DECISION

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

4 yearly review of modern awards – Overtime for casuals
(AM2017/51)

Electrical contracting industry

VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BULL

SYDNEY, 28 OCTOBER 2021

4 yearly review of modern awards - Electrical, Electronic and Communications Contracting Award 2020 – outstanding issues

Introduction

[1] This decision concerns three outstanding issues that have arisen in this part of the 4 yearly review of modern awards in relation to the *Electrical, Electronic and Communications Contracting Award 2020* (EECC Award), and one additional issue. The three outstanding issues arose following our decisions of 18 August 2020[1] (August decision) and 30 October 2020[2] (October decision) in which we determined (at [314]-[321] and [63]-[74] respectively) that, on the proper interpretation of the 2010 EECC Award, overtime rates for casual employees were to be calculated on a compounding basis (that is, overtime penalty rates were to be applied to a base rate that included the casual loading). The EECC Award was varied, by way of a determination issued on 30 October 2020,[3] to give effect to the decision by making the provisions concerning overtime for casuals unambiguously clear. These variations took effect from 20 November 2020.

First issue – overtime rates for casual shiftworkers

[2] The first issue has arisen from email correspondence sent to the Commission by WorkSight Pty Ltd (Worksight), a workplace relations consultancy, on 11 November 2020. That correspondence stated:

[1] [2020] FWCFB 4350

[2] [2020] FWCFB 5636

[3] PR723896

"The overtime on shiftwork clause has not been varied to include overtime rates for casual shiftworkers (clause 13.16 in the 2020 Award) which could cause confusion given that the clause 20 will include the casual overtime rate. Is there a possibility this clause can be updated as well."

[3] Clause 13.16 of the EECC Award provides:

13.16 Overtime on shiftwork

(a) Subject to clause 13.16(b), for all time worked in excess of or outside the ordinary hours of work prescribed by this award or on a shift other than a rostered shift, a shiftworker must be paid:

(i) if employed on continuous shiftwork—at the rate of **200%** of the ordinary hourly rate; or

(ii) if employed on other than continuous shiftwork—at the rate of **150%** of the ordinary hourly rate for the first 2 hours and **200%** of the ordinary hourly rate thereafter.

(b) Clause 13.16(a) does not apply where the time is worked:

(i) by arrangement between the employees themselves;

(ii) for the purpose of effecting customary rotation on shifts; or

(iii) on a shift to which an employee is transferred on short notice as an alternative to standing the employee off in circumstances which would entitle the employer to deduct payment for a day in accordance with the Act. Provided that when less than 8 hours' notice has been given to the employer by a relief worker that the relief worker will be absent from work and the employee whom the relief worker should relieve is not relieved and is required to continue to work on the employee's rostered day off, the unrelieved employee must be paid **200%** of the ordinary hourly rate.

(c) Such extra rates will be in substitution for and not cumulative upon the shift premiums.

[4] Following receipt of the correspondence from WorkSight, directions were made for interested parties to file any submissions in response by 26 November 2020. Two submissions were received which are pertinent to the issue identified. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) submitted that clause 13.16 should be varied by the addition of the following immediately after clause 13.16(a):

(aa) Subject to clause 13.16(b), for all time worked in excess of or outside the ordinary hours of work prescribed by this award or on a shift other than a rostered shift, a casual shiftworker must be paid:

> (i) if employed on continuous shiftwork—at the rate of 250% of the ordinary hourly rate; or
>
> (ii) if employed on other than continuous shiftwork—at the rate of 187.5% of the ordinary hourly rate for the first 2 hours and 250% of the ordinary hourly rate thereafter.

[5] The primary submission of the National Electrical and Communications Association (NECA) was that, with respect to the EECC Award, the August decision was incorrect, the 30 October 2020 determination varying the award should be rescinded and that no modification to clause 13.16 was necessary. In the alternative, it proposed that a note be added to clause 13.16 in the following terms:

> NOTE: The overtime rates for casual employees engaged on shiftwork are to be calculated by adding the casual loading prescribed by clause 11.2 to the ordinary hourly rate before applying the overtime rates for full-time and part-time employees engaged on continuous or non-continuous shift work prescribed by clause 13.16(a).

[6] We do not intend to revisit the August decision or the October decision. The direction we issued to permit interested parties to file submissions in response to the WorkSight correspondence was not an invitation to parties to raise grievances at large. The NECA previously filed extensive submissions in response to the provisional views we expressed in the August decision, and those submissions were considered at length, and rejected, in the October decision. The NECA submission does not raise any new matter which would cause reconsideration of either decision but rather relies upon misleadingly incomplete characterisations of our reasoning and conclusions with respect to other awards in the August decision.

[7] In respect of the actual issue at hand, there does not appear to be any difference of substance between the positions of the CEPU and the NECA. Both parties appear to accept, consistent with the central proposition in the WorkSight correspondence, that the EECC Award should address the issue of overtime rates for casual employees working shift work. The calculation methodology contained in the NECA's proposed note produces the same result percentage penalty rates as are contained in the CEPU's proposed clause 13.16(aa), and is consistent with our conclusions in the August decision.

[8] We consider that clause 13.16 of the EECC Award should be varied so that the overtime penalty rates for casual shiftworkers are specified expressly. We think this is necessary to achieve the modern awards objective. The variation we propose to make is contained in the draft determination accompanying this decision.

Second issue – ordinary and penalty rates for casual shiftworkers

[9] The second issue is one raised by the CEPU in its submissions filed in response to the WorkSight correspondence. The CEPU submitted that clause B.3.2 of Schedule B of the EECC Award, which sets out hourly ordinary and penalty rates for casual shiftworkers, "*has not been amended to conform to the determination issued by the Full Bench on the 30 October 2020*

[sic] and as a result contains significant errors with respect to casual shift worker ordinary and penalty rates". The CEPU's submissions annexed a table which sets out what it contends is the correct calculation methodology for each rate set out in the table contained in clause B.3.2.

[10] The Australian Industry Group (Ai Group) and the NECA filed submissions in response to this aspect of the CEPU's submissions. The Ai Group submitted that:

- the annexure to the CEPU's submissions adopted a compounding approach in some instances and a cumulative approach in others;
- the matters raised by the CEPU were outside the scope of matters falling for determination in the Overtime for Casuals Common Issues Proceedings (AM2017/51), since they did not relate to overtime rates for casual employees;
- contrary to the CEPU's central assertion, its proposed variations are not justified by the October decision, which did not involve the consideration of the interaction between the casual loading and the rates applicable to shiftwork in clauses 13.13, 13.14 and 13.15 of the EECC Award;
- a determination of the merit of the variations proposed by the CEPU would require that separate and detailed consideration be given to the interpretation of the shiftwork provisions in the EECC Award and also whether the amendments proposed are necessary to achieve the modern awards objective; and
- these are matters which have not been considered in the substantive proceedings, and it would be unfair to employer parties and inappropriate for such matters to now be determined in the context of a process directed at finalising the terms of an award variation determination dealing with unrelated matters.

[11] The NECA's submission was to similar effect.

[12] The CEPU filed a reply submission in which it modified its proposed variation so that the compounding approach was consistently taken in respect of the rates of pay for casual shiftworkers. The CEPU submitted that its approach was consistent with the process adopted by the Commission and that neither the Ai Group nor the NECA had advanced any merit-based argument as to why the process should now be distinguished when applying shift penalties for casual shift workers.

[13] The Ai Group and the NECA are correct to criticise the CEPU for using an opportunity provided to file submissions about a specific issue to seek to advance an extraneous matter. However, notwithstanding this, we consider that the CEPU has identified a difficulty in the EECC Award as it currently stands.

[14] The conclusion we reached in the August decision and the October decision that overtime penalty rates were to be applied to the casual hourly rate inclusive of the casual loading (the compounding approach) was based on a construction of the terms of the award then

applying. This conclusion was based on the particular terminology used by the EECC Award at that time to describe the overtime rate, as was made clear in the October decision:

> "[70] As stated in the August decision, the *Yallourn* and *Domain Aged Care* decisions establish a default position whereby the use of the expressions "*time and a half*", "*double time*" and "*double time and a half*" indicate that the compounding approach is to be taken unless there is some textual contra-indicator supportive of a different approach. We reject the NECA's submission that the use of the expression "*for all hours worked*" indicates that a contrary approach should be taken; it is not a question of whether the casual loading is payable for all hours worked (which is not in dispute), but rather of the extent of the penalty rate for working overtime imposed by the use of the expressions "*time and a half*", "*double time*" and "*double time and a half*"…"

[15] We went on in the October decision to explain that our conclusion concerning the EECC Award was based on what the award, properly construed, already provided for, and did not involve any merits-based consideration:

> "[73] For the reasons given in the August decision, we consider that this award currently provides for the compounding method for the calculation of the overtime rate for casual employees. The variation proposed in the draft determination would therefore not effect a substantive variation to the award but is intended to confirm the existing position. The Ai Group's submission that the compounding approach lacks industrial merit is not a submission specifically applicable to this award, but would apply to any award in which we have determined that the compounding method applies, including awards where the Ai Group agrees that it applies. As earlier stated, no interested party sought a uniform approach to the calculation of overtime rates for casual employees based upon any common industrial principle; rather parties generally sought the continuation and confirmation of what they considered to be the status quo, and we have determined the matter on that basis."

[16] Clause B.3.2 of Schedule B of the EECC Award calculates the rates payable to shiftworkers pursuant to clauses 13.13, 13.14 and 13.15 using the cumulative method – that is, the casual loading has been added to the percentage amounts specified in those clauses as applicable to afternoon or night shifts, permanent night shifts, Saturday shifts, Sunday shifts and public holiday shifts. That is correct because, in those provisions, the penalty rates are expressed as applicable to the "*ordinary hourly rate*". This expression is defined in clause 2.3 to mean the "*hourly rate for an employee's classification specified in clause 16.2, plus the industry allowance*", and therefore does not include the casual loading.

[17] The equivalent provisions in the earlier 2010 version of the EECC Award (clauses 24.13 and 24.14) were somewhat differently expressed. Clause 24.13, which dealt with continuous afternoon and night shifts and permanent night shifts, described the loadings as percentage amounts (15% or 30%) payable on the employee's ordinary rate. We do not consider that this is to be construed as involving the compounding approach, and we think that the 2020 version of the award reflects a correct continuation of the previous approach.

[18] However, shift penalties for working non-successive afternoon and night shifts Saturday, Sunday and public holiday shifts were expressed (in clauses 24.13 and 24.14) as

either "*time and a half*", "*double time*" and "*double time and a half*". For the reasons explained in the August decision and the October decision, those expressions are, in the absence of any textual contra-indicator, to be construed as applying in the case of casual employees to their rate of pay inclusive of the casual loading. We can identify no textual contra-indicator which would operate to displace the ordinary meaning of the expressions used. Therefore, we consider that the compounding approach applied in respect of these shifts under the 2010 award.

[19] The terms of the 2020 version of the EECC Award came into effect after a long period of consultation with parties and after extensive consideration by the relevant Full Bench. The definition of "*ordinary hourly rate*" and the terms of clause 13.15 and clause B.3.2 of Schedule B were the subject of specific consideration and determination by the Full Bench.[4] The issue now raised by the CEPU was, regrettably, not raised in the course of those proceedings. However, there is no indication that the Full Bench intended to effect a substantive change to the rates for casual shiftworkers working non-successive afternoon or night shifts or Saturday, Sunday and public holiday shifts.

[20] This has led to a significant anomaly in the current award: the total casual rates for working on Sundays and public holidays are expressed as 250% and 312.5% respectively in clause 20.4, but for casual shiftworkers the rates in clause B.3.2 are calculated on the basis of 225% for working shifts on Sundays and continuous shifts on public holidays and 275% for working non-continuous shifts on public holidays. There is no rational basis for this in circumstances where these penalty rates were all expressed in the same way under the 2010 Award.

[21] Our *provisional* view is that the EECC Award should be varied so that the percentage of the ordinary hourly rate payable to casual shift workers working the following shifts should be as follows:

- Non-successive afternoon and night shifts: 187.5% for the first two hours and 250% thereafter
- Saturday shifts: 187.5%
- Sunday shifts: 250%
- Public holidays – continuous: 250%
- Public holidays – non-continuous: 312.5%.

[22] The terms of the variation necessary to effect this are contained in the draft determination which accompanies this decision.

Third issue – public holiday rates for casual employees

[23] The third issue has been identified in an email from Employsure, a workplace relations advisory business. In the determination we issued on 30 October 2020 in conjunction with the October decision, clause 20.4(b)(ii) was varied to provide that the rate payable to a casual employee working on a public holiday was 312.5% of the ordinary hourly rate. However, the hourly rates for casual employees other than shiftworkers on public holidays specified in clause

[4] [2020] FWCFB 5307 at [56]-[65], [67]-[78]

B.3.1 of Schedule B are calculated on the basis of 275% of the ordinary hourly rate. Our *provisional* view is that this is an error, and that the rates in clause B.3.1 should be varied so that they are expressed and calculated consistently with clause 20.4(b)(ii). The requisite variation is contained in the draft determination accompanying this decision.

Additional issue

[24] We have identified an additional issue in respect of the EECC Award. Clause 20.1(a) provides for overtime penalty rates for full time and part-time employees of 150% for the first two hours and 200% thereafter. Clause 20.1(b) is the equivalent provision for casual employees, and provides for overtime penalty rates of 187.5% for the first two hours and 250% thereafter. Both provisions operate with respect to "*all work done outside ordinary hours*". Clause 13.2 provides that ordinary hours are to be worked Monday to Friday so, ostensibly, clauses 20.1(a) and (b) apply to all work performed on a weekend. However, clause 20.4(a) provides, in respect of "*[w]ork done on Sundays*", that full-time and part-time employees are to be paid at the rate of 200% and casual employees 250%. Additionally, clause (b) provides in relation to "*[w]ork done on a public holiday*" (which may or may not be on a weekend) that full-time and part-time employees are to be paid at the rate of 250% and casual employees 312.5%.

[25] We consider that there is potential uncertainty in the interaction of these provisions. Our *provisional* view is that we should on our own initiative vary clauses 20.1(a) and (b) to make clear that they do not apply to work done on Sundays or public holidays. A variation to this effect is contained in the draft determination accompanying this decision.

Next step

[26] Interested parties may file submissions in response to the provisional views expressed in this decision and the draft determination within 14 days of the date of this decision.

VICE PRESIDENT

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