

22 January 2021

Bernadette O'Neill
General Manager
Fair Work Commission
Level 4, 11 Exhibition Street
Melbourne VIC 3000

By email: melbourne@fwc.gov.au

Dear Ms O'Neill,

Conflicting rates in the *Vehicle Repair, Services and Retail Award* and the applicable Fair Work Ombudsman Pay Guide

We act on behalf of several businesses in the vehicle retail industry, covered by the *Vehicle Repair, Services and Retail Award 2020 (the Vehicle Award)*.

We write to you because we have identified what appears to be an error in the Vehicle Award, and a subsequent conflict between the Vehicle Award and the associated pay guide released by the Fair Work Ombudsman on 8 September 2020 (**the Pay Guide**). For your assistance, we have enclosed a copy of the Pay Guide with this correspondence.

We have attempted to contact the FWO about these issues and have received mixed and concerning responses.

The details of the conflicts are described below, along with the interactions with the FWO.

Internal Errors in the Vehicle Award

The conflict arises around the correct pay rates for permanent 20-year-old roadhouse attendants, console operators and driveway attendants.

The Vehicle Award contains the following relevant provisions:

- Clause 2 defines an 'adult roadhouse attendant' as "*an employee of 20 years of age or over employed in a roadhouse, snack bar, kiosk or restaurant*";
- Clause 16.6(a) provides that 20-year-old employees in the classifications set out in Clause 16.6(b) are entitled to **87.5%** of the relevant adult rate. Clause 16.6(b) includes driveway attendants and roadhouse attendants who are required to cook takeaway foods;

- Clause 16.6(c) provides that 20-year-old employees in the classifications set out in Clause 16.6(d) are entitled to 87.5% of the relevant adult rate. Clause 16.6(d) includes console operators and roadhouse attendants who are engaged primarily to cook other than takeaway foods;
- Schedule B.3.1 provides a summary of pay rates for full-time and part-time console operators, driveway attendants and roadhouse attendants who are '20 years and over', providing the full adult rate;
- Schedule B.3.4 provides a summary of pay rates for junior full-time and part-time console operators, driveway attendants and roadhouse attendants. That table only refers to employees who are 19 years of age or below;
- While there are specific provisions for junior casual console operators, driveway attendants and roadhouse attendants in the body of the Vehicle Award, at Clause 27.3(b), which refer only to employees who are 19 years of age or below, there is no equivalent provision for permanent employees in these classifications that explicitly limits junior rates to those ages.

Effectively, the rates set out in Schedule B do not appear to have a direct source in the body of the Vehicle Award.

Notably, the Pay Guide released by the FWO provides the 87.5% junior rate for those permanent 20-year-old employees in the relevant classifications.

We recognise that this might not strictly be considered an 'error' with respect to roadhouse attendants, as the definition in Clause 2 might override the rates set out in Clause 16.6. However, this interpretation still doesn't allow for consideration of 20-year-old driveway attendants and console operators, who are also given adult rates in Schedule B.3.1.

Ultimately, the above either results in an internal conflict or, in the alternative, a set of clauses that are so confusing that even the FWO had difficulty interpreting them, as arose in our discussions, which we detail below.

The Fair Work Ombudsman's Response

On 14 January 2021, we contacted the FWO's support line twice, asking about their views on the issues set out above, noting the discrepancy between the Pay Guide and the schedule of the Vehicle Award.

In the first call, after the FWO representative raised the matter with a supervisor, we were advised that it appeared that the Pay Guide '*may be wrong*' and that it would be correct to proceed on the basis of assuming that the Vehicle Award summary was correct. This would mean that 20-year-old employees in the relevant categories should be paid adult rates, contrary to the information in the Pay Guide. Comments were made during the call that the matter was flagged for the Pay Guide to be reviewed and potentially revised.

Soon after, to confirm the advice given in the first call, a second call was made to the FWO, asking the same question about the conflict identified above in the same terms. A different FWO representative, again after raising the matter with a supervisor, returned and said that the matter had been elevated to be researched and that they were unable to give an answer at that time.

When asked about whether it would be correct to proceed on the basis that the relevant employees should be paid adult rates, we were informed that the FWO was not in a position yet to make any conclusive statements, and that we would be called back about the subject when research had been conducted, which would take at least a week.

The result of these two phone calls is that, until the FWO returns with additional information, it remains unclear as to whether the information provided by the regulator should be relied upon, although it seems to be in line with the body of the Vehicle Award, or the information in the Schedule should be relied upon, as it comprises part of the Vehicle Award itself.

As advisers and representatives of businesses in the industry, this puts us in the untenable position of being able to advise our clients one way or another about their legal obligations and the correct rates of pay.

Addressing Employer Errors

As you might imagine, it can create significant anxiety for our clients when information provided by the FWC and the FWO does not align, and it appears that they must contravene the guidance of at least one government body when paying their employees.

We therefore assume that if any employer has been paying staff in accordance with the FWO's Pay Guide, there will be no retrospective consequences, as they were acting in reliance on the information put out by the regulator.

In order to settle the above anxiety, we request written confirmation that employers will not be found in breach of the Vehicle Award if they have paid in accordance with the FWO's Pay Guide.

Resolving Future Conflicts

While we recognise that it is not the role of lawyers or industrial advocates to dictate to the FWC or to the FWO how they should operate, we consider that this error, and others like it, could be avoided by implementing processes that increase efficiencies in the process of releasing minimum wage rates.

First, and most drastic, as the modern award schedules are expanded to include detailed pay rate information, including overtime and penalty rates, it is worth considering centralising pay rate information into those schedules. This would remove the need for a separate pay guide, as the information is effectively doubled in close proximity.

Assuming that the FWO still considers that there is additional value to be found in having the pay guides separate, it would most likely simplify internal processes and errors (and avoid confusion for employers) if pay rate calculations were done by one source, which is then used for both the modern award schedules and the FWO pay guides. This would avoid conflicts like the one discussed above, and any 1c and 2c discrepancies that occasionally arise due to (we presume) differences in the FWO's rounding processes.

Next steps

As discussed above, we recognise that the FWC has discretion in the formation of the modern awards. This letter is meant only to identify the particular conflict and make suggestions to resolve it.

That being said, we would be happy to clarify any points raised above at your request, or to provide assistance in resolving conflicting processes if required.

We await your response.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "Dan Feldman", followed by a long horizontal flourish.

Dan Feldman
Partner