



DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—Award flexibility

(AM2014/300)

RESTAURANT INDUSTRY AWARD 2010

[MA000119]

Restaurants

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER LEE

MELBOURNE, 14 DECEMBER 2016

4 yearly review of modern awards - award flexibility - time off instead of payment for overtime - time off at overtime rates.

A. Further to the Full Bench decision issued by the Fair Work Commission on 13 December 2016¹ the above award is varied as follows:

1. By deleting clause 33.5 and inserting the following:

33.5 Time off instead of payment for overtime

- (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
- (b) The period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made.

EXAMPLE: By making an agreement under clause 33.5 an employee who worked 2 overtime hours at the rate of time and a half is entitled to 3 hours' time off.

(c) Time off must be taken:

- (i) within the period of 6 months after the overtime is worked; and

¹ [\[2016\] FWCFB 7737](#); see also [\[2016\] FWCFB 4258](#).

- (ii) at a time or times within that period of 6 months agreed by the employee and employer.
- (d) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 33.5 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.
- (e) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (c), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.
- (f) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- (g) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 33.5 will apply for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

- (h) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 33.5 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 33.5.

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation from 14 December 2016. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after 14 December 2016.

PRESIDENT

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