

From: Pill, Stuart <SPill@claytonutz.com>

Sent: Thursday, 1 October 2020 6:12 PM

To: Chambers - Hatcher VP <Chambers.Hatcher.VP@fwc.gov.au>; Ken McAlpine <kmcAlpine@nteu.org.au>

Cc: Condello, Matthew <mcondello@claytonutz.com>; 'Catherine Pugsley' <catherine.pugsley@aheia.edu.au>

Subject: RE: AM2017/51 - Overtime for casuals - Higher Education Industry-General Staff-Award 2020 [CU-Legal.FID1999041]

Dear Associate

Please see attached letter to assist in informing the mention.

I have also copied Ms Pugsley of the AHEIA, representing the other University employers.

Regards

Stuart Pill, Partner

Clayton Utz

Level 18, 333 Collins Street, Melbourne VIC 3000 Australia | D +613 9286 6148 | F +613 9629 8488 | M +61 408994144 | spill@claytonutz.com | www.claytonutz.com

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Vice President Hatcher
Fair Work Commission
Chambers.Hatcher.VP@fwc.gov.au
AMOD@fwc.gov.au

1 October 2020

Dear Associate

AM2017/51: Overtime for Casuals - Higher Education Industry – General Staff – Award 2020

1. **Background**

1.1 We act for the Group of Eight universities. We refer to our submission to the Commission dated 8 September 2020, and submissions in reply filed by the NTEU on 24 September 2020. Those submissions were made in relation to the Commission's Decision in [\[2020\] FWCFB 4350](#), specifically in relation to the Higher Education Industry – General Staff – Award 2020 (**General Staff Award**).

2. **Summary**

2.1 For the reasons below, the position set out by the NTEU now in its late submission dated 24 September 2020 is inconsistent with the approach that it has submitted in this proceeding throughout the last three years and the consent position of the interested parties to the General Staff Award, which has been agreed in writing, communicated to the Commission by the parties, and acknowledged by the Commission on a number of occasions.

2.2 The position now adopted by the NTEU should not be accepted by the Commission, and it is respectfully submitted cannot be adopted based on the material before the Commission.

3. **The consent position of the parties**

3.1 In our letter dated 8 September 2020, we noted that:

(a) the interested parties in the General Staff Award had previously reached a consent position in relation to a proposed variation to the Award to deal with the issue of overtime for casuals, which had been presented by the parties to the FWC and the Full Bench indicated it was adopting; and

(b) the consent position on one issue (being clear identification of when a casual staff member would receive overtime) had not been picked up in the draft clause and sought confirmation that the full consent position be reflected.

3.2 The consent position of the parties that was not reflected was the insertion of the following clause:

A casual employee will be paid overtime only in respect of work in excess of 20 per cent of the ordinary weekly hours of an equivalent full time employee, on one day.

3.3 The above wording, which was proposed to be inserted in the General Staff Award by consent, existed in the relevant pre-reform awards and reflected the agreed position of all parties in this review process. The proposed insertion of these words was on the basis that it was acknowledged by all parties and the FWC that the General Staff Award did not clearly provide an entitlement to overtime for casual employees, nor did it set out when they would be entitled to overtime. This ambiguity was identified by the Commission in [\[2017\] FWCFB 6417 \(2017 Statement\)](#).

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3.4 The NTEU submission now made is contrary to all previous submissions and positions. In summary:

(a) on [8 December 2017](#), the NTEU wrote to the Commission, stating:

Further to Statement of the Full Bench issued on 4 December 2017, [2017] FWCFB 6417 and analysis of overtime provision in the above Awards (Attachment A), NTEU agrees that there is ambiguity in the two awards in relation to overtime for casuals.

In relation to the Higher Education (General Staff) Award 2010, there is also ambiguity around whether, when and how overtime is paid to casuals in accordance with clauses 12, 21, 23 and 26 of the Award;

(b) on [18 December 2017](#), the NTEU provided to the Commission a draft determination to vary the General Staff Award, which included that overtime would be payable "For those hours worked in excess of 20% of the ordinary weekly hours of an equivalent full time employee, on one day (Monday – Sunday);

(c) on [18 December 2017](#), the Group of Eight wrote to the Commission, enclosing a draft determination to the General Staff Award, which sought the inclusion of the position that had been reflected in the pre-reform awards, being that "Overtime is only payable to casual general staff in respect of work in excess of 20 per cent of the ordinary weekly hours of an equivalent full time employee, on one day";

(d) following a hiatus, a mention was then held on [25 February 2019](#). There was no appearance for the NTEU at this mention, but it was noted that on this issue of casual overtime the parties substantively had the same position;

(e) a report back was held in this matter on [29 July 2019](#). Prior to the report back the issues were discussed and a consensus reached. At the report back, it was noted (see PN455 to 459) that the Group of Eight, AHEIA and NTEU representatives had reached substantive in-principle agreement on a variation to deal with when casuals were entitled to overtime and the relevant rate, which was to reflect the pre-reform award provisions that had been inadvertently omitted in making the modern award. The NTEU appeared at this report back. The only issue raised at that report back was in relation to an interest Australian Business Limited may have in the General Staff Award as they had not been part of the discussions for the consent position. The Bench therefore asked us to finalise that draft consent position with the AHEIA and NTEU and provide it to ABL for any comment/submissions. That then occurred and was resolved (see below at (g));

(f) on [5 August 2019](#), we wrote to the Commission, with NTEU representatives being copied to that email, setting out the agreed consent position of the parties and reflected in a draft variation to insert an entitlement to overtime for casuals and the rate that then applies to that overtime. That position had been agreed in writing by the NTEU prior to us communicating that consent position to the Commission. Our 5 August 2019 correspondence stated:

*In accordance with the Full Bench directions dated 30 July 2019, that agreed position is reflected in the attached updated draft variation **which is filed jointly by our clients, the AHEIA and NTEU** and takes into account the comments of the Bench and adopts the clear position previously applying under the relevant pre-reform awards;*

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- (g) On [7 August 2019](#), Australian Business Lawyers wrote to the Commission, indicating that it was supportive of the agreed submissions and determinations;
- (h) in [\[2019\] FWC 8318](#), Vice President Hatcher issued a statement and noted at [6], in respect of the General Staff Award "*there is either a consensus among the interested parties that the relevant provisions in the exposure drafts should be modified in agreed terms, or no identifiable opposition to a proposed modification*". At [7] the Full Bench noted that it would "*review the position in respect of the above awards, and if any difficulties are identified, the parties will be advised, and further submissions invited*" and otherwise would proceed to adopt those positions;
- (i) on [18 December 2019](#), a mention was held in AM2019/17 (Finalisation of Exposure Drafts – Tranche 2), which relevantly included the General Staff Award. There was no appearance for the NTEU at this mention. At PN381-383, the Group of Eight referenced the consent position of the parties and that the issue of overtime for casuals would be dealt with by the Overtime for Casuals Full Bench;
- (j) in [\[2020\] FWC 1541](#), the Full Bench in AM2019/17 issued its decision in relation to the finalisation of Tranche 2 awards, including the General Staff Award. At [28]-[29], the Full Bench acknowledged the submission made by the Group of Eight in relation to the agreed position of the parties; and
- (k) in [\[2020\] FWC 4350](#), the Overtime for Casuals Full Bench noted at [304] that it decided to proceed on the basis of the consensus of the interested parties in respect of the General Staff Award.

4. The NTEU's fundamental change in position

- 4.1 The NTEU has now submitted that it does not support the proposal of the Group of Eight in the terms proposed (i.e. the adoption of the provision that identifies when overtime rates apply to casual staff as per the pre-reform awards).
- 4.2 As is clear from the above:
 - (a) the position conveyed by us to the Commission is not a Group of Eight proposal, nor was it new or seeking to reduce or remove some existing overtime entitlement for casuals. It was the consistent consent position of the interested parties, which relevantly includes the NTEU; and
 - (b) it was a consent position reached to insert an entitlement to overtime for casual employees in the General Staff Award, which all parties and the Commission agrees was currently ambiguous and was acknowledged by the Commission on a number of occasions in its published transcripts, statements, and decisions. All parties had considerable opportunity to make further submissions in relation to the consent position.
- 4.3 If the NTEU had adopted the position it has now included for the first time in its latest submission at any time during the previous 3 years of proceedings, there would not have been the consent position and a different process and substantive material and submissions would have been required. This is particularly the case given the NTEU position adopts a position different to previous settled industrial conditions (under which overtime for casuals was based on volume hours performed) and which are reflected in a number of enterprise agreements throughout the sector.

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- 4.4 It is unsatisfactory, both as a matter of principle, given the consent position represented to the Commission throughout the proceeding, and as a matter of procedural fairness after three plus years of review and determination by the Commission, for a different position to now be accepted and adopted. The NTEU's position that the General Staff Award already provided an entitlement to overtime for casuals is inconsistent with the views of the Commission (as expressed in the 2017 Statement), the previous submissions made to the Commission by the NTEU (and employer parties), and the manner in which the matter proceeded.
- 4.5 The NTEU claim now proposed has not been made previously and not been the subject of any submissions or evidence. In the absence of a consent position, there is no material before the Commission to be satisfied that the insertion of a clause as proposed by the NTEU is necessary to meet the modern awards objective.
5. **Conclusion**
- 5.1 For the above reasons, the submission and drafting now sought by the NTEU should not be adopted.
- 5.2 The previously non-contentious wording reflecting the consent position on this issue, as confirmed in the Group of Eight submission on 8 September 2020 and reflecting previous consent draft variations, should be adopted.
- 5.3 If you have any queries regarding this letter, please do not hesitate to contact us.

Yours sincerely



Stuart Pill, Partner
+61 3 9286 6148
SPill@claytonutz.com

Matt Condello, Senior Associate
+61 3 9286 6460
mcondello@claytonutz.com

Our ref 928/19237/80178278