



# DECISION

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 yearly review - Health Professionals and Support Services Award 2010 and Horse and Greyhound Training Award 2010** (AM2019/2)

VICE PRESIDENT HATCHER  
DEPUTY PRESIDENT DEAN  
DEPUTY PRESIDENT SAUNDERS

SYDNEY, 9 APRIL 2020

*Health Professionals and Support Services Award 2010 and Horse and Greyhound Training Award.*

### **Introduction**

[1] The purpose of this decision is to resolve an issue concerning the part-time employment provisions in the *Health Professionals and Support Services Award 2010* (HPSS Award) and the *Horse and Greyhound Training Award 2010* (HGT Award) that has arisen in the course of the 4 yearly review of modern awards.

[2] Clause 10.3(d) of the HPSS Award currently provides:

(d) The terms of this award will apply on a pro rata basis to part-time employees on the basis that the ordinary weekly hours for full-time employees are 38.

[3] In exposure drafts for the HPSS Award, the equivalent provision (numbered as clause 10.1(c) in the most recent exposure draft published on 29 January 2020) was redrafted to read as follows:

**10.1** A part-time employee:

(c) receives, on a pro-rata basis, pay and conditions equivalent to those of full-time employees who do the same kind of work.

[4] Similarly, the second sentence of the current clause 10.3 of the HGT Award provides:

### **10.3 Part-time employment**

...The terms of this award apply pro rata for part-time employees on the basis that ordinary weekly hours for full-time employees are 38.

[5] An earlier exposure draft for this Award likewise redrafted the above provision in the same way as for the HPSS Award. However in the most recent draft published on 29 January 2020, the equivalent provision has reverted to the following:

**9.2** The terms of this award apply pro rata for part-time employees on the basis that ordinary weekly hours for full-time employees are 38.

[6] In a decision issued on 26 September 2018<sup>1</sup> (2018 decision) the Full Bench dealing with the 4 yearly review of Group 2 modern awards noted a submission made by the Australian Industry Group (Ai Group) to the effect that the proposed alteration to the existing clause 10.3(d) of the HPSS Award would change its effect so that it dealt with all pay and conditions, including over-award payments, and not just those prescribed by the Award. This, the Ai Group submitted, was inappropriate and not necessary to ensure a fair and relevant minimum safety net and, additionally, the addition of the reference to full-time employees “who do the same kind of work” was confusing.<sup>2</sup> The Full Bench said (footnote deleted):

“[114] The redrafted provision does change the effect of the equivalent provision in the current award. However, the current provision is deficient in a number of respects. As Ai Group have pointed out in relation to a number of other instruments the statement that the “terms of this award apply on a pro-rata basis to part-time employees” is not entirely correct. Some terms such as the quantum of annual leave and personal/carer’s leave apply on a pro-rata basis but other provisions such as allowances, penalty rates and loadings may not.

[115] We refer to the Statement [2018] FWC 411 where Hatcher VP considered a clause that the Clerks—Private Sector Award 2010 applied in the same way to part-time and full-time employees. The Vice President noted that ‘on normal principles of interpretation, the award would be read as applying to everybody covered by it unless it specifically provided otherwise, and that on this basis the clause may be deleted.’

[116] This issue will be determined by a separately constituted Full Bench.”

[7] The decision also noted that the Ai Group had made the same submission in respect of the proposed change to the part-time provision in the HGT Award, and the Full Bench stated the same conclusion.<sup>3</sup>

[8] This Full Bench has been constituted to deal with the identified issue.

## **Submissions**

[9] The Ai Group submitted that the existing provisions should be retained, and that no party had identified any deficiency in the provisions of the type suggested by the Full Bench in the 2018 decision. It opposed the deletion of the provision on the basis that while it

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<sup>1</sup> [2018] FWCFB 5986

<sup>2</sup> Ibid at [112]-[113].

<sup>3</sup> Ibid at [143]-[144]

acknowledged that it did not have application in relation to certain provisions such as penalty rates or meal breaks, it at least had potential work to do in relation to allowances expressed as a weekly amount. The Ai Group also submitted that, absent an exhaustive analysis of each provision of the awards, the deletion of the provision might affect the application of other provisions of the Awards.

[10] Australian Business Industrial and the NSW Business Chamber concurred with the submissions of the Ai Group and submitted that some form of wording regarding the proportionality of the entitlements of part-time employees should be retained in respect of both awards.

### **Consideration**

[11] We accept the submissions advanced by the Ai Group in respect of the redrafted part-time employment provision included in the exposure drafts for the HPSS Award and earlier exposure drafts for the HGT Award. The redrafted provision is not drawn by reference to the terms of the awards and may, we agree, be read as requiring part-time employees to be paid on a pro-rated basis equivalent to the actual rate of pay of full-time employees in the workplace, inclusive of over-award payments. It is not consistent with the modern awards objective or the minimum wages objective in ss 134(1) and 284(1) respectively of the *Fair Work Act 2009* (FW Act) for modern awards to regulate over award payments that do not form part of the minimum safety net. We also agree that the reference to “full-time employees who do the same kind of work” is likely to be conducive of confusion and is unnecessary. Accordingly these redrafted provisions will not be included in the two awards.

[12] However the existing provisions are unsatisfactory because they are misleading. Read literally, they require *all* the provisions of the awards to be applied on a pro-rata basis to part-time employees when, as the Ai Group properly acknowledged, that will obviously not be the case with a whole range of entitlements. The Ai Group submitted that the provision has at least work to do in relation to weekly allowances, but as a blanket proposition even that is problematic because we do not consider that it can be assumed that allowances are to be paid on a pro-rata basis to part-time employees merely because they are expressed as weekly amounts.

[13] To illustrate this point, the only allowances expressed as weekly dollar amounts in the HPSS Award are the uniform allowances in clause 18.3(b) and the tool allowance in clause 18.12. Other weekly allowances are expressed as percentage amounts and obviously would not require any adjustment in their application to part-time employees. In respect of the uniform allowances, clause 18.3(b) provides:

- (b) Instead of the provision of such uniforms, the employer may, by agreement with the employee, pay such employee a uniform allowance at the rate of \$1.23 per shift or part thereof on duty or \$6.24 per week, whichever is the lesser amount. Where such employee’s uniforms are not laundered by or at the expense of the employer, the employee will be paid a laundry allowance of \$0.32 per shift or part thereof on duty or \$1.49 per week, whichever is the lesser amount.

[14] It is highly debatable, we consider, whether the weekly amount should be pro-rated for part-time employees, since it would put out of balance the relationship between the weekly amounts and the daily amounts. For example, if a part-time employee works five four-hour days in a week and this uniform provision allowance is applicable, it is arguable that it was never intended that the employee would receive a lesser pro-rated amount of \$3.28 per week rather than five payments of \$1.23 per shift. This would not seem to make sense given the allowance is essentially an expense-related reimbursement allowance and not a disability allowance.

[15] Similarly the tool allowance in clause 18.12, which is payable at the rate of \$11.45 per week for the supply and maintenance of tools by chefs and cooks who are not provided with all the necessary tools by the employer, has the apparent purpose of reimbursing employees for the supply and maintenance of those tools. Arguably, such an allowance would not be pro-rated for part-time employees because the cost of supplying and maintaining tools is likely to be largely the same irrespective of the number of hours worked in a week.

[16] The issue of pro-rating for part-time employees also has interesting implications in relation to clause 18.5, which is concerned with reductions of wages where the employer provides board and lodging. It provides:

**18.5 Deduction for board and lodging**

Where the employer provides board and lodging, the wage rates prescribed in this award will be reduced by the following amounts per week:

- (a) employees receiving full adult rate of pay—\$25.76;
- (b) trainees—\$11.64; or
- (c) where the employee buys their meals at ruling cafeteria rates, by an additional amount of—\$16.06.

[17] Arguably, the weekly amounts by which wage rates are to be reduced should not be pro-rated, because the cost to the employer and the benefit to the employee associated with the provision of board and lodging are the same regardless of the number of weekly hours worked.

[18] In respect of the HGT Award, the only allowance expressed as a weekly dollar amount is the “*Boots, cap and vest allowance*” in clause 14.6. This allowance is payable to subsidise track riders who provide their own skullcap, safety vest and riding boots, and is essentially an expense-related allowance. The cost of obtaining and providing these items for work purposes is likely to be the same regardless of the weekly hours worked, arguably making the pro-rating of the allowance inappropriate.

[19] In summary, we cannot identify any weekly allowance expressed as a dollar amount in either award which should inarguably be pro-rated for part-time employees.

[20] We find it difficult to identify any other provision in either award which clearly requires to be pro-rated for the purpose of part-time employment apart from wages and leave. With respect to wages, because the exposure drafts for the awards contain a schedule of hourly rates encompassing all classifications, it is not necessary to have a provision expressed as pro-rating the weekly rates of pay for part-time employees. Insofar as leave entitlements are concerned, with three exceptions, both awards simply refer to the NES provisions in the FW Act, and the pro-rating of such entitlements must occur in accordance with the NES provisions (noting that this is an issue of some controversy which will presumably be settled by the *Mondelez* litigation). The first exception is that both awards provide for an annual leave loading but, since this is expressed as a percentage amount, no pro-rating provision applicable to it is necessary. The second is that clause 31.1 of the HPSS Award provides an extra week's leave for shiftworkers who regularly work Sundays and public holidays. "Shiftworker" is defined by clause 3.1 to mean "*an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker as defined in clause 24*". It is difficult to conceive of a part-time employee being a shiftworker of this nature, but in any event it is clear that the extra week's leave would be paid for at a part-time employee's weekly rate. The third exception is that clause 35 provides for ceremonial leave, which is not in the NES. However this is unpaid leave and accordingly no issue of pro-rating the leave for part-time employees would seem to arise.<sup>4</sup>

[21] For the above reasons, our provisional view is that clause 10.3(d) of the HPSS Award and the second sentence of clause 10.3 of the HGT Award are not necessary to meet the modern awards objective and should be deleted. We will invite further submissions in response to this provisional view. To the extent that such submissions seek to demonstrate that there are particular provisions that are required to be pro-rated in respect of part-time employment, consideration should be given to whether those particular provisions should be modified to accommodate this rather than maintaining the existing general pro-rata provisions. The further submissions should be provided within 21 days of the date of this decision.

#### VICE PRESIDENT

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<sup>4</sup> Clause 36 of the HPSS Award and clause 27 of the HGT Award contain the Commission's standard clause concerning family and domestic violence leave, but this is now part of the NES (see ss 106A-106E of the FW Act).