

Submission to the Fair Work Commission

By the Shop, Distributive and Allied Employees' Association

[2018] FWCFB 3516

Via email: amod@fwc.gov.au

Background

On the 21st of December 2012 Fair Work Australia ('FWA'), as it was known at the time, issued a decision¹ that dealt with the introduction of two new part-day public holidays in the state of South Australia on Christmas Eve and New Year's Eve.

FWA was satisfied the proclamation of the part-day holidays gave rise to "ambiguities and uncertainties²." FWA resolved to make a range of "marginally different determinations affecting some 113 modern awards... to resolve the ambiguities and uncertainties in the relevant awards³."

FWA noted the determinations were "largely unopposed⁴." The Shop, Distributive and Allied Employees' Association ('SDA') was involved in the hearings leading up to the decision and agrees the determinations were largely agreed between the various parties, in part because of the impending observance of the new part-day holidays.

However, FWA noted that the determinations were made "on an interim basis only⁵" and the position taken by the parties is "without prejudice to the position they may take in any subsequent consideration of these issues⁶."

Where are we now?

On the 15th of June 2018 the Fair Work Commission ('FWC') issued a statement⁷ in relation to the interim schedules in various modern awards, which deal with part-day public holidays on Christmas Eve and New Year's Eve. The part-day public holidays now apply in South Australia *and* the Northern Territory.

The FWC says it is of the view the "arrangements for the part-day public holidays should be finalised...⁸" The Shop, Distributive and Allied Employees' Association (SA Branch) ('SDA') agrees with these sentiments.

The SDA is of the view the existing schedules unnecessarily replicates rights and entitlements under the *Fair Work Act 2009* (Cth) ('the Act') and various modern awards.

By way of example see below an analysis of Schedule F of *General Retail Industry Award 2010* (Cth) ('GRIA') and its interaction with the rest of the award and the Act.

Schedule F—2017 Part-day Public Holidays

This schedule operates where this award otherwise contains provisions dealing with public holidays that supplement the NES.

¹ [2012] FWAFB 10738.

² Ibid PN 12.

³ Ibid PN 15.

⁴ Ibid PN 17.

⁵ Ibid PN 20.

⁶ Ibid PN 20.

⁷ [2018] FWCFB 3516.

⁸ Ibid PN 5.

F.1 Where a part-day public holiday is declared or prescribed between 7.00pm and midnight on Christmas Eve (24 December 2017) or New Year's Eve (31 December 2017) the following will apply on Christmas Eve and New Year's Eve and will override any provision in this award relating to public holidays to the extent of the inconsistency:

(a) All employees will have the right to refuse to work on the part-day public holiday if the request to work is not reasonable or the refusal is reasonable as provided for in the NES.

(b) Where a part-time or full-time employee is usually rostered to work ordinary hours between 7.00pm and midnight but as a result of exercising their right under the NES does not work, they will be paid their ordinary rate of pay for such hours not worked.

(c) Where a part-time or full-time employee is usually rostered to work ordinary hours between 7.00pm and midnight but as a result of being on annual leave does not work, they will be taken not to be on annual leave between those hours of 7.00pm and midnight that they would have usually been rostered to work and will be paid their ordinary rate of pay for such hours.

(d) Where a part-time or full-time employee is usually rostered to work ordinary hours between 7.00pm and midnight, but as a result of having a rostered day off (RDO) provided under this award, does not work, the employee will be taken to be on a public holiday for such hours and paid their ordinary rate of pay for those hours.

(e) Excluding annualised salaried employees to whom clause F.1(f) applies, where an employee works any hours between 7.00pm and midnight they will be entitled to the appropriate public holiday penalty rate (if any) in this award for those hours worked.

(f) Where an employee is paid an annualised salary under the provisions of this award and is entitled under this award to time off in lieu or additional annual leave for work on a public holiday, they will be entitled to time off in lieu or pro-rata annual leave equivalent to the time worked between 7.00pm and midnight.

(g) An employee not rostered to work between 7.00pm and midnight, other than an employee who has exercised their right in accordance with clause F.1(a), will not be entitled to another day off, another day's pay or another day of annual leave as a result of the part-day public holiday.

This schedule is not intended to detract from or supplement the NES.

This schedule is an interim provision and subject to further review⁹.

Analysis

Clause F.1 – s115(1)(b) of the Act deals with the concept of the declaration of part-day holidays other those listed in section 115. Further, the words that deal with overriding provisions in the award to the extent of an inconsistency have no work to do, as shown below.

Clause (a) – the clause replicates rights contained within s114 of the Act.

Clause (b) - the clause replicates rights contained within s116 of the Act.

Clause (c) - the clause replicates rights contained within s89 of the Act.

⁹ General Retail Industry Award 2010 (Cth).

Clause (d) – this clause is not dealt with explicitly in the Act or the GRIA but could be dealt with by inserting a clause at 28.7 (c) mandating substitution when a part-day holiday falls on an RDO, and the employee is normally rostered to work ordinary hours between 7.00pm and midnight. One could make an argument the RDO would simply accumulate under the existing provisions of the GRIA, as a result of its interaction with s 114 of the Act.

Clause (e) – this clause replicates a right contained at cl 29.4 of the GRIA.

Clause (f) – the GRIA does not provide for annualised salaries.

Clause (g) - the clause replicates limitations contained within s116 of the Act.

Proposal

We say a conference of all interested organisations should be convened to explore whether separate schedules (or particular provisions with the awards concerned) are required across the modern awards, if at all. The current schedules may be relevant to some awards, but clearly there is unnecessary replication in the various schedules, and the removal of certain clauses may be warranted.

All enquiries to be directed to the SDA: bradley.cagney@sda.com.au