IN THE FAIR WORK COMMISSION

AM2014/196

FOUR YEARLY REVIEW OF MODERN AWARDS

CASUAL COMMON ISSUE

SUBMISSIONS ON DRAFT DETERMINATION

4 AUGUST 2017

1. On 5 July 2017 a Full Bench of the Fair Work Commission (**Commission**) issued its decision in the Casual Employment Common Issue (**Decision**).[1]

2. On 20 July 2017 the Shop, Distributive and Allied Employees' Association (**SDA**) filed a Draft Determination (**Determination**) which it says gives effect to the Decision.

3. The Australian Retailers Association (**ARA**) provides the following submissions on the Draft Determination in the *General Retail Industry Award 2010* (**GRIA**).

Overtime penalties should exclude casual loading

4. While the ARA accepts the Commission determined that the casual loading should be applied to the ordinarily hours rate, and be additional to the overtime penalty rates, the ARA is concerned that this over compensates casual employees in respect of overtime when compared to permanent employees.

5. The casual loading applicable under the GRIA was set through a decision of the Full Bench of the Australian Industrial Relations Commission (**AIRC**)[2]. At paragraph [49] of the AIRC decision, the Full Bench said:

   "In 2000 a Full Bench of this Commission considered the level of the casual loading in the Metal, Engineering and Associated Industries Award 1998 (the Metal industry award). The Bench increased the casual loading in the award to 25 per cent. The decision contains full reasons for adopting a loading at that level. The same loading was later adopted by Full Benches in the pastoral industry. It has also been adopted in a number of other awards. Although the decisions in these cases were based on the circumstances of the industries concerned, we consider that the reasoning in that case is generally sound and that the 25 per cent loading is sufficiently common to qualify as a minimum standard."

6. The decision in the Metal Industry Award[3] involved, in part, a re-setting of the casual loading applicable to casual employees under that award. In setting the casual loading at 25% (increased from 20%), the Full Bench, at paragraphs [170] to [172], said:

[1] [2017] FWCFB 3541
[2] [2008] AIRCFB 1000
[3] Print T4991, (2001) 105 IR 27

[170] Paragraphs 7.1.1 and 7.1.11 of the Award provide that annual leave accrual is calculated at the rate of 2.923 hours for each 38 ordinary hours worked. That formula produces 152 hours annual leave for a 52.00 weeks or 260 working day year. It would seem notionally appropriate and otherwise unexceptionable to assume that the same rate of accrual may be applied to the annual leave loading entitlement of 17.5% or 3.5 days; to personal leave liability that we will take to be 10 days; and to the 10 public holidays that fall during working days. On that assumed accrual basis, annual leave plus the additional 23.5 days would involve a total accrual rate of 6.358 hours for each 38 ordinary time hours. That accrual is equivalent to 16.73% loading on ordinary time rates. That figure, which corresponds with one of the Commonwealth's estimates, may be taken as the lower estimate of the potential cost liability to the employer of paid leave entitlements on an annual accrual basis.

[171] However, although the accrual of annual leave entitlements is expressed in annual terms, the actual working year of a full-time or part-time employee includes as "time worked" up to 152 hours personal leave, as well as other paid leave including annual leave, public holidays and long service leave. Subparagraph 7.1.5(a) of the Award expressly provides for those absences to be counted as time worked in calculating leave entitlement. Consequently, the apparent 16.73% loading to ordinary time costs for paid leave entitlements for day workers understates the relative cost to the employer of, or relative advantage to, a full-time employee over a casual employee in relation to time worked. To take account of that difference, it is reasonable to apply a factor of 1:18, the ratio of available working days to working time less paid leave entitlements. When that factor is applied to the accrual rate of 6.358 hours for each 38 ordinary time hours, the product is 7.514 or 19.77% of ordinary time hours.

[172] It follows from that calculation that leave and leave loading entitlements may currently be costed to account for about 19.8% of the 20% casual rate loading. We do not consider that costing to be unrealistic. It is founded upon a working time comparative cost for the employer. In practice, offsetting factors would apply. In the full-time employees first year of service personal leave accrues at a lower rate, and accrued entitlements would not be sufficient to fill out 152 hours at time worked. The actual pattern of leave accrual of an employee in the first year of service is therefore a basis for reducing the estimate downward, but not as far downward as the 15.2% suggested by the Commonwealth in one of its estimates. We consider it would be artificial to significantly deflate the estimate for that reason. The average length of service of full-time employees, the effects of shift loadings in excess of the 17.5 leave loading, or extra

leave are also not taken into account although they also are considerations that bear upon relative cost. Similarly, the obligation to pay out public holidays as they fall due is a consideration going to relative cost comparisons of the kind but not taken into account. We do not believe that resort to such complexity or detail is likely to be productive of a conclusive answer. The figures we have supplied provide an adequate guide to the relative disadvantage to casual employees under the Award in respect of paid leave entitlements. In that connection, we note that subclause 8.2 of the Award appears to allow a loading of 17.5% to casuals engaged under Part II, as well as annual leave. That arrangement was not explained or brought under notice in the course of the hearing. However, the presence in the Award of such a loading tells against too ready an acceptance of the lower estimate of the employer cost of paid leave entitlements.

7. The Full Bench determined that leave and leave loading components amounted to 19.8% of the casual loading.

8. The ARA raises this because applying a casual loading on top of an overtime penalty will result in casual employees obtaining greater entitlements when compared with permanent employees.

9. Section 90 of the *Fair Work Act 2009* (Cth) (**FW Act**) provides, in relation to payment for annual leave:

   If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period. (our emphasis)

10. Section 99 of the FW Act provides, in relation to payment for personal leave:

    If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period. (our emphasis)

11. It follows from this that overtime hours worked, which do not form part of an employee's ordinary hours of work, will not attract either annual or personal leave (or annual leave loading). This means that the most substantial component of the casual loading, as determined by the AIRC and inserted into the GRIA, is not relevant in respect of overtime hours. In the ARA's submission this should cause the Commission to reconsider whether it is fair and relevant that casual employees working overtime should receive

compensation for an entitlement which is not relevant to overtime work performed by permanent employees.

Content of Draft Determination

12. The ARA's submissions in relation to the content of the Draft Determination in relation to the GRIA, and the amendments to the Draft Determination set out below, are made without prejudice to the primary position with respect to the application of the casual loading to overtime.

13. The SDA's Draft Determination in relation to the GRIA contains a number of matters which need to be addressed. Proposed clause 29.2(c) does not provide for equivalent entitlements between casual and permanent employees. The entitlement to overtime for work performed in excess of 38 hours per week for full time employees is referenced to clause 28, and in particular clause 28.1. Clause 28.1 provides:

> ***28.1*** *A full-time employee will be rostered for an average of 38 hours per week, worked in any of the following forms or by agreement over a longer period:*
>
> ***(a)*** *38 hours in one week;*
>
> ***(b)*** *76 hours in two consecutive weeks;*
>
> ***(c)*** *114 hours in three consecutive weeks; or*
>
> ***(d)*** *152 hours in four consecutive weeks. (our emphasis)*

14. This means that an employer can elect to average the 38 ordinary hour limit over 4 weeks, and that the employer and an employee may agree to average this over a longer period. Employers should be able to average the 38 ordinary hour limit for casual employees in the same terms. We have set out below amendments to the Draft Determination which addresses this.

15. The SDA's Draft Determination also replicates the content of clauses within the GRIA, when it would be simpler to just reference those clauses. The Draft Determination also over-complicates the distinction between casual and permanent entitlements, and is inconsistent with the way these entitlements are expressed elsewhere in the GRIA. Further, the Draft Determination refers to "ordinary hourly rate of pay" where the GRIA contains no definition of ordinary hourly rate of pay. We have set out below amendments to the Draft Determination which addresses these matters.

29.2 Overtime

(a) Hours worked by full time employees in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first three hours and double time thereafter.

(c) Hours worked by casual employees in excess of 38 hours per week (averaged over a period of up to 4 weeks, or longer by agreement), outside the ordinary hours specified in clause 27.2 or outside the maximum daily hours specified in clause 27.3 ~~or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle shall~~ will be paid at 175% of the ordinary ~~hourly~~ rate of pay applicable to a part time employee for the first three hours and 225% ~~of the ordinary hourly rate of pay~~ thereafter.

~~(d) Hours worked by casual employees outside the span of hours for each day specified in clause 27.2(a) shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter.~~

~~(e) Hours worked by casual employees in excess of 9 hours per day shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter, provided that for one day per week a casual employee may work 11 hours without attracting overtime penalty rates in accordance with clause 27.3.~~

(f) The rate of overtime ~~for full-time and part-time employees~~ on a Sunday is double time (225% for casual employees), and on a public holiday is double time and a half (275% for casual employees).

(g) ~~The rate of overtime for casual employees on a Sunday is 225% of the ordinary hourly rate of pay, and on a public holiday is 275% of the ordinary hourly rate of pay~~.

(h) Overtime is calculated on a daily basis.

Operative date

16. It is noted that the SDA's Draft Determination does not contain an operative date. The ARA notes that while the Full Bench concluded that the imposition of overtime penalty rates would result in the imposition of a significant cost burden on businesses under the GRIA, it is clear that some cost burden will flow. The ARA submits that the Commission should defer the commencement of the variation to the GRIA in order to allow retail businesses to prepare for the changes.

FCB GROUP ON BEHALF OF THE AUSTRALIAN RETAILERS ASSOCIATION