

IN THE FAIR WORK COMMISSION

2014 Award Review

(AM2017/51)

Community and Public Sector Union (CPSU) (PSU Group)

Submissions re: overtime for casual employment in the *Miscellaneous Modern Award*

Introduction

1. These submissions are made pursuant to the Directions on 15 March 2019 by the Full Bench of Vice President Hatcher, Deputy President Kovacic and Deputy President Bull.
2. The CPSU makes the following submissions in support of United Voice's application to vary the *Miscellaneous Award* to provide for casual employees covered by that Award to receive overtime rates when they work greater than 10 hours per shift or more than 38 ordinary hours in a week.
3. The CPSU represents members who are covered by the *Miscellaneous Award*.
4. The CPSU says it is consistent with the *Fair Work Act 2009's* (The Act) modern award objective that variations to clearly provide for overtime payments for casuals are made.
5. The CPSU supports the submissions of the ACTU of 19 January 2017 regarding the eligibility for and payment of overtime for casuals. As a matter of principle, the CPSU believes casual employees should be eligible for overtime payments when they exceed ordinary hours on a day or a week or perform work outside the span of hours. As such the default position should be that casuals are entitled to overtime payments.
6. Regarding the employers and employees covered by the *Miscellaneous Award*, the CPSU notes the comments made in during the Award modernisation process regarding the coverage of this award.¹ Because of this issue the CPSU does not propose to deal with the nature of the industry or work performed under this award or provide evidence regarding the utilisation of casual engagement or overtime of employees.

The *Miscellaneous Modern Award*

7. The *Miscellaneous Award* relevantly provides:

10.4 Casual employment

¹ See [84] of [2009] AIRCFB 865

- (a) A casual employee is one engaged as such. Casual employees must be paid a loading of 25% in addition to the relevant minimum wage in clause 14. This loading is instead of the leave to which full-time employees are entitled under the NES and this award.

20. Ordinary hours of work and rostering

20.1 The ordinary hours fixed in accordance with clause 10—Types of employment, for employees other than casuals are to be worked on a regular basis with fixed starting and finishing times over a maximum of six days per week, provided that on average an employee must not be required to work ordinary hours on more than 20 days in any 28 day period. Once fixed, the starting and finishing times can be varied by agreement at any time or by the employer on seven days' notice.

20.2 Ordinary hours are not to exceed 10 hours on any day or shift except by agreement in which case the maximum number of ordinary hours is 12.

22.1 Overtime

All time worked in excess of an average of 38 hours per week by a full-time employee or in excess of the agreed number of hours per week by a part-time employee is overtime and must be paid at the rate of 150% of the relevant minimum wage for the first three hours and 200% of the relevant minimum wage thereafter. In the case of part-time employees, the agreed number of hours means the number of hours agreed in writing either at the commencement of employment or subsequently.

22.3 Penalty rates

(a) All work performed by an employee, other than a casual, outside the hours of 7.00 am and 7.00 pm Monday to Friday and on Saturday which is not overtime must be paid at the rate of 120% of the relevant minimum wage.

(b) All work performed by an employee, other than a casual, on Sunday which is not overtime must be paid at the rate of 150% of the relevant minimum wage.

(c) All work performed by a casual employee outside the hours of 7.00 am and 7.00 pm Monday to Friday and on Saturday which is not overtime must be paid at the rate of 145% of the relevant minimum wage.

(d) All work performed by a casual employee on Sunday which is not overtime must be paid at the rate of 175% of the relevant minimum wage.

(e) All work performed by an employee on a public holiday is to be paid at the rate of 250% of the relevant minimum wage.

8. The *Miscellaneous Award* does not provide for casuals to receive overtime payments. The CPSU says the Award is also inconsistent and unclear with its treatment of casuals. Clause 10.4 says the 25% loading is paid in lieu of leave. Clause 20.2 says employees, other than shiftworkers must not work greater than 10 hours in each day. The casual loading is paid in lieu of other conditions or entitlements. This is reflected in clause 22.3 where casuals receive penalty rates in addition to their casual loading. However, clause 22.1 only provides for full-

time and part-time employees to receive overtime rates. So while casuals can work a maximum of 10 hours, they do not receive overtime payments.

9. Consistent with how the Award describes what the casual loading is to compensate for and with other penalties and full and part-time employees, the Award should be varied provide for casual employees to receive overtime payments.

The Award modernisation process

10. The CPSU refers to the decisions of [2009] AIRCFB 865 and [2009] AIRCFB 945 where the Full Bench of the Commission made decisions to create the *Miscellaneous Award*. The decision contains a reference of a general nature to casual entitlements in [2009] AIRCFB 945 at [154] as follows:

We do not think it is appropriate to exempt casual employees from weekend and other penalties applicable to full-time employees.

Notwithstanding this general comment, the specific matter of overtime and casuals does not appear to be clearly adverted in submissions by the parties or by considerations of the Full Bench making the Award.

The Casual employment and Part-time employment decision

11. The CPSU refers to previous decisions of the Full Bench regarding casual employees and overtime. The *Casual employment and Part-time employment* [2017] FWCFB 3541 decision 5 July 2017 (the *Casual employment and Part-time employment decision*) held:

[548] We are satisfied, having regard to the matters we are required to take into account under s.134(1), that a fair and relevant minimum safety net for casual employees covered by the 3 awards in question requires that casual employees receive the benefit of overtime penalty rates. On the basis of the factual conclusion we have set out, it is apparent that casual employees who work long hours in the course of a day or a week are subject to significant disabilities. Those disabilities are essentially the same as those applying to permanent employees who work lengthy hours and receive overtime penalty rates for doing so. We see no good reason for the different treatment of casual employees, nor was any convincing rationale for this advanced by any interested employer party. These are matters bearing particularly upon the consideration in s.134(1)(da)(i), which we have accordingly assigned particular weight in reaching our conclusion. The position here appears to be the same as that discussed by the Full Bench in relation to the SCHCDSI Award in Australian Municipal, Administrative, Clerical and Services Union¹ as follows:

“[39] 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.”

[549] Overtime penalty rates serve the dual purpose of compensating employees for disabilities of that nature and establishing a disincentive for employers to require particular employees to work long hours. Employers in the industry sectors in question may be able avoid the cost of overtime penalty rates by adopting rostering systems and practices which ensure that no single employee is commonly required to work excessive hours, and in that sense the introduction of penalty rates need not cause significant additional cost burdens for employers. That is relevant to the consideration in s.134(1)(f), which we have taken into account as not being adverse to the proposition that a fair and relevant safety net should provide for casual overtime penalty rates.

12. The CPSU says the reasoning displayed in the *Casual employment and Part-time employment decision* is applicable to the *Miscellaneous Award*. There is no clear reason why casual employees covered by the *Miscellaneous Award* should be comparatively financially worse off than full time or part-time employees when they perform overtime.

The Modern Awards Objective and a fair and relevant minimum safety net

13. The CPSU says it is necessary to meet the modern awards objective for the *Miscellaneous Award* to include the proposed variation and provide casual employees with overtime payments.
14. Section s134 of the Act sets out the modern awards objective. The CPSU will address the relevant factors in s134 below (in accordance with [115] of the *Penalty Rates Decision*). Regarding the expression ‘fair and relevant safety net’, in the *Penalty Rates Decision*, the Commission said:

[117] First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. . . .

[119]. . We would also endorse the following observation by the Full Bench in the *Equal Remuneration Decision 2015*:

‘We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for ‘fair minimum wages’ is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.’

[120] In the context of s.134(1) we think the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances. . . .

[121] Finally, as to the expression ‘minimum safety net of terms and conditions’ . . .

[130] Rather, the purpose of modern awards, together with the NES and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)).

15. Regarding s134(1), the CPSU says it is not a fair system of wages or conditions for employees performing the same work and same hours to be treated and remunerated differently. There is a financial incentive from the award for employers to utilise casuals in preference to full time employees when overtime is required. Casual employees receive their casual loading in lieu of paid leave and redundancy provisions.² It does not compensate them for working additional overtime hours. The variation sought would create a relevant safety net of minimum terms and conditions in line with community expectations.

The Modern Awards objective criteria

16. The CPSU addresses the s134 of the Act criteria which we believe are the main relevant ones as follows. The criteria in s134(1) not dealt with below we say are neutral in the Commissions assessment.

(a) relative living standards and the needs of the low paid; and

17. This consideration is relevant because casual employees by definition do not have the stability of work and income of full time employees and would generally receive fewer hours and fewer conditions than their full time counterparts. Casual employees are more likely to be minimum wage reliant³ and can be considered low paid.⁴ For casuals to be remunerated for overtime at an equivalent rate to full time employees would assist the low paid and relative living standards.

...

(da) the need to provide additional remuneration for:

- (i) employees working overtime; or**
- (ii) employees working unsocial, irregular or unpredictable hours; or**
- (iii) employees working on weekends or public holidays; or**
- (iv) employees working shifts; and**

18. The CPSU says this is the most relevant of the s134 criteria. We note the consideration given in *Casual employment and Part-time employment decision* at [545] to the amendments to the *Fair Work Act 2009* contained in s.134(1)(da). It would be consistent with the Modern Awards Objective, in particular s134(1)(da) and the *Casual employment and Part-time employment decision* for the *Miscellaneous award* to be varied to provide casual employees with overtime payments.

² See: Penalty Rates [2017] FWCFB 1001 at [894-896]

³ *Productivity Commission Inquiry Report: Workplace Relations Framework*, Vol 1 p.208

⁴ *Ibid*, p.205

19. The provisions of s134(1)(da) emphasise the need for employees working overtime to be provided additional remuneration. If full-time and part-time employees receive such additional remuneration in the form of overtime payments under the *Miscellaneous Award*, then it is inconsistent with 134(1)(da) for casual employees to be excluded from overtime payments.

(e) the principle of equal remuneration for work of equal or comparable value; and

20. The CPSU says this is also a relevant consideration. Unequal remuneration for full-time, part-time and casual employees performing overtime under the same award violates this principle.

Conclusion:

21. Consistent with s138 of the Act, the CPSU says that without a variation to provide for overtime payments for casual employees, the *Miscellaneous Award* does not meet the s134 Modern Awards Objective and should be varied to meet this objective.

9 May 2019

CPSU - SYDNEY