

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: *Funeral Industry Award 2010* – Final Stage proceedings

Matter Number: AM2019/17

Section: s.156 – 4 yearly review of modern awards

Document: Submission pursuant to Statement of 26 November 2019

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Background

1. On 26 November 2019 a Full Bench issued a Statement in this matter.
2. In the Statement the Full Bench identified a remaining issue in relation to the Exposure Draft of the *Funeral Industry Award 2010*. The remaining issue was expressed to be the appropriate way to calculate the rates for an afternoon shiftworker performing overtime work. The Full Bench further stated that how this was to be determined would depend on the construction of clauses 22.5 and 22.6 of the current Award.
3. At [10] of the Statement the Full Bench invited interested parties to file submissions in relation to the issues outlined in the Statement. It further stated that it would be seeking the view of the Fair Work Ombudsman about the interpretation of these provisions.
4. The Australian Federation of Employers and Industries (AFEI) has an interest in the Award.
5. We provide the following further submissions pursuant to the Statement of 26 November 2019 to assist the Full Bench addressing terminology to be used in the final Exposure Draft.
6. We do not agree with the amendments proposed by the AWU, and submit that clauses 20.6 and 20.7 of the Exposure Draft, and the consequent table of rates should be amended to reflect an overtime loading of 150% for 3 hours and then 200% thereafter for all shiftworkers (except when working on an RDO when a relief employee is absent).

Submissions

7. Contrary to the submission of the AWU, the Full Bench has not determined the approach to calculating shiftwork overtime under *Funeral Industry Award 2010* ('Award'). The Full Bench has only ever expressed a provisional view.¹
8. AFEI does not agree with the Full Bench's provisional view. We rely upon our submissions on this issue dated 21 April 2017 and concur with the submissions of ABI on this issue dated 20 April 2017, as these submissions are directly relevant to the question posed by the Full Bench in its Statement of 26 November 2019.

¹ 4 yearly review of modern awards--Award stage--Group 4 awards [2018] FWCFB 1548 [454]; see also *Statement* [2019] FWCFB 8026 [10].

Full Bench Approach to Applicable Rate

9. In reaching its provisional view the Full Bench commented that:²

On a plain reading of the text in the current Funeral Award, the use of the words 'applicable rate' for shiftworkers as contrasted with the words 'ordinary rate' for employees other than shiftworkers, suggests that the rates applying to the two types of employment are different.

10. Any inference or implication that can be drawn from the use of the words 'applicable rate' should further not be interpreted to distort the plain words of clauses 22.5 and 22.6 of the current Award, which we submit distinguishes between the shift allowance in 22.5 which applies to 'all ordinary hours worked during the shift', and 22.6 which only applies to 'all time worked in excess of or outside of' the ordinary hours clause (i.e. overtime hours). Our submissions of 21 April 2017 address this further. It does not appear that the Full Bench has given sufficient weight to the plain meaning of these words in the current Award.

11. Secondly, the use of the words 'applicable rate' in clause 22.6(a) of the current Award, as contrasted to the use of 'ordinary rate' does not provide a sufficient basis upon which the Full Bench should draw a conclusion that the overtime loading is cumulative upon the afternoon shift loading (at clause 22.5), given that:

- a. The pre-Modern Victorian Funeral Award 2003 included a specific clause excluding the cumulating of shiftwork and overtime penalties (at clause 9.6.5);
- b. The pre-Modern Award (at 9.6.2) in regards to shiftwork (funeral directors) refers to the overtime penalty being paid '*for all time worked in excess or outside the ordinary working hours...*' (underline added), suggesting that the overtime penalty was intended to compensate an employee fully for all of the disutility with working overtime hours;
- c. The current Award clauses 22.5 and 22.6 appear by structure and text to be based on the clauses referred to above from the Victorian Funeral Award;
- d. The pre-Modern Award explicitly excludes Saturday loadings from the calculation of overtime penalties for coffin makers doing shiftwork,³ suggesting that the industrial context in the industry under this pre-Modern Award is that overtime loadings are commonly intended to be 'stand-alone' penalties reflecting the full burden associated with working such hours;

² 4 yearly review of modern awards--Award stage--Group 4 awards [2018] FWCFB 1548 [450].

³ 4 yearly review of modern awards--Award stage--Group 4 awards [2018] FWCFB 1548 [451].

- e. There is an absence of any statement from the Australian Industrial Relations Commission during the Award Modernisation about any intention to change the how penalties to these clauses apply under this Award.

12. It is therefore our submission that the Victorian Funeral Award from which the current Award's clauses are derived explicitly and implicitly do not provide for a cumulating of shift loading and overtime loading. There is no sufficient basis upon which to suggest that this was intended to be changed in the Award Modernisation process, and as a result, the current Award clauses should be interpreted consistently with their predecessors.⁴

Our View on Applicable Rate

13. We therefore submit that the use of the words 'applicable rate' in clause 22.6 should be construed to mean the applicable rate for the employee's classification (i.e. the minimum rate applicable to the employee's classification). If the Full Bench does not agree, we alternatively submit that the meaning of 'applicable' in this context is therefore uncertain, as it is capable of numerous interpretations, and therefore there is no sound basis upon which to conclude that it refers to a shift-loaded rate. We note that elsewhere 'applicable rate' has been used to refer to the Award minimum rate of pay, such as at clause 23.1 Overtime in the *Commercial Sales Award 2010*.

Further Relevant Considerations

14. The structure of clause 22 of the current Award also supports that clause 22.6 is not intended to interact with clause 22.5. Each clause is contained within its own separate and distinct heading that indicates to the reader the penalty that will be paid for the condition described within it. Clause 22.5 describes and delineates between continuous and non-continuous shiftworkers and sets out the relevant penalties for when they work ordinary hours. Clause 22.6 Overtime for shiftworkers disregards this distinction, explicitly setting conditions for when any shiftworker performs overtime.

15. In reaching its provisional view the Full Bench commented that:⁵

We are, on balance, persuaded that the Award Modernisation Full Bench, in combining the provisions for funeral directors and coffin makers, did not intend to lower the provisions for coffin makers.

⁴ 4 yearly review of modern awards - Penalty Rates [2017] FWCFB 1001 [283].

⁵ 4 yearly review of modern awards--Award stage--Group 4 awards [2018] FWCFB 1548 [453].

16. We do not agree with the provisional view on this issue. We submit that it has not been uncommon in the Award Modernisation process that certain categories of employees become entitled to lower percentages of penalties or loadings as a result of the restructuring and simplification of the Award system.⁶ We submit that the wording of clause 22.5 and 22.6 indicates that the AIRC intended to simplify and create one uniform overtime penalty for shiftworkers that compensated them fairly for the disutility of overtime hours.

Australian Federation of Employers and Industries

23 December 2019

⁶ *4 yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 [283].