

4 yearly review of modern awards

Overtime for casuals

SUBMISSIONS OF THE ACTU

1. These brief submissions are directed to general issues that may arise for consideration by the Full Bench considering the matter of overtime for casuals in the course of the Four Yearly Review of Modern Awards. These submissions are not directed to whether or not any particular award may be regarded as ambiguous in its treatment of overtime for casuals, nor do we provide any Draft Determinations to vary any particular awards.
2. Overtime payments commonly arise where ordinary hours are exceeded (either on a per day or per week basis), where rostered workers are unforeseeably retained beyond the completion of a rostered shift, or where work is performed outside the span of ordinary hours otherwise fixed by the award. As a general proposition, it is appropriate that casual employees receive overtime payments in circumstances that would attract overtime payments for other classes of employees covered by a particular award. This general proposition is reflected in the reasoning of the Full Bench in the *Casual and Part Time Common Issue* in its decision of 5 July 2017¹ in which it described the following as “generally applicable propositions”:
 - “(1) Casual employees who work in excess of ordinary hours in a single day, or over 38 hours per week in a particular week or on average over the course of a roster cycle, are subject to the same disabilities as full time employees – that is, fatigue and a general restriction of opportunities to engage in family, social, community and other activities.
 - (2) The standard casual loading of 25% in modern awards does not include any element of compensation for the disabilities associated with working overtime.”
3. That Full Bench also, in its consideration of section 134(da) of the Act in the context of claims for overtime payments for casual workers, had regard to the reasoning of a Full Bench considering overtime penalties in the *Social, Community, Home care and Disability Services Industry Award*², referring in particular to the following:

¹ [2017] FWCFB 3541

² [2014] FWCFB 379

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“ We do not consider that there is any sound rationale for casual employees to be excluded from overtime penalty rates in circumstances where they apply to full-time and part-time employees. No such rationale was advanced by any party before us. The result of this exclusion is or will be twofold. Firstly, it will result in a reduction in the rate of pay for those casual employees who regularly perform overtime work, without any apparent industrial justification for this occurring. Secondly, it means that it will be cheaper to utilise casual employees to perform overtime work rather than full-time or part-time employees. No party was able to advance any reason why the SCHCDS Award should contain a bias in favour of casual employment and against full-time and part-time employment.”³

4. The concern to ensure there are no cost biases in favour of casual employees working particular hours was a matter addressed by the Full Bench which determined the *Penalty Rates* matters in the course of this Review⁴. That Full Bench concurred with the views of the Productivity Commission that the “default” position, whereby casual loadings were paid in addition to other penalty rates, was preferable, and adopted that position in relation to each of the variations it made to weekend penalty rates. In addition to reasons of cost neutrality, that Full Bench noted that the casual loading was not designed to compensate for working such hours and that the “default” method for applying a casual loading was “simple and easy to understand” for the purposes of subsection (1)(g) of the modern awards objective.⁵ The Full Bench determining the *Casual and Part Time Common Issue* has also accepted “as a matter of general principle”⁶ that the default position “is the correct approach”⁷. Different or additional considerations might arise where a particular award has explicitly described casual workers as receiving an all purpose rate inclusive of a casual loading, or payment of overtime penalties on a compounding basis upon a loaded casual rate is clearly expressed or is to be implied for other contextual or historical reasons.
5. The Full Bench determining the present matter must also, as others have observed, ensure that the requirements of section 62(1) (particularly as it interacts with section 55) and 147 of the Act are accommodated and complied with in the Awards under review. As to the former, a Full Bench has recently determined that it should vary the *Seagoing Industry Award* to ensure that it does not contravene the NES (in particular section 62(1)) by purporting to require certain employees to work 40 hours a week. In reaching that decision the Full Bench observed:

“Section 134(1) requires that modern awards provide a fair and relevant minimum safety net of terms and conditions, taking into account a number of specified matters. We

³ [2014] FWCFB 379 at [39], cited in [2017] FWCFB 3541 at [548]

⁴ [2017] FWCFB 1001

⁵ At [337]-[338]

⁶ [2017] FWCFB 3541 at [891]

⁷ *Ibid.*

consider that such a fair and relevant safety net should provide for ordinary weekly hours consistent with the standard established by s 62(1), and that consistent with standard practice overtime penalty rates should be payable for hours worked in addition to ordinary hours." (emphasis added)⁸

6. Section 147, which deals with mandatory content in modern awards, may be satisfied either by including terms *specifying* the ordinary hours of work for each classification and each type of employment or by including terms *providing for the determination of* those ordinary hours. In our view the former- *specification* of ordinary hours - is preferable where it may be accommodated within the rostering and facilitative provisions of a given award, given that the extent to which an award is "simple and easy to understand" is a relevant consideration in ensuring awards meet the modern awards objective. Such specification might provide a sensible starting point from which to then apply the general principles referred to above (subject to industry, contextual and historical considerations) to resolve any ambiguities that Full Bench identifies in the awards currently before them. As a general proposition, it seems unlikely that awards which provide for overtime penalties to compound upon the loaded rate for casuals could be regarded as ambiguous as to their specification of ordinary versus overtime hours for those casuals for which those rates are specified.

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⁸ [2018] FWCFB 129 at [13]