

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009

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

SUBMISSION

26 November 2020

NATIONAL ELECTRICAL AND COMMUNICATIONS ASSOCIATION

Overtime rates for Casual Shiftworkers

Electrical, Electronic and Communications Contracting Award 2010 [MA000025]

Introduction

1. On 11 November 2020, the Award Modernisation Unit (AMOD) of the Fair Work Commission received an email from Work Sight Pty Ltd in the following terms

"I have been looking over the determination for overtime for casuals for the Electrical Contracting Award.

The overtime on shiftwork clause has not been varied to include overtime rates for casual shiftworkers (clause 13.16 in the 2020 Award) which could cause confusion given that the clause 20 will include the casual overtime rate. Is there a possibility this clause can be updated as well?"

2. Work Sight Pty Ltd is a Business Advisory firm which, according to its website [provides] "Services and areas of expertise" in:

- *Developing enterprise agreements*
- *Mediating and assisting to resolve workplace conflicts*
- *Investigating grievances and bullying complaints*
- *Providing insightful guidance for clients*
- *Developing policies and procedures*
- *Working with clients to train and develop their staff*
- *Interpreting awards and agreements.*

3. On 19 November, VP Hatcher invited Interested parties to file any submissions in response by **5.00pm on Thursday 26 November 2020**.

4. Following the decision of a Full Bench of the Commission to adopt the 'compounding approach' to the accumulation of the base rate of pay, casual loading and penalties for casual employees working overtime Monday to Friday

NEW SOUTH WALES BRANCH

122 Hume Highway
Chullora NSW 2190

T +61 2 9744 1099
F +61 2 9744 1830
E necansw@neca.asn.au
W www.neca.asn.au



or on a Sunday or Public Holiday¹, variations to commence on 20 November 2020 were made to clauses 20.1(b), 20.4(a)(ii) and 20.4(b)(ii) of the *Electrical, Electronic and Communications Contracting Award 2020* (the 2020 Award)²

5. On 18 August 2020 a Full Bench of the Commission issued a decision, 4 yearly review of modern awards – Overtime for casuals (AM2017/51)³ (August Decision) and Draft Determination
6. In the August Decision the Full Bench noted provisions of the *Electrical Electronic and Communications Contracting Award 2010* [MA000025] (the 2010 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. . . .”

7. Clause 13.16 of the 2020 Award is in similar terms to clause 24.15 of the 2010 Award, both of which conclude by stating at paragraph (c)
“Such extra rates will be in substitution for and not cumulative upon the shift premiums.”

Submission

8. NECA’s primary submission is that no “update” to clause 13.16 is necessary.
9. It is difficult to reconcile the Full Bench’s decision to adopt the compounding approach in the 2020 Award with the August Decision which adopted the cumulative approach in respect of other awards.

¹ [2020] FWCFB 5636

² [PR23896]

³ [2020] FWCFB4350



10. For example, in reference to the *Textile, Clothing, Footwear and Associated Industry Award_2010*, the Full Bench stated at [262] of the August Decision:

We consider that the position of the Ai Group is correct. Clause 14.3 makes it clear that the casual loading is calculated by reference to “1/38th of the weekly award wage” – that is, the ordinary hourly rate. Clause 39.3 is less than clear as to the basis upon which overtime penalty rates are to be calculated, but clause 14.5 clarifies this by providing that casual employees are to receive the same overtime penalty payments as permanent employees, which necessarily means that the penalty payments for casual employees under clause 39.3 must also be calculated by reference to “1/38th of the weekly award wage”.

11. It is submitted that clause 10.3(d) of the 2010 Award (11.4 of the 2020 Award) makes it equally clear that “casual employees are to receive the same overtime penalty payments as permanent employees, which necessarily means that the penalty payments for casual employees... must also be calculated by reference to “1/38th of the weekly award wage.”

12. In referring to the *Water Industry Award* the Full Bench at [280] of the August Decision referred to clause 10.5(c), “Penalties (including public holiday penalties) and overtime for casual employees will be calculated on the ordinary hourly rate for the classification in which they are employed exclusive of the casual loading” before concluding at [290]:

“For the above reasons, we conclude that the casual loading is not payable on overtime.”⁴

13. Similar to clause 10.5(c) of the *Water Industry Award*, clause 11.2 of the 2020 Award should be read objectively.

14. The Full Bench turned its attention to the *Wool Storage, Sampling and Testing Award 2010* at [292] to [298] of the August Decision

15. Clause 10.3, Casual Employment, is quoted at [293] and states

“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 minimum weekly rate of pay for their classification in clause 13—Classifications and minimum wage rates, plus a casual loading of 25%.

⁴ One of those reasons as explained at [289] was that in reference to the similarly worded *Local Government Industry Award 2010* “it was agreed between the LGAs and the ASU that the identical provisions in that award mean that the casual loading is not payable on overtime.”



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

16. At [297] the Full Bench concludes:

"We see no reason to draw any different conclusion for this award than for the Oil Refining and Manufacturing Award 2010. Accordingly we conclude that the casual loading is payable on overtime, but calculated on a cumulative, non-compounding basis. It is also payable on the same basis for shift work, weekend work and public holiday work."

17. Clause 10.3(b) of the *Wool Storage, Sampling and Testing Award 2010* is in practically identical terms to clause 10.3(b) of the 2010 Award (11.2 of the 2020 Award). In particular, both clauses prescribe that a loading of 25% will be paid to casual employees *"for each hour worked."*

18. At paragraph [300] of the August decision the Full Bench listed a number of awards including the *Building and Construction General On Site Award 2010* (Building Award) *"where the consensus is that the casual loading and the overtime penalty rate are added separately to the minimum hourly rate (the cumulative approach)"*

19. Clause 36.2 of the Building Award states:

" All time worked beyond an employee's ordinary time of work (inclusive of time worked for accrual purposes as prescribed in clauses 33—Ordinary hours of work and 34—Shiftwork), Monday to Friday, must be paid for at the rate of time and a half for the first two hours and at double time thereafter." (underlining added).

20. The Full Bench does not appear to have applied the *"Yalourn/ Domain Approach"* consistently. Reliance on it to determine adoption of the compounding approach to the calculation of overtime rates for casual employees at [69] of the October Decision⁵ cannot be justified.

Conclusion

21. It is NECA's submission that adoption of the compounding approach when calculating overtime payments for casual employees covered by the 2020 Award is incorrect.

22. That error should not be compounded by "updating" clause 13.16 of the 2020 Award.

⁵ [2020] FWCFB 5636



23. The Determination⁶ issued on 30 October 2020 and subsequent variations to the 2020 Award should be rescinded.

24. If NECA's primary submission is rejected, the overtime rate to be paid to casual shift workers could be clarified by inserting a note at 13.16 similar to that appearing at clause 20.1(b) in the following terms:

"NOTE: The overtime rates for casual employees engaged on shiftwork are to be calculated by adding the casual loading prescribed by clause 11.2 to the ordinary hourly rate before applying the overtime rates for full-time and part-time employees engaged on continuous or non continuous shift work prescribed by clause 13.16(a)"

NECA

A handwritten signature in blue ink, appearing to read "O Judd", is written over a light blue horizontal line.

Oliver Judd

