DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2016/26)

RAIL INDUSTRY AWARD 2010
[MA000015]

Rail industry

SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT SAMS
COMMISSIONER CAMBRIDGE SYDNEY, 17 FEBRUARY 2017

Four yearly review of modern awards – Rail Industry Award 2010 – substantive issues – rates of pay for work on a Saturday – definition of Level 9 Clerical, Administrative and Professional classification.

[1] This Decision concerns two proposed variations to the *Rail Industry Award 2010* (the modern award) as part of the four yearly review of modern awards conducted by the Fair Work Commission in accordance with s.156 of the *Fair Work Act 2009* (the FW Act).

[2] The first proposal is made by the Australian Rail Tram and Bus Industry Union (RTBU) and the Australian Municipal, Administrative, Clerical and Services Union (ASU) (together the unions), supported by the Australian Manufacturing Workers' Union (AMWU), and concerns rates of pay for work on a Saturday, particularly overtime work. The second proposal is made by a number of rail industry employers[1] (the rail employers) and concerns the proposed inclusion of additional detail in the definition of the level 9 clerical, administrative and professional classification.

[3] Written submissions were received from the Parties. In addition, a Hearing was conducted in Sydney on 3 February 2017. The RTBU was represented by Mr M Diamond, the ASU by Mr M Rizzo, and the AMWU by Mr M Nguyen. The rail employers were granted permission to be represented by Mr A Woods, solicitor.

Relevant statutory provisions

[4] The proposed variations to the modern award arise as part of the 4 yearly review being conducted pursuant to s.156 of the FW Act. As part of the 4 yearly review process, the Commission has the power, pursuant to s156(2)(b)(i) to make '*one or more determinations*

varying modern awards'. The power to vary a modern award involves the exercise of '*modern award powers*'.

[5] In exercising these powers, the Commission is required to apply the '*modern awards objective*' contained in s.134. This provides as follows:

'**134 The modern awards objective**

What is the modern awards objective?

(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) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees 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.'

[6] The Full Bench in the '*Preliminary Jurisdictional Issues Decision*' set out a number of considerations applicable to the 4 yearly review. This included the following:

> '3. The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.
>
> 4. The modern awards objective applies to the Review. The objective is very broadly expressed and is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'.
>
> 5. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.
>
> 6. There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective.
>
> 7. The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> 8. Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards. Depending on the terms of a variation arising from the Review, certain other

provisions of the FW Act may be relevant. For example, Division 3 of Part 2-1 of the FW Act deals with, among other things, the interaction between the National Employment Standards (NES) and modern awards. These provisions will be relevant to any Review application which seeks to alter the relationship between a modern award and the NES. The Review will also consider whether any existing term of a modern award is detrimental to an employee in any respect, when compared to the NES (see s.55(4)).'[2]

Rates of pay for work on a Saturday

[7] Clause 23.2 of the modern award provides as follows:

'Except as provided otherwise in this clause employees will be entitled to be paid:

(a) A loading of 50% of the ordinary hourly base rate of pay for the first three hours, and 100% of the ordinary hourly base rate of pay thereafter for any time worked outside of ordinary hours on a Monday to Friday, except for public holidays.

(b) For all ordinary hours and overtime worked between midnight Friday and midnight Saturday a loading of 50% of the ordinary hourly base rate of pay.

(c) For a minimum of four hours if recalled to work overtime after leaving the employer's premises.'

[8] The unions propose that cl 23.2(b) be deleted and replaced with the following:

'**(b)** On Saturday, a loading of 50% of the ordinary hourly base rate of pay for the first three hours, and 100% of the ordinary hourly base rate of pay thereafter.'

[9] The unions submitted that it was anomalous for employees under the modern award who work overtime on a Saturday to be paid at a lesser rate than those who work overtime between Monday and Friday (who are paid at a rate of 150% for the first three hours and 200% thereafter).

[10] The unions noted that the exposure draft published on 12 September 2008 provided for overtime to be paid at the rate of 150% for the first three hours and 200% thereafter Monday to Saturday, and 200% after noon on a Saturday or at any time on a Sunday.

[11] In their written submission, filed on 6 December 2016, the unions said they had '*skimmed the transcripts*' of the hearing in regards to the 2008 exposure draft and were '*at a loss as to how the overtime clause went from providing the industry standard overtime rates as set out in the 2008 Exposure Draft to the overtime rates that now exist in the current Modern Rail Award 2010.*'

[12] The unions analysed the Saturday overtime provisions in a number of pre-reform awards, namely the *Locomotive Operations Awards 2002*, the *Locomotive Drivers (Victoria) Award 2001*, the *Locomotive Enginemen's – New South Wales Award 2002*, the *Railway*

Traffic Operating, Workshops and Miscellaneous Grades Award 2003, the *Railways Metal Grades Award 2002*, the *Railways Miscellaneous Grades Award [1960]*, the *Railways Professional Officers Award 2002*, the *Railways Salaried Employees (Victoria) Award 2002*, the *Railways Salaried Employees Award 2003*, the *Railways Traffic, Permanent Way and Signalling Wages Staff Award 2002*, and the *Salaried Officers' (Railways – New South Wales) Award 2002*.

[13] According to the unions, this analysis showed that the majority of pre-reform awards paid overtime on Saturday at:

(a) time and a half for the first 2 or 3 hours and double time thereafter for hours worked outside of ordinary hours; and
(b) double time for hours worked in excess of ordinary hours.

[14] The unions also submitted that four out of five NAPSAs and the vast majority of modern awards currently in operation contain overtime rates for Saturday that pay time and a half for the first two or three hours, and double time thereafter.

[15] The AMWU supported the submission of the unions. It submitted that the proposed variation was consistent with the modern award objective, particularly s.134(da), which requires the Commission to take account of the need to provide additional remuneration for employees working overtime, or working on weekends or public holidays. The AMWU noted that this provision was not a guiding principle in 2008 when the modern awards were made. It contended that the failure to distinguish between ordinary hours and overtime hours worked on a Saturday was inconsistent with the requirement to provide additional remuneration for working overtime.

[16] The AMWU also submitted that the majority of enterprise agreements in the industry provide for overtime on Saturday at either double time, or time and a half for the first three hours and double time thereafter.

[17] The rail employers submitted that the unions had failed to address the relevant legislative provisions, and failed to include any probative evidence which supported their proposed variation. They argued that in circumstances where the Commission has to proceed on the basis that *prima facie* the modern award achieved the modern awards objective at the time it was made, without any probative evidence supporting the variation to the award, the proposal must be rejected.

[18] The rail employers presented evidence concerning the insertion of the current overtime provision in the modern award. They drew attention to the original version of the provision published in the exposure draft of the award on 12 September 2008. This *inter alia* provided for an additional payment of 50% of the ordinary hourly base rate of pay for the first three hours and 100% of ordinary hourly base rate of pay thereafter, for overtime worked from Monday until noon Saturday, and an additional 100% of the ordinary hourly base rate of pay for overtime worked after noon on a Saturday.

[19] The rail employers responded on 26 September 2008 with a revised overtime provision along the following lines:

'**21.2 Overtime rates**

Subject to a variation agreed in accordance with Clause 8 Award Flexibility or any other arrangement that averages hours of work, employees will be entitled to be paid:

(a) at the rate of time and one half of the base rate of pay for the first three hours, and double the base rate of pay for time thereafter for any time worked over 8 hours on a Monday to Friday, except for public holidays.

(b) for all ordinary hours worked between midnight Friday and midnight Saturday time and a half the base rate of pay, and for time outside of ordinary hours or a combination of both, time and a half for the first 11 hours and then double time thereafter.'

[20] The draft clause was accompanied by the following submission from the rail employers:

'The proposed overtime clause has been substantially amended. The clause as drafted did not reflect the fact that parts of the industry operate on a 24 hour/7 day basis. The draft also operated inequitably depending on the period of time in which an employee worked overtime on Saturdays. This would particularly impact upon the ability of staff to swap shifts to meet personal convenience because of the variable pay rate.'

[21] According to the rail employers, the RTBU made submissions on 10 October 2008 which adopted the overtime clause in the exposure draft without amendment.

[22] The rail employers then made final submission on 13 October 2008 reiterating the submissions they had made on 26 September 2008, while adding that the clause contained in the exposure draft would also result in a substantial cost increase.

[23] On 21 October 2008, the rail employers made the following oral submissions to the Award Modernisation Full Bench:

'In respect of the overtime clause which is 21, I appreciate the difficulties [the] Commission may have had in identifying how to approach this given the variety and nature of work within the industry. You will see in our submission we have substantially recast the way in which the overtime clause operates. In particular in relation to clause 21.1(a) which deals with some of the basic overtime rates we have recast it to reflect the nature of the work that is done in the industry, rather than looking at a metal industry style overtime clause, because otherwise, for example, we will see disparity of treatment between someone who started work on Saturday morning as opposed to a Saturday afternoon.

We understood from our consultation with the union that they agreed with our approach in respect of the overtime clause. They haven't adopted it in their draft, I am not quite sure what happened between our consultation and the outcome, but in terms of dealing with the overtime clause as a whole and dealing with the shift penalties, we

> have addressed what we say is the way the industry is actually working and reflects what people are being paid.'

[24] According to the rail employers, none of the unions made oral submissions at the Hearing on the issue of Saturday overtime.

[25] Further to the Hearing of 21 October 2008, a private conference was conducted before Senior Deputy President Harrison on 5 December 2008. The rail employers were present at the conference together with some of the relevant unions (including the RTBU but not the ASU). A number of matters were discussed, including hours of work and overtime. A draft amendment to the clauses regarding ordinary hours of work and overtime was circulated at the conference by the Rail Skills and Career Council (RSCC). It is apparent that the final version of sub clause 21.3 of the modern award reflects this draft amendment.

[26] The rail employers submitted that the pre-reform awards are irrelevant to the current proceedings. They were before the Australian Industrial Relations Commission (AIRC) at the time of award modernisation. The rail employers also submitted that the manner in which overtime is provided for in enterprise agreements is irrelevant to the formulation of the modern award, which is designed to provide a safety net of minimum conditions.

[27] The rail employers submitted that the modern awards objective provides that the Commission must ensure that modern awards (together with the NES) provide a fair and relevant minimum safety net of terms and conditions. The requirements to have regard to the criteria in s.134(1) (da) are met by the current award provision, which provides a 50% loading for all hours worked on a Saturday, rather than loading only for hours worked outside of ordinary working hours.

[28] The rail employers reiterated that the current overtime clause properly addresses the nature of work in the rail industry as a 24/7 business, and the way in which work is actually performed.

[29] In his oral submissions, Mr Woods noted that the various pre-reform modern awards had a wide variety of provisions dealing with Saturday work, with some awards silent about Saturday pay, others providing time and a half, etc. He described the award modernisation process as '*an enormous balancing exercise*', which included the obligation to take into account the impact on employment costs.

> '…the final outcome of the clause that we've got is, well, we've introduced a Saturday rate of pay for all classifications that is time-and-a-half. Some classifications in some awards that pre-existed didn't have it. So you've got an upside and you've got a balancing side.'[3]

Consideration

[30] There is no doubt that the current provision for overtime pay on Saturday in the modern award is quite unusual, when compared to provisions in other modern awards. However, while the Full Bench that established the modern award did not explicitly deal with the rationale for the current provision in its published Decision,[4] we are satisfied, based on the

history provided by Mr Woods, that the Commission turned its mind to the issue. The current provision is not the one contained in the exposure draft, which had the support of the unions. Instead it reflects the proposed clause presented by the RSCC at the conference held on 5 December 2008.

[31] As Mr Woods submitted, the award modernisation process involved a balancing exercise. There were 'swings and roundabouts' with some groups of employees gaining improvements in their award conditions and others losing. When seen as a provision dealing with payment for working on Saturday (rather than just a provision dealing with overtime on that day), it represented an improvement compared to some pre-reform awards – even if it was disadvantageous when compared to other pre-reform awards.

[32] We are satisfied that the modern award achieved the modern awards objective at the time that it was made. Further, we are not satisfied that circumstances have changed sufficiently to justify a variation to the award as proposed by the unions. The only change the unions referred to was the legislative amendment made in 2013 to insert s.134(1)(da). This included '*the need to provide additional remuneration*' for employees working overtime or working on weekends. However, s.134(1)(da) does not prescribe any particular level of additional remuneration. The current clause already prescribes additional remuneration for employees working on Saturday, whether working overtime or not.

[33] The proposal to alter the current rates of pay for overtime on Saturday is accordingly rejected.

Level 9 Clerical, Administrative and Professional Classification

[34] The classification structure was inserted in the modern award by the AIRC as part of the award modernisation process. It is set out in Schedule A – Classification Definitions. There are three streams: Clerical, Administrative and Professional (CAP), Operations, and Technical and Civil Infrastructure.

[35] The CAP stream has nine levels. Most of the levels have an introductory descriptor, followed by a series of more detailed dot points. For example, CAP Level 8 is defined as follows:

> 'The employee would be supervising the day-to-day activities of others and managing their rosters and relief.
>
> They may be delivering training to others.
>
> - Employees at this level will provide expert interpretation of documents and legislation.
>
> - The employee would be liaising with senior managers on complex matters and provide specialised reports on payroll or budgets.
>
> - The employee would have strong interpersonal skills and an ability to work autonomously.

- They would have a high level of knowledge of specialised computer systems.

- The employee can be expected to have four years post-tertiary qualifications experience or equivalent in their specialised area.'

[36] The definition of CAP Level 9 is as follows:

'The employee will provide guidance and direction to staff supervising others. The employee will have high level specialised skills.'

[37] There are no more detailed dot points.

[38] The rail employers propose that this definition be deleted and replaced with the following definition:

'Employees at this level will have the skill levels of a Level 8 employee and:

- Provide guidance and direction to staff supervising others

- Have high level specialised skills

- May contribute to policy development

- May develop training materials and directs training activities

- Are involved in short-term planning and make independent operational decisions

- Example: Managing a suburban station, payroll team leader, infrastructure team leader

Excludes persons with functional responsibility for a regional, organisational or functional area e.g. group of stations, work teams. Example: Payroll Manager, Depot Manager'

[39] The rail employers describe this proposed amendment as incorporating the existing requirements and adding additional indicia and examples. They submitted that the proposed definition would provide greater guidance to employers and employees as to which employees within the organisation within the organisation fall within the definition. Mr Woods said:

'…the proposition I put is two sentences are very hard to try to decide what it means.'[5]

[40] The RTBU submitted that the proposed variation was nothing more than an attempt to limit coverage of the modern award, and that no change should be made to the CAP Level 9 definition.

[41] The RTBU submitted that the proposed change would affect coverage in the following ways:

(a) The inclusion of 'May contribute to policy development' and 'May' develop training materials and directs training activities' water down the seniority of Level 9 and align to Level 8.
(b) The reference to being involved in 'short-term' planning infers that long-term decision makers are not included at Level 9 and may thereby limit the scope of the classification to exclude the intended second level managers (e.g. Shift Managers) who make long term decisions and supervise others and who are currently covered.
(c) The insertion of the requirement that Level 9 applies to 'operational decisions' immediately eliminates all support and specialist functions that are not in operations.
(d) The inclusion of the example roles should not be permitted as the roles specified are no different to other roles when performed except in title (e.g. managing a suburban station compared to managing multiple rural stations).

[42] Mr Woods pointed out that the use of the word 'operational' in the proposed definition referred to '*delivering the business*' as opposed to the 'operations division'. The distinction was with employees who had '*strategic roles'* and were '*responsible for a high level of direction*'.[6] The proposed clause would not necessarily exclude employees just because they were in specialised roles (IT, for example).[7]

[43] The RTBU queried whether anything had changed since the making of the modern award to justify the proposed change.[8]

Consideration

[44] The rail employers presented no evidence concerning the need to amend the classification description for the CAP Level 9 definition. In particular, there was no evidence before us that there has been any particular confusion about which employees are covered by the classification.

[45] There has been one relevant decision of the Commission since the creation of the modern award. In *Oliver v Queensland Rail*,[9] Simpson C was called on to determine whether the applicant in an unfair dismissal case was covered by the modern award. The applicant had been employed in the position of Senior Legal Counsel, Property and Projects. The Commissioner concluded that the applicant's role was a management role of such seniority that it was not intended to be covered by the modern award. Simpson C was satisfied, having regard to the scale of the projects the employee had carriage of, and the extent of her responsibility for the work associated with them, that the '*principal purpose*' of her role was management, not technical and/or legal. Further, Simpson C found that the accountability requirements attached to the applicant's role were that of a senior manager.

> 'The Applicant's role included the performance of strategic management functions and she was recruited for that purpose and not primarily for her technical skills as a lawyer. While the evidence demonstrates the Applicant did spend a significant proportion of

her time using those technical skills that does not alter the fact that the breadth of her responsibilities went beyond that contemplated by level 8 or level 9 of the Award.'[10]

[46] We agree with Simpson C that the modern award is not intended to cover employees who perform '*strategic management functions*'. However, we are unconvinced that the modern award as it stands needs amendment to clarify that point. We do not consider that the proposed change is justified.

Conclusion

[47] Both proposed variations are rejected.

SENIOR DEPUTY PRESIDENT

Appearances:

M Diamond for the Australian Rail, Tram and Bus Industry Union.
M Rizzo for the Australian Municipal, Administrative, Clerical and Services Union.
M Nguyen for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).
A Woods, solicitor, for Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd.

Hearing details:

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February 3.

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1 Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd

2 [2014] FWCFB 1788 at [60].

3 PN86.

4 [2008] AIRCFB 1000.

5 PN137.

[6] PN143.

[7] PN203.

[8] PN217-PN219.

[9] *Marie-Christine Oliver v Queensland Rail Limited T/A Queensland Rail* [2013] FWC 2583, 17 May 2013.

[10] Ibid [46].