From: Stephen Bull <Stephen.Bull@unitedworkers.org.au>
Sent: Friday, 13 March 2020 12:26 PM
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Cc: Phillip Ryan <phillip.ryan@ahansw.com.au>; victor@rca.asn.au; Ben Redford <Ben.Redford@unitedworkers.org.au>
Subject: AM2014/284 - Restaurant Industry Award 2010.

Dear Amod

There is one matter that we may have overlooked in our comment on the exposure draft of the *Restaurant Industry Award* 2020 which we lodged on 28 February 2020. We apologise for making this late comment but we only became aware of the matter yesterday.

This additional comment concerns the exposure draft's treatment of an entitlement to a break within a long duration of work at clause 16.2.

On 1 January 2018, an entitlement to intra-day and intra-week overtime was inserted into the Restaurant Award for casual employees. Similar entitlements were also inserted into the Hospitality Award and the Clubs Award. The industrial treatment of the hours of work of casual employees under the Restaurant Award has been altered as casual employees now have ordinary hours. All hours worked which are overtime hours are not ordinary hours. Prior to the creation of an entitlement to overtime for casual employees, all hours worked by a casual employee were notionally ordinary hours.

The current award at clause 32.2 the Restaurant Award uses the terminology '*ordinary hours'* in its break entitlement. This is a long standing feature of the Award. The exposure draft and plain language version of the Award initially up to 23 October 2019 used the term '*hours*.'

The current exposure draft of the Restaurant Industry Award at clause 16.2 uses the words '*ordinary hours'* in column 1 of table 2. This wording was proposed by the Australian Hotels Association ('AHA') in a submission dated 30 September 2019 on the basis that it would provide clarity in the context of the break entitlement when overtime is worked. A similar amendment was **not** made to the Hospitality Award exposure draft and this is now the subject of an award variation by the AHA (AM2020/5 -application by the AHA to vary the Hospitality Award). On 12 March 2020, Deputy President Masson conducted a directions hearing for the AHA variation application to the Hospitality Award and this is why we are raising this matter now.

In the review of the Restaurant Award, this matter was dealt with at a hearing on 10 October 2019 (see: PN92 to PN111). The words '*ordinary hours'* are proposed by the AHA to be reinserted in the draft so as to make the breaks clause clearer. There was concern that there was some disconnect between the general entitlement to a break for hours worked at what is now clause 16.2 and the specific entitlement for a break after the commencement of overtime (clause 16.8).

On 23 October 2019, the Commission adopts the proposal and the exposure draft is altered (see: [2019] FWCFB 7035 at [4] to [20]) . From our reading of the decision of 23 October 2019, the substitution of '*ordinary hours'* for '*hour'* as the measure of hours that must be worked before an employee is entitled to a break is not directly addressed (but see [19] and [20]). Having now reviewed the general consequence of using '*ordinary hours'* as the measure in the context of AM2020/5 the altered wording has significant substantive effects which does not appear to have been considered when the wording was adopted for the Restaurant Award.

The initially proposed use of '*hours'* is far more consistent with the modern awards objective as all employees covered by this award now have ordinary hours. Previously it could be said all hours worked by a casual employee were ordinary hours. Permanent employees have fairly rigid provisions concerning rostering and overtime which would provide them with some protection.

The problem with the use of the term '*ordinary hours'* in the breaks clause in the Restaurant Award is that long shifts of overtime or comprising overtime can and will be worked. Once a casual employee (or a permanent employee) has worked more than 38 ordinary hours in a week (or an average of 38 hours within a 4 week roster) and exhausted their ordinary hours, the employee will being working shifts which are entirely composed of overtime hours. On the face of it, current clause 16.2 would not entitle an employee to a break when a shift comprised overtime hours or where less than 5 ordinary hours are worked and subsequent overtime is worked. The problem will most likely affect casual employees as a casual will more likely have to work unexpected shifts to cover peaks in demand.

The entitlement of an employee to a break should arise because the employee works a long continuous durations of work and not because of the industrial designation of the hours worked. With intra week overtime, an employee is more deserving of a break after a 5 hours overtime shift than an earlier similar shift of ordinary hours. A strict reading of the current exposure draft says that an employee is not entitled to no break for the later overtime shift.

This consequence does not appear to have been identified or intentional. When the word '*ordinary'* was inserted into the exposure draft by the Commission in its decision on 23 October 2019 it seems to have been in aid of clarity and the fact that the current award uses similar language makes the use of the term understandable. As the designation of hours in this award has become more sophisticated, the initial use of the more neutral term '*hours'* is now more appropriate.

In relation to the Award's entitlement to an additional rest break after overtime has commenced which is at clause 16.8 of the exposure draft, any conflicts with the general break entitlement at clause 16.2 can likely be resolved by the insertion of the word '*Provided that the employee is not entitled to a break under clause 16.2 …*' An alternative solution may be to substitute '*ordinary hours'* for '*rostered hours'* in clause 16.8.

We trust this comments assists the Commission.

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