

Fair Work Act 2009
FAIR WORK COMMISSION

s. 156 – 4 yearly review of modern awards

Gas Industry Award 2010

AM2018/10

Substantive issue – meal break conditions

OUTLINE OF SUBMISSIONS FOR THE AUSTRALIAN WORKERS' UNION

BACKGROUND

1. As part of the 4-yearly review of modern awards, the Fair Work Commission (“**FWC**”) has prepared an ‘Exposure Draft – Gas Industry Award’ (“**Exposure Draft**”). The Exposure Draft is a re-drafted version of the current *Gas Industry Award 2010* (“**Gas Industry Award**”).
2. The FWC has sought various submissions from affected parties about the terms of the Exposure Draft during the review process. This has led to a dispute arising between The Australian Workers’ Union (“**AWU**”) and the Australian Industry Group (“**AIG**”) about the entitlements contained in clause 22 of the Gas Industry Award. This clause states:

22. Meal breaks

- 22.1** *A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.*
- 22.2** *Employees required to work for more than five hours without a suitable interval for a meal as provided for in clause [22.1](#) must, for all time worked in excess of the five hours before being allowed such interval, be paid at double time.*
- 22.3** *Employees required to continue or resume work during the meal break, must for the time of continuance or resumption until the full meal break is given, be paid at time and a half.*

3. The conditions in clause 22 of the Gas Industry Award are reflected in clause 9 of the Exposure Draft which currently states:

9. Breaks

9.1 Meal breaks

(a) A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.

(b) Employees required to work for more than five hours without a meal break as provided for in clause 9.1(a) must, for all time worked in excess of the five hours before being allowed a meal break, be paid at 200%.

(c) Employees required to continue work during the meal break must be paid at 150% for all hours worked from the beginning of the scheduled meal break until the full meal break is given.

(d) Employees required to resume work during the meal break must be paid at 150% for all hours worked from resuming work until the full meal break is given.

9.2 Breaks *during after* overtime are to be taken in accordance with clause 13.6.

4. The AIG has argued clause 9 of the Exposure Draft should refer to an employee being paid at 150% or 200% of the “minimum hourly rate”.
5. The AWU has argued the change sought by AIG could have the effect of an employee receiving no additional payment, or even a lesser amount, when their meal break is delayed or missed. This can arise because the employee could already be receiving 150% or 200% of the “minimum hourly rate” via other provisions in the award.
6. The FWC Full Bench dealing with technical and drafting issues arising with the various Exposure Drafts relevantly stated the following in its 12 September 2018 Decision¹:

[48] *In the June 2018 decision, we agreed with the AWU that the effect of the term ‘minimum hourly rate’ would mean that an employee entitled to higher weekend or public holiday penalties would be entitled to a lesser*

¹ 4 yearly review of modern awards – Award stage – Group 1 [2018] FWCFB 5602.

amount under the circumstances contemplated by clause 9.1 of the Exposure Draft. We stated that the intention of the clause is to create a disincentive for employers to delay or interrupt employees' meal breaks. In order to achieve this, the rates under clause 9.1 must be in excess of that which employees are otherwise entitled.

[49] Despite agreeing with the AWU, we expressed a provisional view that a definition of 'applicable hourly rate' would not be inserted into the Exposure Draft for the Gas Award as this may cause confusion and add an unnecessary level of complexity. We proposed to use the term 'minimum hourly rate' as suggested by Ai Group, and clarify this by adding the words 'plus penalties and relevant loadings,' as follows:

9.1 Meal breaks

(a) A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.

(b) Employees required to work for more than five hours without a meal break as provided for in clause 9.1(a) must, for all time worked in excess of the five hours before being allowed a meal break, be paid at 200% of the minimum hourly rate, plus penalties and relevant loadings.

(c) Employees required to continue work during the meal break must be paid at 150% of the minimum hourly rate, plus penalties and relevant loadings for all hours worked from the beginning of the scheduled meal break until the full meal break is given.

(d) Employees required to resume work during the meal break must be paid at 150% of the minimum hourly rate, plus penalties and relevant loadings for all hours worked from resuming work until the full meal break is given

...

[61] We accept that the provisional view represents a substantive change to the award. However, the objective of the current award term is to provide a disincentive for employers to delay or interrupt employee's meal breaks. That objective is not met in circumstances where the rate paid when an employee is required to continue working during a meal break (or to interrupt a meal break) is not greater than that which would otherwise apply.

[62] This matter will be given further consideration by a separately constituted Full Bench.

THE GENERAL INDUSTRIAL APPROACH – CUMULATIVE PAYMENTS

7. An employee working under the Gas Industry Award may already be receiving the following payments, in addition to their minimum wage rate, when their meal break is delayed or missed:
 - (i) a 25% casual loading (clause 10.6(b));
 - (ii) a first aid allowance (clause 15.1(a));
 - (iii) an afternoon shift allowance of 15% (clause 21.6(a));
 - (iv) a night shift allowance of 30% (clause 21.6(b));
 - (v) time and a half for working on a Saturday (clause 24.1);
 - (vi) double time for working on a Sunday (clause 24.2); and/or
 - (vii) double time and a half for working on a public holiday (clause 24.3).
8. An award is a beneficial instrument - the standard industrial approach is for the entitlements prescribed to be cumulative. This is the only sensible approach to interpreting the various conditions.
9. When an award is intended to depart from this standard approach, the award will expressly state this.
10. For example, clause 23.1 of the Gas Industry Award states:

23.1 Overtime rates not cumulative

If more than one of the following provisions apply to an employee, payment is only to be made under the provision which prescribes the higher rate.

11. Another example is clause 37.4 of the *Manufacturing and Associated Industries and Occupations Award 2010* which states:

37.4 Rate for working on Saturday shifts

The rate at which a shiftworker must be paid for work performed between midnight on Friday and midnight on Saturday is time and a half. The extra rate is in substitution for and not cumulative upon the shift premiums prescribed in clause [37.3](#).

12. Importantly, there is no indication in the Gas Industry Award that the time and a half and double time payments in clause 22.2 and 22.3 are intended to be paid in substitution for any other entitlement.

13. Given the Gas Industry Award **does** clarify when certain rates are not to be cumulative in clause 23.1, the absence of such a provision in clause 22 is a significant textual indication that the prescribed payments are cumulative.
14. The cumulative approach to different award entitlements has been reiterated in numerous tribunal decisions including FWC decisions during the 4-yearly review of modern awards.
15. For example, the 4-yearly review Full Benches dealing with penalty rates and part-time and casual employment have both confirmed, as a matter of industrial principle, that a casual employee's 25% casual loading is normally paid in addition to penalty rates and overtime payments. This is because the casual loading is not paid to compensate an employee for working overtime or on the weekend.
16. The primary decision by the *Penalty Rates* Full Bench states²:

[65] In each of the Sunday and public holiday penalty rates we have fixed we have adopted what the Productivity Commission Inquiry Report: Workplace Relations Framework (PC Final Report) describes as the 'default approach' to setting the appropriate rate for casual employees (see [333]–[338]). Under this approach the rate of pay for casual employees is always 25 percentage points above the rate of pay for non-casual employees. Hence if the Sunday penalty rate for full-time and part-time employees is 150 per cent, the Sunday rate for casuals will be 150 + 25 = 175 per cent.

17. The primary decision by the *Casuals Case* Full Bench states³:

[677] In each case overtime penalty rates are to be applied to the ordinary hourly rate of pay, with the casual loading also to be applied to the ordinary hourly rate of pay. Overtime rates should not compound upon the casual hourly rate of pay.

18. The FWC Full Bench dealing with technical and drafting issues in the 4-yearly review has also recently determined a cumulative approach should apply to overtime payments for shift workers covered by the *Funeral Industry Award 2010* i.e. an employee should receive their shift loading and an overtime

² 4 yearly review of modern awards – *Penalty Rates* [2017] FWCFB 1001.

³ 4 yearly review of modern awards – *Casual employment and Part-time employment* [2017] FWCFB 3541.

loading when working overtime - but the loadings should not be calculated on a compounding basis:

[274] The method of calculating overtime for shiftworkers should not be to combine a shiftworker's afternoon shift penalty in clause 18.5, being 120% or 150% of their minimum hourly rate, with the overtime loading in clause 18.6, being 150% or 200% of their minimum hourly rate nor should it be to compensate an shiftworker for 150% or 200% of their loaded shiftworker rate. This would unduly result in shiftworkers receiving double the intended compensation for the inconvenience of working unsocial hours by virtue of being a shiftworker. Rather, a shiftworker should only be entitled to 20% or 50% of the minimum hourly rate in clause 18.5 in addition to the overtime rate in clause 18.6, or otherwise described as either 170% or 220% of the minimum hourly rate.⁴

19. Finally, the FWC Full Bench dealing with technical and drafting issues in the 4-yearly review has previously determined that a meal break provision in the *Wine Industry Award 2010*, which is generally to the same effect as clause 22 of the *Gas Industry Award*, will apply in the following manner:

[566] There are no similar provisions to clauses 29.1 - 29.4 in the current award or 9.1 - 9.4 in the exposure draft in either the Horticulture Award 2010 or the Silviculture Award 2010. We consider that clause 29.4 of the current award clearly contemplates that employees may work through their meal break during day work, shift work or overtime and that employees coming within the operation of clauses 29.1 – 29.3 are required to be paid the applicable day, shift or overtime rates. As such, we are satisfied that clause 29.4 of the current award requires the loading of 50% to be applied to the pay rate applying to the worker at the time. The wording of clause 9.4 of the exposure draft would alter this situation and as such, we will amend it so that it reads:

9.4 Working through meal break

*An employee not given a meal break in accordance with clauses 9.1, 9.2 and 9.3 must be paid from then on at **150%** of the rate of pay applying immediately before the meal break was due until the meal break is given.*

⁴ 4 yearly review of modern awards—Award stage—Group 4 awards [2018] FWCFB 4175.

20. Therefore, the outcome already determined by that Full Bench for the *Wine Industry Award 2010*, in relation to a clause which is substantially the same as that under consideration here for the Gas Industry Award, is more beneficial for affected employees than the clause that Full Bench previously proposed for the Gas Industry Award⁵ - because the calculation for the *Wine Industry Award 2010* is applied on a compounding, rather than cumulative, basis.

CONCLUSION

21. Clause 22.2 and 22.3 of the Gas Industry Award prescribe a higher rate payable to an employee if their meal break is delayed or missed. The higher rate is either time and a half (an extra 50%) or double time (an extra 100%).

22. There is no logical reason for a casual employee, shift worker, or first aid attendant to receive less compensation than other employees when their meal break is delayed or missed. The casual loading, shift loading and first aid allowance are not paid to compensate an employee for missing their meal break or having it disturbed.

23. The Full Bench dealing with technical and drafting issues during the 4-yearly review has already determined:

... the objective of the current award term is to provide a disincentive for employers to delay or interrupt employee's meal breaks. That objective is not met in circumstances where the rate paid when an employee is required to continue working during a meal break (or to interrupt a meal break) is not greater than that which would otherwise apply.

24. This means the only issue this separately constituted Full Bench needs to determine is what additional payment should apply when an employee's meal break is delayed or missed.

25. The answer to this question is obvious – the additional payment should be the same one that currently applies under the Gas Industry – either time and a half (an extra 50%) or double time (an extra 100%). This payment is in addition to any other amounts payable to an employee under the award e.g. shift loadings, casual loadings and allowances.

26. This outcome is consistent with the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions.

⁵ 4 yearly review of modern awards – Award stage – Group 1 [2018] FWCFB 5602 at [49].

27. An extensive analysis of the factors in s 134(1) of the *Fair Work Act 2009* is not required to resolve this matter - all the Full Bench is doing is clarifying the intended operation of the current award.
28. It is also relevant that the additional payments prescribed in clause 22 of the Gas Industry Award are intended to apply in very limited circumstances. The intent of the award is for an employer to make the necessary arrangements to allow the prescribed break to be taken. The additional payments are included to provide fair and reasonable conditions when unforeseen events occasionally disturb the break.

WHAT THE EXPOSURE DRAFT SHOULD STATE

29. The AWU submits that clause 9.1 of the Exposure Draft should be amended, generally in the terms proposed by the FWC Full Bench dealing with technical and drafting issues in the 4-yearly review⁶, but the provision should also make it clear that applicable allowances remain payable.
30. The wording proposed by the AWU is:

9.1 Meal breaks

(a) A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.

(b) Employees required to work for more than five hours without a meal break as provided for in clause 9.1(a) must, for all time worked in excess of the five hours before being allowed a meal break, be paid at 200% of the minimum hourly rate, this amount is in addition to any other applicable penalties, loadings and allowances.

(c) Employees required to continue work during the meal break must be paid at 150% of the minimum hourly rate, this amount is in addition to any other applicable penalties, loadings and allowances, for all hours worked from the beginning of the scheduled meal break until the full meal break is given.

(d) Employees required to resume work during the meal break must be paid at 150% of the minimum hourly rate, this amount is in addition to any other applicable penalties, loadings and allowances, for all hours worked from resuming work until the full meal break is given.

⁶ 4 yearly review of modern awards – Award stage – Group 1 [2018] FWCFB 5602 at [49].

A handwritten signature in black ink, appearing to read 'SCA', is positioned above the printed name.

STEPHEN CRAWFORD
SENIOR NATIONAL LEGAL OFFICER

9 NOVEMBER 2018