

IN THE FAIR WORK COMMISSION:

s.156 – 4 yearly Review of modern awards

Award Stage – Group 3

[AM2014/] *Higher Education (Academic Staff) Award 2010* [MA000006]

[AM2014/] *Higher Education (General Staff) Award 2010* [MA000007]

[AM2014/] *Educational Services (Post-Secondary Education) Award 2010* [MA000075]

Outline of Issues Identified by the National Tertiary Education Industry Union (NTEU)

Below is an outline of issues identified within the 3 modern awards in the Higher Education industry which the NTEU will pursue during the Award stage of the 4-yearly review of modern awards.

1. Issues relating to the *Higher Education (Academic Staff) Award 2010* [MA000006] (“the Academic Staff Award”)

There are six issues relating to this Award that the NTEU intends to raise to ensure that the Award operates as an effective safety net for Academic staff in Universities; the fifth and sixth of these issues relate to both the Academic and General Staff Awards (see below at 3.)

The first issue confined to the Academic Staff Award is **a term providing for the determination of the ordinary hours of work for academic staff** and the second is **compensation for certain categories of casual staff who are currently not paid for the work they are required to perform to maintain currency in their discipline.**

(i) A term providing for the determination of ordinary hours of work for academic staff

Previous awards regulating Academic working conditions did not include regulation of ordinary working hours, and largely this omission has carried over into the Modern Award. However it should be noted that those earlier awards were made in a context where the Commission held a general dispute resolution and award making power which meant that issues relating to working hours were capable of resolution, including through award regulation, if and when they arose. Also, at the time those awards were made, there was no legislative requirement for an award to regulate ordinary working hours. Both these things have now changed.

There is irrefutable evidence that most academic staff working in Higher Education are working excessive hours.

Section 147 of the *Fair Work Act* (“the Act”) prescribes that:

*“A modern award must include terms specifying, or **providing for the determination of, the ordinary hours of work** for each classification of employee covered by the award and each type of employment permitted by the award”.*

The Academic Staff Award does not include any such term.

Clause 22- Hours of Work states:

“For the purpose of the NES, ordinary hours of work under this award are 38 per week”.

This clause does not meet the requirements of the legislation in specifying OR providing for the determination of ordinary hours of work for each classification of employee; (classifications are set out at clause 18 of the Award).

The absence of ordinary hours for academic staff in the Award means that the “BOOT” cannot be applied in relation to a critical element of working conditions – working hours; [s. 193 of the Act].

The NTEU will therefore be seeking an award variation which provides a method for determining ordinary hours of work for academic staff, whilst taking account of the unique nature of academic work. That is, we will seek to regulate working hours without unnecessarily compromising the current professional flexibility in relation to the timing and manner of performance of much academic work – a flexibility which has benefit for both employees and employers – provided that the totality of work required can reasonably be expected to be completed within ordinary hours. The award variation sought by the NTEU would limit the work required of an employee such that it can be performed to a professional standard within ordinary hours.

The NTEU contends that the Award should provide that the maximum work allocated to an employee, or required to meet the performance expectations of the employer to a professional standard, should be able to be performed in 1845 hours per year (less leave and public holidays).

(ii) Professional and Discipline Currency Allowance

The Higher Education Industry is heavily reliant on casual (“sessional”) teaching academics to provide lecturing and tutoring of students. Currently the Academic Staff Award includes provision for casual staff to be paid for preparation of lectures/tutorials and marking of students’ work (sub-clause 18.2).

However, there is no provision for remuneration for casual staff for the specific work required to maintain currency in their discipline and relevant pedagogy, or to keep abreast of extensive institutional policies, both of which are inherent requirements of the job (as reflected in the fact that full time academics are paid to do this work).

NTEU will make a claim for compensation for time spent on maintaining currency in an academic discipline or field of study and keeping abreast of employer policies, on behalf of casual staff.

(iii) Academic classification standards and promotion

Clause 18 of the Academic Staff Award is as follows:

18. Classification of academic staff

Minimum standards for levels of academic staff, other than a casual, are set out in Schedule A- Minimum Standards for Academic Levels (MSAL). The levels are differentiated by level of complexity, degree of autonomy, leadership requirements of the position and level of achievement of the academic. The responsibilities of academic staff may vary according to the specific requirements of the employer to meet its objectives, to different discipline requirements and/or to individual staff development.

*An academic appointed to a particular level may be assigned and may be expected to undertake responsibilities and functions of any level up to and including the level to which the academic is appointed or promoted. In addition, an academic may undertake elements of the work of a higher level in order to gain experience and expertise consistent with the requirements of an institution's promotion processes. **MSAL will not be used as a basis for claims for reclassification;** [emphasis added]*

Uniquely to academic staff, the Industrial Relations Commission approved the system whereby the actual method of career advancement for academic staff is **academic promotion**, hence the inclusion of the words in bold (above). However, the clause requires amendment in order to provide safety net protection for those not covered by a bona fide promotion system. To the best of our knowledge, there is no University that does not currently operate a bona fide promotion system. However, particularly as the system becomes more deregulated, with new providers entering the market, the safety net should ensure that the award classification structure reflects work value and sets a minimum reference point for promotion standards. The NTEU will propose a variation to provide that **in the absence of a bona fide academic promotion system** (and only in that circumstance) academic employees may seek to enforce the correct classification and rate of pay for the work that they perform on the basis of the MSALs.

(iv) Conversion of Casual Academic work

The NTEU has asked the ACTU to include the *Higher Education (General Staff) Award* in its common claim to the Commission around deeming of casual work to on-going employment, after 6 months.

For academics, such a clause is not so straightforward due to a variety of reasons specific to the work.

NTEU has therefore developed a draft claim for the conversion of academic work within institutions (as distinct from incumbents).

2. Issues relating to the *Higher Education (General Staff) Award 2010* [MA000007] ("the General Staff Award)

There are three issues specific to this Award, **General Staff Working Hours and Overtime**, the **Classification Definitions ("Descriptors")** included at Schedule B of the Award and a simple anomaly around **linking the body of the General Staff Award to the Classification Definitions**.

(i) General Staff Working Hours and Overtime

There is irrefutable evidence that many general staff working in Higher Education are working long, and in many cases, excessive hours and are not being compensated for this.

This is a result of the unusual award provision that "An employee will be paid overtime for ***all authorised work*** performed outside of, or in excess of, the ordinary or rostered hours" (cl 23, emphasis added). The way this works in practice in this industry is that it is not uncommon for an employee to work far beyond their ordinary hours in order to get the work done, with the employer aware that the additional hours are being worked and accepting the benefit of that work, but refusing to pay overtime due to a lack of "authorisation" for the additional hours worked.

This is exacerbated by unreasonable workloads and a culture which discourages staff from asking for and/or receiving overtime payment or time off in lieu, which has developed over time. This culture has remained unchecked and therefore the provisions of Part 5 of the Award (and clause 23 in particular), are failing to provide a fair and effective safety net of protection against excessive hours.

The NTEU will seek an award variation that imposes an obligation on employers to take active steps to ensure that staff are only working additional hours if they are appropriately compensated through overtime payments, time off in lieu or similar.

(ii) Classification Descriptors

The Classification Definitions ("Descriptors") in the Award are over 20 years old. Essentially the Descriptors have stood the test of time, however they require some updating to reflect work in Universities in 2014.

Our claim is limited to up-dating and will not seek to vary work value or relativities between job levels.

(iii) Linking the award to the Classification Descriptors

Currently the General Staff Award includes Rates of Pay at clause 15, Salary movement within a Classification Level at 16, and the Classification Definitions (known as "Descriptors") at Schedule B. There are no words stating that the classifications are the determinant for classifying general staff.

This should be a simple and straightforward application to correct an anomaly that was omitted in error from the final General Staff Award in 2010.

The relevant clause from the previous HEGS Award was as follows:

The Higher education worker position classification standards set out in Schedule A - Position classifications standards shall be the primary determinant of the classifications of general staff positions. Positions will be classified at the level which most accurately reflects the work performed by the employee as required by the employer, taking into account the skills and responsibilities required to perform that work.

3. Issues relating to both the *Higher Education (General Staff) Award 2010 [MA000007]* and the *Higher Education (Academic Staff) Award 2010 [MA000006]*

(i) Research Institutes

In 2012 the NTEU made applications to vary the Higher Education Awards to cover general, technical and research staff in medical, health and science **research institutes**.

The Applications were part of the 2-year interim Review of Modern Awards.

Deputy President Smith did not determine the merits of the case but suggested the 2-year Review was not sufficiently broad to consider the issues concerned with the matter; ([2013] FWC 7947).

The NTEU will apply for the Awards to be varied to cover staff in research institutes as part of the 4 year Review.

(ii) ICT Allowances

Many Higher Education workers are required to use their own telephone, mobile, email and internet to perform work. The NTEU will apply for allowances to be paid with respect to the costs of establishing, maintaining and using such ICT facilities when a worker is required to do so in order to satisfactorily perform their duties.

4. Issue relating to all of the *Higher Education (General Staff) Award 2010 [MA000007]*, the *Higher Education (Academic Staff) Award 2010 [MA000006]* and the *Educational Services (Post-Secondary Education) Award 2010 [MA000075]*

(i) Minor Drafting Errors and Omissions

There are some drafting errors in the 2010 Modern Awards which omit or inadvertently amend clauses via 'typos' in the FWC drafting. This has had the effect of reducing or changing the operation of particular clauses.

One example is the representation of the PhD/Subject Coordination pay point in casual academic teaching rates in both the *Educational Services (Post-Secondary Education) Award 2010* and the *Educational Services (Post-Secondary Education) Award 2010*. The rates for casual academic tutoring and marking reflect the PhD point in the full time rates (drawn from levels A2 or A6 in the full time scale), depending on whether the employee has a Doctoral qualification. In the full-time rates and in the predecessor awards, the higher casual rate applies if the employee has a Doctorate **or undertakes full subject coordination duties**. This criterion was omitted from sub-clause 18.2 of the Academic Staff Award and sub-clause 14.2 of the Post-Secondary Education Award.

Given that no party sought this change, it should be possible to have the parties agree to have the full words reinstated as a drafting correction.

The NTEU will seek this and other minor drafting changes.