

Summary of Decision

16 July 2015

4 yearly review of modern awards—Award Flexibility

AM2014/300

1. This Full Bench decision deals with the variation of modern awards in relation to two matters, time off in lieu (TOIL) of payment of overtime and make-up time. The decision is issued as part of the 4 yearly review of modern awards (the Review). It was decided during the initial stage of the Review that flexibility provisions in modern awards would be dealt with as a ‘common issue’.
2. The Australian Industry Group (Ai Group) made two claims in this matter. The first claim seeks to insert a model TOIL clause into 26 modern awards that do not currently have a TOIL provision, and to delete existing TOIL provisions in 10 modern awards and replace them with the model clause. Their second claim seeks to insert a ‘make-up time’ provision into 51 of the 122 modern awards.
3. The Australian Manufacturing Workers’ Union (AMWU) also made a claim in this matter, seeking to vary the provisions relating to TOIL in 5 modern awards to provide for the accrual of TOIL at the ‘time for penalty’ rate rather than on an ‘hour for hour’ basis.
4. Ai Group’s claims were said to be based on model clauses determined by a Full Bench of the Australian Industrial Relations Commission (AIRC) in the 1994 *Family Leave Test Case* decisions. In their decision, the Full Bench noted that there are some similarities and some significant differences between the current statutory context and the context at the time the *Family Leave Test Case* was decided. Compared to the position when the *Family Leave Test Case* was determined, the current statutory framework provides additional flexibilities, protections and rights for employees and employers. Further, the role of modern awards and the nature of the Review are quite different from the arbitral functions previously performed by the AIRC. Under the current Act, the modern awards objective is central to the Review, and modern awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’. Parties seeking a variation to a modern award must demonstrate it is necessary to achieve the modern awards objective.
5. Despite the differences in the statutory framework the Full Bench concluded that some aspects of the *Family Leave Test Case* TOIL provision are relevant in the current statutory context. The Full Bench did not depart from the test case standard regarding the calculation of time for the purpose of TOIL, that is, at the ordinary rate (i.e. time for time) rather than the overtime rate (i.e. time for penalty).
6. The Full Bench rejected the AMWU’s claim. In doing so, they held that the ‘time for penalty rate’ aspect of the claim is inconsistent with the *Family Leave Test Case* standard and the AMWU had not mounted a persuasive case to depart from that standard.

7. The Full Bench also rejected the Ai Group's claim in relation to make-up time. They held that the type of agreement sought to be facilitated by the claim can be entered into pursuant to the model flexibility term in all modern awards. It was accepted that while Ai Group's proposed make-up time provision may be more administratively convenient, the material fell short of establishing that the variations proposed were *necessary*, within the meaning of s.138 of the Act.
8. Ai Group's claim to vary the existing TOIL provision in 10 modern awards was also rejected. However, the Full Bench held that it was necessary to vary modern awards which do not presently contain a TOIL provision to insert a model TOIL provision. The Full Bench were satisfied that Ai Group had advanced a sufficient merit case, though they provisionally reached a different conclusion as to the content of a proposed model TOIL clause.
9. The Full Bench set out a provisional model TOIL term at paragraph [267] of the decision. The provisional view of the Full Bench is that the proposed model term will facilitate agreements between an employee and their employer to take TOIL instead of payment for overtime at a time or times agreed, subject to appropriate safeguards. It is proposed that TOIL will generally be calculated at the ordinary time rate, consistent with the *Family Leave Test Case* standard. The exception will be in relation to those modern awards which currently provide for TOIL at the 'time for penalty' rate.
10. The Full Bench discuss three modern awards in particular at the conclusion of their decision. These three awards are the *Building and Construction General On-Site Award 2010*, the *Joinery and Building Trades Award 2010* and the *Seagoing Industry Award 2010*. The awards have not been included in the list of awards to which it is proposed that the model term will be inserted. This is due to the unusual arbitral history of the two construction awards and the particular features of the industry covered by these two awards (including the operation of daily hire). Any application to insert a TOIL provision in these awards will be dealt with during the award stage of the Review. In relation to the *Seagoing Industry Award 2010*, the Full Bench note that work under this award is predominantly performed at sea and includes an aggregate annual salary provision. Again, any application to vary this award to insert a TOIL provision will be dealt with during the award phase of the Review.
11. Interested parties are provided the opportunity to make further submissions directed at the provisional model term and the Full Bench's provisional view that all modern awards which provide for overtime be varied to insert the model term. Submissions should be lodged by **Friday 28 August 2015** with a further hearing scheduled for **Friday 4 September 2015**.

[2015] FWCFB 4466

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

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