honour Justice Ross
Fair Work Commission

Dear Associate

AM2016/15 & AM2014/284 - PLAIN LANGUAGE - RESTAURANT INDUSTRY AWARD

We act on behalf of ABI and the NSW Business Chamber with respect to the above proceedings and refer to the Decision of the Full Bench dated 24 October 2017 (**Decision**).

In its Decision, the Full Bench has considered the meaning of the term 'ordinary rate of pay', which is found in clause 24.4(a) of the current award and 24.6(a) of the plain language exposure draft (**PLED**) in the context of the payment of an allowance for distant work. The relevant part of the current Award provision is as follows:

24.4 Allowance for distant work

(a) The special rate to be paid to employees who work away from their employer's place of business for the time occupied in travelling between the employer's place of business and work or between the employee's residence and work will be at ordinary rates. (emphasis added)

The Full Bench has expressed a provisional view at [44] that the term 'ordinary rates' includes applicable penalties and loadings.

Our clients' previous commentary on the subject referred to clause 34.3 of the current Award, which provides as follows:

34.3 Penalty rates not cumulative

Except as provided in clause 32—Breaks, where time worked is required to be paid at more than the ordinary rate such time will not be subject to more than one penalty, but will be subjected to that penalty which is to the employee's greatest advantage. (emphasis added)

letter to fwc re allowance for distant work.docx

The equivalent provision is clause 27.3 of the PLED, which no longer contains a reference to the 'ordinary rate'. Clause 27 - Penalty rates now refers to the 'minimum hourly rate' for the purpose of calculating penalties.

Accordingly, on further consideration, our clients consider that 'ordinary rate' (at least in the context of 34.3 of the current Award) may actually be intended to refer to the 'ordinary base rate of pay' (to use the terminology used elsewhere in the current Award) or the 'minimum hourly rate' (the PLED terminology).

Pre-modern reference instrument

Clause 24.4 is identical to Clause 32.1 of the *AP787213CRV - Liquor and Accommodation Industry - Restaurants - Victoria - Award 1998*. The expression 'ordinary rate' is not defined in that instrument, but is used elsewhere. For example, in Clause 31.9 in the context of casual employees working on a public holiday:

Casual employees who are required to work on any of the public holidays set out above, will be paid at 2.75 times the ordinary rate (i.e. double time and three-quarters). (emphasis added)

Clause 26.4 of that Award ('Penalty rates not cumulative') is also the same as clause 34.3 of the current Award, which is extracted above.

Accordingly, at least in some instances, the use of the term 'ordinary rate' in the pre-modern instrument does not appear intended to include applicable penalties and loadings.

Conclusion

In light of the above, our clients respectfully propose that, before a final decision is made with respect to the clause, the parties may benefit from the opportunity for further discussion regarding its intended operation.

If you have any questions, please contact Kate Thomson on (02) 4989 1003.

Yours sincerely



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