
Fair Work Commission: 4 yearly Review of Modern Awards

AM2014/197: CASUAL EMPLOYMENT

**REPLY SUBMISSIONS - CASUAL ENTITLEMENT TO OVERTIME
PENALTIES AND RELATED MATTERS**

GENERAL RETAIL INDUSTRY AWARD 2010

Australian Business Industrial (ABI)

-and-

NSW Business Chamber (NSWBC)

18 OCTOBER 2016

1. INTRODUCTION

1.1 These submissions are filed in relation to the casual employment proceedings AM2014/197 (**Proceedings**) by:

- (a) Australian Business Industrial (**ABI**), which is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 3,900 members; and
- (b) New South Wales Business Chamber (**NSWBC**) which is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.

2. BACKGROUND

2.1 The Shop Distributive and Allied Employee's Association (**SDA**) filed an application¹ seeking to vary casual employment conditions in the following Modern Awards (**SDA Submission**):

- (a) Fast Food Industry Award 2010;
- (b) General Retail Industry Award 2010 (**Retail Award**);
- (c) Hair and Beauty Industry Award 2010; and
- (d) Pharmacy Industry Award 2010.

2.2 On 9 September 2016, the Full Bench of the Fair Work Commission (**Full Bench**) issued Directions in the Proceedings requiring any interested party that opposed the SDA's claims to file submissions and evidence in reply.

2.3 In accordance with the above directions, this submission represents ABI and NSWBC's response to the submissions and material filed by the SDA in relation to the Retail Award.

3. THE LEGISLATIVE FRAMEWORK OF THE 4 YEARLY REVIEW

3.1 The legislative framework applicable to the Four Yearly Review has been canvassed in great detail in various proceedings currently before the Commission. As already noted in submissions previously filed in the Casual and Part-Time Proceedings generally, a relevant summary of the applicable principles can be found in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**).

3.2 Given the considerations outlined in the Preliminary Issues Decision, the Full Bench is now required to determine whether:

- (a) the SDA has advanced a case as contemplated by the Preliminary Issues Decision, including the requirement for probative evidence properly directed to demonstrating the facts supporting the proposed variation², such as to warrant the Commission exercising its discretion pursuant to section 139;
- (b) any such exercise of discretion is consistent with section 134(1)(a)-(h); and
- (c) the proposed changes would be consistent with section 138.

3.3 ABI and NSWBC will now address the proposed variations put forward by the SDA.

¹ SDA Submission dated 13 May 2016

² Preliminary Issues Decision at paragraph 23 and 60

4. THE SDA'S CLAIM

4.1 The SDA is seeking the following variations to casual employment conditions³:

- (a) the payment of overtime for work in excess of 38 hours;
- (b) the payment of overtime for work performed outside "ordinary hours";
- (c) that casual loading to be **in addition** to penalties for unsociable work (such work performed on Saturdays, Sundays and public holidays).

(the **Overtime Claims**)

4.2 The SDA's position as outlined in its submissions⁴ is that the proposed variations are necessary as the current award provisions:

- (a) are inconsistent with the amended Modern Award objectives under s134(1)(da) of the *Fair Work Act 2009* (Cth)(**Act**);
- (b) undermine the integrity of the principle of the 38 hour week;
- (c) encourage high levels of casual employment; and
- (d) are not remedied by the payment of a 25% casual loading.

4.3 ABI and NSWBC respond to these propositions below.

5. RESPONSE TO SDA'S CLAIM

Section 134(1)(da) of the Act

5.1 The SDA Submission relies heavily on the erroneous proposition that s 134(1)(da) of the Act mandates overtime rates as a right to all employees, under all awards. This is not the case.

5.2 As has previously been canvassed during the Review, s 134(1)(da) of the Act is but one of the limbs of the Modern Awards objective to be considered by the Full Bench. It is not, as put by the SDA in its submissions, a Modern Award objective in of itself. As such, it is our position that the mere existence of 134(1)(da) does not mandate overtime rates for all in all awards. If universal overtime rates in Modern Awards were required by the Act, such a requirement would not be found in the multi-factorial Modern Awards objective but presumably would be located in Part 2-3, Division 3, Subdivision C of the Act which mandates certain Modern Award content.

5.3 In our view, the existence of s 134(1)(da) simply requires the Full Bench to consider the need for additional remuneration in the relevant overtime scenarios.

5.4 In our submission none of the factors (a) to (h) of section 134 should be given any greater weight or primacy than others. This position is reflected by the Full Bench's decision in the Preliminary Issues Decision at [32]-[33]:

No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a Modern Award.

³ Fast Food Industry Award 2010, General Retail Industry Award 2010, Hair and Beauty Industry Award 2010, Pharmacy Industry Award 2010

⁴ SDA Submission dated 13 May 2016

... The Commission’s task is to balance the various s.134(1) considerations and ensure that Modern Awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different Modern Awards means that the application of the Modern Awards objective may result in different outcomes between different Modern Awards.

5.5 Principal in the consideration of the SDA Claim is the likely impact of increased wage expenses for business⁵. Our understanding of the effect of the SDA Claim in respect of a Casual Retail Employee Level 3 under the Retail Award is as follows:

	“Overtime” hours	Evening Work which is after 6pm	Saturday Work	Sunday Work	Sunday Overtime Work	Public Holiday	Public Holiday Overtime
Current entitlement	\$25.27	\$25.27	\$27.29	\$40.43	\$40.43	\$55.61	\$55.61
SDA proposed entitlement	\$35.39 (time and a half) \$45.50 (double time)	\$30.33	\$30.33	\$45.50	\$45.50	\$55.61	\$55.61
Percentage Increase	40% (time and a half) 80% (double time)	20%	11.1%	12.5%	12.5%	0%	0%

5.7 On any assessment, where the proposed variations will result in wage increases, such increases will be substantial. No evidence has been called in support of such changes.

5.8 ABI and NSWBC also note that in relation to the Public Holiday aspect of the SDA Claims, no substantive change will arise in respect of the pay rate of casuals. In such circumstances, the changes cannot be said to be necessary to fulfil the Modern Awards Objective.

The 38 hour week

5.9 The SDA submits that failure to pay casuals for working overtime, “*undermine[s] the integrity of the 38 hour week.*”⁶ This submission is considerably undermined by the drafting of the current clause 29.1, in that it does not permit employers to have casuals work overtime. Presumably this results in a situation where casuals cannot work overtime unless they **agree**. If they agree, they are doing so on the basis that no additional remuneration is received above and beyond their base rate, casual loading and any applicable penalties. In our submission, the fact that an employer cannot unilaterally require a casual to work overtime

⁵ See s 134(1)(f) of the Act

⁶ SDA Submission dated 13 May 2016 at paragraph 29

is a sufficient safeguard to allow employees the discretion to decide whether they wish to work additional hours for the same rate of pay.

Increased Casualisation

5.10 The SDA claims that non-payment of overtime creates a “*perverse incentive for some employers to increase casual employment to the detriment of permanent positions*”.⁷

5.11 No evidence has been provided by the SDA to prove a causal link between the non-payment of overtime and increased casualisation in an industry that has a history of employing large numbers of casuals.

5.12 The retail industry:

- (a) requires large increases in staff numbers around the Christmas shopping period;
- (b) has a high percentage of young, school or university aged, employees in its workforce, who require flexibility as their hours of work fluctuate depending on the school term and holiday periods; and
- (c) has a high percentage of transitional workers that view the job as temporary.

5.13 All these factors contribute to a large casual and part-time workforce.⁸

Casual Loading

5.14 The SDA Submission implies that overtime and penalty payments for casuals have been absorbed into the 25% casual loading. This cannot be the case as casuals sometimes receive penalties in addition to casual loading. For example, on Saturdays casuals receive a 10% penalty in addition to the 25% casual loading and on public holidays casuals receive a 150% penalty in addition to the 25% casual loading. Such penalties provide evidence that the casual loading is not always inclusive of penalties and/or overtime.

5.15 What is or isn't included in a casual loading payment must be determined on an award by award basis.

5.16 We submit that regardless of whether overtime payments are incorporated into the casual loading, the Commission must consider all limbs of s 134 (a) - (h) when determining whether or not overtime payments should be granted to casual employees.

6. PREVIOUS FINDINGS ON OVERTIME IN THE RETAIL AWARD

6.1 The Overtime Claims by the SDA seek a range of changes to be introduced into the Retail Award which would have the effect of introducing an overtime entitlement for casuals into the Retail Award.

6.2 This is not the first attempt of the SDA to seek overtime for casuals in the Retail Award. The Commission previously considered the issue of whether casuals are entitled to overtime under the Retail Award before Fair Work Australia in December 2010 (the **Decision**).⁹

6.3 The Decision led to a determination¹⁰, where the then Vice President Watson made the following observations:

⁷ SDA Submissions dated 13 May 2016 at paragraph 28

⁸ Retail workforce study conducted by the Australian Government, Service Skills Australia and the Australian Workforce and productivity Agency, March 2014, pages 13-14

⁹ PR503930 [2010] FWA 8806

*[16] The SDA seeks to ensure that the clause creates an entitlement to overtime for casuals who work more than 38 hours. **In my view there is no such entitlement in the current provision and the current clause is not ambiguous.** In any event **I am not persuaded that it would be appropriate to make the change** even if there was an ambiguity in the clause.*

[Emphasis added]

*[22] For the above reasons I will make a determination varying the award with respect to the meal break clause and the overtime clause (**except in relation to overtime for casuals**). Other aspects of the applications are dismissed.*

[Emphasis added]

- 6.4 It is our position SDP Watson's comments in the decision, coupled with the submissions made by the parties to the hearing in December 2010, indicate that the overtime provisions in clause 29 of the Modern Award do not, and should not, apply to casual employees.
- 6.5 The industry is distinctive in that casual employees are not, and traditionally have not been, entitled to overtime (at least not in all states of Australia). This can be in part explained by the characteristics of the Industry identified at paragraph 5.12 above.
- 6.6 The SDA Submission fails to recognise the industrial history of the Retail Award which confirms that casuals have not always had an entitlement to overtime. This was the case irrespective of the legislated hours in a working week or the payment of casual loading. We submit excluding casuals from overtime in the Retail Award was not only deliberate but was made for cogent reasons which are still applicable.
- 6.7 For the above reasons, the Overtime Claim cannot be sensibly described as self evident and therefore requires a significant and substantive application requiring merit based probative evidence in support. This has not occurred.

7. THE REQUIREMENTS OF THE ACT

Section 138

- 7.1 Section 138 conditions what may or must be included in a Modern Award. Section 138 is of a limiting nature. It is important to understand the proper character of this limitation. Section 138 effectively limits the content of a Modern Award "only to the extent necessary" to achieve the Modern Awards objective and the minimum wages objective and must necessarily be read alongside section 134 and section 284 of the Act.
- 7.2 Given that section 134 is intended to create a minimum safety net, the phrase "only to the extent necessary" relates to including terms in Modern Awards only to the extent necessary to create a minimum floor. Once this minimum floor is created, section 138 restrains the Commission from going any further, irrespective of what historically would be called the general industrial merits of the case.

¹⁰ PR504525

- 7.3 Based on the standard outlined in the Preliminary Issues Decision, in order to be successful, the SDA is required to adduce merit based evidence of a probative nature to demonstrate that the variation is necessary such that the Award fulfils the Modern Awards Objective.
- 7.4 No evidence has been produced to support SDA's application for what is a significant change to the Retail Award.

8. CONCLUSION

8.1 The granting of the Overtime Claim:

- (a) represents a fundamental shift in the current practice of the retail industry;
- (b) serves to undermine the Award in meeting the specific demands of the retail industry especially given that the Industry requires short periods of intense activity (including long hours) during key shopping periods;
- (c) lead to increased costs, which, given the extent of casualisation in the industry and the nature of work, are likely to be significant;

8.2 For the reasons outlined above, it is apparent that the proposed variations made in these Proceedings by the SDA:

- (a) are not supported by probative evidence properly directed toward demonstrating the facts supporting the proposed variation in respect of the Retail Award, such as to warrant the Commission exercising its discretion pursuant to s 139 of the Act;
- (b) are not consistent with the Modern Awards Objective as outlined in s 134 of the Act; and
- (c) are not terms that the Full Bench is required to include, only to the extent necessary, to achieve the Modern Awards objective within the scope of s 138 of the Act.

8.3 For all the above reasons, ABI and NSWBC submit that the Overtime Claims should be dismissed.