REPORT

Fair Work Act 2009
s.156 – 4 yearly review of modern awards

4 yearly review of modern awards–Award stage
(AM2014/202)

FIRE FIGHTING INDUSTRY AWARD 2010
[MA000111]

JUSTICE ROSS, PRESIDENT MELBOURNE, 4 DECEMBER 2018

4 yearly review of modern awards – award stage – group 2 awards – Fire Fighting Industry Award 2010.

[1] This Report deals with an outstanding issue relating to the review of the *Fire Fighting Industry Award 2010* (the Fire Fighting Award) that arose during the award stage of the Review.

[2] Following the 26 September 2018 Group 2 decision[1] (the *September 2018 decision*) there are three outstanding issues relating to the Fire Fighting Award. The issues can be described as:

- Rates of pay for public sector employees on day work
- Definition of overtime – private sector
- Rates of pay for employees on annual leave

[3] A conference was convened by the President on 7 November 2018 to deal with each of the above items. A transcript of the conference is available on the Commission's website.

[4] The following organisations were represented at the Conference:

- United Firefighters' Union of Australia (UFU)
- The Australian Workers' Union (AWU)

[5] Employer organisations were not represented at the conference.

[6] Following the 7 November conference, parties were provided a further opportunity to file written submissions. Submissions were received from the AWU and the UFU. Each issue is dealt with below.

[1] [2018] FWCFB 5986

[7] Clause 22.4 of the current award provides:

> '**22.4 Day work**
>
> Employees may be employed on day work in which they may be required to work up to 10 ordinary hours per day, between the hours of 7.00 am and 6.00 pm, Monday to Sunday. If the employer and a majority of affected employees agree, up to 12 ordinary hours per day may be worked.'

[8] It appears to be unclear what rate of pay public sector day workers are paid under the new provisions. On one view they are paid the same as the 10/14 roster, however clause 10.3(f) of the exposure draft sets out the following:

> '(f) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the appropriate weekly rate prescribed in clause 15 – Minimum wages—public sector.'

[9] The UFU submit that the award does not provide for penalty rates for day work employees for working either on weekends or public holidays, despite allowing for employees to work ordinary hours at these times. The UFU further submit that public sector workers engaged on the 10/14 roster are entitled to a 30 percent loading which is built into their minimum wage under clause 27 of the Award in lieu of penalties for various types of unsociable hours. The UFU contends that this amount is not able to be separated into amounts payable for respective types of unsociable hours such as weekend, public holiday and night shift penalties.

[10] The UFU submit that public sector day workers may be required to perform unsociable hours that are compensated by the loading and that public sector day workers are also able to meet the definition of shift worker provided in clause 28.2. On this basis it is submitted that they should receive the same loading payable to workers performing the 10/14 roster. The UFU further submit:

> 'Were public sector day workers to be paid at the minimum rate only, the Award would have, effectively, been changed to allow unsociable hours to be performed by employees under the award without compensation. This has not been argued for by any party.
>
> It has been a long-standing practise within all public sector fire-services to pay a 'rolled in rate' inclusive of penalties for weekends, public holidays and night shift. This was reflected in the pre-modern awards, which also did not contain separate penalty rate amounts.
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> Payment of a rolled in rate has a clear benefit to employees. By smoothing out payment's, employees are better able to plan financially and access loan finance. If dayworkers are denied this benefit they will be disadvantaged relative to shift workers.
>
> This is particularly undesirable given that a disproportionate number of people with family and carer responsibilities perform day work.

> The current practise across enterprise agreements in both the private and public sectors is to pay day workers at the same hourly rate. The modern award should reflect this practise.'[2]

[11] The AWU submit that the "appropriate weekly rate" referred to in clause 10.3(f) of the Award is the total weekly wage for the relevant classification of the part-time public sector employee, found at clause 15.1 of the Award.[3]

[12] The AWU notes that in the public sector, the basis on which a full-time employee's weekly wage is calculated is according to a 10/14 roster. This is true even for full-time public sector employees not working a 10/14 roster; the Award stating at clause 22.3(d):

> "(d) Full-time employees (other than recruits) not working a 10/14 roster, will receive the same total weekly wage as employees on a 10/14 roster."

[13] The AWU submit that consistent with at least most part-time provisions in modern awards, the part-time provision in the Award for public sector employees states at clause 10.3:

> "(a) A part-time employee is an employee who:
>
> …
>
> (iii) receives, on a pro-rata basis, equivalent pay and conditions to those full-time employees who do the same kind of work."

[14] The AWU further submit that a part-time public sector employee is entitled to a rate of pay that is equivalent to the rate of pay a full-time public sector employee is entitled to for the same kind of work, on a pro-rata basis. Because all full-time employees in the public sector, regardless of roster (except recruits), are entitled to the total weekly wage for their respective classification, it follows that any hourly rate for a part-time public sector employee must be based on the relevant total weekly wage as set out in clause 15.1 of the Award.[4]

[15] The AWU submits that the above conclusion is entirely logical and consistent with the general approach to determining the rate of pay for part-time employees. The AWU notes that the exclusion of recruits from clause 22.3(d) is not relevant to the determination of rates of pay for part-time employees as the Award does not permit recruits to be employed on a part-time basis.

[16] The AWU submits that having regard to the specific modern award considerations that the Full Bench in the Decision determined were in favour of introducing part-time provisions for public sector employees covered by the Award, it would be inappropriate to conclude that the rate of pay for part-time employees in the public sector is anything other than an hourly rate of pay based on the equivalent total weekly wage.[5]

[17] Despite the difference in explanation the AWU position appears to be the same as that put by the UFU, namely that public sector day workers should be paid the same rate as those

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[2] UFU submission, 23 November 2018 at paras 6-10

[3] AWU submission, 16 November 2018 at para 11

[4] AWU submission, 16 November 2018 at paras 14-15

[5] AWU submission, 16 November 2018 at para 18

on the 10/14 roster. The AWU submission then goes further to note that part-time public sector day workers are paid an hourly rate based on the equivalent total weekly wage.

Definition of overtime – private sector

[18] At clause 20.2(b)(ii) of the exposure draft published on 15 December 2014 the Commission posed the following question:

> 'Parties are asked to clarify when overtime for shiftworkers, other than those on 10/14 roster, is payable. Is it payable at the same rate as for shiftworkers on 10/14 roster?'

[19] This query now appears at clause 20.3(b)(ii) of the June 2017 exposure draft. Clause 20.3(b)(ii) of the June 2017 exposure draft reads:

> '**(ii)** For a shiftworker not working on a 10/14 roster, overtime is any time required to be worked:'

[20] Clause 20.3(b)(i) of the June 2017 exposure draft provides the definition of 'overtime' for shiftworkers working a 10/14 roster in the private sector and is as follows:

> '**20.3 Definition of overtime—private sector**
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> …
>
> **(b) Shiftworkers**
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> **(i)** For a shiftworker working a 10/14 roster, overtime is any time required to be worked:
>
> - in excess of a rostered shift; or
> - in excess of four shifts in any one week.'

[21] In response to the Commission's question, the UFU (relying on earlier submissions filed in November 2015) submit that "…overtime should be payable to shift workers not working a 10/14 roster on the same basis as those working a 10/14 roster. Specifically, overtime should be paid where a fire fighter works outside their rostered shifts or works more than 4 shifts in any week."[6]

[22] The AWU submit that employees in the private sector who are not on a 10/14 roster system are entitled to overtime where they work outside the ordinary hours in clause 10.2 and 10.4(b). The AWU proposed the following amendment to the wording of the clause as follows:

> 'For a shiftworker not working on a 10/14 roster, overtime is any time required to be worked:
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> - In excess of the maximum hours on any shift in Clause 10.4(b)—Shift rosters, or

[6] UFU submission, 30 November 2016 at para 3

- In excess of 38 hours per week, which may be averaged in accordance with Clause 10.2—Ordinary hours of work'[7]

[23] The MFB submit that it is appropriate for overtime provisions to payable on the same basis as for workers on a 10/14 roster.

[24] The MFB and AWU agree that shiftworkers not working on a 10/14 roster should be entitled to the same overtime provisions payable to shiftworkers working a 10/14 roster.

[25] The AWU's proposed solution provides overtime on a different basis.

[26] In the *26 September 2018 decision* dealing with this award the Full Bench said:

> **'[60]** It appears to us that it would be inappropriate for shiftworkers not working a 10/14 roster to receive overtime for time worked in excess of four shifts per week as that provision is specific to the work arrangements under a 10/14 roster system. The proposal by the AWU however appears to have some merit in that it provides overtime for shiftworkers working in excess of either the maximum hours *per shift* allowed under clause 10.4(b) or for working in excess of an average of 38 hours over a cycle of up to eight weeks (as provided in clause 10.2).
>
> **[61]** It is our *provisional* view that it is appropriate for the exposure draft to clearly set out the overtime provisions for shiftworkers not working on a 10/14 roster. It is our *provisional* view that the approach of the AWU is preferable as it provides a fair basis for the provision of overtime for shiftworkers not working the 10/14 roster. Parties are asked to file a written submission on our *provisional* view no later than **4.00 pm on Wednesday 10 October 2018**.'[8]

[27] At the conference on 7 November, it was noted that the AWU and UFU were in agreement regarding this item, and as a result would jointly propose a clause to be inserted into the Award to determine when overtime rates are payable to private sector shiftworkers not working a 10/14 roster.

[28] The clause proposed by the AWU and UFU will replace the current sub-clause 20.3(b)(ii) of the Exposure Draft for the Award, and is as follows:

> '**(ii)** For a shiftworker not working on a 10/14 roster, overtime is any time required to be worked:
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> - In excess of a rostered shift; or
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> - In excess of 38 hours per week.'

Rates of pay for employees on annual leave

[29] At the end of clause 22 of the exposure draft published 15 December 2014, the Commission posed the following question to interested parties:

> 'Parties are asked to consider whether a provision should be inserted in clause 22 to clarify the rate of pay for an employee on annual leave.'

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[7] AWU submission, 5 February 2015 at para 6

[8] [2018] FWCFB 5986 at [60]-[61]

[30] The question was raised in relation to the following wording extracted from clause 28.3 of the current award:

> '**(a)** Notwithstanding clause 28.2, a full-time employee working the 10/14 roster and other full-time employees of public sector employers will be entitled to 65.06 days annual leave per annum inclusive of the NES. Part-time employees working the 10/14 roster will be entitled to annual leave on a pro rata basis of 65.06 days annual leave per annum inclusive of the NES. Such leave is to be taken on the following basis:
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> > **(i)** for full-time employees subject to the 10/14 roster, such leave will be taken in periods of 28 calendar days within alternating periods of 20 weeks and 24 weeks; and
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> > **(ii)** for other employees not subject to the 10/14 roster and for part-time employees, such leave will be taken within periods as reasonably prescribed by the employer. These employees will be required to take any public holiday on the date reasonably prescribed.
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> **(b)** Where an employee leaves their employment they will be entitled to pro rata payment instead of the annual leave provided in this clause for such broken periods of service calculated on the basis of 21.67% of the ordinary wage payment received by the employee during such period.'

[31] The issue that the Commission sought to clarify with its question to parties was whether the rate of pay for an employee whilst on annual leave would be at the *total weekly rate* (where applicable), *the ordinary hourly rate* (where applicable), or on some other basis.

[32] It appears that clause 28.3(b) of the current award envisages that, at least for an employee who leaves their employment, the pro rata amount would be based on the employee's 'ordinary wage payment'. The current award is otherwise silent about the appropriate rate of pay. The note inserted into the exposure draft at clause 22.1 clarifies the situation where an employee receives overaward payments but sheds no light on the applicable award rate while on annual leave. In the absence of the award providing a higher rate, it is likely that the NES base rate of pay would apply.

[33] In the *October 2016* decision, the Full Bench stated the following:

> 'Due to the different rates of pay used for various purposes in this award (i.e. minimum hourly rate, ordinary hourly rate and total hourly rate) we consider it would be of assistance to insert a provision to clarify the rate of pay for an employee while on annual leave. However, it is not clear which rate of pay should be paid to an employee while on annual leave. The options appear to be either the 'ordinary hourly rate' or the 'total hourly rate'. The answer to that question may depend on whether the employee is a shiftworker or not. We propose to provide an opportunity for the parties to comment on which rate(s) of pay is to be specified through written submissions.'

[34] At the conference on 7 November 2018 the union parties agreed that all public and private sector employees on the 10/14 roster should be paid on the basis of their total weekly wage. No party put forward a potential provision to be inserted into the award to give effect to this proposition.

Next Steps

[35] No employer party has commented on the positions advanced by the AWU and UFU and it is therefore appropriate that the employer interests be provided one final opportunity to comment.

[36] Any employer party with an interest in this award is directed to file a short written submission regarding the contents of this Report and the positions put forward by the UFU and the AWU. Comments should be sent to amod@fwc.gov.au no later than **4.00 pm** on **Thursday, 31 January 2019**.

[37] In the event no party comments on the contents of this Report then the positions set out will be adopted in the exposure draft for the Fire Fighting Industry Award.

[38] In the event there is a dispute about the contents of this Report a separately constituted Full Bench will determine each issue. The matter may be determined on the papers without need for a hearing. If any party requests an oral hearing they should make a written request to amod@fwc.gov.au.

PRESIDENT