DECISION

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

4 yearly review of modern awards – Plain language re-drafting – *Restaurant Industry Award 2010*

(AM2016/15 & AM2014/284)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

MELBOURNE, 21 MAY 2018

4 yearly review of modern awards – plain language project – Restaurant Industry Award 2010 – plain language re-drafting of award-specific clauses.

[1] A decision issued on 24 October 2017[1] (the October 2017 decision) determined most of the issues arising from the plain language redrafting of the *Restaurant Industry Award 2010*. This decision deals with the remaining outstanding issues, subject to any related issues arising from the plain language review of the *Hospitality Industry (General) Award 2010*.

[2] The two outstanding issues – relating to 'breaks after working overtime' and 'payment for travel time for distant work' – were set out in the Statement issued on 20 December 2017[2] (the December statement). Interested parties were invited to make submissions in relation to the outstanding issues and were informed that we intended to resolve the outstanding issues on the papers, unless any party requested a formal hearing. Submissions were received from Business SA, United Voice and Australian Business Industrial and New Sought Wales Business Chamber (ABI).

Break after working overtime

[3] The first outstanding issue relates to clause 26.2 (Break after working overtime) of the plain language exposure draft (PLED). Business SA submitted that the change from 'ordinary hours' to 'work' in clause 15.1(e) broadened the current entitlement.[3] The word 'work' was replaced by the words 'ordinary hours' in clause 15.1(e) in the 24 October 2017 PLED in response to this submission. While this addressed Business SA's concern,[4] the amendments to clause 15.1(e) (Ordinary hours of work) gave rise to a question from the plain language expert about the length of the break between shifts when overtime is worked immediately after finishing ordinary hours on one day or immediately before working ordinary hours on the

[1] [2017] FWCFB 5397.

[2] [2017] FWC 6873.

[3] Business SA submission, 14 June 2017, page 8, paragraph 19.

[4] Transcript, 12 September 2017, PN 30.

next day. The expert asked if the effective minimum break is reduced by the amount of overtime worked.

[4] Business SA acknowledged that an anomaly existed in the payment of overtime where the employee does not receive an 8 hour break between the overtime and ordinary hours depending on whether the overtime was worked immediately after working ordinary hours or immediately before working ordinary hours.[5] In the October 2017 Decision, Business SA was invited to submit a draft variation to address the anomaly. Business SA suggested an amendment to clause 26.2 (Break after working overtime) of the PLED.[6]

[5] Clause 26.2 of the PLED states:

> **'26.2 Break after working overtime**
>
> **(a)** Clause 26.2 applies to an employee who works overtime and is next rostered to start work less than 8 hours after the employee finishes working overtime.
>
> **(b)** The employee may delay the start of their next rostered shift until 8 hours after the employee finished working overtime without loss of pay for the rostered ordinary hours not worked.
>
> **(c)** If the employee does not have an 8 hour break, the employer must pay the employee at the overtime rate until the employee has a break of at least 8 hours.'

[6] Clause 33.4 is the equivalent provision in the current award and states:

> **'33.4 Breaks after working overtime**
>
> If starting work at the employee's next rostered starting time would mean that the employee did not receive a full eight hour break then:
>
> **(a)** the employee may, without loss of pay, start work at such a later time as is necessary to ensure that the employee receives a break of at least eight hours; or
>
> **(b)** the employer must pay the employee overtime rates for all work performed until the employee has received a break of at least eight hours.'

[7] Business SA submitted that neither the current award nor the exposure draft properly consider the circumstance where overtime is worked immediately *before* working ordinary hours.[7] Business SA submitted that, based on their interpretation of clause 33.4 of the current award, where an employee works overtime immediately before starting rostered hours the employee appears to have an entitlement to an eight hour break without loss of pay before starting work.[8] Business SA submitted that while this provision makes sense in the context of overtime *after* rostered hours, it applies awkwardly in the context of overtime *before* rostered hours.[9] Business SA foreshadowed that addressing this issue would likely be considered a substantive change and accordingly did not propose any alternate wording.

---

[5] Business SA submission, 22 September 2017, page 2, paragraph 1.6.

[6] [2017] FWCFB 5397 – 24 October 2017, paragraph [30].

[7] Business SA submission, 22 September 2017, paragraph 1.6.

[8] Business SA submission, 22 September 2017, paragraph 1.7.

[9] Business SA submission, 22 September 2017, paragraph 1.7.

[8] ABI noted that there was some ambiguity regarding the operation of the current award clause and sought the opportunity for further discussion on the issue.[10]

[9] In the October 2017 Decision Business SA was invited to submit a draft variation to clause 26.2 of the exposure draft to address the anomaly identified.

[10] The draft variation submitted by Business SA was set out at paragraph [3] of the December Statement, as follows:

> **'26.2 Break after working overtime**
>
> **(a)** Clause 26.2 applies to an employee who works overtime and is next rostered to start work less than 8 hours after the employee finishes working overtime.
>
> **(b)** The employee may delay the start of their next rostered shift until 8 hours after the employee finished working overtime without loss of pay for the rostered ordinary hours not worked.
>
> **(c)** If the employee does not have an 8 hour break, the employer must pay the employee at the overtime rate until the employee has a break of at least 8 hours.
>
> **(d)** Paragraphs (b) and (c) will not apply if:
>
> (i) the employee works overtime prior to, and continuously with, their next rostered shift; and
>
> (ii) the employee had a minimum break of 8 hours before starting the overtime.'[11]

[11] Interested parties were invited to comment on Business SA's draft variation to clause 26.2 of the PLED.

[12] United Voice did not oppose the draft variation proposed by Business SA, on the basis that the variation is limited to circumstances in which an employee is working overtime prior to and continuously with their next rostered shift, and further, has had a minimum break of 8 hours prior to commencing overtime.[12]

[13] No other party expressed a view about Business SA's draft variation.

[14] On the material before us we are not persuaded that the amendment proposed by Business SA is necessary. In this regard it needs to be born in mind that the *Restaurant Award* does not prescribe a daily spread of hours and provides that employees may be required to work 11.5 ordinary hours per day (provided they work an average of 38 ordinary hours per week)[13]. In such circumstances it seems to us that the amendment proposed by Business SA is directed at a 'problem' which is unlikely to arise in practice.

[15] In the event that Business SA wishes to pursue the proposed amendment it must advise us by no later than **4.00pm on Wednesday 13 June 2018**. If the matter is to be pursued then

---

[10] ABI submission, 22 September 2017, page 1.

[11] Business SA submission, 13 November 2017, page 2, paragraphs 1-7.

[12] United Voice submission, 1 February 2018.

[13] See clauses 9 and 15.1 of the PLED. We note that while the award does not specify a spread of hours, penalty rates apply to ordinary hours worked between 10pm and 6am Monday to Friday and on weekends and public holidays.

Business SA is directed to provide further information detailing the circumstances in which the proposed amendment would operate.

Clause 24.6—Allowance for distant work

[16] The second outstanding issue relates to clause 24.6 of the plain language exposure draft and the meaning of 'ordinary rate of pay' for the purposes of payment for time spent travelling while engaged on distant work.

[17] In response to a question raised in the plain language exposure draft interested parties made submissions regarding whether 'ordinary rate of pay' included applicable penalties or loadings. United Voice suggested that 'ordinary rate of pay' may include penalties if the travel occurs at appropriate times.

[18] We expressed a *provisional view* at paragraph [46] of the October decision that the term 'ordinary rate of pay' in clause 24.6(a) of the plain language exposure draft should include applicable penalties and loadings. The Full Bench proposed the following amendment to clause 24.6:

> '**24.6 Allowance for distant work**
>
> **(a)** An employer must pay an employee who works away from their employer's workplace at their applicable ~~ordinary~~ rate of pay for time spent travelling both ways between the employee's residence and their place of work.
>
> NOTE: ~~**ordinary**~~ **applicable rate of pay** includes any penalties or loadings that apply to the distance work.'

[19] Any party opposing the provisional view was invited to file submissions.

[20] United Voice continued to support the proposed amendment.[14]

[21] ABI sought the opportunity for further discussions regarding the intended operation of clause 24.6 and in the December Statement interested parties were given the opportunity to hold further discussions and advise the Commission of the outcome.

[22] ABI opposed the *provisional view* and submitted that 'ordinary rate of pay' in clause 24.6 should not include applicable penalties and loadings. ABI submitted that 'ordinary rate' may actually be intended to refer to the 'ordinary base rate of pay' (to use the terminology used elsewhere in the current Award) or the 'minimum hourly rate' (in the PLED terminology).

[23] ABI referred to clause 34.3 of the current award (penalty rates not cumulative) which also contains reference to 'ordinary rate' to illustrate that, at least in some circumstances, ordinary rate means the minimum hourly rate in the PLED terminology. ABI also identified the pre-reform award *AP787213CRV – Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998* (the 1998 Restaurant award) and provided other examples where 'ordinary hourly rate' was used and did not include applicable penalties and loadings.

[14] United Voice submission, 1 December 2018.

[24] We have considered the terms used to describe rates in the 1998 Restaurant award and the current award. The 1998 Restaurant award used a number of different terms to describe rates of pay. These include 'ordinary hourly rate', 'ordinary time rate', 'ordinary base rate' and 'normal rate of pay'. These terms are used in the definitions, redundancy, breaks, allowances, overtime, penalty rates and public holiday clauses of the 1998 Restaurant award. In each instance it is apparent that these terms, including 'ordinary hourly rate', were intended to mean the minimum hourly rate, not including overtime and penalties.

[25] For example, clause 4.4 of the 1998 Restaurant award defines 'double time' as follows:

> **'4.4** **Double time** shall mean when applicable to the ordinary hours of work on a week day, Sunday or holiday, the ordinary hourly rate payable as part of the weekly wage and in addition a rate equal to such ordinary hourly rate.'

[26] In the 1998 Restaurant award double time was defined as 'the ordinary hourly rate payable as part of the weekly wage and in addition a rate equal to such ordinary hourly rate'. This suggests that the ordinary hourly rate did not include penalties and loadings. The term 'double time' is not defined in the current award. However, the rates for working overtime and days attracting penalty rates are consistent with this interpretation.

[27] Clause 31 of the 1998 Restaurant award prescribes penalty rates payable to employees for working on public holidays. Examples from clause 31 include the following clauses:

> '**31.6 What if an employee works on both the substitute day and the actual holiday?**
>
> **31.6.1 Monday to Friday employee**
>
> **31.6.1 (a)** On the actual day employees shall be paid 2.5 times the ordinary hourly rate. Except for work performed on Christmas Day and/or New Year's Day where there is an additional entitlement of an extra day's pay or an extra day added to the employee's annual leave.
>
> …
>
> **31.9 Casual workers**
>
> Casual employees who are required to work on any of the public holidays set out above, will be paid at 2.75 times the ordinary rate (i.e. double time and three-quarters).'

[28] An ordinary interpretation of clause 31 of the 1998 Restaurant award also suggests that 'ordinary hourly rate' in the context of that clause does not include penalties and loadings. This interpretation is consistent with the rates that were included in the current award (although casual employees were not originally entitled to an additional 25%).[15] An alternative interpretation would lead to the compounding of penalties which is excluded at clause 26.4 of the 1998 Restaurant award:

[15] Rates have been changed by the 2017 penalty rates decision PR593956.

> **'26.4 Penalty rates not cumulative**
>
> Except as provided in clause 24—Breaks, where time worked is required to be paid at more than the ordinary rate such time shall not be subject to more than one penalty, but shall be subjected to that penalty which is to the employee's greatest advantage.'

[29] Clause 34.3 of the current award is equivalent to clause 26.4 of the 1998 Restaurant award. Clause 34.3 of the current award is as follows:

> **'34.3 Penalty rates not cumulative**
>
> Except as provided in clause 32—Breaks, where time worked is required to be paid at more than the ordinary rate such time will not be subject to more than one penalty, but will be subjected to that penalty which is to the employee's greatest advantage.'

[30] Based on an analysis of the terms in the 1998 Restaurant award and a comparison of the equivalent provisions in the current award, it appears that the term 'ordinary rate of pay' in the PLED is *not* intended to include penalties and loadings.

[31] Accordingly, we have decided amend the clause proposed at paragraph [46] of the October decision. In order to avoid confusion we will delete the phrase 'ordinary rate of pay' and replace it with the term 'minimum hourly rate' as used elsewhere in the plain language exposure draft.

[32] Clause 24.6 of the PLED will be amended as follows:

> **'Allowance for distance work**
>
> **(a)** An employer must pay an employee who works away from their employer's workplace at their ~~ordinary rate of pay~~ minimum hourly rate for time spent travelling both ways between the employee's residence and their place of work.
>
> ~~NOTE: ordinary applicable rate of pay includes any penalties or loadings that apply to the distance work.'~~
>
> **(b)** Paragraph (c) applies to an employee to whom all of the following apply:
>
> **(i)** the employee is engaged for work that requires the employee to travel 80 kilometres from their usual place of work or more to take up the engagement; and
>
> **(ii)** the employee performs their work to the satisfaction of their employer for a period of up to 4 weeks; and
>
> **(iii)** the employee is willing to complete the full period of the engagement.
>
> **(c)** The employer must pay the employee for transport both ways between the employee's residence and their place of work.'

[33] We accept that the adoption of this proposal may be said to give rise to some unfairness in circumstances where, for example, an employee is required to travel on a Saturday or Sunday. We also note that some other modem awards deal with this issue differently. In the event that United Voice seeks to vary the provision in the PLED to expressly provide for the payment of penalties or loadings then they may seek a substantive variation to that effect.

Part-time and casual employment determinations[16]

[34] Determinations were issued in the part-time and casual employment common issues varying clauses 12, 13, 24 and 33 of the current award. These determinations have been subject to plain language re-drafting and inserted into the PLED at clauses 10, 11, 24 and 26.

[35] Amendments to clause 10 of the PLED have been updated in the same terms as those in the Hospitality PLED in order to maintain consistency between the two awards and amendments to them in accordance with the draft determinations where appropriate.

[36] Interested parties are invited to make submissions in relation to the changes made to reflect the part-time and casual determinations at clauses 10, 11, 24 and 26 by **4.00 pm, Wednesday 30 May 2018**. Reply submissions should be filed by **4.00 pm, Wednesday 13 June 2018**.

Minimum wages

[37] New wording has been inserted at clauses 18.1 and 18.3 as a result of changes made to other plain language exposure drafts. Similar amendments were made to the *Hospitality Industry (General) Award* plain language exposure draft.[17] Interested parties are invited to comment by **4.00 pm, Wednesday 30 May 2018.**

Next Steps

[38] An updated version of the PLED will be published shortly.

[39] In accordance with paragraph [15] of this decision, Business SA is to advise if it wishes to pursue its proposed amendment by **4.00pm, Wednesday 13 June 2018**. If the matter is to be pursued then Business SA is directed to provide further information detailing the circumstances in which the proposed amendment would operate.

[40] Submissions in relation to the incorporation of the part-time and casual employment determinations in accordance with paragraphs [36] and [37] of this decision should be filed by **4.00 pm, Wednesday 30 May 2018**. Reply submissions should be filed by **4.00 pm, Wednesday 13 June 2018**. All material should be sent to amod@fwc.gov.au.

[16] PR598487 and PR599064.

[17] Report – Hospitality conference, 28 February 2018, item 110.

[41] Liberty to apply.

PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR606882>