# DECISION

*Fair Work Act 2009*
s.158 - Application to vary or revoke a modern award

## United Workers' Union
(AM2019/19)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
COMMISSIONER CAMBRIDGE SYDNEY, 2 JULY 2020

*Application to vary the Security Services Industry Award 2020.*

**Introduction and background**

**[1]** The United Workers' Union (UWU) has lodged an application pursuant to s 158 of the *Fair Work Act 2009* (FW Act) for the Commission to exercise its power under s 157(1)(a) to vary the *Security Services Industry Award 2020* (Security Award 2020). The Security Award 2020 took effect on 18 June 2020. At the time the UWU's application was filed, the *Security Services Industry Award 2010* (Security Award 2010) was in effect, and that application was drafted by reference to that award. The application was amended and, as pressed at the hearing, sought two substantive variations:

(1) Delete current clause 21.1(a) and insert the following:

Ordinary hours and roster cycles

(a) The ordinary hours of work are 38 hours per week or, where the employer chooses to operate a roster, an average of 38 hours per week to be worked on one of the following bases at the discretion of the employer but subject to sub-clause (b) below:

(i) 76 hours within a roster cycle not exceeding two weeks;

(ii) 114 hours within a roster cycle not exceeding three weeks;

(iii) 152 hours within a roster cycle not exceeding four weeks; or

(iv) 304 hours within a roster cycle not exceeding eight weeks.

(2) Insert a new clause 21.1(b) as follows:

(b) Overtime rates will be paid for any time in excess of the hours prescribed for each roster cycle in clause 21.1(a).

**[2]** The UWU's application is intended to address a concern it holds as to the rostering of overtime on certain types of rosters. It describes the purpose of the variation as seeking to align the treatment of overtime under the award with the "*accepted industrial meaning of the term*" and to ensure that an employer covered by the award "*cannot arbitrarily allocate overtime hours within a roster cycle regularly and systematically to hours where the overtime penalty is absorbed within another penalty*". The UWU said in its written submissions:

> "The variation is responsive to the development within the sector covered by the Award of a rostering practice of arbitrarily labelling Saturday and Sunday hours, often early in a roster cycle, as overtime hours when the roster requires an employee to then work hours in excess of ordinary hours labelled as ordinary hours ('the Practice')."

**Statutory framework**

**[3]** The UWU's application seeks the exercise by the Commission of power under s 157(1)(a) of the FW Act, which provides:

> (1) The FWC may:
>
> (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; ….
>
> if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

**[4]** The modern awards objective is set out in s 134(1) as follows:

> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) working overtime; or
>
> (ii) working unsocial, irregular or unpredictable hours; or
>
> (iii) working on weekends or public holidays; or

(iv) working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

**[5]** As discussed further below, the UWU contends that there is an inconsistency between what the Security Award 2020 permits in respect of the rostering of overtime hours within a roster cycle and the National Employment Standard concerning the maximum weekly hours of work in s 62 of the FW Act. Section 62 relevantly provides:

**62 Maximum weekly hours**

*Maximum weekly hours of work*

(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:

(a) for a full-time employee--38 hours; or

(b) for an employee who is not a full-time employee--the lesser of:

(i) 38 hours; and

(ii) the employee's ordinary hours of work in a week.

(2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

Determining whether additional hours are reasonable

(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee's personal circumstances, including family responsibilities;

> (c) the needs of the workplace or enterprise in which the employee is employed;
>
> (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;
>
> (e) any notice given by the employer of any request or requirement to work the additional hours;
>
> (f) any notice given by the employee of his or her intention to refuse to work the additional hours;
>
> (g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;
>
> (h) the nature of the employee's role, and the employee's level of responsibility;
>
> (i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;
>
> (j) any other relevant matter.

**The Wilson Security litigation**

**[6]** The genesis of the application was litigation between the UWU and Wilson Security Pty Ltd (Wilson Security) and two resultant decisions of the Federal Court of Australia concerning the construction of the Security Award 2010. The litigation concerned the way in which Wilson Security constructed a certain type of roster for employees in the Australian Capital Territory. The roster was intended to provide security coverage for 24 hours per day, seven days per week. This was covered by rostering two 12-hour shifts each day. The roster cycle operated over a four-week period, with individual employees working day shifts for two of those weeks and night shifts for the other two weeks. Each employee worked a total of 168 hours each roster cycle, consisting of 152 ordinary hours and 16 overtime hours.

**[7]** Prior to 31 October 2016, Wilson Security constructed the roster so that the overtime fell at the end of the roster (and was equally allocated to the last two shifts in the roster). Two earlier ordinary-time shifts in the roster which fell on a Sunday were therefore subject to the Sunday double-time penalty rate provided under the Security Award 2010, and the overtime on the last two shifts attracted the overtime penalty rates. However, from 31 October 2016, Wilson Security changed the construction of the roster so that the 16 hours of overtime were allocated to the two Sunday shifts. This meant that the Sunday overtime penalty rates substituted for the Sunday ordinary-time penalty rates, and the last two shifts were simply paid as ordinary time. The effect of this was to reduce the income of employees across the roster. The UWU (then named United Voice) contended that this constituted a breach of the Security Award 2010 and, in conjunction with an affected employee, Mr Davis, commenced proceedings in the Federal Court against Wilson Security.

**[8]** In a decision issued on 16 August 2018,[1] the Court (Tracey J) rejected the UWU's case that Wilson Security's new rostering practice constituted a breach of the Security Award 2010. The case advanced by the UWU, and the question to be determined, were characterised by the Court as follows:

> "[28] United Voice and Mr Davis contended that:
>
> - It was open to an employer, under the Award, to adopt a four week roster cycle: see cl 21.1(a)(iii).
>
> - Overtime penalties are payable in respect of hours above 152 hours in that four week cycle.
>
> - Clauses 22 and 23 of the Award have the effect that:
>
> - The first 152 hours worked in the four week roster cycle are ordinary hours; and
>
> - Hours in excess of an average of 152 are overtime and payable at the overtime rates prescribed by cl 23.3.
>
> [29] Implicit in these submissions are the propositions that:
>
> - The overtime hours are not worked until all 152 ordinary hours are worked in a four week period. That is, no overtime can be worked until all ordinary hours have been completed. In this sense the two sets of hours are mutually exclusive and sequential. There is, as a result, no scope for the working of, and payment for, overtime hours before all ordinary hours have been worked.
>
> - It is not open to an employer to fix the rostering arrangements such that workers are prevented from being paid both weekend penalty rates and overtime during the four week cycle.
>
> [30] The question then becomes whether these implied restrictions on rostering find support in the text of the Award."

**[9]** The Court concluded as follows:

> "[49] The Award provides for ordinary hours (that is, 38 hours per week) to be averaged over two, three, four or eight week roster cycles "at the discretion of the employer": cl 21.1(a). It also provides for additional payments for the working of overtime hours: cl 23.3.

[1] [2018] FCA 1215; 281 IR 352

> [50] Rostering arrangements are within the discretion of the employer. Consistently with the existence of this discretion the Award does not contain any express restrictions on the exercise of that power. In particular it is open to an employer:
>
> - to choose the day on which a roster is to begin;
>
> - to decide whether overtime hours can be included in the roster at a point before which all ordinary hours have been worked;
>
> - to decide on the number of days on which ordinary hours can be worked; and
>
> - to fix the number of days of the week on which ordinary hours are to be worked (subject to the limitations prescribed by cls 21.3 and 21.4).
>
> [51] Absent such express restrictions, the ordinary and natural language of the Award, in my view, permits an employer to act in the manner in which the respondent has done in the present case.
>
> [52] The language employed by the draftsman of the Award does not compel the reading in of the kind of restrictions contended for by United Voice. Nor is this rendered necessary in order to ensure the effective operation of the Award provisions. Decisions of industrial tribunals of long standing have favoured contrary constructions… What these conflicting decisions highlight is the absence of any clearly understood and mutually accepted understanding of the operation of the rostering provisions and the allocation of overtime to Sundays. Given these circumstances it is all the harder to support the implication of terms in the Award which do not appear.
>
> [53] The Court should be hesitant to read in restrictions in an award which, if not complied with, might give rise to penal consequences under the FW Act.
>
> [54] The constructional dispute is, as I have already observed, one of long standing. Throughout that period it has been open to either party to apply to the FWC for an amendment to the Award to make it clear, one way or another, whether or not employers should be restricted in the manner contended for by United Voice. That option remains open."

**[10]** The Federal Court Full Court rejected an appeal from the above decision in a judgment issued on 26 April 2019.[2] Two aspects of the judgment are significant. First, the Court noted the argument advanced by the appellants that overtime, as a matter of the ordinary meaning of the term understood in its historical industrial context, meant hours worked *after* the prescribed number of ordinary hours had been completed. The Full Court rejected this, saying:

---

[2] [2019] FCAFC 66

> "[30] Properly considered, "overtime" means no more than it states and has been long understood on the authorities referred to above – over, or more, than ordinary hours, in relation to the period of time for which ordinary hours apply. The chronological limitation Mr Davis seeks to impose is the product of historic usage and application, rather than inherent meaning. Even that usage and application does not necessarily support the appellants' argument. It is an amount of time that is over the ordinary hours, not necessarily after the ordinary hours, even if it more commonly, or even invariably, takes place after those ordinary hours will be, or have been, worked.
>
> [31] If the ordinary hours under consideration are those of a single day, then overtime may be such extra hours to be worked before those ordinary hours, or after those ordinary hours, being the number of hours that will be in excess of ordinary hours. The same approach may be taken on a weekly basis, or, as in this case, a four-weekly basis, but with the additional element that the overtime hours may take place not just before or after the ordinary hours for the week or four weeks have been, or will be, worked, but also during a period in which ordinary hours are worked, or will be worked."

**[11]** Second, the Full Court then stated the following conclusions concerning the proper construction of the award:

> "[34] If words in the Award permit Wilson Security to roster overtime prior to the point in time at which ordinary hours will have been worked, and the ordinary meaning of overtime is not confined to the period after ordinary hours have been worked, it is not to the point that this might otherwise be seen as unlikely, out of step with how overtime might have been historically and conveniently organised, or, if done without due care, produce impracticalities and even involve a measure of arbitrariness from Mr Davis' perspective.
>
> . . . .
>
> [36] Clause 21.1 of the Award provides that the employer could choose to operate a roster whereby the ordinary hours of work were an average of 38 hours per week to be worked on one of four bases at the discretion of the employer. No roster was in evidence, but the hearing below and this appeal proceeded on the basis of admitted facts, as reflected in the table in the primary judge's reasons, reproduced at [7] above. Clause 21.1 had the effect that, because the respondent chose to operate a four week roster, the ordinary hours of work were 38 hours per week averaged over four weeks, being a total of 152 ordinary hours over a four week roster.
>
> [37] Wilson Security elected to roster 152 ordinary hours within a roster cycle involving 12 hour shifts over a 4 week period. Clause 21.2(a)(ii) required ordinary time shifts for full-time employees to be limited to a maximum of 10 ordinary hours. Clause 21.2(b) permitted each such shift to be up to 12 ordinary hours, by agreement between an employer and the majority of employees concerned. By reason of the shift duration of 12 hours without overtime for the last two hours, included in the admitted facts before the primary judge, there must have been the necessary agreement in this case. Ordinary hours were therefore able to be longer than the otherwise maximum of 10 hours per shift, precluding the eleventh and twelve hours necessarily being considered as overtime. Clause 21.2(d) expressly provided that an agreement to have 12 hour shifts of ordinary hours was "not intended to prevent an employer

> implementing 12 hour rosters through the use of regular rostered overtime", subject to s 62 of the of the Fair Work Act.
>
> [38] Clause 21.11 provided that employees must work ordinary hours of work in accordance with a roster. Clause 21.12 provided that the employer must notify employees who work their ordinary hours in accordance with a roster which identified the commencing and ceasing times of the rostered hours of work. Clause 21.12 also provides that additional hours that are required of any employee once a roster has issued, and for which less than seven days' notice has been given, results in overtime being payable for that time, which could conceivably occur before a four-week roster period has even commenced.
>
> [39] As noted above, the key feature of overtime is that it involves extra hours to ordinary working hours, whether that be hours for which insufficient notice is given to be ordinary hours, hours that occur before ordinary working hours, or simply hours that are more than ordinary working hours in the four week period. Once that characteristic of an excess over ordinary hours is present, the obligation on an employee to perform those extras hours, whenever they are rostered to take place, is qualified, rather than absolute: the requirement to work the extra hours, whenever they might be required, must be reasonable in the circumstances dictated by s 62 of the Fair Work Act. Reasonableness is to be ascertained in context, including the total number of hours to be worked. Viewed in this way, while the protection in s 62 may be somewhat diminished by Wilson Security's approach to rostering overtime, its protective function is not rendered otiose.
>
> [40] Because Wilson Security had an obligation under cl 21.12 to roster ordinary hours, it follows that it could choose what hours would be worked as ordinary hours. By notifying Mr Davis that his overtime hours would be allocated to Sundays, Wilson Security necessarily notified him that the other rostered hours, which did not exceed 152 hours in number, were to be worked as ordinary hours. From 31 October 2016, Mr Davis' ordinary hours included shifts 13 and 14 on a Wednesday and Thursday, and consequently no overtime was payable in respect of those shifts."

**Relevant award provisions**

**[12]** A number of provisions of the Security Award 2020 are relevant to the UWU's application. Firstly, clause 13.1 of the Security Award 2020 provides:

> **13.1** If the employer chooses to operate a roster, the average of 38 ordinary hours per week required for full-time employment may be worked in any of the following ways at the discretion of the employer:
>
> **(a)** 76 hours over a roster cycle of up to 2 weeks; or
>
> **(b)** 114 hours over a roster cycle of up to 3 weeks; or
>
> **(c)** 152 hours over a roster cycle of up to 4 weeks; or
>
> **(d)** 304 hours over a roster cycle of up to 8 weeks.

**[13]** In terms of daily hours, clause 13.3(a)(i) provides that full-time employees must be rostered a minimum of 7.6 hours per shift. Clause 13.3(b) provides that the maximum daily hours are 10, subject to clause 13.3(c), which allows for 12-hour shifts by agreement and subject to certain prerequisites being met. Clause 13.5(a) provides that "*The employer must prepare a roster showing, for each full-time or part-time employee who works on a roster, their name and the times at which they start and finish work*."

**[14]** Clause 19.2(a) of the Security Award 2020 operates in conjunction with clause 13 to define when overtime rates are payable to full-time employees as follows:

> 19.2 Payment of overtime
>
> **(a)** An employer must pay a full-time employee at the overtime rate for any time worked in excess of their ordinary hours.

**[15]** Clause 19.3 provides for overtime penalty rates of 150% for the first two hours and 200% thereafter on Monday-Saturday, 200% on Sunday and 250% on public holidays.

**[16]** Clause 20.2 provides for penalty rates for ordinary hours worked during various times of the week. Relevantly, clause 20.2 provides that full-time employees are to be paid 150% for ordinary hours worked on Saturdays and 200% on Sundays.

**Evidence and submissions**

*United Workers' Union*

**[17]** The UWU submitted that security work in the contract security industry is characterised by the use of consecutive 12 hours shifts of both day and night work, rostered over roster cycles of up to 8 weeks. In this context, a 4 on, 4 off roster pattern is typical, and the UWU characterised this as involving "*unrelenting*" long durations of work. The UWU made the following submissions in relation to "the practice" of rostering overtime on such roster patterns to fall on Sundays:

- it is inconsistent with s 62(1) of the FW Act, since it allows an employer to require an employee to work unreasonable additional hours in circumstances where it is not reasonable to require an employee to work additional hours as overtime if the only reason for treating the work as nominal overtime hours is to avoid the payment of the overtime penalty on those hours, and where employees are effectively denied the opportunity to refuse to work additional hours;

- the effect of "the practice" is that an employee who works 152 hours and is fatigued would not be permitted to refuse to work their remaining shifts because they are notionally ordinary hours rather than overtime;

- the practical effect of "the practice" is that low-paid employees are not compensated adequately for the disutility of overtime and work on Sundays;

- "the practice" also gives rise to distinct disutility as it creates impediments that should not exist to an employee taking annual leave, diminishes the amount of

superannuation payable for employees on shift work and distorts decision-making by employees about personal leave;

- "the practice" when implemented results in low-paid employees covered by the Security Award 2020 receiving less remuneration for working the same roster pattern, contrary to the consideration in s 134(1)(a);

- overtime, on its ordinary meaning, means those hours worked after the completion of ordinary hours, not hours allocated at the discretion of the employer;

- whether hours are ordinary hours or overtime hours is a function of the hours worked by the employee, not the employer's decision to label certain hours as overtime; and

- "the practice" is not simple and easy to understand.

**[18]** The UWU relied on five statements of evidence:

- two statements and attached reports of Associate Professor Olav Muurlink dated 29 February 2016 and 13 May 2019 respectively;

- statement of Grant Robinson dated 17 December 2019; and

- statement of Robert Nikic dated 18 December 2019; and

- statement of Jed Moore dated 29 May 2020.

**[19]** Associate Professor Muurlink's statements and reports gave an overview of research which demonstrated the fatigue and disabilities associated with working long hours. Mr Robinson is a security guard employed by Wilson Security, and is covered by an enterprise agreement. He works at a defence base in South Australia, and works on an 8-week roster under which he works 3 consecutive 12-hour shifts and then an 8 hour shift. He gave evidence that Wilson Security changed the rostering of his overtime in 2019 so that overtime would be rostered only on Saturday nights and Sundays, which had the effect of reducing his remuneration. He described the fatigue effect of working shift work, and the effect on his social life of working 6 weekends out of 8.

**[20]** Mr Nikic gave evidence that he was employed by Serco Sodexo as a security guard at a RAAF base until 2014, and from 2014 was employed full-time on a 4 on, 4 off roster over 8 weeks with 32 hours rostered overtime. He said that in July 2014, Serco lost the contract to MMS Security. He was offered a full-time position with MSS doing the same work on the same roster, which he accepted, but on its rosters MSS allocated overtime to Saturdays or Sundays. This caused a reduction in his remuneration, and also meant that if he took annual leave, he would not be paid for the Sunday, and he cannot take personal leave if he falls ill on a Sunday. Mr Nikic described the fatigue effects of working shift work and the effects it had on his family and social life.

**[21]** Mr Moore is the General Counsel for ISS Facility Services, which is the largest provider of contract security services in the Australian aviation sector. Mr Moore gave evidence regarding rostering practices at ISS, and said that ISS did not roster overtime earlier in the roster cycle prior to the conclusion of ordinary hours. On that basis, Mr Moore said that

the grant of the UWU's application would not affect the manner in which ISS managed its security work and, accordingly, ISS did not oppose the application.

*Australian Security Industry Association Limited (ASIAL)*

**[22]** ASIAL opposed the UWU and submitted that:

- what was sought by the UWU would make it unlawful to roster efficiently, having regard to operational requirements and penalty rates applicable, and require employers to roster inefficiently with a view to maximising the penalty and overtime rates that employees can receive;

- the premise of the UWU's application, namely that it sought to align the award's treatment of overtime with the accepted industrial meaning of the term, was directly contrary to how the Full Court defined overtime in the Wilson Security decision;

- the UWU was unable to demonstrate that the award variations it sought were necessary to achieve the modern awards objective; and

- "the practice" concerning rostering of which the UWU complained was not new, and has been permitted by the current and predecessor awards and has been implemented in practice for many years across most of the industry.

**[23]** ASIAL relied on evidence from three witnesses. Mr Jamie Adams, the General Manager - Victoria and Tasmania for MSS Security, gave evidence that:

- the security services industry is highly competitive;

- a significant portion of the industry employs a majority of security guards as shift workers covering shifts across a 24-hour span, 7 days per week;

- MSS usually rostered employees on 12-hour shifts across an 8-week roster cycle, and such shifts were preferred by employees;

- MSS had endeavoured to roster overtime on Sundays for many years, and to change its rostering in the way preferred by the UWU would cause an increase in wage costs of about 4 percent;

- alternatively, MSS could reduce each employee's hours and employ additional persons to cover the roster, but this would reduce employees' earnings and take away their 12-hour shifts, which would be unpopular.

**[24]** Mr Daniel Goodwin, the National Strategic Account Manager of Wilson Security, gave evidence that the security services industry was highly competitive and, due to competition in the market, Wilson Security operated on a low profit margin in order to win and retain work. He said that allocating overtime to Saturday nights and Sundays was the most cost efficient method because Wilson Security did not have to pay weekday overtime to an employee and then weekend penalty rates for ordinary hours worked on a weekend. Not allocating overtime this way would increase costs by about 4 percent and, to avoid this,

Wilson Security would have to cut employees' hours and employ additional casual employees.

**[25]** Mr Chris Delaney, the Workplace Relations Advisor of ASIAL, gave evidence that:

- 12-hour shifts were initially introduced into the *Security Industry (New South Wales) Award 1999* in order to meet the demands of clients who required the provision of security guards 24 hours per day, 7 days per week;
- the introduction of 12-hour shifts led to employers introducing a roster pattern of 4 shifts on, 4 shifts off over an 8-week roster cycle, which required 32 hours overtime to be incorporated into the roster for each employee;
- rostered overtime was a common feature of the industry, and the usual practice was to allocate the overtime on the roster in the most cost-efficient way, which usually meant rostering the overtime on Sundays;
- in his experience, it would be rare to roster overtime at the end of a roster cycle after the maximum number of ordinary hours had been reached;
- by the time of the award modernisation process which created the Security Award 2010, it was a well-established industry practice that overtime was rostered at the employer's discretion, and this continued afterwards; and
- his estimate was that 90 percent of security guards are paid under the award, and 50 percent work on a 4-on, 4-off, 8-week roster cycle.

*Australian Business Industrial/NSW Business Chamber (ABI)*

**[26]** ABI submitted that:

- the UWU's proposed variation was unnecessary, given that employees have the right under s 62(2) of the FW Act to refuse to work unreasonable overtime;
- there is already a sufficient range of rostering protections in the Security Award 2020, and these are complemented by penalty rates of working at times of disutility;
- the modern award system generally permits overtime to be worked when other penalties apply without any prohibition or additional penalty;
- the proposed variations were inconsistent with the modern awards objective;
- the proposed variations would not in any event achieve the UWU's own objective or result in any change to the effect of the relevant provisions of the Security Award 2020; and
- the rostering practice preferred by the UWU, whereby overtime would be rostered at the end of the roster cycle, was not practicably possible because it would not permit compliance with the requirement in clause 13.3(a) of the Security Award 2020 that full-time employees be rostered for a minimum of 7.6 ordinary hours per shift.

**Consideration**

**[27]** It cannot be said that the variations sought by the UWU are necessary to achieve the modern awards objection because they would not, if granted, effect any substantive change to the Security Award 2020. The first proposed variation, which seeks a new provision concerning ordinary hours and roster cycles, is no different in effect to the current clause 13.1 of the Security Award 2020. Similarly, the second proposed variation, which would specify that overtime rates are payable for "*any time in excess of the hours prescribed for each roster cycle*" in the proposed new provision concerning ordinary hours and roster cycles, is the same in effect (in respect of full-time employees) as the current clause 19.2(a), which required overtime rates to be paid "*for any time worked in excess of their ordinary hours*".

**[28]** It was tentatively suggested by the UWU that the drafting of the Security Award 2020, to the extent that it differs in some respects from the Security Award 2010, is somehow "*helpful*" to its position and may alter the position established in the Federal Court decisions in the Wilson Security litigation. This is rejected. The modernisation in the drafting of the Security Award 2020 carried out as part of the Commission's conduct of the 4 yearly review of modern awards was in no way intended to change the means by which an employer may roster ordinary hours and overtime. The critical textual features of the Security Award 2010 which caused the Federal Court to reach the conclusion about its construction that it did – namely the capacity of an employer to operate roster cycles chosen from one of four options; maximum daily hours of 10 or, by agreement, 12; the obligation of the employer to publish and the employee to work in accordance with a roster setting out the employee's hours of work; and the lack of any restriction as to when any overtime hours are to be placed in that roster – remain in the Security Award 2020. We do not accept the UWU's submission that the requirement in clause 19.2(a) that overtime rates are payable "*for any time worked in excess of their ordinary hours*", which did not appear in the Security Award 2010, supported its desired position. As earlier set out, the Full Court proceeded on the basis that overtime on its ordinary meaning referred to hours worked that are *over*, *or more*, than ordinary hours, not hours worked *after* ordinary hours. The description in clause 19.2(a) of overtime as hours worked *in excess of* ordinary hours is entirely consistent with the Full Court's approach.

**[29]** If this was *inter partes* litigation, the conclusions we have stated would provide a proper basis for the dismissal of the UWU's application. However s 599 provides that the Commission is not required to make a decision in relation to an application in the terms applied for. Therefore, although the award variations sought by the UWU if granted would not achieve its desired objective, it would be open us to craft award variations which did meet that objective if we considered that the UWU's case had substantive merit.

**[30]** However, we do not consider that the UWU's case has merit, for the following six reasons. First, the UWU's contention that the ordinary or traditional industrial concept of overtime involves hours worked *after* the completion and not merely *in excess* of the prescribed number of ordinary hours was considered and rejected in paragraph [30] of the Full Court's decision. We cannot identify any proper basis to revisit that issue in the present proceedings.

**[31]** Second, this is not a case where the Federal Court decisions reversed or upset a long-established industrial practice. As stated in the judgment of Tracey J, previous decisions of this Commission and its predecessor tribunal concerning the issue of the rostering of overtime

have resulted in conflicting outcomes and "highlight … the absence of any clearly understood and mutually accepted understanding of the operation of the rostering provisions and the allocation of overtime to Sundays". The evidence of Mr Delaney before us was that, since the introduction of 12 hours shifts in the *Security Industry (New South Wales) Award 1999*, the large majority of employers have always taken the approach, where possible, of rostering overtime on the Sundays falling in a roster cycle in order to minimise the payment of penalty rates. Thus, when Wilson Security changed its method of rostering in 2016, it was moving towards the position already adopted long before by most of the industry.

**[32]** Third, the UWU did not advance any workable proposal by which all overtime could be allocated to the end of the roster. Both the 2010 and 2020 iterations of the Security Award require that full-time employees have a minimum of 7.6 ordinary hours rostered per day but, as was pointed out by ABI, it is not possible to meet this requirement for shifts at the end of the roster cycle if overtime must be rostered at this point. It seems to be the case that the roster operated by Wilson Security in the ACT prior to 31 October 2016 did not comply with this requirement. The UWU accepted that, in order for the roster to provide for a minimum of 7.6 ordinary hours per day, it would be necessary to manipulate the rostering of overtime so that it was spread over the last few days of the roster. This would not be consistent with its own conception of overtime, since this would still require overtime to be rostered before the exhaustion of all ordinary hours. Thus, it appears, it is simply not possible to achieve the UWU's objective in relation to the types of roster typically used in the contract security industry.

**[33]** Fourth, what is proposed by the UWU would involve a wages cost to employers outside of and in addition to annual wage review increases of approximately 4 percent. The evidence before us was that many employers in the contract security industry either operate on preserved pre-FW Act "*zombie*" agreements which undercut the Security Award 2020, or simply do not comply with the award and/or pay their employees unrecorded cash payments. The imposition of this cost burden would cause further competitive disadvantage to those employers who comply with the award and further destabilise the modern award system in the industry in circumstances where, the evidence demonstrated, direct wage costs typically constitute about 75 percent of total costs and labour costs inclusive of on-costs constitute about 90 percent of total costs.

**[34]** Fifth, the UWU did not articulate a proper basis for the proposition that the relevant provisions of the Security Award 2020 are such as to result in it not achieving the modern awards objective in s 134(1). From the perspective of employees, the critical consideration in the modern awards objective is s 134(1)(da)(i) and (iii) (which we have earlier set out). Where employees have overtime rostered on a Sunday, they are required to be paid double time for all such hours in accordance with clause 19.3 of the Security Award 2020. That penalty rate is intended to compensate for the double disability of working overtime hours and working on Sundays, as evidenced by the fact that the overtime rate is higher for Sundays than for other days, and thus on any view satisfies "*the need to provide additional remuneration*" for such hours worked.

**[35]** Sixth, the contention that, because the provisions of the Security Award 2020 permit "the practice" to occur, s 62 of the FW Act is in some way excluded is rejected. The mere fact that overtime is included in a roster does not mean that an employee is deprived of the right under s 62(2) to refuse to work such overtime if it is unreasonable. The right applies no matter how the overtime is allocated across the roster. Indeed, on one view, the rostering of overtime

in accordance with "the practice" places the employee in a more beneficial position, since the employee will have the right under s 62(2) to refuse to work rostered overtime on Sundays if it is not reasonable for them to do so. That is a right not available when only ordinary time hours are rostered on Sundays as a result of overtime being allocated to weekdays at the end of the roster.

**[36]** Beyond this, the UWU's contentions as to the fatigue effects associated with the type of rosters the subject of its application appear to us to be an irrelevancy. To the extent that such rosters cause fatigue, that will occur regardless of the way in which the overtime hours are allocated across the roster. The evidence before us suggested that 12 hour shifts worked across multi-week rosters that include rostered overtime are relatively popular with employees, and Mr Nikic and Mr Robinson did not give the impression that they have any real desire to work less hours (and thereby earn less) than they currently do, regardless of how they are paid. From the perspective of employers, such rosters are an established feature of the industry and are unlikely to change.

**[37]** For the above reasons, we are not satisfied that the variations to the Security Award 2020 sought by the UWU, or any variations to the relevant provisions of the award, are necessary to meet the modern awards objective. Accordingly, the UWU's application is dismissed.


VICE PRESIDENT

*Appearances*:

*Mr S Bull* on behalf of the United Workers' Union.
*Mr T McDonald* on behalf of Australian Security Industry Association Ltd.
*Mr L Izzo* on behalf of Australian Business Industrial and New South Wales Business Chamber.

*Hearing details:*

2020.
Sydney:
17 and 18 June.

Printed by authority of the Commonwealth Government Printer

<PR720686>