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Fair Work Act 2009
FAIR WORK COMMISSION
s.156 – 4 yearly review of modern awards
AM2017/51

AWU SUBMISSIONS CONCERNING THE HAIR AND BEAUTY INDUSTRY
AWARD 2010 – OVERTIME ISSUES

BACKGROUND

1. On 5 March 2021, a Full Bench of the Fair Work Commission issued a Decision¹ directing interested parties to file submissions in respect of overtime and penalty rate conditions in the *Hair and Beauty Industry Award 2010 (Award)*.
2. The Australian Workers' Union (**AWU**) makes the following submissions in respect of these issues.

OVERTIME FOR CASUALS

3. The AWU supports the proposed variations to clauses 31.2 and 13.3 as outlined at [10] and [11] of the Decision. The AWU considers these changes resolve the issues that inadvertently arose from the variations which took effect on 20 November 2020.

OVERTIME FOR FULL-TIME AND PART-TIME EMPLOYEES

4. At [13] of the Decision, the Commission invited interested parties to make submissions on the rates applicable to full-time or part-time employees where these employees work outside the span of hours specified in clause 28.2(a), or in excess of the maximum daily hours specified in clause 28.3.
5. As outlined at paragraph [6] to [8] of the AWU's submissions in respect of the Hair and Beauty Award Plain Language Exposure Draft on 25 November 2020, an ambiguity exists in the current Award with respect to the entitlement of full-time and part-time employees to overtime rates for hours worked outside the span of hours outlined in clause 28.2(a), and hours worked in excess of the maximum daily hours in clause 28.3.
6. To remedy this ambiguity, the AWU considers it necessary to vary the Award, to confirm full-time and part-time employees are entitled to be paid overtime rates for work performed outside the span of hours, and for hours worked in excess of the maximum per day.

¹ [2021] FWCFB 1121.

7. In respect of the entitlement to overtime rates for hours worked outside the span of ordinary hours identified in clause 28.2(a), the AWU submits that the intent of clauses 28.2 and clause 31.2 is to require the payment of overtime rates to full-time and part-time employees where employees work outside the span of ordinary hours.
8. Clause 31.2 contains an express reference to the hours of work in clause 28.2, which sets out the span of ordinary hours. It appears from this cross reference that the provision was intended to provide for the payment of overtime rates where full-time and part-time employees work outside the span of ordinary hours.
9. In the absence of the payment of overtime rates for work performed outside the span of hours, the only alternative construction available is that the Award currently operates to prohibit the working of hours outside the span because these hours could not be classified as ordinary hours and would not meet the definition of overtime.
10. The same issue arises with the maximum daily hours prescribed in clause 28.3. If overtime rates are not payable when the maximum hours are exceeded, the Award must be interpreted as prohibiting the working of additional hours.
11. Any technical argument that hours outside the span or in excess of the daily maximum would be classified as overtime hours that do not attract penalty rates should be rejected by the Commission. This would result in a manifestly unjust outcome because the overall remuneration of an employee for working ordinary hours (minimum rates plus superannuation) would be lower than the overall remuneration for working overtime (superannuation is generally not paid on overtime).
12. The AWU submits that to remedy these ambiguities, the existing overtime conditions in the Award should be clarified to cover work outside the span of ordinary hours and in excess of the maximum daily hours.
13. The AWU submits an appropriate way of remedying the current ambiguity would be to amend clause 31.2(a) of the Award to the following effect:

*Overtime hours worked by a full-time or part-time employees in excess of, or outside of, ordinary hours are to be paid at **150%** of the ordinary hourly rate of pay for the first three hours and **200%** of the ordinary hourly rate of pay after three hours.*
14. The overtime rates in clause 31.2(a) would continue to operate subject to clause 31.2(d) which requires a loading of 100% for all ordinary hours and overtime worked on a Sunday.
15. The AWU understands the effect of this variation to be:

- (i) a full-time employee will be entitled to overtime rates when they work in excess of an average of 38 rostered ordinary hours per week (with a maximum 4-week rostering period as per clause 30.1), outside the span of ordinary hours in clause 28.2(a) and in excess of the maximum daily hours in clause 28.3 of the Award; and
- (ii) a part-time employee's ordinary hours agreed in accordance with clause 12.2 must fall within the span of ordinary hours in clause 28.2(a) and within the maximum daily hours prescribed in clause 28.3 and other limitations on ordinary hours in the Award. Hours worked in excess of the hours agreed within these parameters are paid at overtime rates in accordance with clause 12.7 and 31.2.

16. The AWU considers the approach outlined above is consistent with the intended operation of the Award when read as a whole and consistent with the approach to overtime adopted in various other modern awards.

Modern Awards Objective

17. The AWU also considers the changes above are consistent with the modern awards objective including for the following reasons.

s.134(1)(a) - relative living standards and the needs of the low paid; and

18. Many award-reliant employees in the hair and beauty industry are low-paid within the definition used by the Expert Panel in the 2018 – 19 Annual Wage Review.²

19. In determining the meaning of 'low paid', the Expert Panel noted at [359]:

'A threshold of two-thirds of median adult full-time ordinary earnings is the benchmark we use to identify who is 'low paid' within the meaning of ss 134(1)(a) and 284(1)(c).'

20. The Expert Panel in the 2018 – 19 Annual Wage Review states at [205] that according to the most recent data from the Australian Bureau of Statistics, two-thirds of median earnings were equal to \$886.67 per week.

21. The Award is divided into six classification streams in accordance with the employee's skill level and qualification.

22. Employing the Expert Panel's definition of 'low paid' in the 2019 – 20 Annual Wage Review, half of all award-reliant employees in the hair and beauty industry are low-paid employees.

² The AWU notes that the Expert Panel in the 2019 – 20 Annual Wage Review did not state the quantum of two-thirds of median income. The AWU therefore relies on the 2018 – 19 Annual Wage Review.

23. The clarification of overtime rates for full-time and part-time employees may provide a small improvement to the relative living standards and needs of the low paid.

s.134(da) – the need to provide additional remuneration for (i) employees working overtime

24. This consideration heavily supports the AWU's proposed amendment.

25. The Award currently arguably does not compensate full-time and part-time workers for the disabilities associated with working in excess of the maximum daily hours or outside the span of hours because it fails to clearly require the payment of overtime rates for these hours.

Other factors

26. The AWU submits the other factors identified in s 134(1) operate as neutral considerations or do not weigh strongly against addressing the existing ambiguity in the manner proposed by the AWU.