**Corrigendum filed: 3 April 2018**

# IN THE FAIR WORK COMMISSION

## Matter No: AM2016/13

## Section 156 - Four Yearly Review of Modern Awards - Annualised Salaries

## SUBMISSION

**UNITED VOICE**

1. This submission is in response to the decision of Commission in the Annualised Wage Arrangements common issue proceedings published on 20 February 2018[1] ('the Decision').

**General findings**

2. The Commission seeks further submissions concerning various general matters at **[134].**
3. We thank the Commission for the Decision and note that if the findings and model clauses are implemented within the modern award system in relation to the award specific claims, annualised wage arrangements ('salary arrangements') will more accurately reflect the parameters set by section 139(1) (f) of the *Fair Work Act* 2009 ('the Act') and provide for effective enforcement of the safety net. Our comments here are responsive to the general findings but informed by the modern awards which were the subject of our award specific claims, specifically the *Hospitality Industry (General) Award* 2010 ('Hospitality Award') and the *Restaurant Industry Award* 2010 ('Restaurant Award').
4. From our experience, in relation to the 2 hospitality awards the subject of our specific claims, salary arrangements are used to minimise the payment of penalty rates and overtime and can result in an employee working excessive unsocial hours without receiving appropriate compensation. The salary holder is rostered routinely on weekends and evening and generally over utilised and no additional remuneration to compensate for the unsocial nature of the work. We have recently resolved significant underpayment claims where this was the *modus operandi* of the employer.

[1] *Annualised Wage Arrangements* [2018] FWCFB 154.

5. The measures outlined in the Decision should go some way to minimising these abuses. The Commission is approaching an appropriate balance between such arrangements providing stability and some administrative simplicity and ensuring that employees working under salary arrangements are not disadvantaged.

6. At paragraph 106 of the Decision, it is noted that 19 modern awards currently contain salary arrangements. The *Registered and Licenced Clubs Award* 2010 ('the Clubs Award') contains salary arrangements for managers. United Voice did not pursue any claim in relation to the salary provisions in the Clubs Award.

**Threshold amount**

7. None of the model clauses stipulate a precise percentage above the applicable minimum weekly rate which should be paid for the arrangement to be an annualised wage arrangement.

8. Annualised wage arrangements are efficacious if the worker works regular overtime and periods when penalty rates would be paid and the salary '*rolls-up*' regular overtime and penalty rate payments. It is intended that the employee will receive at least what would have been paid had the full array of award terms and conditions applied. Both the Hospitality Award and the Restaurant Award require annualised salary arrangements to be '*at least 25% or more'* above the applicable minimum wages for the classification.

9. The Commission indicated at **[128]** of the Decision that the 25% bench mark was not demonstrated as mathematically justified in any sense as '*buying out'* award terms and conditions. In hospitality, there are difficulties in justifying any particular threshold as appropriate. The fair threshold will depend on the utilisation of the employee within the framework of unsocial work hours that can lead to a variety of remuneration outcomes. For example, rostering an annualised salary holder consistently on Sundays will significantly alter the remuneration outcome for the employee. The definition of the hours and periods that salary holder will work in the Decision's model clauses is important.

10. We broadly agree with the further finding at **[128]** that '*no reasonable percentage threshold can guarantee that the employee will never be worse off regardless of the hours worked'*. But if there are appropriate reconciliation provisions and an ability for '*overs'* to be paid, the increment paid above the base rate is less important. The model clauses generally have good reconciliation, enforcement and record keeping provisions which will assist in ensuring that employees are not disadvantaged by a salary arrangement subject to some matters noted below.

11. What is generally clause X.1(c) in the model clauses is important and we understand the practical effect of this provision is that employers will have to pay an additional amount for work outside the parameters of the written agreement with regular pays.

12. A principal advantage for both the employer and the employee of a salary arrangement is administrative simplicity. This advantage is diminished if the salary is not significantly above the base rates of the award and if additional hours are regularly paid through the reconciliation provisions as essentially deferred award entitlements. There is utility in setting a threshold percentage which should guarantee that the employee is generally not worse off and that the employer does not benefit from the deferral of payments awaiting a reconciliation. 25% is the bench mark for annualised salary arrangements in the Hospitality Award and the Restaurant Award. The Clubs Award provides for 2 categories of '*specified salaries'* arrangements for managers receiving 20% and 50% above the minimum annual salary rates for the appropriate classification.

13. Nothing less than 25% should be the threshold and there is some merit in setting the threshold higher. Currently, the model clauses propose the '*buy out'* of a wide variety of entitlements through a salary arrangement. Such a scenario coupled with a low threshold, will, we believe, be problematic.

14. We note that model clauses 1 and 3 do not envisage a percentage above base rates to be paid.

15. We query whether there is any utility in such clauses which do not clearly state that the arrangement must be in excess of otherwise applicable minimum wages by a particular amount. Model clause 1 is designed for the most stable and predictable patterns of work where there may not be significant overtime or penalty rates work subsumed within the arrangement. This is not the case in relation to model clause 3.

16. Having a buffer of at least 25% between base rates and the salary would provide some incentive for an arrangement to be entered into for both parties. In the case of salaries close to the base rate, it would generally be simpler for the employee to be paid under the relevant award rather than imposing in effect the additional complexity of a salary arrangement.

**Indexation**

17. We note that one of the considerations of the Commission at [129] at (4) (A) is that salary arrangements should contain a requirement for a '*minimum increment above the base rate of pay prescribed in the annual wages clause itself.*' As noted, a salary arrangement is not an over award payment but a type of payment condoned by a modern award. Such arrangements will also potentially be longstanding. We note that the Commission has included terms in the model clauses that deal with consideration 4(B)[2] which require terms that identify the way that the salary is calculated and consideration 4(C) which deals with annual reconciliations.

18. It can be assumed that a salary arrangement when it is made will be in excess of the base rate remuneration that the employee would otherwise receive. The same relationship between the

[2] The Decision, see page 55.

arrangement and the award based rates should be maintained during the lifetime of the arrangement. This is to maintain the nature of the initial arrangement made and avoid obsolescence. We note that the model terms allow arrangements to continue indefinitely and are only terminable by a party giving 12 months' notice. While in theory changes in base rates can be accommodated by the requirement that the methodology is specified and clause X.3, the requirement to update the arrangement in terms of changes in relevant base rates should be explicit.

19. The legislative arrangements concerning minimum wages under the *Fair Work Act* 2009 ('the Act') do not strictly dictate uniform increases across the modern award system but it has been the consistent practise of the Commission in conducting reviews under section 285 of the Act to make a national minimum wage order that provides for a percentage increase in award minimum wages.

20. We view clause X.3 as opaque and while it appears to mandate annualised salary arrangements being related to increases in the minimum wage, the relationship should be explicit. These arrangements are safety net arrangements and generally should increase in accordance with the minimum wage. As noted below, our proposal that the leave loading and allowance not be included in salary arrangements also focusses these arrangements as principally concerned with wages as an expression of the award's base rates.

21. The link between award terms and conditions should be maintained by the indexation of the gross amount paid under an annualised wage arrangement with the annual minimum wage process. Clause X.3 should be simplified to '*Gross payments under an arrangement made pursuant to this clause are varied annually in accordance with the relevant rate of pay in Clause X- Minimum Weekly Wages.*'

**Annual leave loading**

22. We restate our view that it is undesirable to include annual leave loading in the '*list'* of award entitlements bought out by an annualised wage arrangement. One continuing relevant reason for annual leave loading is to encourage an employee to actually take leave and have a period of rest and recreation. As noted by the 2012 review of the Fair Work Act:

> *The provision of annual leave loading was originally to compensate employees for the notional loss of overtime earnings while on leave, although the benefit then spread to most sectors of the workforce, including areas not generally subject to overtime payments.*[3]

[3] '*Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*' (2012) at p 101.

23. In both the Restaurant Award and the Hospitality Award, leave loading is an award entitlement. One of the main continuing justifications for such an entitlement is the preservation of a leave entitlement as a break from work and as a disincentive against leave hoarding and cashing out. These are considerations that benefit both the employer and the employee.

24. Annualised wage arrangements are necessarily going to apply to full time staff and it is likely that these employees will be working hours in excess of their ordinary hours and at unsocial times. In hospitality, persons on salary are typically critical staff within hospitality businesses and there are a variety of incentives for the employer to over utilise their labour. It is not appropriate that an incentive for this group of employees to take leave be removed.

**Allowances**

25. In relation to allowances under the Restaurant Award and Hospitality Award, it is not appropriate that all allowances be excluded. Neither of the 2 hospitality awards can be described as having a particularly generous array of allowances and some such as their clothing, equipment and tool allowance and laundry allowances directly relate to the nature of the work.

26. For example, each of the *Restaurant Award* and *Hospitality Award* require an unpaid break after 5 and 6 hours continuous work respectively or the payment of a penalty.[4] This penalty compels employers to provide a break or pay 50% loading until a break is provided. The current salary provisions in each award do not absorb or relieve the employer of the requirement to provide a break or pay a penalty.

27. The function of the penalty is to ensure that employees are provided with breaks. The concept has also embedded itself more broadly in the hospitality work practices as it is a longstanding and well understood entitlement. This is especially important for chefs where the work is physically demanding and the kitchen environment can be uncomfortable. Chefs are usually the only non-managerial employees in restaurants and hotels who are routinely engaged on salary. The function of the breaks penalty with respect to their employment is to ensure the safe performance of their duties at the tail end of their shift.

28. The focus of both of the current salary provisions in the Hospitality Awards and the Restaurant Award is overtime and penalty rates. The Hospitality Award allows '*other specified award-derived entitlements*' to be part of a salary arrangement. Whereas the Restaurant Award is more prescriptive and only includes the split shift allowance found at clause 24.2 within an annualised salary arrangement.

[4] See: clause 32.4, Restaurants Award; clause 31.4, Hospitality Award.

29. The Decision contemplates that a salary will include many non-wage related allowances. This would be a reduction in the safety-net and is undesirable. Maintaining a focus on penalty rates and overtime would be a more appropriate. At least in hospitality, limiting these arrangements to penalty rates and overtime will also create greater simplicity particularly when reconciliation occurs.

30. The Clubs Award is illustrative in some respects. The salary arrangements for managers found at clause 17.3 provide for arrangements at 20% and 50% in excess of the minimum annual salary rate and only the 50% arrangements buys out an array of entitlements which is analogous to what the model clauses propose in the context of no defined increment about the minimum payable.

**Inspection**

31. Model Clause 4 and the other model clauses does contain an obligation for the employer in X1(e) to give the employee a copy of the agreement, and further in X2(c) there is an obligation to keep a record of start and finish times and any unpaid breaks and to have this record signed by the employee each pay cycle however there is nothing about the employee inspecting or copying the record. One of United Voice's claims was to ensure the employee could inspect and copy these records. The Commission recognises in the Decision at **[124]** that regulation 3.34 of the Fair Work Regulations 2009 in relation to employee records do not cover annualised salary agreements specifically and therefore the right to inspect and copy under the regulation 3.42 may arguably not apply. The model clauses should contain a provision stating that the employee has the right to inspect and copy such records in X2(c). This would be aligning salary arrangements with standard industrial practice.

32. Allowing salary holder to inspect their employment records is not providing to them an entitlement which is in any sense extraordinary.

**Other Awards currently not containing annualised salary provisions**

33. We would urge the Commission generally not to vary modern awards that do not currently contain a salary arrangement to include one of the proposed model clauses. As the Act recognises, annualised wage arrangements as not mandatory terms. Annualised wage arrangements are abused in hospitality as a way to over utilise key staff and minimise the employer's liability for penalty rates and overtime. They were an established part of the industrial environment of this sector prior to award modernisation and were included in the successor modern awards in 2009.

34. Where the established practice is to pay award reliant employees on the award, this should remain the practice.

**Part time employment**

35. In relation to the Hospitality Award and the Restaurant Award their part time employment provisions have recently been varied and made more flexible, salary arrangements for this category of employee should be avoided.

**Notice of termination**

36. The current model clauses provide that the arrangement can only be terminated with 12 months' notice. This is excessive. We agree with the submission of the Health Services Union ('HSU') that 3 months' notice is appropriate.

**Health Professionals Award**

37. We note that the Full Bench accepted our submission that an annualised salary arrangement should **not** be inserted into this award for non-managerial employees. We thank the Commission for this finding.

38. In relation to the possibility of salary arrangements for managerial level staff, we support the position of the HSU.

**Hospitality Award and Restaurants Award**

39. We note that the Commission accepted our submission that the current annualised salary clauses for Hospitality Award and the Restaurants Award are '*inadequate'* **[143].** We further note that the Commission has characterised non-managerial work under these 2 modern awards as work with highly variable hours or significant ordinary hours which would attract penalty rates. We agree with this characterisation: overtime and penalty rates will generally always be a significant component of the remuneration of this group.

40. We agree that some variant of model clause 4 should be adopted for non-managerial employees covered by the Restaurant Award and Hospitality Award.

41. In relation to the percentage threshold we note our comments concerning the current 25% standard.

42. We make **no** explicit submission concerning whether model clause 2 should be adopted in relation to managerial staff in hotels. **We note that** due to the operating hours of many hospitality enterprises many managers will not necessarily work 9 to 5 hours. Clause 27.2 of the Hospitality Award is titled '*Salary absorption (Managerial Staff (Hotels))*' and appears at odds with the Decision and more generally the modern awards objective. This clause appears to exclude managerial staff, paid a salary greater than $57,484.00 per annum, from the fair and relevant safety net of terms and conditions. This is problematic.

United Voice

**23 March 2018**