DECISION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Variation of *Professional Employees Award 2020* on Commission's own motion

(AM2022/7)

Scientific services

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER P RYAN SYDNEY, 16 MARCH 2023

Professional Employees Award 2020 – Commission acting on its own motion – hours of employment and overtime – coverage.

Introduction

[1] On 20 January 2023 we issued a decision (*January 2023 decision*)[1] in which we decided to vary the *Professional Employees Award 2020* (Award) in respect of two issues:

(1) the hours of work and overtime provisions; and

(2) the coverage provisions.

[2] A draft determination to give effect to the decision was issued concurrently with the *January 2023 decision*. In respect of the first issue identified above, the draft determination proposed variations to clause 13, *Ordinary hours of work*, the insertion of a new clause 18, *Overtime and penalty rates*, and consequential variations to the pay rate tables in Schedule C, *Summary of Hourly Rates of Pay*. As to the second issue, the draft determination proposed a variation to Schedule A *Classification Structure and Definitions*.

[3] In the *January 2023 decision*, interested parties were invited to file submissions in response to the draft determination by 10 February 2023.[2] The following parties filed submissions:

- Australian Business Industrial and NSW Business Chamber (ABI and the NSWBC);[3]
- Australian Industry Group (Ai Group);[4] and

- Pritchard Francis.[5]

[4] The Association of Professional Engineers, Scientists and Managers Australia advised by email on 10 February 2023 that it had reviewed the draft determination and did not have any objections nor any further submissions to make in the matter.[6]

[5] None of the parties' submissions opposed the proposed variations to the Award in relation to the coverage provisions. Accordingly, we confirm that this variation will be made. We address the submissions in relation to the hours of work and overtime provisions below.

Submissions

ABI and NSWBC

[6] ABI and the NSWBC expressed a general concern that the draft determination would impose a significantly increased administrative burden because of the requirement to keep employee records and calculate penalty rates. They also submitted that, for businesses not currently paying 25% above the minimum wage rates, they will have to grapple with either implementing the administrative requirements that would be necessary to comply with the requirements or increasing salaries across the board. The cost burden of this, it was submitted, would disproportionately impact the employment of graduates and early-stage professionals because they are less likely to be paid at 25% above the relevant minimum rate. In addition, employees already working flexible hours to suit their needs, including by working before 6.00 am and after 10.00 pm, may not be permitted to continue working in accordance with these working patterns.

[7] More specifically, ABI and the NSWBC submitted that an averaging provision for ordinary hours, which has been omitted from proposed clause 13.1, should be included in the Award. ABI and the NSWBC expressed concern that the reference to simply working 38 ordinary hours per week in clause 13.1, without more, will detract from user understanding that the Award is intended to permit flexibility with respect to hours of work. This, they submit, may be compounded by the deletion of clauses 13.2 to 13.6 which contemplate flexibility with respect to hours of work.

[8] ABI and the NSWBC submitted the requirement in proposed clause 18.2(a) that all hours worked in excess of 38 hours per week be paid at the appropriate minimum hourly rate, including work on or in connection with call-backs and work performed on electronic devices or otherwise remotely, will be extremely burdensome since employers will be required to somehow account for every occasion an employee checks an email or text message outside working hours, even where this only takes a few minutes or is not required to be undertaken by the employer. ABI and the NSWBC further submit that the time involved in calculating time off in lieu (TOIL) or the additional pay required could outweigh any benefit which might arise from the employee undertaking the work.

[9] ABI and the NSWBC also noted that the proposed clause does not allow for rounding the additional time worked to the nearest 15 or 30 minutes, unlike other modern awards such as clause 25.10(c) of the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award). ABI and the NSWBC proposed the following additions (in

underline) to clause 18.2(a) of the Award to address their concerns, drawing on clause 25.10(c) of the SCHADS Award:

> (a) The employer must, subject to clauses 18.3, 18.4 and 18.5, pay a full-time employee the appropriate minimum hourly rate in clause 14 for all hours worked in excess of 38 hours per week. This must include work on or in connection with call-backs and work performed on electronic devices or otherwise remotely <u>where an employee is required by their employer to perform such work.</u>
>
> <u>An employee who performs work on or in connection with call-backs and work performed on electronic devices or otherwise remotely must maintain and provide to their employer a time sheet or other record acceptable to the employer specifying the time at which they commenced and concluded performing any work and a description of the work that was undertaken. Such records must be provided to the employer within a reasonable period of time after the work is performed.</u>

[10] ABI and the NSWBC also submitted that there should be a transitional arrangement for the implementation of the changes to the Award to provide employers time to ensure their systems and processes can support compliance. Additionally or in the alternative, ABI and the NSWBC proposed a delayed commencement date to ensure that businesses can plan how best to make the changes work for their enterprise and establish relevant systems. They noted that some of their member organisations have proposed a commencement date of 1 July.

Ai Group

[11] The Ai Group first submitted that the Award should continue to permit the averaging of ordinary hours in relation to full-time and casual employees because the existing clause 13.2 permits averaging and its removal may unjustifiably disrupt existing arrangements in that many professional employees are paid an above-award annual salary intended to compensate them for all hours worked. In determining the salary, many employers may have proceeded on the basis that they can average an employee's ordinary hours over a period of 12 months. In addition, the Ai Group submitted that it may not be practicable for employees to be provided with 38 ordinary hours each week, and the inclusion of an ability to average ordinary hours would mitigate some of the adverse impacts on employers that will flow from the *January 2023 decision*. The Ai Group also noted that the hours of part-time employees can be averaged under clause 10.1 of the Award, and that a large number of modern awards in a broad range of industries permit the averaging of ordinary hours, including some that also cover professional employees. The Ai Group proposed that the Award should include a provision in the following terms (in lieu of current clause 13.2):

> 13.2 An employer and employee may agree that the employee's ordinary hours will be averaged over a period of up to 12 months.

[12] Consistent with this, the Ai Group submitted that proposed clause 18.2(a) should be amended to take into account averaging arrangements.

[13] The Ai Group next noted that proposed clause 18.2(a) creates an obligation to pay full-time employees in respect of overtime "*for all hours worked*" in excess of 38 hours, and contrasted this with proposed clause 18.4(a), which creates an obligation for employers to pay penalty rates for "*all hours worked at the direction of the employer*" during the periods specified. The Ai Group submitted that professional employees may elect to undertake activities that could be characterised as performing additional hours of work for a range of reasons that do not encompass a requirement by their employer to undertake such work, and it would be inappropriate and unjustifiable to require employers to pay employees in respect of hours of work they are not authorised to undertake. It proposed that clause 18.2(a) should be amended to require payment only in respect of hours worked at the direction of the employer, consistent with the approach adopted in respect of proposed clause 18.4(a).

[14] The Ai Group raised a number of concerns about the final sentence of the proposed clause 18.2(a), which provides that payment for work in excess of 38 hours per week "*must include work on or in connection with call-backs and work performed on electronic devices or otherwise remotely*". It submitted that the proposed provision would give rise to an entitlement for employees to be paid in respect of *any* work performed remotely or on an electronic device, including where this is done voluntarily and, in addition, the scope of the provision is unclear and of inappropriately broad import. The Ai Group proposed that similar language to clause 25.10(b)(iii) of the SCHADS Award be adopted, so that proposed clause 18.2(a) would be amended to provide:

> (a) The employer must, subject to clauses 18.3, 18.4 and 18.5, pay a full-time employee the appropriate minimum hourly rate in clause 14 for:
>
> (i) All time worked at the direction of the employer in excess of 38 ordinary hours per week; or
>
> (ii) All time worked at the direction of the employer in excess of an average of 38 ordinary hours per week, where an employee's ordinary hours are averaged in accordance with clause 13.2.
>
> (b) For avoidance of doubt, clause 18.2(a) applies to all overtime worked at the direction of the employer on a call-back and work that is not required to be performed at a designated workplace (for example, work performed on an electronic device at the employee's place of residence).

[15] As to proposed clause 18.5, the Ai Group submitted that by imposing record keeping requirements in respect of *all hours* worked on a Sunday or public holiday or before 6.00 am or after 10.00 pm on a Monday to Saturday, rather than only imposing this requirement in respect of overtime hours, the clause extends beyond the scope of what was contemplated in the *January 2023 decision*. This submission is based on the Ai Group's conclusion that the sole basis for proposed clause 18.5 is to require records to be kept in respect of overtime because reg 3.34 of the *Fair Work Regulations 2009* (Cth) will not apply. It submitted that a provision requiring an employer to keep records of ordinary hours worked at the aforementioned times is not "necessary" for the purposes of s 138 of the *Fair Work Act 2009* (Cth) (FW Act) and would unjustifiably and unnecessarily impose a new regulatory burden on employers. The Ai Group proposed that clause 18.5 instead provide as follows:

18.5 The employer must keep records of all overtime hours worked by an employee.

[16] The Ai Group submitted that any changes relating to hours of work and overtime should not commence operation until at least 12 months following the date the final determination is published. This is necessary, it submitted, because:

- Employers will need to ascertain the extent to which its employees have a contractual entitlement to an annual salary that exceeds the relevant minimum salary prescribed by the Award by 25% or more which will require consideration of the contractual arrangements in relation to each employee separately.

- In respect of employees who do not have a contractual entitlement to a salary that is 25% higher the minimum salary under the Award, employers may have to choose whether to provide such an entitlement to avoid the requirement to pay by the hour and keep associated records, and should be provided with a reasonable opportunity to undertake the required analysis in order to make this assessment and implement any new arrangements.

- Employers will likely need to change their payroll, time and attendance, and rostering systems to facilitate the payment of wages in accordance with the new provisions; to create and maintain the required records; and to facilitate the accrual and taking of time off in lieu of payment for overtime. This will often take months.

- Employers will likely need to revisit and revise contractual arrangements in place with employees covered by the Award.

- Employers may need to revisit and revise internal policies or other similar sources that may deal with how an employee is to be compensated for performing additional hours of work, and will need to consider, more broadly, how work is allocated, how it is distributed, how employees are supervised and the way in which they are managed.

- Some employers may experience unexpected costs from the new obligations to be imposed or the implementation of the proposed changes.

- Employers will need to educate and train various parts of their workforce about the variations made to the Award, as well as corresponding changes made in their business to implement the variations.

[17] Finally, the Ai Group submitted that the Award should be varied to permit the new overtime and penalty rates to be absorbed into over-award payments and to make clear any new Award terms do not require employers to maintain or increase over-award payments. It submitted in this respect that employees covered by the Award are commonly paid above-Award salaries intended to compensate them for the performance of all work, and extant common law arrangements between employers and employees may not contemplate an ability to rely on over-award payments in order to satisfy the new monetary obligation. As such, employers may not be able to absorb the new obligations into over Award payments,

particularly because an employer cannot unilaterally alter existing contractual arrangements. The Ai Group proposed the following new provision to resolve this:

> The monetary obligations imposed by clauses 18.2-18.4 may be absorbed into over-award payments. Nothing in clauses 18.2-18.4 requires an employer to maintain or increase any over-award payments.

[18] The Ai Group submitted that the above provision may be included in a modern award under s 139(1)(a), (1)(d) and (1)(e) of the FW Act, and its inclusion is necessary to meet the modern awards objective in s 134(1).

Pritchard Francis

[19] Pritchard Francis is an engineering consultancy business which employs professional engineers covered by the Award. It submitted that it employed professionals on annualised salaries greater than the Award rates. In respect of the proposed variations to the Award concerning overtime and penalties, it noted that this would mostly affect graduate engineers, who are currently paid about 18% above the Award rate, whereas more experienced professionals are paid 25% or more above the Award rate. It submitted that any increase to graduate salaries would have a flow-on effect for all employees to maintain separation that recognises experience and capability, which would increase the business' employment costs considerably.

[20] In its submission, Pritchard Francis said it disagreed with the conclusions in the *January 2023 decision* concerning the modern awards objective, and contended that the variations would result in a reduction in graduate hires, thereby reducing graduate employment options, reduce highest-income workers' participation due to higher costs and the need to meet this by charging higher fees, increase employment costs and regulatory burdens, and affect the construction industry because of increased costs of professional employees.

[21] As to the draft determination, Pritchard Francis submitted that:

- averaging of ordinary hours over 12 months should be permitted;
- proposed clauses 13.2-13.6 should be deleted; and
- proposed clause 18 should provide for an exemption for annualised wage arrangements, whereby employees would be provided with an annualised wage that identifies how many reasonable additional hours can be worked based on their individual annualised wage agreement, with overtime being paid when additional hours to this are worked.

Consideration

[22] To the extent that the submissions of ABI and the NSWBC and Pritchard Francis suggest that we should fundamentally depart from the conclusions reached in the *January 2023 decision* concerning reform of the hours of work and overtime provisions of the Award, those

submissions are rejected. Without restating the reasoning in the *January 2023 decision*, the following points may be (re-)emphasised:

(1) For employers which pay employees covered by the Award more than 25% above the minimum rates prescribed by the Award, the variations proposed will have no impact. The evidence before us indicates that this constitutes a large proportion of the employees covered by the Award: the evidence cited at paragraph [15] of the *January 2023 decision* shows that, for example, the median pay for professional engineers for at classification levels 2, 3 and 4 was well in excess of 25% more than the minimum Award rate. Only in respect of Level 1 engineers was median pay less than the Award rate plus 25%. This broadly confirms what is stated in Pritchard Francis's submissions that any issue which may arise is concerned primarily with graduate engineers.

(2) In respect of employees earning less than the 25% threshold, the variations do not cause the employer to incur any additional cost if the employee's hours of work are confined to 38 hours per week, Monday to Saturday, between the hours of 6.00 am and 10.00 pm. Further, even where the employee works hours in excess of 38 within that time span, this need not cost the employer anything if the TOIL provisions are accessed.

(3) It is not the case, with respect to overtime hours and work at unsociable hours, that the variations proposed in the *January 2023 decision* establish payment obligations where none existed before. As explained in paragraph [48] of the *January 2023 decision*, the minimum salaries prescribed by the Award were never intended to constitute the full measure of remuneration for hours worked in excess of 38 per week, or for unsociable hours. Current clauses 13.3-13.6 already have the effect of requiring employers to compensate for work regularly performed in excess of ordinary hours or during unsociable hours. If any employer is currently providing employees covered by the Award no compensation for overtime or for work performed during unsociable hours, that is likely to constitute a contravention of the Award.

(4) The proposed variations would establish a minimalist regime for overtime payments at single time and modest penalty payments for late night, early morning, Sunday and public holiday work in a way which is simple, certain and enforceable.

[23] The specific issues raised in the submissions concern averaging of ordinary hours, the circumstances when overtime is payable, payment for call-backs and work performed on electronic devices/remotely, records of hours worked, transition/operative date and absorption of over-award payments. We will deal with each of these issues in turn.

Averaging of ordinary hours

[24] In the *January 2023 decision*,[7] we proposed not to include a provision for the averaging of ordinary hours because of the minimalist approach we intended to take. One of the matters which informed this approach was that although there was evidence before us of professional

employees frequently working in excess of 38 hours per week, there was no evidence of such employees regularly working less than 38 hours per week such as to make an averaging provision of any practical utility. However, we note that clause 13.2 of the Award currently provides for averaging of ordinary hours over a regular cycle of hours which is worked by agreement. While we do not consider that any basis has been demonstrated for the addition of an entirely new provision allowing for averaging over 12 months, on a fine balance and having regard to the submissions now advanced, we will include an averaging provision which allows for averaging over a period broadly equivalent to the maximum reasonable extent of a regular cycle of hours by agreement. Accordingly, we will add a new provision to follow clause 13.1:

> 13.2 An employer and employee may agree that the employee's ordinary hours of work will be averaged over a period of up to 13 weeks.

[25] There will be a consequential amendment to proposed clause 18.2(a) so that the overtime rate will be payable "for all hours worked in excess of 38 hours per week, or an average of 38 hours per week over a period agreed pursuant to clause 13.2".

Circumstances when overtime is payable

[26] We do not consider that it is appropriate or necessary to include a provision requiring an express direction from the employer for the employee to work overtime in order for overtime to become payable. It is not appropriate because a professional employee under the Award, particularly at more senior levels, will usually not work under close supervision and may be left to exercise their own judgment as to what work needs to be done, and when, in order to meet their employment expectations. In that circumstance, a requirement for a specific direction to work overtime will be inapposite to the role of a professional employee. It is not necessary because clause 18.1 already contemplates, consistent with s 62 of the FW Act, that an employer may *request or require* an employee to work reasonable additional hours.

Payment for call-backs and work performed on electronic devices/remotely

[27] We consider that there is merit in respect of ABI and the NSWBC's submission concerning a requirement for the employee to maintain and provide a record of any work on electronic devices and other remote work, although we do not consider that this requirement should extend to call-backs since these are employer-initiated events. Accordingly, proposed clause 18.2 will be modified to provide:

> **18.2 Payment for overtime**
>
> (a) The employer must, subject to clauses 18.2(c), 18.3, 18.4 and 18.5, pay a full-time employee the appropriate minimum hourly rate in clause 14 for all hours worked in excess of 38 hours per week, or an average of 38 hours per week over a period agreed pursuant to clause 13.2. This must include work on or in connection with call-backs and work performed remotely on electronic devices or otherwise.
>
> (b) This payment is in addition to the minimum annual wage in clause 14.1 prescribed for working ordinary hours.

(c) An employee who performs remote work outside of ordinary hours must maintain and provide to their employer a time sheet or other record acceptable to the employer specifying the time at which they commenced and concluded performing any remote work and a description of the work that was undertaken. Such records must be provided to the employer within a reasonable period of time after the remote work is performed.

NOTE: Part-time and casual employees are paid their hourly rate for work in excess of 38 hours per week in accordance with clauses 10.2 and 11.1.

Records of hours worked

[28] We do not propose to alter proposed clause 18.5, since it will be necessary for the employer to keep records of any ordinary hours worked before 6.00 am or after 10.00 pm on any day Monday to Saturday, or on a Sunday or public holiday, in order to comply with proposed clause 18.4.

Transition/operative date

[29] We accept that employers will need time to adjust their contractual arrangements, work arrangements, record-keeping and pay systems in order to comply with the new provisions concerning hours of work, overtime and penalty rates. Accordingly, the provisions concerning these matters will take effect six months after the date of this decision. The variation to Schedule A will take effect seven days after the date of this decision.

Absorption of over-award payments

[30] We do not propose to make a clause concerning the absorption of over-award payments for the same reasons stated in the 30 September 2015 decision[8] of the Full Bench in *4 yearly review of modern awards* at paragraphs [71]-[74]. In particular, we see no reason to depart from the following general principle stated in paragraph [74] of that decision:

> [74] Modern awards are part of the minimum safety net of terms and conditions established by the Act. It is not the function of such a minimum safety net to regulate the interaction between minimum award entitlements and overaward payments. Such matters are adequately dealt with by the common law principles of set off to which we have referred and should be left to individual employers and employees to determine. It is not necessary to include an absorption clause in modern awards in order to provide a fair and relevant minimum safety net. As the absorption clause is not a term which is necessary to achieve the modern awards objective it cannot be included in a modern award.

[31] The principles concerning the setting off of over-award payments against identified award entitlements are well-established.[9] To the extent that there needs to be some modification of existing contractual arrangements in order to conform to those principles, the operative date we have determined will provide sufficient opportunity for this to be dome.

Conclusion

[32] We consider that the variations proposed in the *January 2023 decision*, as modified in this decision, are necessary to ensure that the Award achieves the modern awards objective in accordance with the requirement in s 138 of the FW Act. We confirm the conclusions concerning the mandatory considerations in s 134(1) stated in paragraph [58] of the *January 2023 decision*. A determination giving effect to the *January 2023 decision* and this decision will be published in conjunction with this decision.

PRESIDENT

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[1] [2023] FWCFB 13

[2] Ibid at [85]

[3] Australian Business Industrial and another – Submission

[4] Australian Industry Group – Submission

[5] Pritchard Francis – Submission

[6] APESMA - Submission (fwc.gov.au)

[7] [2023] FWCFB 13 at [56](1)

[8] *4 yearly review of modern awards* [2015] FWCFB 6656

[9] *Poletti v Ecob* [1989] FCA 779, 31 IR 321; *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* [2001] FCA 1785, 111 IR 227; *James Turner Roofing Pty Ltd v Peters* [2003] WASCA 28, 132 IR 122; *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99, 240 FCR 578, 252 IR 69