

IN THE FAIR WORK COMMISSION

Matter No: AM2018/23

Section 156 - Four Yearly Review of Modern Awards –*Funeral Industry Award 2010* –
Substantive Issues

SUBMISSION OF UNITED VOICE

1. This submission is made pursuant to the Direction of the Fair Work Commission (‘the Commission’) on 16 November 2018 requiring any ‘party’ to file written submissions, witness statements and any other documentary evidence in support of outstanding substantive claims in the 4 yearly review of the *Funeral Industry Award 2010* (‘the Award’).
2. United Voice has 2 outstanding claims in this review and both claims are pressed.
3. These claims can be identified as S7/10 Uniform Allowance and S8/17 Work on Saturday and Sunday in the Summary of Proposed Substantive Variations in the republished 20 November 2017 (which connects with S15/16 Payment for Overtime –other than shiftworkers and Removals of the Summary of Submissions –Technical and Drafting dated 20 November 2017). For simplicity, we refer to the second claim as ‘*Minimum engagement periods for part-time and casual employees*’.

S7/10 Uniform Allowance

4. This is a claim that has arisen out of the technical and drafting review of the Award.
5. In the Exposure Draft of Award published 16 November 2016, the Commission asked the question:

‘Parties are asked to confirm whether clause 16.3(c) applies to all employees (i.e. part-time and casual employees also).’
6. There were divergent views between the parties and as the matter could not be resolved in the technical and drafting proceedings it was referred to the substantive review of the Award.
7. Clause 15.8 Uniform allowance of the Award states:

‘Where a full-time employee is required to wear a uniform, the employer will reimburse the employee for the cost of purchasing and laundering the uniform.’
8. It is our primary position that the current clause applies to full-time, part time and casual employees.
9. Whilst the clause refers to a ‘*full-time employee*’, the clause must be read in the context of the Award as a whole.
10. Part-time employees are entitled to receive the allowance as in accordance with clause 10.4(a)(iii), part time employees receive ‘*on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.*’

11. Casual employees are entitled to receive the allowance as the Award does not prescribe that the casual loading is paid in lieu of any entitlement. Absent a specific exclusion, it should be assumed that a condition in this Award applies to a casual employee.
12. As the current wording appears to be resulting in confusion about which employees are entitled to receive the allowance, we propose that Clause 15.8 is amended as follows:

‘Where an employee is required to wear a uniform, the employer will reimburse the employee for the cost of purchasing and laundering the uniform.’
13. In the alternative, if it is determined that the uniform allowance does not apply to part-time and/or casual employees, it is our position that the Award should be amended to provide all employees with an entitlement to the uniform allowance.
14. Providing the uniform allowance only to full-time employees is unjustified and does not meet the modern awards objective.
15. Firstly, under clause 15.8, an employee is only entitled to a uniform allowance when they are *required* to wear a uniform by the employer and whether an employee is full-time, part-time or casual will generally be irrelevant to this requirement.
16. The requirement to wear a uniform would commonly depend on factors such as:
 - a) the nature of the employee’s role;
 - b) the extent of public or external client contact required in the role;
 - c) any occupational, health and safety considerations; and
 - d) any internal policy of the employer.
17. It would be highly unusual for an employer to require to full-time employees to wear a uniform but permit part-time and casual employees to wear other clothes simply on the basis that they are part-time or casual.
18. The requirement to wear a uniform should be the entitling criterion in determining whether an employee receives the allowance or not. Where an employee is required to wear a uniform, they should receive the uniform allowance.
19. Secondly, just like full-time employees, part-time and casual employees will incur costs where they are required to wear and launder a uniform.
20. There may be a difference in the total costs. A full-time employee may require several uniforms to allow sufficient clean clothing for 38 hours of work per week, whereas a part-time employee may only require 1-2 uniforms in total, depending on their hours of work.
21. However, this needs to be considered in light of a difference in income levels as well. Part-time and casual employees will be working less hours per week, and will be earning less income than full-time employees.
22. As the uniform allowance in clause 15.8 is a direct reimbursement allowance, it is able to accommodate this difference.

23. It is appropriate and fair that part-time and casual employees be reimbursed for the cost of purchasing and laundering uniforms.
24. This claim can be resolved with the same amendment to clause 15.8 that we have proposed in paragraph [12] of this submission.
25. Such an amendment would be in line with the modern awards objective, and would assist to ensure that the Award provides a fair and relevant minimum safety net of terms and conditions. The following considerations under the *Fair Work Act* (2009) are relevant:
 - s134 (1)(a) - *relative living standards and the needs of the low paid* - The lower classification levels of the Award can be considered low paid. Grade 1 employees are paid the national minimum wage. Low paid part-time and casual employees should not be made to bear the cost of purchasing and laundering uniforms that the employer requires they wear.
 - s134(1)(g) - *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards* –There is no rational or logical justification for the Award to only provide a uniform allowance for full-time employees. Ensuring that the uniform allowance is available to all employees required to wear a uniform will assist in ensuring that the Award is simple and easy to understand.

Minimum Engagement Periods for Part-time and Casual Employees

26. This is also a claim that has arisen out of the technical and drafting review of the Award.
27. In the Exposure Draft of Award published 16 November 2016, the Commission asked the question:

‘Parties are asked to confirm how clauses 19.1(b), 19.4(a) and 19.4(b) interact with the minimum engagement provisions in clauses 10.5 and 11.3.’
28. The equivalent clauses in the Award are clauses 24.2(b), 24.4(a), 24.4(b) and clauses 10.4(d) and 10.5(c).
29. Again, as there were differing views between the parties and as the matter could not be resolved in the technical and drafting proceedings it was referred to the substantive review.
30. The relevant Award clauses are set out in the following paragraphs.
31. Clause 24.2(b) states:

‘(b) Where an employee is recalled to work before 7.00 am or after 7.00 pm for other than arranged overtime, the employee will be paid a minimum of one hour’s pay at the appropriate rate of overtime on each occasion the employee is recalled to work overtime.’

32. Clause 24.4(a) states:

'(a) Where an employee is called to undertake removals between the hours of 7.00 pm and midnight and work is completed at or prior to midnight, the employee will be paid 150% of their ordinary rate for the first three hours of work and 200% of their ordinary rate thereafter with a minimum payment of two hours at the appropriate rate.'

33. Clause 24.4(b) states:

'(b) Where an employee is called to undertake a removal, any portion of which occurs between the hours of midnight and 7.00 am, the employee will be paid 200% of their ordinary rate with a minimum payment of two hours.'

34. Clause 10.4(d) states:

(d) An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

35. Clause 10.5(c) states:

(c) On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours' work, including when engaged more than once in any day. This minimum payment is made whether the casual employee is required to work the full four hours or not.

36. Minimum engagement provisions for work on weekends (aside from weekend removals) are contained in clauses 24.1(a) and (b) of the Award.

37. Clause 24.1(a)(i) states:

(i) For work performed on a Saturday, employees will be paid at the rate of 150% of their ordinary rate for the first three hours worked, and 200% of their ordinary rate thereafter, with a minimum of two hours' pay.

38. Clause 24.1(a)(ii) states:

(ii) Where an employee is actually engaged in the carrying out of a funeral on a Saturday, the employee will receive a minimum of four hours' pay at the following rates:

- 1. if the work is completed in three hours or less, the total minimum payment will be paid at 150% of their ordinary rate; and/or*
- 2. if the work exceeds three hours, all additional time will be paid at 200% of their ordinary rate.*

39. Clause 24.1(b) states:

(b) All work performed on a Sunday will be paid at 200% of their ordinary rate, with a minimum payment of two hours' pay.

40. Our position is that clause 24 provides minimum engagement provisions for the benefit of full-time employees, who do not otherwise have a minimum engagement provisions in the

Award. Part-time employees and casual employees have their minimum engagement periods set out respectively, in clauses 10.4(d) and 10.5(c).

41. Clause 10.4(d) states that an employer is required to roster a part-time employee for a minimum of three hours on ‘any’ shift. There is no exception made for shifts that occur on a weekend, during overtime or on removal shifts. The minimum engagement period of three hours for part-time employees applies to *all* shifts.
42. Clause 10.5(c) states that a casual employee must be paid for a minimum of four hours’ work, ‘including when engaged more than once in any day.’ Again, this is comprehensive and stipulates the minimum engagement period for any shift the casual employee is required to work. There is no exception made for shifts that occur on a weekend, during overtime or on removal shifts.
43. Minimum engagement provisions are important in ensuring that employees are provided with an adequate amount of compensation for the cost of each attendance in the workplace.
44. There are several costs of attending the workplace, which were recognised in the Decision on Casual employment and Part-time employment dated 5 July 2017¹ (‘July Decision’):
[399] Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee’s labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).
45. The Award should not be ‘read down’ to reduce the minimum engagement periods of part-time and casual employees. If the minimum engagement periods in clause 24, which are as low as one hour (see clause 24.2(b)), were to apply to part-time and casual employees, the income earned within that one or two hour shift may not be sufficient to cover the expense and inconvenience experienced.

¹ [2017] FWCFB 3541.

46. This would reduce the incentive for employees to engage in part-time and casual employment within this sector. As such it would work against the modern awards objective in s 134 (c) of the Act, *‘the need to promote social inclusion through increased workforce participation’*.
47. The provisional view of the Full Bench of the Commission in the Decisions dated 21 March 2018² (‘March Decision’) and 7 August 2018³ (‘August Decision’) in respect of casual employees was that the minimum engagement period in clause 10.5(c) applies to all shifts.⁴
48. The provisional view of the Full Bench of the Commission in the March Decision in respect of part-time employees was that the minimum engagement period in clause 10.4(d) apply instead of the minimum engagement periods for weekend work in clause 24.1, but that when a part-time employee undertakes recalls and removals outside of ordinary hours of work, the minimum engagement periods in clause 24.4 apply.
49. The Commission departed from this provisional view in the August Decision, and stated that in paragraph [290] that *‘we agree that the specific minimum engagement provisions relating to part-time and casual employees (clauses 10.5 and 11.3) are applied for these types of employees instead of the minimum engagement provisions set out at clauses 19.4 and 20.1.’*⁵
50. Any interpretation of the Award that reduces the minimum engagement period for part-time and casual employees should be rejected.

**United Voice
20 December 2018**

² [2018] FWCFB 1548.

³ [2018] FWCFB 4175.

⁴ See paragraph [475] of the March Decision and paragraph [290] of the August Decision.

⁵ Reference in the August Decision is to the Exposure Draft of the Award.