

Tony Sheldon National Secretary

4 Yearly Review of Modern Awards

Matter No's: AM2014/196 – Part-time employment

AM2014/197 – Casual employment

Submissions of the Transport Workers' Union of Australia

Passenger Vehicle Transportation Award 2010

Introduction

1. The Transport Workers' Union of Australia (TWU) refers to the Directions issued by the Fair Work Commission (the Commission) on 29 June 2015 in relation to the above matters. The TWU is seeking a variation to the *Passenger Vehicle Transportation Award 2010* (the Award) and makes the following submissions in support of the draft determination filed on 17 July 2015.

Background

2. In a Statement issued on 17 March 2014, the Commission identified a number of common issues to be dealt with as part of the four yearly review of modern awards. The Commission stated that the common issues identified were to be dealt with in separate proceedings to the Award stage. The common issues identified included part-time and casual employment.¹

¹ [2014] FWC1790

3. In a Statement issued on 30 October 2014, the Commission called on parties to provide a written outline setting out the variations they wished to pursue in relation to any awards in Group 2.²
4. On 24 November 2014 the Fair Work Ombudsman (FWO) wrote to the Commission outlining specific award provisions within the Group 2 Modern Awards that may cause uncertainty for workplace participants when determining award entitlements. The FWO indicated that its intention in providing the information was to assist the Commission and relevant parties to achieve the modern award objectives.
5. For the purposes of these submissions the relevant issue identified by the FWO relates to the entitlements of casual school bus drivers covered by the Award. The FWO referred to clause 10.5(d) of the Award, which provides that a casual employee who is engaged solely for the purpose of transporting school children to and from school is to be paid a minimum payment of two hours for each engagement.
6. The FWO indicated that it may not be clear whether a casual employee who is transporting school children in the morning and again in the afternoon is entitled to be paid a minimum of two hours for the morning run and two hours for the afternoon run or alternatively whether both the morning and afternoon runs constitute one engagement.
7. On 25 November 2014 the TWU provided written submissions in support of a number of proposed variations to the awards the TWU has an interest in. One of the proposed variations to the Award sought to address the issue raised by the FWO as identified in its correspondence to the Commission on 24 November 2014.
8. In Directions issued on 29 June 2015, Vice President Hatcher listed the common issues – Casual employment and Part-time employment matters for hearing commencing 14 March 2016. The matters to be dealt with included specific award

² [2014] FWC 7743

provisions identified in a schedule to the Directions. Item 1.2.2 deals with the issue raised by the FWO in relation to clause 10.5(d) of the Award.

Minimum engagements for school bus drivers – Clause 10.5(d) of the current award

9. The current Award makes particular provision for the minimum engagement of casual employees engaged solely for the purpose of transportation of school children to and from school. Relevantly, clause 10.5(d) of the Award provides:

(d) A casual employee is to be paid a minimum of three hours pay for each shift. A casual employee solely engaged for the purpose of transportation of school children to and from school is to be paid a minimum of two hours for each engagement.

10. There is clearly distinct language in clause 10.5(d) reflecting that the engagement is for a continuous period of work. The clause provides that a casual employee is to be paid a minimum payment of three hours pay for each shift. Provision is then made for a casual employee solely engaged for the purpose of transportation of school children to and from school with a minimum payment of two hours for each engagement. The clause clearly distinguishes the engagement as a continuous period of work from the minimum payment for a day for other employees under the award.
11. The Full Bench considered the issue of minimum engagements for casual employees transporting school children in the award modernisation decisions. In the first Award Modernisation Statement for the public transport sector dealing with the issue of minimum engagements for this Award, the Full Bench noted that:

The exposure draft contains minimum engagement provisions for full-time, part-time and casual workers and we invite submissions as to whether a minimum engagement provision is necessary for a full-time employee. In the case of part-time and casual employees we have included a three-hour minimum engagement. We are aware that the transport of school children gives rise to special considerations about minimum hours, particularly in

*more remote areas. We will leave it to the parties to make further submission about this matter as they see fit.*³

12. The current provisions cannot reasonably be interpreted as meaning anything other than two hours for each start in a particular day, that is two hours each time a driver is required to transport children to or from school. This is made clear in the second Award Modernisation Statement where the Full Bench addressed the issue of minimum engagements saying that:

*In the case of casual employees we have retained a three-hour minimum for each shift but where the transportation of school children is undertaken then we have provided for a two-hour minimum for each engagement.*⁴

13. The issue that has been identified by the FWO to the Commission was raised as part of the review of all modern awards after 2 years. In *Australian Public Transport Industrial Association*,⁵ Commissioner Bissett considered variations proposed by both the Australian Public Transport Industrial Association (APTIA) and the TWU. The variations sought by the parties were directed at the issue of the minimum engagement provisions for casual school bus drivers who are engaged solely for the transportation of school children.
14. The principal submission advanced by the TWU was that the existing provisions of the Award are clear. However the TWU proposed an additional provision should it have been considered necessary to make clearer what the clause means, that is the clause requires the minimum payment of two hours for each start/engagement. Each engagement relates to each occasion children are transported to and from school. If an employee transports children in the morning they are to be paid a minimum of two hours for that particular engagement. If he/she then transports children again in the afternoon they are to be paid a minimum of two hours for that engagement. Each start/engagement is a continuous period of work.

³ (2009) AIRCFB 450 at paragraph [187]

⁴ (2009) AIRCFB 826 at paragraph [229]

⁵ [2013] FWC 3221

15. The principal submission advanced by the APTIA was that there was an anomaly in the use of the word “engagement” that had created confusion in the industry. The APTIA relied on evidence from some of its members in support of their claim that the clause created confusion, with some employers in the industry paying a minimum of two hours per day whilst others paid a minimum of two hours in the morning and another minimum of two hours in the afternoon. To cure the alleged anomaly the APTIA sought to replace the word “engagement” with the word “shift”.
16. During the proceedings the APTIA relied on contrary advices from the Fair Work Ombudsman (FWO) on the operation of the clause. In dealing with the issue of whether there was an anomaly Commissioner Bissett said:

Based on the decision of the Full Bench the exposure draft of the PVT Award was amended to reflect provisions for casual employees engaged in the transportation of school children.⁶

That the award provides for different minimum payments for different groups of casual employees is not, in my opinion, an anomaly. It is clear that it was intended that different provisions would apply to casual employees engaged solely in the transportation of school children from those applying to casual employees generally.⁷

Whilst APTIA submits that it seeks to remove an anomaly, the ultimate effect of its variation is to set a minimum payment of two hours on each day that a casual employee is engaged where that engagement is solely for the purposes of transporting school children to and from school. There does not appear to be any agreement that this was the intent of Clause 10.5(d) of the PVT Award.⁸

17. At paragraph 30 Commissioner Bissett went on to say that if the issue the APTIA was pursuing in the proceedings was a question of what the minimum payment per day or per shift was for school bus drivers, then that was a matter more

⁶ at paragraph 22

⁷ at paragraph 23

⁸ at paragraph 24

appropriately dealt with in the four yearly review of modern awards. As for the TWU's proposed variation Commissioner Bissett took the view that it had the potential to create more confusion than it would solve.⁹

The four yearly review

18. As part of the four yearly review, the TWU proposes a number of variations to the Award. In order to narrow the issues between the parties, the TWU and the APTIA have had a number of discussions, including discussions on the interpretation of clause 10.5(d) of the Award.
19. In various submissions to the Commission the APTIA have acknowledged that it agrees with the position that has been consistently advanced by the TWU as to the operation of the provisions of clause 10.5(d), that is the minimum payment of two hours is for each start in a day.¹⁰
20. The issue of the operation of clause 10.5(d) has been considered by the FWO on at least two occasions and has been identified as an issue by the FWO as part of the four yearly review of modern awards. Whilst both the APTIA and TWU agree on the interpretation of the provisions, the TWU submits that it needs to be made clearer to address any uncertainty that may be caused for workplace participants when determining award entitlements.



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26 October 2015

⁹ at paragraph 32

¹⁰ See the APTIA submissions dated 12 May 2015 at paragraph 12 and submissions dated 21 August 2015 at paragraph 8.