Part time and casual employment common issue

AM2017/196 and AM2014/197

Submission by Clubs Australia (Industrial) ('CAI')

1. This submission is in response to the directions 4 and 6 made by the Full Bench of the Fair Work Commission ('Commission') in [2017] FWCFB 3541 ('the Decision') in relation to part-time and casual employment common issues in AM2014/196 and AM2014/197.

Casual Overtime

2. CAI opposes the variations sought by United Voice (UV) to the extent that they extend beyond what it sought in the case, and what was determined by the Commission.

3. The claim by UV in relation to casual overtime was set out at paragraph 39 to 41 of its original submission dated 19 September 2016 as follows:

"39. A new clause 10.5(e) is sought which will read:

(e) Casual employees are paid at overtime rates for:

(i) All time worked in excess of 38 hours per week;

(ii) All time worked exceeds 10 hours per day subject to clause 28.4; or

(iii) All time in excess of 10 hours which is part of a continuous or broken shift.

40. Clause 28.1 needs to be amended to make it apply generically to 'employees'.

41. Clause 28.2 sets the rate for overtime payments and a new clause 28.2(f) is sought to clarify that casual employees are within the scope of the clause. An amendment is further sought to clause 28.7 to ensure that casual employees receive the same meal allowance as permanent employees when required to work overtime,

42 Clause 28.4 of the Clubs Award which deals with the necessary break required between shifts is phrased in terms of 'employees' and requires 'that the employee has had 10 hours' rest before the employees' next regular starting time' No amendment to this subclause is required."

4. The Commission determined:

"we determine that overtime penalty rates should be payable to casual employees for all time worked in excess of 12 hours in a day or 38 hours per week. Where a casual employee works in accordance with a roster, the 38 hours may, for the purpose of overtime calculations, be averaged over the length of the roster cycle (which may not exceed 4 weeks)"[1]

5. The change sought by UV to clause 10.5(b) of the draft determination to give effect to this decision is as follows:

"(e) A casual employee is paid at overtime rates for any work:

(i) in excess of 38 hours per week;

[1] At [550]

(ii) where a roster applies, in excess of 38 hours per week averaged over the roster cycle provided the roster does not exceed 4 weeks; or

(iii) which exceeds 12 hours per day or within a shift."

6. CAI considers that this proposal reflects the Commission's decision and does not oppose it.

7. However, the other variations sought by UV they relate to provisions that UV did not seek or which it was unsuccessful in obtaining in the decision. CAI submit that these other changes should be rejected.

8. For example UV seeks the inclusion of a new requirement to roster casual employees. This was not sought by UV in its submissions or as part of the proceedings. The claim appears to derive from the Commission' decision that:

"Where a casual employee works in accordance with a roster, the 38 hours may, for the purpose of overtime calculations, be averaged over the length of the roster cycle (which may not exceed 4 weeks)"[2]

9. CAI submits that this does not introduce a requirement to establish a roster for casual employees. Rather, the Commission is careful to limit the circumstances in which overtime is not payable after 38 hours work to circumstances where an employee is working to a roster. For example, if a casual employee was relieving a full-time employee who worked 40 hours a week as part of a 19 days month, overtime would not be payable when a 40 hour week was worked.

10. The introduction of a requirement to roster casual employees would be a very fundamental change which was not considered in the Commission's proceedings. It would not be appropriate, in the circumstances, for a change of such significance to be made.

11. Similarly, the transitional provision sought by UV was not advanced in the proceedings or awarded by the Commission. Given the Commission's view that *"greater flexibility in part-time employment provisions would be in the interests of both employees and employers' there would seem to be no good reason to prevent them being implemented for existing part-time employees.*[3]

Commencement Date

12. At paragraph 8 UV seek an operative date of 12 December 2017 to give notice to employers and employee's to be able to adjust to the new provisions and due to hiring staff for the Christmas / New Year period. UV recognise, however that an earlier rather than later commencement date may be "appropriate to capture more of the recruitment of staff for this period".

13. Given the view of the Commission that these provisions will be in the interests of both employers and employees, CAI submits that there is no reason to delay their implementation.

14. UV seek that overtime for casual employees take effect on the same date as the overtime provisions. CAI agrees with this approach.

Payment for overtime

15. CAI submits that the casual loading should not be payable in addition to the overtime penalty.

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[2] *Penalty Rates Decision* [2017] FWCFB 1001 at [550]

[3] at [526]

16. The casual loading is payable for, amongst other reasons, the benefits that employees working ordinary hours would otherwise receive, such as annual leave, personal / carer's leave, notice of termination redundancy benefit and other entitlements of full – time and part –time employment.[4]

17. Those entitlements do not accrue to full –time employees when working overtime, they only accrue when working ordinary hours. Overtime is distinguishable from payments for work in ordinary time, such as a weekend penalty, when entitlements, such as annual leave, would otherwise accrue.

18. In the circumstances, there is no reason as to why a casual employee should be paid more for overtime than a full-time employee. It is also noteworthy thatwher penaties are payable on weekends or public holidays that casual employees under the Clubs Award are paid the sam rate as weekly employees (ie they do not also receive a separate casual loading). Further, it is not necessarily desirable that it be cheaper to engage a weekly employee for overtime than a full-time employee.

19. UV curiously cites a clause from the old *Fast Food Industry Award-South Eastern Division 1984 (Queensland)* as as the precedent for casual overtime remuneration. That Award, however, was far different to the Clubs Award. It has no penalty rates for casual employees for weekend work and only prescribes overtime after a casual employee works in excess of 152 hours within a 28 day cycle at the rate of time and one half for the first three hours and double time thereafter. It is also different to the *Fast* Food Industry Award 2010 which did not include such a provision and does not require that casual employees be paid both the casual loading and the overtime rate[5]

20. CAI seeks that the Commission take a conservative approach to fixing the overtime rate for casual employees, particularly having regard to this being the introduction of a new entitlement in circumstances in which UV has not provided any evidence about how it will impact club employees or employers. As the Commission observed in *Australian Municipal, Administrative, Clerical and Services Union v Jobs Australia & Aged and Community Services Association of NSW and ACT Incorporated and Others*:

    "In all the circumstances we think a conservative approach is called for….

    The provision of overtime penalty rates for casual employees, even without the addition of the casual loading, will be a significant benefit for those casuals who work overtime, and will equalise the overtime cost of full-time, part-time and casual employees. The variation is, we consider, appropriate to remedy the issue of casual employees not being entitled to overtime rates which this review of the SCHCDS Award has identified, having regard to the modern award objective in s.134[6]."

21. Consistent with the above passage, such an approach would also meet the modern award objective.

Part - Time Employment

Minimum Weekly Hours

22. The proposed clause contains an 8 hour weekly minimum for part-time employees. CAI has consulted widely in light of the decision and there is concern that the 8 hour minimum will impinge upon existing part-time work arrangements and unduly impede future part time work opportunities. While CAI sought a minimum of 32 hours per four week cycle, no such minimum was sought by U. V. in the proceedings, and there has been no such minimum contained in the

[4] *Penalty Rates Decision* [2017] FWCFB 1001 at [337]

[5] (see clause 26).

[6] [2014] FWCFB 379 at [44].

Clubs Award (despite there being a greater flexibility in part-time hours of work for the majority of part-time employees by virtue of the preservation of the NSW part-time provisions in clause of the Clubs Award).

23. It is difficult to identify any detriment associated with continuing to provide for no minimum weekly hours, which would inevitably limit part-time employment opportunities. As the Commission found[7]:

The position which pertained in the club industry in New South Wales after 1999 under the Clubs Employees (State) Award and the succeeding NAPSA demonstrates that a more flexible part-time provision can lead to a very large increase in the proportion of parttime employees (and a corresponding drop in the proportion of casuals). That was a regime which was supported, and its introduction facilitated, by the union. A number of employee witnesses before us gave evidence that the part-time work arrangements which they had entered into under that regime were highly suitable to them, in that they had job security, a guaranteed level of income, access to leave entitlements, and better access to finance, and that they preferred part-time employment to casual employment. That confirms our view that greater flexibility in part-time employment provisions in the Hospitality Award and the Clubs Award would be in the interests of both employees and employers. It would also make the operation of casual conversion provisions more effective.

And at [527]

The evidence before us demonstrates that part-time employment is generally seen as desirable to employees who have major family, study or other important commitments in their lives which they need to accommodate. The degree of flexibility afforded to employers to alter working hours on notice cannot be to such a degree that part-time employees can be rostered to work during hours which they are simply unavailable to work because they need to attend to their other major commitments.

24. There is a real potential, however, that such a weekly minimum could cause disadvantage. This was highlighted by the Industrial Relations Commission of NSW when rejecting a claim for the prescription of weekly minimum hours for part time work agreements in the State Part-Time Work Case[8]. In outlining the Commissions approach to the issue, it stated:

"It is a matter of concern to the Commission to ensure that measures designed to be protective of employees, do not in reality operate to their detriment. By setting too high a minimum level of hours for part-time work agreements, part-time workers who need to obtain more than one job to satisfy their need for particular hours per week, may be denied the opportunity".[9]

25. The Commission concluded:

"We have determined not to impose any weekly minimum working hours. We reject the proposal of the Labor Council and the Minister that there be a weekly minimum of 12 hours, which in our view would have untoward and undesirable results. Such a prescription would, for instance, permit a part-time work agreement requiring a 12 hour shift to be worked on 1 day per week, but not 1 of 10, 8 or 7.5 hours per week. It would also permit a woman with family responsibilities or a student to agree to work 3 shifts of 4 hours per week, but not 3 shifts of 3 hours duration. The condition was pressed on the basis that it was important to ensure a 'real' wage or income stream. For similar reasons to those explained above, we reject that approach. We add that the approach again carries with it a real risk of direct and indirectly discriminatory consequences, in that it could particularly deprive women, young workers and those with disabilities from access

[7] at [526]

[8] [1998] NSW IRComm 142

[9] At p. 21

to part-time work agreements which their personal circumstances require and which would not make such agreed arrangements exploitative in any sense."[10]

26. If the Commission was minded to include a weekly minimum number of hours, CAI submits that a more logical minimum would be 6 hours as this could be constituted by 2 engagements of 3 hours.

Conclusion

27. A draft determination proposed by CAI is attached

2 August 2017
for Clubs Australia Industrial

[10] At p. 25

DRAFT DETERMINATION

Fair Work Act 2009
s.156–4 yearly review of modern awards

4 yearly review of modern awards—Casual Employment and Part-time employment

(AM2014/196 and AM2014/197)

REGISTERED AND LICENSED CLUBS AWARD 2010

[MA000058]

Licensed and registered clubs

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL SYDNEY, XX YYY 2017

4 yearly review of modern awards – casual employment

A. Further to the Full Bench decision issued by the Fair Work Commission[1] , the above award is varied as follows:

3. By inserting a new clause 10.5(e) as follows:

(e) A casual employee is paid at the overtime rates set out in clause 28.2 for any work:

(i) in excess of 38 hours per week;

(ii) where a roster applies, in excess of 38 hours per week averaged over the roster cycle provided the roster does not exceed 4 weeks; or

(iii) which exceeds 12 hours per day or shift.

4. By deleting clause 28.1 and inserting the following:

28.1 An employer may require an employee to work reasonable overtime at overtime rates.

B. This determination will come into operation from DATE OF DECISION. In accordance with s.165(3) of the Fair Work Act 2009 (Cth) this determination does not take effect until the first full pay period that starts on or after DATE OF DECISION.

[1] 5 July 2017