

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009

Title of Matter: 4 Yearly Review of Modern Awards - Overtime for Casuals (AM2017/51)

NATIONAL ELECTRICAL AND COMMUNICATIONS ASSOCIATION - SUBMISSION

Casual Loading and Overtime Penalties

Electrical, Electronic and Communications Contracting Award 2010 [MA000025]

Executive Summary

1. NECA opposes adoption of the 'compounding approach' to the calculation of the overtime rate to be paid to casual employees
2. Adoption of the compounding approach would be an "unreasonable and unnatural." construction when read in context of the Award as a whole.
3. The casual loading is not identified as forming part of the "all purpose" rate used to calculate overtime penalties and shift loadings.
4. The *Electrical, Electronic and Communications Contracting Award 2010* (Electrical Award) provides that the casual loading (of no less than 25%) is paid to casuals for "all hours worked." That is, an employer who pays a casual loading for each hour worked by the employee plus the Award base hourly rate times 1.5 or 2 or 2.5 (as determined by clause 26.1 or 24) when the casual employee works overtime is not in breach of the Award.
5. The compounding approach mandates effective casual loadings of 37.5%, 50% and 62.5% when a casual employee work overtime. That is a result that is inconsistent with the scheme of the Electrical Award that provides that the casual loading is paid "*instead of annual leave, paid personal/carers leave, notice of termination, redundancy benefits and other attributes of full time or part time employment.*"
6. The Electrical Award does not increase any of those 'attributes' because the employee has worked overtime.
7. Similarly, work related special allowances referred to at clause 17.4 (not being specifically identified as all purpose allowances) which are calculated by reference to the 'standard' rate are not increased when an employee works overtime.
8. Use of the expressions "*time and a half, double time and double time and a half*" do not suggest that overtime payments paid to casuals under the Electrical Award are to be calculated on the ordinary time rate of pay inclusive of the casual loading.

9. The relevant pay advice for the Electrical Award issued by the Fair Work Ombudsman adopts the cumulative approach when calculating the rate to be paid to a casual employee when working overtime,
10. The CEPU submission referred to at para [214] of the Decision should be rejected.
11. The Commission's draft and/or final Determination should adopt the 'cumulative approach.'

Introduction

12. On 18 August 2020 a Full Bench of the Commission issued a decision, 4 yearly review of modern awards – Overtime for casuals (AM2017/51) (Decision) and Draft Determination
13. The Decision at para [5] referred to the Full Bench Award Modernisation Decision under part 10A of the *Workplace Relations Act* ([2008] AIRCFB 1000)

[50] In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate."

14. And noted at Para [6] that calculation of penalties and the casual loading on the ordinary time rate was not applied consistently. The AIRC adopted three approaches
 - (1) awards where overtime penalty rates are payable in substitution for the casual loading;
 - (2) awards where the casual loading and the overtime penalty rate are added separately to the minimum hourly rate (the cumulative approach);
 - (3) awards where the overtime penalty rate is applied to an ordinary hourly rate consisting of the minimum hourly rate and the casual loading (the compounding approach).
15. In considering relevant passages of the *Aged Care Award 2010*, the Full Bench at [25] of the Decision referred to a Decision in *Yallourn* [2017] FWCFB 381; 262 IR 300

[25]...The "time" referred to is the rate of pay that would be payable to the employee for ordinary hours. In the case of casual employees, the ordinary time rate is inclusive of the casual loading. Therefore, the overtime rate is calculated by reference to the ordinary time rate inclusive of that loading, unless there is some provision which expressly indicates otherwise. That means that the casual loading is included in the overtime rate on a compounding basis.

[26] This position was established in the Full Bench decision in AMWU v Energy Australia Yallourn Pty Ltd (Yallourn),⁵ which concerned the proper construction of a provision in an enterprise agreement which established a "double time" overtime rate of pay for casual employees. The Full Bench said:

"[41] We are satisfied that the words in the Agreement are not ambiguous or uncertain. The clause sets out how you calculate the ordinary time rate for casual employees and that rate includes the casual loading. The Agreement provides that casual employees are entitled to double time for working overtime. We are satisfied that that double time means double the amount paid for working ordinary time. We are satisfied that, in the absence of express words excluding the casual loading from

the calculation of overtime, on its ordinary meaning, the clause provides that the loading is included when calculating overtime payments.”

16. *Yallourn*, which was held to establish that casual loading is part of the ordinary hourly rate for casuals referred to the words of an EA and not an Award.

17. In adopting the ‘compounding approach’ The Full Bench also considered wording of the Nurses Award 2010

[27] Similarly, the Full Bench majority in Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care (Domain)⁶ interpreted the overtime provisions in clause 28.1 of the Nurses Award 2010, which prescribed overtime rates of “time and a half” and “double time”, as meaning in respect of casual employees, that the rates were calculated on the ordinary time rate inclusive of the casual loading. The Full Bench said:

“[17] Clause 10.4(b) of the Award says that a casual employee will be paid an hourly rate equal to 1/38th of the weekly wage plus a casual loading of 25%. On a plain reading of the clause, the hourly rate includes the loading; the loaded casual rate is the ‘ordinary rate of pay’. When a casual employee works ordinary hours on a Saturday or Sunday, clause 26 of the Award requires the weekend loading to be applied to the ordinary rate of pay. For casual employees, this rate is the casual rate. The same is the case with the public holiday penalty in clause 32.1. . . . [19] The Commissioner’s conclusion that overtime penalties are also paid on the loaded casual rates of pay is in our view also correct. Clause 28.1 simply speaks of ‘time and a half for the first two hours and double time thereafter’ for Monday to Saturday work, ‘double time’ for Sunday and ‘double time and a half for public holidays.’ The relevant ‘time earnings’ for a casual under clause 10.4 include the casual loading. Further, clause 28.1(c) provides that overtime rates are in substitution for and are not cumulative upon shift and weekend premiums. Nothing is said of the casual loading being excluded. We appreciate that this sub-clause is concerned with applying one penalty to the exclusion of another, rather than precluding the calculation of a penalty based on a loaded rate, which is the focus of the interpretative controversy in this instance. Nonetheless, clause 28.1(c) is a limitation on the interaction of different penalties, and nothing is said about confining the application of the casual loading.”

18. . Clause 10.4 of the Nurses Award says:

10.4 Casual employment

(a) A casual employee is an employee engaged as such on an hourly basis.

(b) A casual employee will be paid an hourly rate equal to 1/38th of the weekly rate appropriate to the employee’s classification plus a casual loading of 25%.

(c) A casual employee will be paid a minimum of two hours pay for each engagement.

(d) A casual employee will be paid shift allowances calculated on the ordinary rate of pay excluding the casual loading with the casual loading component then added to the penalty rate of pay.

Unlike the Electrical Award the Nurses Award does not say that a casual employee will be paid the casual loading “for each hour worked.”

Electrical, Electronic and Communications Contracting Award (Electrical Award) Decision

19. The Full Bench noted provisions of the Electrical Award.

[315] Clause 10.3 of the award relevantly provides:

10.3 Casual employment

(a) A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.

(b) For each hour worked, a casual employee will be paid no less than 1/38th of the all purpose weekly wage rate of pay for their classification in clause 16— Classifications and minimum wages, plus a casual loading of 25%.

(c) The casual loading is paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.

(d) The overtime provisions of clause 26—Overtime and clause 24.13 apply to casual employees. . . .

[316] In respect of the rate of overtime, clauses 26.1(a) and 26.4 provide:

(a) For all work done outside ordinary hours, the rates of pay will be time and a half for the first two hours and double time thereafter.

26.4 Sunday and public holiday work

Double time must be paid for work done on Sundays and double time and a half must be paid for work on any of the public holidays prescribed in this award.

20. And concludes by saying.

[318] The use of the expressions "time and a half", "double time" and "double time and a half" in clauses 26.1(a) and 26.4, on the Yallourn/Domain approach, suggest that the overtime rate of a casual employees is to be calculated on the ordinary time rate, inclusive of the casual loading. Clause 10.3(d), which specifically applies clause 26 to casual employees, likewise suggests that the penalty rates provided for in clause 26 are to be applied to the casual rate established by clause 10.3. We cannot identify any textual contra-indicator which would displace the Yallourn/Domain approach.

[319] The updated exposure draft for this award published on 14 May 2020, provides for casual employment in clause 11, which in all relevant respects is drafted in the same way as the current clause 10.3. Clause 20.1 of the exposure draft is equivalent to the current clause 26.1(a), but expresses the penalty rates as 150% or 200% of the "ordinary hourly rate". Clause 20.4, which is the equivalent of the current clause 26.4, likewise expresses the penalty rates for Sundays and public holidays as 200% and 250%, respectively, of the "ordinary hourly rate". Clause 2.2 of the exposure draft defines the expression "ordinary hourly rate" as follows:

ordinary hourly rate means the hourly rate for an employee's classification specified in clause 16.2, plus the industry allowance. Where an employee is entitled to additional all-purpose allowances, these allowances form part of that employee's ordinary hourly rate.

[320] The exposure draft does not identify that the casual loading is an all-purpose rate, meaning (it appears) that the casual loading is not included in the calculation of the penalty rates in clause 20.1 and 20.4. It is unclear whether the casual loading is then to be added to the calculated rate. This at least creates ambiguity and, on our provisional view as to the meaning of the current provisions, constitutes a substantive change to the current position.

[321] We will publish a draft determination that is consistent with our provisional view as to the meaning of the current provisions. This draft determination will specify that the overtime rates for casual employees are 187.5% of the hourly rate (plus any all-purpose allowance payable) for the first 2 hours and 250% thereafter, and are 250% on Sundays and 312.5% on public holidays, inclusive of the casual loading. Interested parties will then be allowed a period of 21 days to file any submissions they wish to make in response.

The Electrical Award

21. Clause 3.2 of the Electrical Award defines 'Standard Rate' as "*means the minimum wage for an Electrical Worker Grade 5 in clause 16- Classifications and minimum wages.*"
22. Clause 16.2 sets out the minimum wages for an employee other than an apprentice
23. Clause 16.3 provides for the addition of other 'all purpose' allowances as nominated at clause 17.2 of the Award. That is all purpose allowances are added to the base classification rate for the purpose of calculating shift penalties and overtime and the like.
24. The casual loading is not described as being an all purpose allowance or paid for all purposes of the Award.
25. Clause 10.3 (c) of the Award says the casual loading is paid instead of annual leave, paid personal/carers leave, notice of termination, redundancy benefits and other attributes of full time or part time employment. None of those payments is affected by the amount of overtime worked by a full time or part time employee.

Award Interpretation

26. In *Electrical Trades Union of Australia New South Wales Branch and Sydney West Area Health Service [2008] NSWIRComm 1137* Commissioner Bishop of the NSW Industrial Relations Commission referred to established principles of Award Interpretation as referred to in Full Bench decision *Director of Public Employment by her agent the Commissioner of New South Wales Fire Brigades and New South Wales Fire Brigade Employees' Union [2008] NSWIRComm 158*, which noted in part at [47]

47 Nevertheless, it would be untenable to attempt to construe the terms of an award according to the subjective intentions of the parties if, in doing so, it resulted in an unreasonable and unnatural construction having to be placed on the words of the award. In interpreting the provisions of an award the intention of the drafters must

be ascertained by reference to the actual words used (and those words should be given their plain, ordinary meaning), thereby disclosing the underlying purpose or object of the award and its context, using that term in its broadest sense, including extrinsic material. Thus, attention must at all times be given to the meaning and effect of the award as it appears from the plain and ordinary meaning of the words used: see Zoological Parks at [43]. It is not permitted to attach to a provision of an award a meaning which the words of the award cannot reasonably bear: Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia (1981) 147 CLR 297 at 321 (per Mason and Wilson JJ).

27. In *AIMEU v Golden Cockerel Pty Ltd* [2014] FWCFB 7447 a full bench of the Commission considered the principles to be applied in interpreting enterprise agreements as

- a. *The Acts Interpretation Act 1901 (Cth) does not apply to the construction of an enterprise agreement made under the FW Act.*
- b. *In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.*
- c. *Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.*
- d. *If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.*
- e. *If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstance will be admissible to aid the interpretation of the agreement.*
- f. *Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include:*
 - (a) *evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;*
 - (b) *notorious facts of which knowledge is to be presumed;*
 - (c) *evidence of matters in common contemplation and constituting a common assumption.*
- g. *The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.*
- h. *Context might appear from:*
 - (a) *the text of the agreement viewed as a whole;*
 - (b) *the disputed provision's place and arrangement in the agreement;*
 - (c) *the legislative context under which the agreement was made and in which it operates.*
- i. *Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common intention is identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement.*
- j. *The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties."*

28. Similar principles should be applied to the interpretation of awards.¹
29. Again, clause 10.3(b) of the Award provides that a casual employee shall be paid a casual loading of 25% “for each hour worked.”
30. 10.3(c) says the casual loading is paid instead of “annual leave, paid personal/ carers leave, notice of termination, redundancy benefits and other attributes of full time or part time employment. None of those ‘benefits’ is increased because the full time or part time employee has worked an amount of overtime.
31. Read in the context of the Award, clause 10.3(b) must be read as conferring the casual loading separately from and not as part of the base rate of pay.
32. In its Pay Guide for the Electrical Award, the Fair Work Ombudsman advises that a casual Level 1 Electrical Worker shall be paid \$36.09 for the first two hours of overtime worked Monday to Friday calculated as follows:
- | | |
|--------------------------------|-----------|
| Permanent Employee Hourly Rate | (\$20.62) |
| + Casual Loading of 25% | (\$5.16) |
| + 0.5X \$20.62 | (\$10.31) |
| = | (\$36.09) |

Predecessor Awards

33. There is a significant difference between the application of the casual loading as stated in the Electrical Award and as stated in the *Electrical, Electronic and Communications Contracting Industry (State) Award* (the State Award) made by a full bench of the NSW Industrial Relations Commission on 22 June 2005.²
34. Clause 8.2.3 of the State Award states:
- Casual Employment Additional Rate - A casual employee shall be paid 12 per centum of the weekly rate prescribed by clause 3.4, Wages Rates (except for 3.4.1.3 of the said Clause) in addition to the weekly wage rate prescribed by this award for the work which he/she performs. The casual employment additional rate shall be paid for all purposes of the award.*
35. Unlike the Electrical Award, the State Award provided that the casual loading was to be paid for all purposes of the Award.
36. Conversely the *National Electrical, Electronic and Communications Contracting Industry Award 1998*³ that operated in Victoria, South Australia, Tasmania and the ACT, states at clause 11.3.1
- A casual employee shall be paid per hour 1/38 of the gross weekly ordinary all purpose rate of pay prescribed for the classification in which the employee is ordinarily employed for the work performed, plus a loading of twenty percent.*
- The overtime provisions of clause 22 of this award apply to casuals.*

¹ See also Four yearly review of modern awards - Penalty Rates [2017] FWCFB 1001 (23 February 2017) at 3.1

² [IRC 3778 of 2002 and 652 of 2004]

³ C no 30341 of 1998 [Print K3299]

37. Put simply, words similar to those appearing in the State Award could have been included in the Electrical Award if it was intended that the casual loading was to form part of the all purpose rate.

Conclusion

38. For the reasons stated above, the Fair Work Commission should not make a determination that the 'compounding approach' is to be adopted when calculating overtime payments for casual employees.

Should you wish to discuss this submission, please contact Lise Sperling (Head of Policy and Government relations) on 02 9439 8523 or by email lise.sperling@neca.asn.au

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'O. Judd', with a stylized flourish at the end.

OLIVER JUDD

Chief Executive Officer (Acting)
National Electrical and Communications Association