

Fair Work Commission
Level 10, Terrace Tower, 80 William Street
EAST SYDNEY NSW 2011
Via email: AMOD@fwc.gov.au

10 January 2019

AM2018/23 – Funeral Industry Award 2010 – Substantive Issues

BACKGROUND

1. Directions for parties to file submissions in relation to substantive claims being made regarding the *Funeral Industry Award 2010* (**Award**) were published by Deputy President Sams on 16 November 2018.
2. The Australian Workers' Union (**AWU**) has two outstanding substantive claims for the Award. These claims are outlined below.
3. The AWU contends that the proposed variations to the Award that are pursued throughout this submission are self-evident, and as such can be determined with little formality¹.
4. A Draft Determination containing proposed amendments to the Award is attached to these submissions.

SUBMISSIONS

Minimum Engagement for Casual and Part-Time Employees

5. This claim began as two technical and drafting items – items 15 & 16 of the summary of technical and drafting submissions for this Award² – and was referred to this substantive Full Bench for consideration by the Full Bench of the Group 4 Awards Decision in August 2018³ (**August Decision**) in recognition of the matter

¹ [2014] FWCFB 1788 at [23]

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/funeral-industry-summary-technical-drafting-201117.pdf>

³ [2018] FWCFB 4175

being closely related to an outstanding substantive issue⁴ – item S8 on the summary of proposed substantive variations for the Award⁵.

6. Owing to this close relationship between the above three items – specifically in that they each deal with minimum engagement periods for casual and part-time employees – the following submissions address all three concurrently.
7. The AWU seeks a substantive variation to the Award that clarifies that the minimum engagement provisions in the Award pertaining to casual⁶ and part-time⁷ employees respectively are applicable for *all* engagements, and that any other minimum engagement provisions that appear in the Award – namely those for recalls⁸, removals⁹, and work on Saturdays¹⁰ and Sundays¹¹ – are applicable *only* to full-time employees, as full-time employees do not have the benefit of a specific minimum engagement provision in this Award and therefore require such protections.
8. It is the submission of the AWU that the minimum engagement provisions in the Award for casual and part-time employees – of four hours and three hours respectively – are intended to operate regardless of any other minimum engagement provisions provided for elsewhere in the Award. These specific minimum engagement provisions apply to casual and part-time employees as *types of employee* and as such they prevail over any other minimum engagement periods for *types of work*.
9. To be clear, the AWU understands that the above is what the Award currently provides. However, it has become apparent that this understanding is not shared by all parties, which has created the need for a substantive variation being applied for by the AWU in order to ensure that the entitlements of employees covered by the Award are clear and certain for both employees and employers.
10. The AWU submits that both the language of the relevant provisions and the merits of ensuring consistency and certainty in casual and part-time employees' entitlements and conditions¹² for both employees and employers are in favour of this application.

⁴ Ibid at [291]

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/funeral-summary-substantive-201117.pdf>

⁶ *Funeral Industry Award 2010, cl. 10.5(c)*

⁷ *Funeral Industry Award 2010, cl. 10.4(d)*

⁸ *Funeral Industry Award 2010, cl. 24.2(b)*

⁹ *Funeral Industry Award 2010, cl. 24.4*

¹⁰ *Funeral Industry Award 2010, cl. 24.1(a)(i)*

¹¹ *Funeral Industry Award 2010, cl. 24.1(b)*

¹² [2018] FWCFB 1548 at [489]

Casual Employees

11. The minimum engagement provision for casual employees covered by the Award is as follows:

“(c) On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours’ work, including when engaged more than once in any day. This minimum payment is made whether the casual employee is required to work the full four hours or not.”¹³

12. The language of the above provision is clear, both in terms of to whom it applies and when. Clause 10.5(c) operates every occasion a casual employee is required to attend work, including when the casual employee is required to attend work multiple times in one day. It is not available on the words used in the clause to interpret the above clause as having any other application or operation.

13. In the Group 4 Awards Decision in March 2018¹⁴ (**March Decision**), the Full Bench formed a provisional view that the minimum engagement for casual employees of four hours provided for at clause 10.5(c) of the Award applies to any work undertaken by a casual employee, including recalls¹⁵, removals¹⁶, and work on Saturdays and Sundays¹⁷.

14. In relation to the perceived tension between minimum engagement periods in the Award for work on Saturdays and Sundays and the minimum engagement periods in the Award for casual and part-time employees¹⁸, the Full Bench supported a variation proposed by the AWU to resolve the perceived tension in the favour of the latter.

15. The variation proposed by the AWU that was supported by the Full Bench in the March Decision¹⁹ and provisionally inserted into the award at clause 20.1(d) is as follows:

“(d) Work performed by part-time and casual employees, as prescribed in clauses 20.1(a)-(c), is subject to the applicable minimum engagement periods prescribed at clauses 10.5 and 11.3.”

¹³ *Funeral Industry Award 2010, cl. 10.5(c)*

¹⁴ [2018] FWCFB 1548

¹⁵ *ibid* at [475]

¹⁶ *ibid* at [479]

¹⁷ *ibid* at [489]

¹⁸ This is the substance of item S8 in the summary of proposed substantive variations.

¹⁹ *ibid* at [490]

16. Although the Full Bench in the March Decision held the view that the minimum engagement provision for casual employees located at clause 10.5(c) of the Award was to be observed for all purposes, it did not consider that a similar amendment such as the clause inserted at 20.1(d) was required in relation to recalls or removals²⁰.
17. However, the AWU submits that as the issue of interaction between these minimum engagement provisions is still the subject of dispute between the parties, such an amendment is evidently required.
18. The Full Bench in the August Decision maintained the view that the minimum engagement period for casual employees located at clause 10.5(c) of the Award prevails over any other minimum engagement periods provided in the Award²¹.
19. The AWU submits that such an interpretation ensures consistency and certainty for casual employees and their employers regarding the minimum engagement period for casual employees under the Award, and adds to the clarity and ease of understanding the entitlements and obligations in the Award.

Part-time Employees

20. The minimum engagement provision for part-time employees covered by the Award is as follows:

“(d) An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.”²²

21. The language of this provision is also clear. The length of any shift that an employer requires a part-time employee to work must be, as a minimum, three consecutive hours long.
22. The AWU submits that this specific minimum engagement period is to be observed for all purposes, and prevails over any other minimum engagement provisions found elsewhere in the Award.

²⁰ [2018] FWCFB 1548 at [481]

²¹ [2018] FWCFB 4175 at [290].

²² *Funeral Industry Award 2010, cl. 10.4(d)*

23. In the March Decision, the Full Bench formed a provisional view that the minimum engagement period for part-time employees applies to work performed on Saturdays and Sundays²³, but not to recalls²⁴ or removals²⁵ - the provisional view held that the minimum engagement periods applicable to recalls and removal work prevailed over the minimum engagement provision specific to part-time employees.
24. The Full Bench in the March Decision held the above provisional view on the basis that the minimum engagement provision for part-time employees applies only to a part-time employee's agreed regular pattern of work, and not in circumstances where a part-time employee is working in excess of this regular pattern of work²⁶.
25. Accordingly, the Full Bench provisionally held in the March Decision that not only full-time employees required the protection of the minimum engagement provisions for recalls and removal work, but also part-time employees²⁷.
26. It is the submission of the AWU that the above provisional view is incorrect. Part-time employees covered by the Award do not require the protection of the minimum engagement provisions concerning recalls and removal work as specific protection for part-time employees in this sense is provided by clause 10.4(d).
27. The intent of this clause to apply for all purposes is explicitly reflected in the terms of the clause – “...a *minimum of three consecutive hours on any shift*”. It is not available on the language used in the clause to conclude that the minimum engagement of three hours for part-time employees is to be observed for some purposes – such as ordinary working hours and work on weekends – but not others – such as recalls or removal work.
28. The effect of the above conclusion is to introduce an inconsistency into the Award in respect to part-time employees' minimum engagement entitlements. A likely result of this inconsistency is confusion for both employers and employees.
29. The AWU made submissions to the above effect on 26 April 2018²⁸.
30. The Full Bench in the August Decision considered the AWU submissions, and ultimately agreed with the AWU that the provisional view in the March Decision

²³ [2018] FWCFB 1548 at [489]

²⁴ *ibid* at [472]

²⁵ *ibid* at [478]

²⁶ *ibid* at [470]

²⁷ *ibid* at [472]

²⁸ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014254andors-sub-awu-260418.pdf>

relating to the minimum engagement periods for part-time employees performing removal work or recalls was incorrect²⁹.

31. The Full Bench in the August Decision stated:

“...We agree that the specific minimum engagement provisions relating to part-time and casual employees (clauses 10.5 and 11.3) are applied for these types of employees instead of the minimum engagement provisions set out at clauses 19.4 and 20.1.”

32. The AWU supports this view of the August Full Bench and encourages this Full Bench to draw the same conclusion: that the minimum engagement provisions for casual and part-time employees – four hours and three hours respectively – are to be observed for all purposes as these provisions are specific to each type of employment and cannot be displaced by other minimum engagement provisions found elsewhere in the Award.

33. The minimum engagement provisions in the Award in relation to recalls, removal work, and Saturday and Sunday work are intended to protect full-time employees as this type of employee does not otherwise have a minimum engagement period.

34. Granting this application to amend the Award to clarify the minimum engagement provisions will ensure consistency and ease of comprehension in relation to minimum engagement provisions in the Award for all types of employment. This is consistent with the Modern Awards Objective, specifically the need to ensure a simple and easy to understand modern award system³⁰.

Minimum Payment for Public Holidays

35. The AWU seeks a substantive variation to the Award to insert a minimum payment for work performed on public holidays equivalent to the minimum payment provisions in the Award for work performed on Saturdays and Sunday. The AWU seeks this inclusion in the Award to provide consistency across minimum payment provisions for work performed on days that attract penalty rates. That is, any work performed on Saturdays, Sundays and public holidays will attract a minimum payment of two hours.

²⁹ [2018] FWCFB 4175 at [290]

³⁰ *Fair Work Act 2009*, s.134(1)(g)

36. Clause 24.1 of the Award provides for a minimum of two hours' pay for work performed on Saturdays and Sundays but is silent in regard to work performed on public holidays.
37. As the AWU has stated in previous submissions³¹, there is no readily available explanation for this inconsistency. The AWU notes that the penalty rates payable for work performed on Sundays³² and public holidays³³ is the same – 200%. Evidently, the Award places the same value to work performed on Sundays as work performed on public holidays. However, of the two only work performed in Sundays attracts a minimum payment.
38. The *Funeral Industry Award 2010* is primarily based on the *Funeral Industry Award 2003*³⁴ in effect in Victoria prior to Award Modernisation³⁵ (**2003 Award**). The AWU accepts that there is no provision regarding minimum payment for work performed on public holidays in the 2003 Award.
39. However, such an entitlement was present within other pre-reform instruments, such as the *A.C.T. Funeral Industry Award 2002*³⁶, which provided for a minimum payment of three hours for work performed on a public holiday³⁷; the *Funeral Industry Award (South Australia) 2003*³⁸, which provided for a minimum payment of four hours for work performed on a public holiday³⁹; and the *Funeral Services Award – State 2002*⁴⁰, which provided for a minimum payment for four hours for work performed on a public holiday⁴¹.
40. The AWU proposal to insert a minimum payment provision for work performed on public holidays will introduce consistency between minimum payment provisions for all work performed on days that attract the payment of penalty rates.
41. The effect of this proposal will be minor. As discussed earlier in these submissions, the minimum payment provisions in clause 24.1 of the Award are only applicable to full-time employees. Casual and part-time employees are protected by specific minimum engagement clauses at clauses 10.5(c) and 10.4(d) respectively.

³¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014269-sub-awu-030717.pdf>

³² *Funeral Industry Award 2010*, cl. 24.1(b)

³³ *Funeral Industry Award 2010*, cl. 24.1(c)

³⁴ AP825425CRV

³⁵ [2009] AIRCFB 865 at [75]

³⁶ AP815104CRA

³⁷ *A.C.T. Funeral Industry Award 2003*, cl.21.5

³⁸ AP827092

³⁹ *Funeral Industry Award (South Australia) 2003*, cl. 29.3

⁴⁰ AN140127

⁴¹ *Funeral Industry Award – State 2002*, cl. 7.6

42. Additionally, the AWU assumes that it would be rare for an employer to require a full-time employee to perform work on a public holiday for less than two hours in any event.

Uniform Allowance

43. The AWU supports the submissions of United Voice in relation to its proposal to amend the Award to clarify that all employees who are required to wear a uniform are entitled to the uniform allowance.

44. There is no apparent justification for the Award to exclude part-time and casual employees from this entitlement.

45. The AWU supports the amended clause as proposed by United Voice at paragraph 12 of its submission dated 20 December 2018.

Yours Faithfully,

A handwritten signature in black ink, appearing to read 'ZD', with a long horizontal flourish extending to the right.

Zachary Duncalfe
NATIONAL LEGAL OFFICER
The Australian Workers' Union

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3 Division 4 – 4 Yearly Review of Modern Awards

s.156(2)(b)(i)

Funeral Industry Award 2010

(MA000105)

4 Yearly Review of Modern Awards

(AM2018/23)

[INSERT FULL BENCH MEMBERS]

SYDNEY, X 2019

Review of modern awards to be conducted.

[1] Further to the decision and reasons for decision <<decision reference>> in <<file_no.>>, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the *Funeral Industry Award 2010* be varied as follows.

[2] Insert the following text immediately under the heading at clause 24:

Work performed by part-time and casual employees as prescribed in clause 24 is subject to the applicable minimum engagement periods prescribed at clauses 10.4 and 10.5 respectively.

[3] Delete the current paragraph 24.1(c) and insert the following:

(c) Public holidays

For work performed on a public holiday, employees will be paid at the rate of 200% of their ordinary rate, with a minimum payment of two hours' pay.

[4] This determination will operate on and from

[INSERT PRESIDING MEMBER]