FAIR WORK ACT 2009 (Cth)

Section 156 – 4 Yearly Review of Modern Awards

AM2014/225

SUBMISSION

27 November 2019

Educational Services (Schools) General Staff Award – Exposure Draft [MA000076]

1. This submission is made by the:
   (a) Association of Independent Schools of New South Wales;
   (b) Association of Independent Schools of South Australia;
   (c) Association of Independent Schools of Western Australia;
   (d) Independent Schools Queensland;
   (e) Independent Schools Tasmania; and
   (f) Independent Schools Victoria (**the Associations**)

2. This submission makes comments about, and suggestions for change, to the following provisions of the Exposure Draft of the Educational Services (Schools) General Staff Award (**the Exposure Draft**) published by the Commission on 14 October 2019:
   (a) cl.12.2 Calculating annual salary for an employee on leave without pay during non-term weeks;
   (b) cl.16.1 Unpaid meal breaks;
   (c) cl.21.3 Reasonable additional hours – part-time employees.

3. This submission notes an inconsistency between cl.14.2 and cl.11.2(a) of the Exposure Draft, which may be resolved by a further decision of a Full Bench of the Commission.

Clause 12.2 Calculating annual salary for an employee on leave without pay during non-term weeks

4. The formula in cl.12.2(b) of the Exposure Draft is identical to the formula in cl.11.2(b) of the *Educational Services (Schools) General Staff Award 2010*.

5. Upon review, it is considered that **C** in the formula could be better defined. In the Exposure Draft, **C** is defined as '*means the annual salary (as contained in clause 15 – Minimum wages) for the employee's classification*'. The annual salary in cl.15 is specified for a full-time employee.

6. The Associations are concerned that the **C** value in the formula could be interpreted to mean that it can only be applied to a full-time employee and does not contemplate an adjusted annual salary for employees engaged to work on a part-time basis.

7. Therefore, the Associations request the following amendment to the formula so that it may also operate to derive an adjusted annual salary for a part-time employee:

> **C*** means the annual salary (as contained in clause 15 – Minimum wages) for the employee's classification
>
> ***Note: The value of **C** is to be adjusted to a pro rata amount of the prescribed relevant annual salary where an employee is engaged part-time (i.e. for less than 38 ordinary hours per week)*.

Clause 16.1 Unpaid meal breaks

8. The meal break provision in the Exposure Draft is as follows:

> **16.1 Unpaid meal breaks**
>
> An employee will be entitled to an unpaid meal break of 30 minutes no later than 5 hours after starting work.

9. The meal break provision in the current award is as follows:

> **24.1 Meal break**
>
> An employer is required to provide an unpaid meal break of not less than 30 consecutive minutes to an employee who is engaged or rostered to work for more than five hours on a day. Such meal break will start no later than five hours after the employee commenced work on that day.

10. In previous versions of the Exposure Draft, the Associations had not noticed the change that had been made to the meal break provision. It is assumed that the change is an administrative change made by the Modern Awards team.

11. The concerns held with respect to the clause in the Exposure Draft are:
    (a) the entitlement is to '30 minutes' and not to '30 consecutive minutes'; and
    (b) the words 'not less than' have been omitted. In schools, the lunch break for students varies. It is rarely 30 minutes in duration. The student lunch break will usually be between 40 and 60 minutes in a school. This means that there will be some employees in a school who will not have work to do for the same period of time and will be provided with a meal break of longer than 30 minutes. With the deletion of the words 'not less than', the interpretation of the clause could be that an unpaid meal break cannot be longer than 30 minutes.

12. The Associations request reinstatement:
    (a) of the word 'consecutive' between '30' and 'minutes'; and
    (b) of the words 'not less than' between 'of' and '30'.

13. Should the Commission be concerned that a meal break may be set for an excessive period of time, the Associations have no objection to 'not less than 30 consecutive minutes and not more than 60 consecutive minutes'.

14. The Associations have a further concern about the words of cl.16.1 of the Exposure Draft.

15. The entitlement to an unpaid meal break arises '*no later than five hours after starting work'*. It is submitted that '*after starting work*' should be clarified.

16. It is proposed that the entitlement is made clear given that a broken shift may be worked on a day. Where a broken shift is worked, the entitlement to an unpaid meal break only arises for a period of duty that is more than five hours in duration. Although, cl.15.2(d)(i) states that a broken shift '*is a shift that is rostered in two periods of duty, exclusive of breaks*', it would be of assistance to employers and employees to have greater clarity in cl.16.1.

17. In summary, the Associations propose that cl.16.1 should be amended as follows:

> **cl.16.1**
> An employee <u>who is engaged or rostered to work a shift of more than 5 hours</u> will be entitled to an unpaid meal break of <u>not less than</u> 30 <u>consecutive</u> minutes no later than 5 hours after starting work.

Clause 21.3 Reasonable additional hours – part-time employees

18. Clause 21.3 of the Exposure Draft is as follows:

> **21.3 Reasonable additional hours – part-time employees**
>
> (a) An employer may require a part-time employee to work reasonable additional hours in accordance with clause 21.3.
>
> (b) The employee will be paid for all additional hours at the applicable casual hourly rate for all hours worked that:
> (i) fall within the applicable daily spread of hours in clause 14.5;
> (ii) do not result in the employee working more than 8 hours on that day; and
> (iii) do not result in an employee whose hours are averaged, to work more than the allowed maximum weekly ordinary hours during the averaging period.

(c) The employee will be paid for all additional hours at the applicable overtime rate in clause 21—Overtime for all hours worked that:
   (i) are outside the applicable daily spread of hours in clause 14.5; and
   (ii) result in the employee working more than 8 hours on that day, or
   (iii) result in an employee whose hours are averaged, to work more than the allowed maximum weekly ordinary hours during the averaging period.

(d) Where additional hours are worked on a day the employee is already attending for work, the minimum casual engagement of 2 hours will not apply.

(e) Additional hours worked by a part-time employee in accordance with clause 21.3 do not accrue leave entitlements under this award or the NES.

19. It is agreed that cl.21.3 is consistent with cl.22.4 of the current award.

20. However, cl.22.4 of the current award could have been more explicitly worded to assist employers and employees to interpret the clause. Whilst it can be assumed from the clause that, where an employee's hours of work are not averaged, the maximum ordinary hours that can be worked in a week are 38, it would be preferable to make an explicit statement.

21. It is considered that such a variation to cl.21.3 of the Exposure Draft will assist employers and employees.

22. It is suggested that cl.21.3(b)(iii) of the Exposure Draft be replaced with:

cl.21.3(b)

(iii) do not result in an employee:
- working more than the allowed maximum weekly ordinary hours;
- working more than the allowed maximum weekly ordinary hours during the averaging period, where the employee's hours are averaged.

Clause 14 Ordinary hours of work – employees other than shiftworkers

23. Clause 14.2 of the Exposure Draft states:

> The ordinary hours of work for a part-time or casual employee will be in accordance with clause 10 – Part-time employees and clause 11- Casual employees.

24. In the first line of cl.11.2(a) of the Exposure Draft, the word 'ordinary' has been struck out. It seems that cl.14.2 and cl.11.2(a) are not consistent.

25. It is assumed that the hours of work for a casual employee will be determined by the Full Bench constituted to deal with the issue of overtime for casual employees.