

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards

AM 2014/196 & AM 2014/197 - Casual Employment & Part Time Employment

HIGHER EDUCATION INDUSTRY - GENERAL STAFF - AWARD 2010 (MA000007)

Filed on Behalf of the Group of Eight Universities

University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland

A. Introduction

1. These submissions are filed in response to the submissions of the National Tertiary Education Union (**NTEU**) dated 5 September 2018 (**NTEU's Submissions**) in which the NTEU proposes for the Commission to issue a Draft Determination in respect of the Higher Education – General Staff – Award 2010 (**General Staff Award**) in the same terms as that to proposed to apply to the Higher Education - Academic Staff Award 2010 (**Academic Staff Award**).
2. The NTEU's Submissions are not responsive to any matter presently before the Commission and reflect an attempt by the NTEU to re-agitate the issue of whether or not the General Staff Award should be varied to include a higher minimum engagement for certain casual employees covered by the General Staff Award, contrary to the previous determination of that issue by the Full Bench and beyond the current directions.
3. The issue of whether minimum casual engagements should be varied was the subject of extensive submission and evidence which lead to the Full Bench, in its decision dated 5 July 2017, ([\[2017\] FWCFB 3541](#)) (**2017 Casuals Full Bench Decision**) determining that:
 - (a) the provisions of the General Staff Award (and many other awards with various existing different minimum engagement periods), would not be varied; and
 - (b) a provisional view that awards that specified no minimum engagement at all, including the Academic Staff Award, be varied to include a minimum engagement of 2 hours for casual staff.
4. Following the opportunity to file materials and submissions in August 2017, the provisional decision of the Full Bench to include such a term in the Academic Staff Award was confirmed in a Full Bench decision on 9 August 2018 ([\[2018\] FWCFB 4695](#)) (**Second Casual Full Bench**

Decision) and identified that parties had the opportunity to comment on the Full Bench's proposed orders to give effect to the Second Casual Full Bench Decision. This included a proposed order in respect of the Academic Staff Award.

5. The current process is therefore an opportunity for interested parties to comment on the wording of the Commission's proposed orders giving effect to the Second Casual Full Bench Decision.
6. This opportunity to comment on draft orders is not a general invitation to overturn the matters determined in the 2017 Full Bench Casual Decision or propose variations to other awards that are not the subject of the proposed orders arising from the Second Casual Full Bench Decision.
7. Matters concerning the General Staff Award were canvassed in submissions made prior to the decisions of the Full Bench on 5 July 2017. The issue now raised by the NTEU to vary the General Staff Award could potentially have been the subject to submissions in August 2017 and otherwise been the subject of an appeal of the 2017 Casual Full Bench's determination not to vary the casual engagement provisions of the General Staff Award.
8. As such, there is no proper basis for the Commission to entertain the NTEU's Submissions. Further, any such submission should be rejected in any event.
9. We have identified below the previous determination by the Commission and then briefly addressed the NTEU submission.

B. Overview of the Full Bench's decisions regarding the General Staff Award and Academic Staff Award

10. After consideration of the submissions and evidence filed by all parties and heard over several months in 2016 and 2017, the Full Bench identified in the 2017 Casuals Full Bench Decision dated 5 July 2017 a number of awards which would not be varied. Relevantly, it determined that a case had not been made out to vary the General Staff Award (referred to in that decision as the "Higher Education Award") to include a different minimum engagement for casual employees. For example (emphases added):

*[404] Modern awards contain a range of different minimum daily engagement periods for casual and part-time employees, and some contain no minimum at all, such as the VMRSR Award. These provisions generally derive from provisions in pre-reform awards which were in most cases likely formulated by the agreement of the award parties. It can be presumed that in doing so the parties took into account the circumstances of the industries in which they operated that prevailed at the time, but beyond this it is not possible to generalise about the basis upon which such provisions were struck. **In particular modern awards, it is clear that that the***

minimum engagement periods were intended to meet the peculiar circumstances of special types of work or workers. For example, ...in clause 12.2 of the Higher Education Award the minimum engagement period for casuals is 3 hours, except that for undergraduate students who are attending the university as a student on the day they work, or for employees with a primary occupation elsewhere, it is one hour.

[405] The ACTU's claim seeks to replace the current variegated situations with a uniform standard of a 4 hour minimum engagement for all part-time and casual employees. It advances that claim on the basis that it would enhance the job and income security of casual employees and part-time employees. However we do not consider that a standard provision of this nature would achieve that objective, because **the evidence demonstrates that in respect of a number of awards the imposition of a 4 hour minimum would probably have the opposite effect and may lead in many cases to a loss of work opportunities and working hours for casual and part-time employees which currently exist. It is not necessary to refer to all of the evidence in this respect; the following examples will suffice:**

(1) The very short minimum engagement period for student casuals in clause 12.2 of the Higher Education Award to which we have just referred was evidently intended to allow such casuals to take advantage of casual employment opportunities on campus while attending to other study commitments there. The evidence of Mr Ward, Mr Gladigau and Mr Greedy for example demonstrated that much of the casual work in which employed students were employed did not require 4 hours' work, and for that reason suited students' commitments and timetables. An increase to a standard 4 hour minimum carries with it the risk that either the university would cease to be able to offer such work to students because the cost would be prohibitive, or students would not be able to perform it because they could not fit it into their other study commitments.

...

[407] While a 4 hour minimum daily engagement might under some awards represent an appropriate balancing of the competing considerations to which have earlier referred, we do not consider that it can be adopted on the across-the-board basis proposed by the ACTU. That would not in all awards meet the modern awards objective in s.134, because we consider that it might have the counter-productive result of reducing workforce participation and social inclusion, and also because under some awards it may inhibit flexible modern work practices and the efficient

and productive performance of work. The ACTU's claim for a standard 4 hour minimum engagement for casual and part-time employees is therefore rejected.

11. Other modern awards providing for variable minimum periods of engagement (including periods of less than 2 hours), were also determined not to require variation and, included:
- (a) the General Retail Industry Award 2010 [MA000004], which provides (at clause 13.4) for a minimum engagement of 1.5 hours for secondary students who meet certain criteria, and 3 hours for all other casual employees;
 - (b) the Pastoral Award 2010 [MA000035], which provides for a minimum engagement of 2 hours for dairy operators who are below 18 years and who are full-time secondary school students, and 3 hours for all other employees (per clauses 10.4 and 10.5(g));
 - (c) the Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100], which provides (at clause 10.4) for a 1 hour minimum engagement for home care employees, 3 hours for disability services work, and 2 hours for all other employees; and
 - (a) a number of awards enabling 1 hour engagements where they suit the circumstances of the employee.
12. In the same 2017 Casual Full Bench Decision, the Full Bench made a provisional decision to insert a clause providing for minimum casual engagement into a list of modern awards that did not already include such a provision, as follows:

[408] However, we do consider, having regard to those same competing considerations, that it is necessary for modern awards to contain some form of minimum engagement period for casual employees in order to avoid their exploitation in order to meet the modern awards objective. The modern awards listed in Attachment G contain no minimum engagement period at all. We have reached the provisional view that such awards should be varied to include a 2 hour minimum engagement period for casuals. However we will provide interested parties an opportunity to provide further submissions concerning this proposition.

13. The Academic Staff Award was item 13 in Appendix G.
14. All parties subsequently had an opportunity to (and did) file submissions in response to this decision. In particular:
- (a) the Group of Eight's submissions were filed on [2 August 2017](#);

- (b) the submissions of the Australian Higher Education Industrial Association (**AHEIA**) were also filed on [2 August 2017](#); and
- (c) the NTEU's submissions in reply were filed on [3 August 2017](#).

15. The recent Second Casual Full Bench Decision confirmed its provisional view to include a 2 hour minimum engagement period for casuals in certain awards, which included the Academic Staff Award. In this decision, the Full Bench relevantly noted:

"[108] The Go8 [56](#) also opposed the addition of a 2 hour minimum engagement period for casuals in the Academic Staff Award. It submitted:

...

- *many casual academic staff were students or staff with other occupations already present at the University;*

...

[109] The Go8 submitted, in the alternative, that if the 2 hour minimum engagement was to be included in the Academic Staff Award, it should be modified so that:

...

- *the minimum engagement requirement would not apply where the staff member could perform their academic activities in 2 or more hours on a single day but chose to perform them across a number of days such that they worked for less than 2 hours on any single day;*
- *it did not apply to employees who were students attending the university in that capacity on the relevant working day, or employees who had a primary occupation elsewhere including with the employing university.*

...

Consideration

[111] As noted in the November decision, [57](#) no party requested an additional hearing in relation to the Academic Staff Award, and accordingly we will decide the matter based on the written submissions of the parties (summarised above).

[112] As submitted by the parties, casual employment under the Academic Staff Award has some unique characteristics. Clause 13.1 of the award provides for casual employment "by the hour and paid a rate on an hourly basis", and clause 13.2 provides that "The minimum salary paid to academic staff employed on a casual basis will be at the rates provided for in clause [18.2](#)...". Clause 18.2 provides for hourly rates of pay, inclusive of the casual loading, for casual academics. The

rates provided for are in 6 streams: Lecturing, Tutoring, Musical accompanying, Undergraduate clinical nurse education, Marking rate and "Other required academic activity". The rates in the first 4 streams all incorporate payment for preparation or "associated working time" ranging from 0.5 hours at a minimum to 4 hours at a maximum. For example, the hourly rate of \$130.17 for a "Basic lecture" includes "1 hour of delivery and 2 hours of associated working time", while the rate of \$50.79 for undergraduate clinical nurse education where there is "Little preparation required" incorporates "1 hour of delivery and 0.5 hours associated working time". However the last 2 streams, (Marking and "Other required academic activity") do not incorporate any additional working time, so that the hourly rate actually pays for one hour of work. The expression "Other required academic activity" is not defined, and presumably it covers any type of academic work under the award which is not encompassed by the other 5 streams.

[113] We do not consider that there is any reason in principle why the provisional view we have reached concerning a 2 hour minimum engagement would not be applicable to casual academic staff. Such staff face the same fundamental issue as other casual employees which was identified in the principal decision - that is, the need, in order to avoid unfairness and exploitation, to ensure that casual employees are provided with sufficient work and income for each attendance at the workplace to justify the expense and inconvenience associated with the attendance. The precise circumstances of individual employees, including whether they have another primary occupation and the extent to which they have to travel to and from work in respect of each particular attendance, will of course vary widely, but the same fundamental issue arises. We consider that it is necessary, in order for the Academic Staff Award to meet the modern awards objective, that there be a 2 hour minimum engagement period for casual academic staff. In reaching that conclusion, we have had regard to the matters specified in paragraphs (a)-(h) of s 134 of the FW Act, and we have placed particular weight on paragraphs (a), (d), (da)(ii) and (f).

[114] However we accept that, in crafting a provision to implement a 2 hour minimum daily engagement period, it is necessary to take into account the incorporation into a number of the prescribed hourly rates in clause 18.2 of payments for preparatory and associated work. It would, we consider, constitute double counting if employees received the benefit of a 2 hour minimum payment in addition to the benefit of an hourly rate which was loaded for additional work. We also do not consider that the implementation of a 2 hour minimum engagement period should interfere with the autonomy of academic staff to determine how, when and where they perform any preparatory or associated work. Because preparation or associated time may occur non-consecutively with teaching time, we do not

propose to require that the 2 hour minimum engagement period consist of 2 consecutive hours' work. ..."

C. Response to the NTEU's Submissions

16. The NTEU appear to suggest that the Commission needs to overturn its determination in respect of the General Staff Award, because of possible different minimum engagement provisions as between the General Staff Award and the Academic Staff Award. There is no proper basis to do so.
17. As noted above, the NTEU's position is inconsistent with the 2017 Casual Full Bench decision, and is otherwise incorrect for the following reasons:
- (a) as is evident from the extracts of the General Staff Award Decision set out at paragraph 10 above, the Full Bench clearly determined (at paragraphs [404] and [405]) that:
 - (i) the imposition of a "very short" 1 hour engagement period for certain casuals in clause 12.2 of the General Staff Award was deliberate, and was designed to meet the "peculiar" needs of the higher education industry and those particular employees; and
 - (ii) an increase to the 1 hour engagement for casuals under clause 12.2 of the General Staff Award would probably be detrimental to such employees, based upon its consideration of the evidence it heard in relation to the General Staff Award; and
 - (b) in reaching its decision to include a minimum engagement of 2 hours for all employees covered by the Academic Staff Award, the Full Bench considered the submissions of the Group of Eight (evident from paragraphs [108] and [109] of the Second Casuals Full Bench Decision, extracted above at paragraph 15), in which the Group of Eight drew the Commission's attention to the issue now being advanced by the NTEU, as follows:
 - (i) at paragraph 4(d):

"4. The Academic Staff Award should not be varied to include the 2 hour minimum engagement for a number of reasons:

..

d. *many casual academic staff are students already in attendance or staff with other primary occupations at the University – a significant number of casual academic staff are*

*students already in attendance at the University and a further number already have a primary occupation with the University which is supplemented by casual academic work. The rationale for the 2 hour minimum engagement (as set out at paragraph 399 of the Decision to cover the expense and inconvenience of transport time and cost, childcare and the like) does not apply (or is significantly diminished) as such staff are already in attendance at the University. This is reflected in the Higher Education – General Staff – Award 2010 (**General Staff Award**) that has 1 hour minimum engagements for such employees (i.e. students at the University and staff with a primary occupation elsewhere, including with the University);*

and

(ii) at paragraph 6(c)(i):

"If contrary to our submission, the Full Bench does decide to adopt a 2 hour minimum daily engagement, then having regard to the above matters any clause for minimum daily engagement for a casual academic staff member included in the Academic Staff Award needs to be tailored or modified to ensure that:

(c) similar to the General Staff Award⁴ and maintained by the Decision, the minimum engagement should not apply to:

(i) employees who are students (including postgraduate students) who are expected to attend the university on that day in their capacity as students. A student would be taken as being expected for attendance on any Monday to Friday during the main teaching weeks of the university, other than public holidays as applied at the relevant university; and

(ii) employees with a primary occupation elsewhere, including with the employing University."

18. The NTEU Submissions are therefore a blatant attempt to try to "back door" a different outcome to what the Full Bench formally determined in respect of the General Staff Award and we further note that:

- (a) entertaining or accepting of the NTEU's Submissions over a year after when any appeal or submissions should have been made, undermines the integrity of the award review process and leads to denial of natural justice; and
- (b) the adoption of the minimum casual engagement provision (for the Academic Staff Award) in the General Staff Award, as sought by the NTEU, would reduce the minimum engagement entitlement for the majority of general staff employees who are not students or employees with a primary occupation elsewhere, who are presently entitled to a minimum engagement of 3 hours under the General Staff Award.

D. Conclusion

19. For the reasons set out above, the Group of Eight submits that:

- (a) there is no proper basis to consider the NTEU's Submissions; and
- (b) the General Staff Award should not be varied in respect of the minimum engagement for casuals.

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13 September 2018